

Responses to Questions from the Committee to the Party concerned (relating to the life-time extension of Dukovany Nuclear Power Plant - ACCC/C/2016/143; as submitted by the Aarhus Convention Compliance Committee on 24 December 2020)

1. According to former Act no. 18/1997 Coll., On Peaceful Utilisation of Nuclear Energy and Ionising Radiation (the Atomic Act) and on Amendments and Alterations to Some Acts, a legal base for a decision-making on repeated operational permit for Dukovany unit 1, urging the SONS (State Office for Nuclear Safety, SÚJB) to adopt the decision if all legal prerequisites, conditions and requirements were met by the applicant was explicitly enacted in section 14 para 2. This section of the aforementioned Act provided as follows:

“The Office shall take a decision on the issue of a licence having verified that the applicant has fulfilled all the conditions established in this Act and in implementing regulations.”

This provision was in force till the 31 December 2016. However, this general legal principle is applied also recently in the Czech legal system (such as in most legal systems of the “continental law”). Free discretion in decision-making process in the Czech Republic is strictly restricted to situations when such possibility is explicitly set in the law. Therefore, all administrative bodies are allowed to make their decisions only in full compliance with legal requirements and submitted applications. If the applicant complies with legal requirements his/her application is considered perfect and the administrative body (including the SONS) must approve it. This common principle finds its legal expression in section 2 of the Act no. 500/2004 Coll., On Administrative Proceedings, which is (and was at the time of issuing the decision in concern) generally applied by administrative bodies within decision-making in the Czech Republic:

“(1) An administrative authority shall proceed in compliance with the acts and other legal regulations as well as international treaties which form part of the legislation (hereinafter referred to as “legal regulations”). Where law is mentioned herein, it shall also include international treaties forming part of the legislation.

(2) An administrative authority shall execute its powers only for those purposes for which it has been entrusted thereto by law, and within the scope determined thereby.

(3) An administrative authority shall examine the rights acquired in good faith as well as the lawful interests of persons affected by the activities of the administrative authority in the particular case (hereinafter referred to as “persons concerned”), and may interfere with these rights only under the conditions set forth by law and in the inevitable scope.

(4) An administrative authority shall care to ensure that the adopted solution be consistent with the public interest and that it respected the circumstances of the particular case and that no reasonable discrepancies arose in respect of decisions on cases of identical or similar merit.”

Provisions of the Act no. 263/2016 Coll., Atomic Act, do not provide the SONS with power (option) to freely consider whether or under which conditions the operation permit would be issued. Its sections 9, 13, 16, 19 and 21 clearly limit procedures for making a decision and prescribe what aspects have to be taken into consideration by the SONS. Even conditions for permitted activity set by the decision must be based on particular requirements and provisions of the Atomic Act and may only specify these requirements in more detailed way.

2. The updated chronology from 28 June 2019, as submitted by OEKOBUERO, omits key elements of licensing process for nuclear power plants, as currently regulated by the Czech legal system. It focuses exclusively on specific procedures and decisions performed and adopted by a nuclear regulator; nevertheless, there are more general procedures leading to construction and operation of nuclear power plant that involve (and historically involved) nuclear safety aspects and enable participation of a general public – procedures according to the construction law, namely the Act no. 183/2006 Coll., On Town Planning and the Building Code (Building Act). Permits issued by the SONS represent only one component of the licensing process requested for any nuclear facility utilization.

Such isolated perspective could lead to conclusion that in concerned procedures, as listed in the updated chronology, the public has no opportunity to participate in the decision-making. In fact, in case of these two specific decisions the general public did not participate in related proceeding. However, this fact resulted from the very special nature of these decisions and is not a common characteristic of decision-making procedures in relation to nuclear power plants. As was repeatedly judged by the administrative courts of the Czech Republic and even by the Constitutional Court (see below), in this very specific situation the decision only repeatedly permits already performed operation of a facility. It is done, generally, under the same conditions and in the same scope, lacking ability to affect rights of the public in relation to the environment. Nonetheless, the Czech legal system enables the general public to participate in the EIA procedures and in so called “subsequent proceedings”, especially procedure for the issue of zoning permit and procedure for the issue of building permit, which precede permits issued by the SONS (including operational permit). The nuclear facility in question had to pass through these proceedings in the past and thus the public could raise its issues.

If there were no other procedures and decisions providing the public with opportunity to participate, it would be obligatory to allow it even in these two proceedings.

3. According to the Act no. 100/2001 Coll., On Environmental Impact Assessment, the public (i. e. one person or more) may submit comments on the project including nuclear installation in a proceeding subsequent to the Environmental Impact Assessment. Public concerned specified in section 3 letter i) point 2 of this Act is entitled to bring an action against the decision issued in subsequent proceeding (as listed by this Act; e. g. construction of the installation) and challenge the substantial and/or procedural legality of such a decision.

According to the section 3 letter g) of the Act no. 100/2001 Coll., On Environmental Impact Assessment, subsequent proceedings are defined as proceedings conducted to a project or a change to a project that are subject to environmental impact assessment, namely:

1. procedure for the issue of zoning permit,
2. procedure for the issue of building permit,
3. joint procedure for the issue of zoning permit and building permit,
4. repeated procedure for the issue of building permit,
5. procedure for the issue of additional building permit,
6. procedure for the issue of mining permit,
7. procedure for the determination of mining site,
8. procedure for the permission of activity performed in a mining way,
9. procedure for the permission of surface water and groundwater use,
10. procedure for the issue of integrated permit,
11. procedure for the issue of stationary source operation permit,
12. procedure for the issue of operation permit for installations for recovery, disposal, collection or purchase of waste
13. procedure for the issue of a decision necessary for the implementation of a project, where no proceeding pursuant to points 1 to 12 is conducted
14. procedure for a change of the decision issued in proceedings pursuant to points 1 to 13 to a project, or a part or a stage thereof, that has not been permitted yet, provided that the conditions of the decision based on the statement are to be changed.

This list of proceedings which are considered as to be subsequent to the EIA process, does not contain any proceeding according to the Act no. 263/2016 Coll., Atomic Act. This fact confirms the premise (already expressed in the Statement of the Party Concerned) that the main subsequent proceedings to the EIA process are the proceedings according to the Act no. 183/2006 Coll., On Town Planning and the Building Code (Building Act) (proceedings listed as no. 1 to 5).

4. Pursuant to section 65 para. 1 of the Act no. 150/2002 Coll., Code of Administrative Justice, as amended, anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by a decision (an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined) may seek the annulment of such a decision, or the declaration of its nullity.

According to legal doctrine (e.g. *Blažek, T., Jirásek, J., Molek, P., Pospíšil, P., Sochorová, V., Šebek, P.: Soudní řád správní – online komentář. 3. aktualizace. Praha: C. H. Beck, 2016*) the framework of the aforementioned provision does not require participation in the administrative proceeding preceding the issue of the contested decision – as far as standing to bring an action is concerned, it is not decisive whether or not the entity concerned (i.e. the person claiming that its rights were infringed upon by the decision) was treated as a party to the administrative proceedings.

This interpretation of section 65 para 1 the Act no. 150/2002 Coll., Code of Administrative Justice, as amended, has been reflected in the judgement of the Supreme Administrative Court of the Czech Republic no. 4 As 157/2013 – 33 (see Annex_4 for both Czech and English versions of this judgement). While not related to proceedings according to the Act no. 263/2016 Coll., Atomic Act, as amended, but to a proceeding on trial operation of a construction according to the Act no. 183/2006 Coll., On Town Planning and the Building Code (Building Act), as amended, in this judgement the Supreme Administrative Court came to a conclusion that it is possible for an administrative decision to interfere in the legal sphere of an entity that was not

a participant to the proceeding in which such a decision was issued, and therefore **participation in an administrative proceeding or an appeal against a decision cannot be stipulated as a condition for its standing to bring an action against such a decision.** In such a case a legal action filed against a first-degree administrative decision may be admissible – in case it was not, it might, in effect, represent a denial of justice.

Given the aforementioned conclusions, in case of the Dukovany LTE it was possible for the NGOs to file actions against the decisions of the SONS, referring to the abovementioned judgement of the Supreme Administrative Court, arguing that these decisions interfered in their legal spheres, and to challenge the legality of the decision.

In conclusion the Party Concerned would like to reiterate here its opinion and previous statements on the matter, i. e. that the activity in question is outside the scope of the Aarhus Convention, which has been confirmed by the Constitutional Court of the Czech Republic in its judgement no. II. ÚS 940/20 of 8 September 2020, which is being provided in Annex 8 to this letter.

5. Czech and English versions of the Act are provided as Annex_5_CZE and Annex_5_ENG to this response.
6. Czech and English translations of section 70 of Act no. 114/1992 Coll. on nature and landscape protection as in force in March 2016 and as currently in force (in force since January 2018).
7. Both Czech and English versions of Sections 3 and 4 of Act No. 100/2001 Coll., on environmental impact assessment, as in force in March 2016, June 2017, December 2017 and currently in force are provided in Annex_7.
8. Czech and English versions of the requested judgements are provided as Annexes_8_a to c.
9. Czech versions of the requested decisions are provided as Annexes_9_a to g.
10. Requested parts of the decisions follows:
 - a. Decision no. 24273/2005

“The SONS in accordance with section 9 para 1 letter d) of the Act No. 18/1997 Coll.

p e r m i t s

operation of unit 1 of the Nuclear Power Plant Dukovany.”

“Validity of this decision ends on 31. December 2015.”

There is no specific provision permitting the reactor’s operation to commence in the decision since the reactor was already in operation and this decision directly followed the previous one. Therefore, the reactor continued its operation without being shut down (even temporarily).

b. Decision no. 55714/2006

“The SONS in accordance with section 67 para 1 of the Act No. 500/2004 Coll., On Administrative Proceedings, and section 9 para 1 letter d) of the Act No. 18/1997 Coll., as amended,

permits

operation of unit 2 of the Nuclear Power Plant Dukovany.”

“Validity of this decision ends on 31. December 2016.”

There is no specific provision permitting the reactor’s operation to commence in the decision since the reactor was already in operation and this decision directly followed the previous one. Therefore, the reactor continued its operation without being shut down (even temporarily).

c. Decision no. SÚJB/ JB/26350/2015

“The SONS in accordance with section 67 para 1 of the Act On Administrative Proceedings, and section 16 para 3 of the Act No. 18/1997 Coll.,

changes condition set by the permit issued by the decision no. 24273/2005, from 16. 12. 2005, so that

words „31. December 2015“ are replaced with words „31. March 2016.”

Since this decision only changes one condition (term of validity) of older decision it has formal nature and does not contain any provision on validity or permitting the reactor’s operation to commence.

d. Decision no. SÚJB/ JB/17140/2016

“The SONS in accordance with section 67 para 1 of the Act On Administrative Proceedings, and section 16 para 3 of the Atomic Act

changes condition set by the permit issued by the decision no. 55714/2006, from 8. 12. 2006, so that

words „31. December 2016“ are replaced with words „10. July 2017.”

Since this decision only changes one condition (term of validity) of older decision it has formal nature and does not contain any provision on validity or permitting the reactor’s operation to commence.

e. Decision no. SÚJB/OSKŘaE/12142/2017

“The SONS in accordance with section 67 para 1 of the Act No. 500/2004 Coll., On Administrative Proceedings, and section 9 para 1 letter f) of the Atomic Act

permits to the participant operation of the nuclear facility - unit 2 of the Nuclear Power Plant Dukovany.”

The decision has been issued for an indefinite period according to section 21 para 2 of the Act No. 263/2016 Coll. According to section 21 para 1 letter d) of the Act No. 263/2016 Coll. this fact is not explicitly expressed in the text of the decision.

There is no specific provision permitting the reactor’s operation to commence in the decision since the reactor was already in operation and this decision directly followed the previous one. Therefore, the reactor continued its operation without being shut down (even temporarily).

f. Decision no. SÚJB/OSKŘaE/24077/2017

“The SONS in accordance with section 67 para 1 of the Act No. 500/2004 Coll., On Administrative Proceedings, and section 9 para 1 letter f) of the Atomic Act

permits to the participant operation of the nuclear facility - unit 3 of the Nuclear Power Plant Dukovany.”

The decision has been issued for an indefinite period according to section 21 para 2 of the Act No. 263/2016 Coll. According to section 21 para 1 letter d) of the Act No. 263/2016 Coll. this fact is not explicitly expressed in the text of the decision.

There is no specific provision permitting the reactor’s operation to commence in the decision since the reactor was already in operation and this decision directly followed the previous one. Therefore, the reactor continued its operation without being shut down (even temporarily).

g. Decision no. SÚJB/OSKŘaE/24078/2017

“The SONS in accordance with section 67 para 1 of the Act No. 500/2004 Coll., On Administrative Proceedings, and section 9 para 1 letter f) of the Atomic Act

permits to the participant operation of the nuclear facility - unit 4 of the Nuclear Power Plant Dukovany.”

The decision has been issued for an indefinite period according to section 21 para 2 of the Act No. 263/2016 Coll. According to section 21 para 1 letter d) of the Act No. 263/2016 Coll. this fact is not explicitly expressed in the text of the decision.

There is no specific provision permitting the reactor's operation to commence in the decision since the reactor was already in operation and this decision directly followed the previous one. Therefore, the reactor continued its operation without being shut down (even temporarily).