Ministerstvo životního prostředí

Secretariat of the Aarhus Convention
Palais des Nations
1211 Geneva
Switzerland

In Prague on 12 September 2024

Comments to the draft advice from the ACCC

Dear Aarhus Convention secretariat,

the Czech Republic would like to make use of the invitation by the Aarhus Convention Compliance Committee to comment on its draft advice concerning the implementation of paragraph 2 (b) (i) and (ii) of decision VII/8e. We would be grateful if you could forward the below comments to the Compliance Committee. Thank you very much for your continuing support and cooperation.

Kind regards

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Ministry of the Environment of the Czech Republic

Comments to the draft advice from the ACCC

1. Introduction

On 9 February 2023, Czechia submitted a request to the Compliance Committee seeking its advice on the implementation of paragraph 2 (b) (i) and (ii) of decision VII/8e, which concerns the issue of effective notification of the public concerned under article 6(2) of the Aarhus Convention in the Czech territory and in the transboundary context. On 3 July 2024, the Compliance Committee sent its draft advice both to Czechia and to the communicants and observers for their comments. Since the issues addressed in the draft advice may be of relevance for other Parties to the Aarhus Convention too, the draft advice was later also sent to the other Parties with an opportunity to comment.

First of all, we would like to express our appreciation to the Compliance Committee for its support in this matter and for the detailed answers it has provided to our questions. At the same time, however, we consider it necessary to comment on some of the aspects of the Committee's draft advice, and we therefore kindly ask the Committee to take the below comments into account before finalising its advice.

2. The CENIA system and official boards (paragraphs 13, 20 and 21)

We believe that it is not possible to disregard the CENIA system in the way the Committee does in paragraph 13 of the draft advice. While it is clear that the system also serves as a tool for making the information relevant to the decision-making accessible to the public concerned under article 6(6) of the Aarhus Convention, it is at the same time an important means of notification under Article 6(2) of the Aarhus Convention. The functionality of the CENIA system is therefore highly relevant, and it must be taken into account.

It is apparent from the draft advice that the Committee does not find the use of "passive" forms of notification sufficient, i.e. those forms which are based on an activity of the public concerned regardless of how small or easy such an activity might be. This is plain especially from paragraph 20 of the draft advice where the Committee recalls that "*it is not reasonable to expect members of the public to proactively check the Ministry's website on a regular basis just in case at some point there is a decision-making procedure of concern to them,*" and adds that "*for the majority of the public, this statement would apply equally even for a "one-stop shop" portal like the CENIA system.*"

In our opinion, the use of a one-stop shop online portal is in fact much more effective than any other means of notification that are being proposed in the draft advice. It is simple, it

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contains up to date information from a verified source and it is accessible from any place with internet connection (both in Czechia and abroad). Thanks to its more than 20-year history, the CENIA system is perceived in Czechia as a common and well-known source of information. As stated already in our previous communication, information about all projects subject to EIA is collected in this system and this information is always published in the shortest time possible. The system is also available in an English version.

We are convinced that members of public who have an interest in environmental decision-making will in general be able and willing to use a one-stop shop portal such as the CENIA system. To members of public with interest in environmental decision-making (or a part thereof, e.g. in decision-making concerning the NPPs), the CENIA system certainly provides for a reasonable chance to learn about proposed activities and about the possibilities to participate. In the future, we would like to explore further possibilities to enhance the functionalities of the system, e.g. with a notification system.

Similarly, we also cannot agree with the assumption expressed in paragraph 21 of the draft advice (that "*it cannot be expected that all, or even a significant proportion of, members of the public concerned visit either the physical offices or websites of their municipality or region on a regular basis*"). In Czechia, it is expected that members of the public visit the official boards of their municipality or region on a regular basis if they want up-to-date information about what is happening or coming up in the area where they live (including information about the meetings of the municipal council, road closures, etc.).

Other forms of notification should therefore aim rather on members of public that are affected or likely to be affected by the environmental decision-making but who do not have a general interest in this type of information, i.e. who would not be checking the one-stop shop portal (or the official boards) on a regular basis. This approach frames the issue at hand in a much more effective way as it supports future technological development of the CENIA system and helps to determine what "additional" means of notification should be used and in what territorial scope (especially in the transboundary context).

3. Identifying the public concerned (paragraph 14)

In paragraph 14, the Committee recommends Czechia to include an explicit provision in its legal framework requiring that the competent public authority, prior to selecting the means of notification to be used to notify the public concerned of a proposed activity, first identifies who is the public concerned by that particular activity.

We are concerned that a legal provision of such a nature would likely cause significant problems in practical implementation and an increased risk of challenging the procedure of the relevant authorities. Practical identification of the public concerned, i.e. of specific persons who may be affected by the decision about a project, is very difficult within the EIA process and with an increasing scope of the project (and of the affected territory) it would become close to impossible. Based on the detail of information about the project and its effects which are known at the given moment, it is usually only possible to determine the affected territory at the level of municipalities. A definite determination of persons who could be affected by the decision-making, i.e. the parties in the relevant administrative procedures, can only occur in the phase of the subsequent proceedings in which the final decision about the project is being taken.

We would therefore argue that the required identification must correspond to the information available at the given stage of the permitting process, and in the EIA process, it should be focused on the affected territory (not the public concerned).

4. Choosing effective means of notification (paragraphs 22, 23, 40 etc.)

In paragraph 23 of the draft advice, the Committee concludes that it will be necessary to include an explicit requirement in legal framework requiring competent public authorities to "*select such means as will ensure effective notification of the public concerned, bearing in mind the nature of the proposed activity and including, in the case of proposed activities with potential transboundary impacts, the public concerned outside the territory of the Party concerned*" (i.e. the wording of paragraph 2 (b) (i) of decision VII/8e).

Similarly to the above, we are concerned that this kind of wording is very vague and that it would likely cause significant problems in practical implementation. Although the principles contained in the recommendation follow from the wording of the decision taken by the meeting of the parties (thereby making sure that Czechia would in fact implement the recommendation therein), we need to make sure that the resulting legal regulation is sufficiently clear and applicable in practice.

It might be better to include a more precise requirements for certain means of notification in the law. We may consider returning the provision of § 16 (3) (c) to the Act on Environmental Impact Assessment, however, this would have to happen in a modified and more precise form. The "additional" method of notification [in at least one of the other ways usual in the affected territory (e.g. in the local press, on the radio, etc.)], which was

included in the Act until 2015, proved to be ineffective and risky, as its general wording gave room for subsequent review of the choice of the form of notification by the competent authority. This choice is indeed very complex, and it often depends on opinion, which may differ fundamentally from person to person.

In paragraph 40 of the draft advice, the Committee makes clear that it expects the means set out in paragraph 64 (a), (b), (e), and (c) or (d) of the Maastricht Recommendations to be used in every case that notification under Article 6(2) of the Aarhus Convention is required. The means set out in paragraph 64 (e) of the Maastricht Recommendations is already used in Czechia, in combination with the CENIA system. We may consider the possibility of including the requirement for publication of a public notice on the official board of the public authority competent to take the decision (online and offline) and/or in a public place in the immediate vicinity of the proposed activity according to paragraph 64 (a) of the Maastricht Recommendations (although it may prove to be quite problematic in the case of projects of extensive or linear nature, such as roads).

The most questionable requirement, however, remains in the application of paragraphs 64 (c) or (d) of the Maastricht Recommendations. In this respect, we feel that the Committee only specified its earlier requirements and did not in fact respond to our concerns, which are expressed in the request for advice. The means of notification listed in these paragraphs are associated with a significant amount of additional administrative and financial burden and their effect in practice remains, in our view, doubtful. Publication in places highly frequented by the public concerned would only duplicate publication of the public notice on official boards, and we still feel that publication in the newspapers is nowadays obsolete and ineffective. The sales of printed newspapers have been decreasing significantly over time (e.g. the print edition of "Lidové noviny" was ended just this summer for this reason). It seems to be unreasonable to legislate now a printed newspaper as an "effective form of notification".

If the publication in the newspapers had to be used, we believe that, at the very least, it is necessary to significantly narrow down the requirement so that it can be worked with in a more efficient and cost-effective manner but remain within the meaning of Article 6(2) of the Aarhus Convention and of paragraph 2 (b) (i) of decision VII/8e. We believe that it is possible to reframe the issue as follows: (1) members of public with interest in environmental decision-making have a reasonable chance to learn about proposed activities and about the possibilities to participate through the CENIA system, (2) in case

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of activities with only local scope, the above means of notification are sufficient (official boards + CENIA system + public notice in the immediate vicinity of the proposed activity), (3) "additional" means of notification are therefore necessary only in case of projects with potential effects that affect a larger territory.

5. Projects with potential transboundary effects (paragraphs 27 etc.)

As an initial point, we would like to ask the Committee to reconsider its position regarding the CENIA system – the arguments given above in point 1 apply in full to the cases of projects with potential transboundary effects, because a member of public with an interest in certain type of environmental decision-making (e.g. about NPPs in Czechia) will be able to check the CENIA system from time to time in order to receive up to date information. In our opinion, it is fully reasonable to expect this from public interested in environmental matters (i.e. often NGOs interested in certain types of activities).

(A) If the affected State cooperates with the Party concerned to carry out effective notification of the public concerned in its territory (paragraph 32)

The success of the procedure proposed by the Committee will depend entirely on the possibilities of international cooperation. At the same time, we are convinced that the affected states cannot be required to notify the public concerned on their territory in a way that does not correspond to their own national legislation.

(B) If the affected State either refuses to cooperate, or fails to carry out effective notification of the public concerned in its territory, upon the Party concerned's request (paragraphs 44, 46 etc.)

In paragraph 44 of the draft advice, the Committee recalls that "*[the Party concerned] should thus request the notice to be published in the print media of the affected States as a minimum, and to expressly require other means to be used as will be necessary to ensure the effective notification of the public concerned in each affected State*". At the same time, in paragraph 46, the Committee also refers Czechia to its advice in paragraph 40.

First, it is necessary to stress again that the use of official boards is not possible in the affected state, unless it is used by the responsible authorities of the affected state. It is therefore not possible to use the means set out in paragraph 64 (e) of the Maastricht Recommendations. We also do not believe that it is feasible to put public notices in places highly frequented by the public concerned outside of the territory of the Czech Republic.

The only "additional" means of notification (i.e. in addition to the CENIA system) which could actually be used in this context is the publication in the newspapers.

However, we are still concerned about the practical feasibility of this measure, as "a basic internet search by the competent authority of the Party" is a weak point that could later become a reason for challenging the procedure of the relevant authorities. At the same time, a requirement to publish in foreign newspapers represents a significant amount of additional administrative and financial burden, it should therefore only be used in cases where it will in fact be effective and necessary (see point 6 below).

In general, we are also very concerned that the interpretation included in paragraphs 31, 36 and 38 of the draft advice seems to suggest that there is an obligation to publish relevant parts of EIA notification or EIA documentation (or information about them) in the territory of another state (without any cooperation from its authorities), even if its authorities do not wish to perform a transboundary assessment, i.e. they do not expect that there is a possibility of significant effects of the project on the environment on their territory. *Ad absurdum*, this would also mean an obligation to translate relevant parts of EIA notification or EIA documentation in the official language of another state under these circumstances. We believe that this approach is unfeasible and in the vast majority of cases unnecessary or not bringing a result commensurate with its costs.

6. Territorial scope (paragraph 48)

In paragraph 48 of the draft advice, the Committee states that the territorial scope for notifying the public concerned of proposed "ultrahazardous activities" is not limited to the public only in those states where a significant effect on the environment has been identified. We believe that, in practice, identification of the territorial scope based on such an assumption is not realistic and all procedures based on it would be jeopardized by the impossibility of proving the correctness of its application.

Following on our previous argumentation, we believe that to the members of public with interest in environmental decision-making (or a part thereof, e.g. in decision-making concerning the NPPs), the CENIA system provides for a reasonable chance to learn about proposed activities and about the possibilities to participate. The last sentence of paragraph 48 should therefore, in our view, be reconsidered accordingly. With this in mind, it would be possible to aim the notification at public affected or likely to be affected by the environmental decision-making, i.e. at the affected territory.

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7. Conclusion

Although we admire the level of ambition embodied in the draft advice, we have to ask the Committee to also consider the practical applicability of the proposed legislative changes. We believe that in order to reach a reasonable solution, it will be necessary to reconsider the level of ambition, especially with regard to the principles of the draft advice concerning the capability of the members of public interested in environmental decision-making to follow relevant information sources without being actively notified about activities that might (or might not) be of interest for them.

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