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Case ACCC/C/2010/50, Czech Republic

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Comments on the Draft findings and recommendations with regard to communication ACCC/C/2010/50

The communicant received on 10 May 2012 the Draft findings and recommendations of the Aarhus Convention Compliance Committee with regard to its communication concerning compliance by the Czech Republic with the Convention. The communicant hereby provides following comments to the Draft findings:

1. The communicant agrees with most of the conclusions presented in the Draft findings. Their content for the most part accurately describes the situation related to the application of the article 6 and 9 of the Aarhus Convention in the Czech Republic, including the systematic drawbacks of this application.
2. The communicant takes the liberty to point out that the part of the Draft findings called “Consideration and evaluation of the Committee” and further to it the part called “Conclusions and recommendations” does not deal with the claims presented in the part III. 2.3 of the communication (paragraphs 41. – 45.), relating to the restrictions on access to review procedures of the administrative omissions. The claims of the communicant, referring to this issue are nevertheless correctly summarized in paragraphs 43. – 44. of the Draft findings. The communicant therefore asks the Committee to include the assessment of this issue to the final text of the Findings. The communicant is of the opinion that especially the court jurisprudence cited in paragraph 43. of the communication and on page 5 of the Answers of the communicant of 1 June 2011 („ad part 2.3“) demonstrates the non-compliance of the practice of the Czech courts with the requirements of the Aarhus Convention with that respect.

3. In paragraph 3. of the Draft findings, summarizing the claims of the communicant, concerning the access to judicial review of acts and omissions relating to the environment, including those relating to land use plans, it would be more precise to replace the formulation "*members of the public*" by the formulation "*the considerable part of members of the public, including the NGOs,*". Similarly, in paragraph 85. of the Draft findings in the third sentence it would be more suitable to substitute the formulation "*no member of the public*" by the formulation "*considerable part of members of the public, including the NGOs,*" and then appropriately reformulate the next part of the sentence ("*cannot challenge...etc.*"). Such a modified text would correspond better to the precise summary of the facts mentioned in paragraphs 52. and 54. of the Draft findings.
4. The communicant cannot completely agree with the conclusions of the Committee, presented in paragraph 86. of the Draft findings, relating to the access to judicial review of acts issued according to the Nuclear Act. Indeed, the Committee correctly deduced that the restrictions on the rights of public (anybody except for the operator) to participate in the decision-making procedures under the Nuclear Act, necessary to permit the construction and operation of nuclear installations, and subsequent impossibility to challenge the legality of operation permits before court, could be considered as violation of the articles 6 and 9 paragraph 2 of the Aarhus Convention. Nevertheless the communicant assumes that the documents submitted by it demonstrate in a sufficient and clear way that the law and judicial practice of the Czech Republic constitute such restrictions. The communicant refers particularly to article 14 paragraph 1 of the Nuclear Act, whose translation is contained in paragraph 51. of the communication, to the court jurisprudence cited on page 10 of the Answers of the communicant of 1 June 2011 (answer on Question 4) and to the explanations provided in the 1st paragraph on page 2 of the „Reaction to the response of the Party concerned” of 7 June 2011. Permitting process for the construction and operation of nuclear installations really represents „a complex procedure“, as the Committee mentioned. Nonetheless, this fact should not mean that the requirements of the articles 6 and 9 of the Aarhus Convention should not be fully applicable to the permitting procedures according to the Nuclear Act. In the scope of these procedures, there are assessed such aspects of the construction and operation of nuclear installations that are not later reviewed in any other phase of environmental decision-making. The communicant finds that the conclusions expressed in paragraph 69. of the Draft findings (referring to the conclusions of the Committee in the case ACCC/C/2006/16) are fully applicable also for this situation. The communicant therefore takes the liberty to ask the Committee to reconsider its conclusions with respect to this kind of permitting procedures including the connected issues of the access to justice.
5. The communicant deems necessary to notify the Committee of its opinion that the general conclusions, concerning restricted possibilities of the of the NGOs with respect to the access to judicial review, expressed especially in paragraphs 70. (3rd sentence), 77. a 78. and 89.(c) of the Draft findings, could be considered as not entirely precise. The communicant in its communication alleged several partial restrictions on the access of the NGOs to courts in environmental matters. These concerned particularly
 - a) the extent to which NGOs may seek judicial review (with regard to this issue, the Committee presents completely accurate conclusions in paragraphs 79. – 81. of the Draft findings),

- b) review of the decisions concerning noise limits and land use plans (in this context, with the partial reservation mentioned above in paragraph 3., the accurate conclusions are drawn in paragraph 85. of the Draft findings),
- c) review of acts issued according to the Nuclear Act (with that respect, see paragraph 4. above),
- d) review of EIA findings, particularly screening decisions (in this issue the communicant agrees with the conclusions drawn in paragraph 82. of the Draft findings) and
- e) ineffectiveness of judicial protection (see next paragraph with that respect).

On the other hand, the communicant does not claim in its communication that the access of NGOs to court procedures for the review of acts under the article 6 of the Aarhus Convention is in general (apart from the above-mentioned partial restrictions) “seriously limited“ in the Czech Republic. It is possibly more suitable to state that the regulation of the access to judicial review is not really systematic and consistent in the Czech Republic (as follows e.g. from the part III. 1. of the communication). The Committee might thus consider reformulating or possibly deleting the mentioned parts of the Draft findings (i.e. 3rd sentence of paragraph 70., paragraphs 77. and 78. and point (c) of paragraph 89.).

6. The communicant accepts the conclusions of the Committee, presented in paragraph 87. of the Draft findings, concerning the injunctive relief. Besides certain shift in jurisprudence, the Czech Parliament also adopted several amendments of CAdminJ, effective since the 1 January 2012, which could increase the availability of the injunctive relief in general. Apart from other things the provisions of CAdminJ, excluding concurrent application of the suspensory effect and preliminary injunction were abolished (paragraph 24. of the Draft findings shall therefore be deleted). On the other hand, the communicant is still convinced that the conclusions of the concerning the failure of the Czech Republic to comply with the obligations under the Aarhus Convention, which are presented in the Draft findings, may be *per se* seen as (at least) a serious indicator revealing that the judicial procedures related to the environmental protection in the Czech Republic are not sufficiently effective, as required under the article 9 paragraph 4 of the Convention. The Committee might therefore make this general remark in paragraph 87. of the Draft findings.

The communicant thanks the Committee for consideration of the above-mentioned comments while formulating the final Findings and recommendations relating to the case.

Brno, 30 May 2012

Martin Fadrný
on behalf of Ekologický právní servis