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Non-govermental Report on Aarhus Convention Implementation2007

NON-GOVERMENTAL REPORT ON AARHUS CONVENTION 2007 IMPLEMENTATION

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Děti Země

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SUMMARY OF NON-GOVERNMENTAL REPORT ON AARHUS CONVENTION 2007 IMPLEMENTATION

The Czech NGOs follow the Aarhus Convention and putting its principles in practice on a long-term basis. They participated in preliminary of wording of the Convention as well as they took part in its ratification process; in a few recent years they too have analyzed the process of its implementation. The Green Circle, an association of ecological non-governmental organizations, cooperates with The Ministry of the Environment on operating web sites providing information on the Aarhus Convention (www.ucastverejnosti.cz), and annually publishes a report, provided by NGOs, on the actual situation of implementation. The report is based on specific case studies and public as well as ecological organizations´ experience with the situation of environmental democracy in the Czech Republic.

In 2005, the NGOs´ report mainly focused on the Access to Information assertion and the current practice weak points characterization. In 2006, mainly the problems of public participation in the decision-making process and insufficiency in the assessment of environmental impacts practice in the terms of public participation was taken into account. In 2007, we are submitting report primarily focused on the third pillar of the Aarhus Convention, which is access to legal protection. Here, we provide our readers with the English translation of the general conclusions of the Convention.

I. THE RIGHT FOR INFORMATION

In the Czech system of law, the Access to Information is treated in the two laws: (1st) the Act of the Access to Information on the Environment (No. 123/1998 Coll.), (2nd) the Act of Free Access to Information (No. 106/1999 Coll.), whereas the Act No. 106/1999 Coll. is used in case of need in the instances excluded by No. 123/1998 Coll. Unfortunately, two acts do not necessarily imply twice as good amendment – the inevitable partition mostly imposes even more problems.

☺ The Aarhus Convention requirements implementation in the Access to Information area into intranational system of law is in good order.

☹ **However, in practice, several areas remain problematic:**

- there is no clear interpretation to establish the providing information provision – according to the Act on the Right for Information, anyone can be provided with information, whereas, according to the Building Act, only a participant of proceeding has the right to look in document.

- there is both information on the environment and other information required in just one request – the obligatory subject, then, is to apply double procedural regime (first, according to the Act on the Access to Information on the Environment, second, according to the Act on Free Access to Information). As a result, there are different deadlines for providing the information, different remedial measurements, requirements for covering the costs of providing the information as well as different judicial protection,

- there is no sufficient legal protection as well as possibility of quick and effective remedy in the case of information supplying denial - judicial review is often slow and ineffective and/or inefficient. The average time for dealing with the matter under discussion in the field of administrative justice is 450 days (15 months), the rate of adjudications given by appellate jurisdiction moves around 30 percent; nevertheless, very often, they are not the matter of the final decision but of submitting the matter to minor court to give the final decision.

☺ In the Czech Republic, there are a lot of information systems presenting their activities in the form of web sites or printed documents. For information on the environment dissemination in urgent cases, there are special procedures treated in several laws.

☺/☹ Since November 1st, 2007, on the basis of amended legislative regulations of the Government, draft laws should be published at the Public Administration web sites; for the legislation being prepared by the Ministry of the Environment, they should be published at the Ministry web sites. Generally obligatory legal regulations and ratified international treaties are published in the Collection of Laws as well as the Collection of International Treaties. Concerning policy, plans, and other relevant documents of resorts and regions, the practice of publishing varies depending on various institutions, and is specified by no obligatory provision. Thus, there are not a few strategic documents that are going to be published as late as within the frame of environmental impact assessment (SEA).

☹ In spite of all these steps, there is no unified, interlinked, and mutually coordinated information system for the environment, system with essential overlap with other sectors (e.g. agriculture).

☹ What is also essential about insufficiency in providing the public with quality information, is lack of environmental information centers, ecological advisory centers, and other public meetings points with significant intermediary and assistance activities.

II. THE PUBLIC PARTICIPATION IN THE PROCEEDINGS

In recent years, in the Czech Republic, there have been some principal amendments in the public participation regulations. Among the most important novelties are:

- the new administrative regulation (the Act No. 500/2004 Coll.), valid from January 1st, 2006,
- the new Building Act (the Act No. 183/2006 Coll.), valid form January 1st, 2007,
- the amendment in the way of delivery according to the Act on Nature and Landscape Protection (an amendment in terms of participation-in-proceedings announcement delivery),
- there were some amendments in public participation in legislation preparation process. The new legislative Government regulations have been approved. Also, in October 2007, the Government approved Draft Proceeding to implement the methodics to include public in the process of preparation of Government documents.

1. SPECIFIC ACTIVITIES

Decision-making on specific activities is the most frequent as well as the most typical area the public takes part in. In practice, this is the matter of decision-making on specific activities with potentially significant environmental impact, e.g. decision-making on situation of buildings lay-out, building-up and activity of large facilities, or approving products for the market.

☺/☹ The procedures in this area are influenced by new legal regulations: the Administrative Act, the Building Act, and updating of the Act on Nature and Landscape Protection. So far, it is practical experience with these amendments what is missing.

☹ However, the practice and the problems solved most often seem to, despite the updated legislation, remain the same. **What are the main areas of insufficiency in practice, then?**

- the lacking definition of the public concerned in the terms of the Aarhus Convention. This fact has serious consequences – the group of the participants is much smaller than the Aarhus Convention requires. So it is virtually only civic associations which take part in the proceedings, not the unorganized public.

Nevertheless, civic associations have problems with access to legal protection as well as to the judicial review of the decision.

- searching, addressing, and defining the public concerned. The (physical) official counter-desks remain the most frequent way of communication. The other causes of the low rate of the public participation in the proceedings are: insufficient direct addressing, short terms, and the ways of publishing information.

- a short time to apply for a proceeding, which is eight days. The update of § 70 of Art. 2 of the Act on Nature and Landscape Protection has made this condition difficult even more. The novelty concerns information announcing day, which is, newly, also "the first day of its publishing in a certain executive board´s official panel and, at the same time, the way enabling remote access".

2. PLANS, PROGRAMS, AND POLICIES

In comparison to the decision-making processes in the specific activities area, the rights and obligations in this area are, in the Czech Republic, defined less precisely. However, the range of public competence remains the same. In the case of searching for appropriate way of the public involvement, the overall arrangement is much more flexible.

2.1 The first group of the documents is **plans and programs** related to the environmental questions. These plans and programs encompass variety of activities in wide spectrum of sectors and in all government levels, e.g. plans on area utilization and its development, planning in the areas of transportation, tourist business, energetics, industry, water management, public health, and hygiencis, as well as government subsidies and action plans.

☹ In terms of making information on proceedings accessible, the Act on the Environmental Impact Assessment is insufficient in public control over factual ratified environmental and public-health conceptions impact. The investor has to provide observation and analysis of approved conception impacts on environmental and public health. Unfortunately, the Act does not treat whether and how this information is going to be transmitted to the public.

2.2 The other group of the documents is called "**policies**". The documents are comparable to the ones within the first group; what is different is the context of their inception: in these cases, it is evidently political. Nevertheless, the contracting countries are obliged to work for the public, who should have enough opportunities to take adequate part in their preparation process.

☺ Plans, policies, programs – positive examples from the practice

- Introduction of a central information system for environmental impact assessment and its active fulfillment;

- Publishing of a methodology for the SEA process, with recommendations for citizens´ participation in the SEA process;

- Publishing of working versions of concepts and SEA working outputs during the concept preparation process;

- Use of the media (Internet, press, radio etc.) to involve the public in the SEA process;

- Organising public meetings in the early phases of the SEA process – beyond the Act, suitable time and place of public negotiations, very good settlement of comments raised by citizens and publishing of the settlement – in a form of settlement table;

- Cooperation of those who present a concept and conduct SEA with working groups involving the professional public;

- Strengthening of procedural rights (i.e. public participation) in area planning through the institute of a representative of the public

☹ Plans, policies, programs – negative examples from practice

- Unsuitable way of informing on public negotiations taking place (official board, internet, regional offices delivery, direct NNO addressing, using local press etc.);
- Bad collection and inferior settlement of the comments raised by citizens, including not appointing responsibility for settlement of those comments;
- Little public interest in the process of SEA participation;
- Unsuitable time of public negotiations: the timing agrees with the needs of officers, not the public;
- SEA outputs are too complicated – quality assessment conclusions summary is missing;
- Insufficient informedness on the SEA process as well as the area planning between professional and laic public;
- Public administration insufficiency in the knowledge of public involvement techniques (unprofessional approach)
- Insufficient identification of the public concerned
- Lack of information on the advantages of the public involvement into the processes.

3. PROVISIONS

The right of the public participation in the provisions preparation is the least strictly amended part of the Aarhus Convention. The situation is also complicated by fact that the countries successfulness assessment in the process of aims fulfilling in this area is not based on results, but on the effort made to involve the public. Contracting parties are obliged only to endeavour to achieve certain aims.

The public participation area of the amended law is delimitated as the normative acts preparation by the public administration authorities. So it includes the public participation in the legislation process until the draft bill is submitted to legislative authorities. The Aarhus Convention states the three steps that, at least, should be fulfilled to achieve its aims: (1st) it is necessary to state sufficient time frame for effective participation; (2nd) the proposal should be published or somehow else made accessible to the public; (3rd) the public has to be provided with the possibility of making comments directly or through representative consultative organs.

Marking up laws, regulations, and public notices is treated by newly amended **Legislative Rules** of the Government. Not only does this version amend compulsory commenting places (the central organs of public administration and other institutions), it also amends other commenting places (for the public).

☺ The draft legal enactment is published at the public administration web site (http://eklep.testcom.cz/eklep/page1.jsf), which is publicly available.

All of the commenting places, including the public, have a basic deadline of 15 working days (and/or 20 working days in the case of Act draft) determined for commenting. This term could be prolonged by draft manager.

☹ Unfortunately, the comments have to meet all, formally demanding, requirements, they are required to be specified and reasoned. In case you require direct amendment of a draft, you also have to offer a new wording.

☹ Only the organs of public administration are allowed to give substantial suggestions. Only the substantial, not granted suggestions have to be given in the draft legal enactment propounding report, including statement of the reasons, why they were not granted. The draft managers are not obliged to discuss these suggestions with the public, nonetheless, they could do so on their own initiative.

III. ACCESS TO JUSTICE

The implementation and application of this part of the Aarhus Convention is the most difficult and the most problematic one. Nevertheless, without well managed possibility of accessing to legal protection, all previously stated competences become unenforceable, thus functionless statements. Access to legal protection in the environmental matters provides one with the possibility of assaulting administrative acts or neglects of administrative authorities at the independent and unbiased organ established by law. The Aarhus Convention divides these competences into three areas:
1) access to information, 2) public participation, and 3) environment "in general".

Courts of justice are, within the Czech Republic, the only authorities, before which it is possible to assault a resolution in such a way; there are no special bodies (e.g. tribunals just for the environmental area) established for such a purpose. That is why the two terms, "access to legal protection" and "access to courts of justice", are being confused. Thus, this problem is a relevant part of general arrangement of administrative justice amended by administrative rules of the court.

☺/☹ Access to justice in **the access to information** is, in the terms of legal framework, ensured - it is everybody´s right to appeal to a court in this matter. In practice, frequent imperfections occur because of long terms and decision-making on information denial legitimacy, not because of the providing information regulation, which makes the whole process even longer. Most of the problems were described in the part devoted to access to information, so there is no need to repeat them.

☹ Another reason to access to justice is, according to the Aarhus Convention, illegality of the decisions, of other acts, or inactivity during the process of **decision-making on specific activities**. But the right to judicial review, in this matter, only has the public concerned, whose definition in the Czech legislation still is not laid down. Furthermore, it is mainly civic associations (taking part in the previous decision making proceedure on the specific acts basis), who demand the judicial review; however, material law of favourable environment is being denied to them, as well as the right to judicial review in the terms of **material correctness**. This makes the whole process complicated even more.

☹ The situation is also complicated by the fact that there is no injunctive relief conceded to the NGOs´ action. Investor thus continues in construction works and when the building permission or any other decision is adjudged illegal, usually, the plan has already been realized. In addition, it is practically almost impossible to achieve removing such a construction. This implies that, in the Czech Republic, it is actually advantageous to build in conflict with legal regulations, the possibility of the public defense against such an acting is very weak.

☹ The third area – Art. 9 par. 3 of the Aarhus Convention – is sort of a **general clause**, which gives the public the right to judicial review of illegal decisions on environmental questions, i.e. instances that are not subjects of the previous paragraphs. Theoretically, this article makes possible to deduce the public right to access to justice in the environmental affairs also in instances, when the national law includes no regulation concerning this article.

This article is not transposed in the Czech system of law, it is supposed to have no direct effect, and the Czech courts of justice rather avoid the duty to interpret the interstate law in conformity with the Aarhus Convention. Under such conditions, it is to be said that the **implementation** of Art. 9 par. 3 in the Czech system of law is **entirely insufficient**, if any.

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Green Circle, Prague, 2008

Green Circle is the association of 28 environmental non-governmental organisations.

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