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Aarhus Convention Secretariat

c/o Fiona Marshall
Palais des Nations
8-14 Avenue de la Paix
1211 Geneva 10, Switzerland

Vienna, 22 November 2022

Regarding: Comments on the plan of action on Decision VII/8e (Czechia)

Dear Secretariat,

Dear Ms. Marshall,

ÖKOBÜRO – Alliance of the Austrian Environmental Movement, GLOBAL 2000, and Aarhus Konvention Initiative appreciate the opportunity to comment on the plan of action of Czechia regarding the implementation of decision VII/8e adopted by the Meeting of the Parties to the Aarhus Convention.

We consider further measures necessary in order to meet the requirements set out in decision VII/8e. Regarding the specific paragraphs of decision VII/8e, we kindly ask the Committee to take note of the following remarks:

- **paragraph 2 (b) (i) and (ii) a**

ÖKOBÜRO, GLOBAL 2000, and Aarhus Konvention Initiative welcome the introduction of a new special tab within the existing CENIA information system envisaged by Czechia. Czechia reports that this would facilitate the display of information about all new projects that are subject to transboundary assessment (i.e., in relation to which cross-border effects are expected) "*at any time and always in one place*".¹

Regarding subsequent proceedings, Czechia states in the attached comments to the action plan that at the moment, a direct notification of persons who submitted comments within an EIA procedure is technically and for data protection reasons not possible.² Instead, the information of the initiation of such a procedure as well as where its documentation can be found is published "*on an official board*".³ In the case of NPP Dukovany, the information was uploaded to a cloud storage for the affected countries, who published it

¹ Plan of action for decision VII/8e (Czechia) p. 8.

² Plan of action for decision VII/8e (Czechia) p. 22, 23.

³ Plan of action for decision VII/8e (Czechia) p. 22.

according to their own provisions. While we appreciate that efforts are made to include information on subsequent procedures on the CENIA platform in the future, we must also stress that we believe that the current practice does not fulfil the requirements of article 6 (2) of the Convention.

The Committee has clearly stated that if there are other environment related permitting decisions regarding the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the basic parameters or which address significant environmental aspects, this could not be said to meet the requirements of the Convention.⁴ This means that the provisions of article 6 (2)-(10) of the Convention must be applied in proceedings fulfilling the above criteria and that thus, the information on the proceedings must fulfil the requirements of article 6 (2) of the Convention.

Czechia must inform the public in an effective, adequate, and timely manner. With regards to the initiation of subsequent procedures, we would like to stress that the constant monitoring of an online platform for information for the potential initiation of procedures, which could occur at any time, requires a great deal of resources from environmental organizations and direct notification would thus be preferable. Czechia must make all reasonable efforts to facilitate participation and introducing a new tab on an official website is not sufficient. As things stand currently, the problem is aggravated by the fact that the relevant documents are not even published on a centralized platform but must be requested separately from the responsible authority.

Czechia has not clarified whether the notification provided on the platform includes even the minimum information requirements stated in article 6 (2) a-f nor if the information is available in English at the respective responsible authorities. Effective notification in the sense of the Convention means that efforts must be made to ensure that the public concerned is not only reached, but that the meaning of the notification is understandable, and all reasonable efforts have been made to facilitate participation.⁵ If the notification via the centralized platform does not contain the minimum information stated in article 6 (2) a-f and if documents are not available in an appropriate language, the notification is not understandable and thus not effective in the sense of article 6 (2) of the Convention. We ask Czechia to include subsequent procedures in the CENIA platform and to introduce a notification system as soon as possible to meet the provisions of the Convention.

Czechia's obligation to ensure that, when selecting means of notifying the public under article 6 (2), public authorities are required to select such means that will ensure effective notification of the public concerned has already been laid down in decision VI/8e adopted at the 6th Meeting of the Parties to the Aarhus Convention in 2017. In the light of the long time that has passed ever since, ÖKOBÜRO and GLOBAL 2000

⁴ ECE/MP.PP/2008/5, para 58.

⁵ UNECE, The Aarhus Convention. An Implementation Guide (2014) 135.

consider an implementation of the necessary legislative and administrative changes to meet the provisions of the Convention by 1 October 2023 more than adequate.

- **paragraph 2 (b) (ii) b**

Czechia elaborates that public participation in the subsequent proceedings to an EIA is ensured by the current legislation of the Czech Republic. According to the plan of action, this includes the zoning permit procedure and the building permit procedure. We appreciate that Czechia has now clarified – upon request in the comments to the draft action plan – whether procedures under the Atomic Act as well as the final building inspection are considered subsequent procedures to the EIA. We regret, however, that this is apparently not the case and the provisions of section 9f of the Act on the Environmental Impact Assessment consequently do not apply.

The issuance of several licenses leading up to the operation of an NPP constitute a case of complex decision making concerning an activity covered by article 6 of the Convention (which Czechia recognizes on p 24 of the action plan). In the case that a permit is related to an EIA procedure, in subsequent procedures which are capable of significantly changing the basic parameters or which address significant environmental aspects of the activity not already covered in foregoing procedures, the provisions of article 6 (2)-(10) must be considered. Czechia argues that *"proceedings according to § 9 of the Atomic Act are of a more technical nature and they do not change the essential parameters of the project that have an impact on the environment."*⁶

While it is true that the EIA procedure also covers the influence of ionising radiation, it must be noted that for example the EIA procedure in the case of Temelín 3+4 was conducted as a blackbox procedure, meaning that the exact type of reactor is only chosen after the conclusion of the EIA procedure. Therefore, whether the reactors ultimately selected will meet the requirements discussed in the EIA can only be answered and decided in subsequent licensing procedures. The proceedings according to section 9 of the Atomic Acts that are claimed to *"not change the essential parameters of the project that have an impact on the environment"* are thus in fact procedures where the technicalities of a specific reactor and its influences on the environment might be discussed for the first time in the entire procedure on the instalment of an NPP. Consequently, a license procedure under section 9 of the Atomic Act may very well address significant environmental aspects of the activity not already covered in foregoing procedures and the provisions of article 6 (2)-(10) must be accounted for. We therefore urge Czechia to include especially procedures under the Atomic Act in the list of subsequent procedures according to section 3 g) of the Act on Environmental Impact Assessment and consequently ensure participation rights in accordance with section 9f. This does not only apply to license procedures under section 9 of the Atomic Act following an EIA, but any case of

⁶ Plan of action for decision VII/8e (Czechia) p. 24.

tiered decision-making where a procedure under section 9 Atomic Act could change essential parameters of the project that have an impact on the environment.

Additionally, it should be clarified that the relevant information and documents regarding subsequent proceedings must be published via the newly created function within the CENIA information system.

paragraph 6 (a)

Regarding the Committee's recommendations derived from article 6 (10) of the Convention, Czechia expects that the amendments adopted after 2017 essentially meet the requirements, as they enable public participation in precisely those procedures that are intended for reconsiderations or updates of operating conditions. Upon request, Czechia has included sections 22 and 204 of the Atomic Act in the present action plan. While we appreciate the opportunity to get a clear picture of the legislative changes, we also regret that in our opinion, the provisions fail to meet the MOPs recommendation to apply the provisions of article 6 (2)-(9) of the Convention *mutatis mutandis* when the operating conditions of a permit are reconsidered.

Section 22 (1), (2) and (3) introduce *"a new procedure to issue a new permit replacing the former decision, inter alia in cases if there has been a material change in the facts on the basis of which the original permit was issued, or if there has been a change in the performance of the originally permitted activity [...] (i.e. also in cases where the operating conditions of the activity shall be reconsidered or updated by the competent authority in the sense of Article 6 (10) of the Aarhus Convention)."* Czechia claims that party status is determined by the general regulation in section 27 Administrative Code and thus granted if *"rights or obligations may be directly affected by the decision"*.

Section 204 allows the authority to impose conditions on the operator of an NPP if it discovers a deficiency in the activities related to the use of nuclear energy or within the framework of exposure situations.

The Party concerned claims that whether the public can participate in such proceedings is regulated by sections 27, 28 of the Administrative Code. We would like to ask for clarification on the relationship between section 27, 28 of the Administrative Code and section 19 (1) of the Atomic Act. According to section 22 of the Atomic Act, the competent authority initiates a new procedure and makes a new decision on the issuance of a permit. The Atomic Act does not contain special procedural regulations that distinguish a proceeding under section 22 from a proceeding on the issuance of a general permit under section 9 of the Atomic Act. In fact, section 22 does not contain procedural regulations at all and the only provision regulating the issuing of licenses is section 9 of the Atomic Act. However, according to section 19 (1) of the Atomic Act, the license applicant shall be the only party to the procedure for issuing licenses. If there is a *lex specialis* for party status in license proceedings in the Atomic Act already, we thus ask Czechia to clarify whether sections 27, 28 of the Administrative Code are applicable and take the necessary measures to ensure public participation in proceedings according to sections 22 and 204 of the Atomic Act. If sections 27, 28 of the Administrative Code are applicable, we ask Czechia to elaborate on how it is going to be

ensured that the provisions will be interpreted in a way that includes the public and environmental organizations in particular.

However, even if the Czech authorities would guarantee the public concerned party status in the abovementioned proceedings according to sections 22 and 204 of the Atomic Act, this is only of any use if such proceedings are started up. The legal situation as currently planned leaves it entirely up to the authorities/the permit holder to decide whether there has been a material change of facts or a change in performance of the NPP, requiring the issuing of a new license according to section 22 Atomic Act or the imposing of measures according to section 204 Atomic Act – the public does not have a petition right.⁷ As a consequence, and also referring to the recommendations in paragraph 6 (b), we would like to stress that members of the public concerned, including environmental non-governmental organizations, must also have access to a review procedure to challenge the legality of omissions under the 1997 or 2016 Atomic Act.

Regarding the Decree on Requirements for Safety Assessment according to the Atomic Act, we would like to stress that it was already assessed by the ACCC for the case at hand whether a PSR constitutes a reconsideration or update of the operating conditions, no space remains for an arbitrary Czech interpretation. In Decision VII/8e, the MOP reaffirmed that by establishing a legal framework that does not provide for public participation in each of the 10-year periodic safety reviews, Czechia fails to comply with article 6 (10) of the Convention. It is therefore obvious that granting the public information rights does not suffice to fulfil the requirements of para 6 (a) of Decision VII/8e. We therefore urge Czechia to acknowledge its obligations under article 6 (2)-(9) of the Convention concerning PSRs and to take the necessary legislative measures.

It is unclear to us why 1 October 2024 is named as the final date by when the implementation of this recommendation will be completed: as stated earlier, enough time has passed since the adoption of the MOPs decision for Czechia to take the necessary legislative and administrative measures.

- **paragraph 6 (b)**

We acknowledge that according to Czech case law (decision of the Constitutional Court of 30 May 2014, No. I. ÚS 59/14 and subsequent jurisprudence of the administrative courts), environmental organizations can have standing to appeal against decisions on grounds of violation of substantive requirements of environmental laws under certain conditions.

At the moment, section 81 of the Administrative Court allows the parties to the proceedings to appeal against a decision. However, party status of the public in procedures under the Atomic Act remains questionable considering the present action plan. We accept that apparently case law exists, stating that

⁷ See e.g. ACCC/C/2011/63 (Austria), ACCC/C/2013/85 & 86 (United Kingdom).

in case of an administrative procedure in which the participation of the public is excluded, it is permitted to file a lawsuit against the decision pursuant to section 65 Code of Administrative Justice, provided that the plaintiff is affected by the decision in their legal sphere. However, this leaves great room for interpretation when it comes to the question of standing of the public concerned and we would also like to remind Czechia that non-governmental organizations meeting the requirements referred to in article 2 (5) do not need to prove their legal interest in the sense of article 9 (2) of the Convention. We believe it is necessary for Czechia to adopt legislation that clarifies the standing of the public concerned, including environmental non-governmental organizations, to appeal to decisions following proceedings for which party status was not granted. This is particularly relevant since participatory rights – according to the action plan - are doubtful for proceedings under sections 22 and 204 of the Atomic Act and factually excluded for procedures under section 9 of the Atomic Act.

We hope that the Committee will be able to take our remarks into account.



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