COUNTRY REPORT: CZECH REPUBLIC

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Introduction

In 2014, the Czech Republic only adopted a few new laws or amendments in the environmental field. The reasons for this are as follows. First, parliamentary elections in the Czech Republic took place in October 2013. As a result, individual ministries are only just beginning to prepare drafts of new legislation for approval in 2015 and 2016. Additionally in 2014, three more elections ran to the European Parliament, Senate and municipalities. Politicians devoted extraordinary efforts to these elections, which lacked for the usual discussions on legislation. Third, the main theme of the previous election was anti-corruption policy and the greatest effort was therefore devoted to such legislation.[1]

Part 1 of this article considers two minor amendments to the *Clean Air Act* and *Waste Act*. The rest of the article we devote to amendments to public participation and access to courts rules, which are close to approval, and novelties in this area of jurisprudence.

Recent Statutory Developments

The Senate has prepared one novel amendment to the *Clean Air Act*.[2] At present, operators of small stationary sources of air pollution are significantly disadvantaged by the wording of the *Clean Air Act*. Large operators with many air pollution resources can divide their investments to reduce their total emissions. Smaller operators have to implement costly pollution reduction measures despite having no corresponding increase in pollution. The *Clean Air Act* amendment allows smaller operators to exchange emission permits that fall

[1] E.g., Law on Civil Servants, legislative process, Law on Public Register of Contracts or Law on Public Prosecutor's Office, the last two of them have still not been approved despite the ruling coalition having a clear majority in both chambers of parliament after these elections.

[2] Amendment No. 87/2014 Coll

within emission limits. This benefits smaller operators and excludes the possibility of increasing emissions in the Czech Republic as a whole, and within the most affected areas.

A recently approved amendment to the *Waste Act* prohibits the landfilling of mixed municipal waste from 2024.[3] The amendment has not addressed whether mixed municipal waste will be incinerated or treated differently, for example recycled. The amendment does require the separate collection of bio-waste and metals in municipalities from1 January 2015. In 2014, the Ministry of Environment also presented for public comment the draft Czech Republic Waste Management Plan for 2015-2024.

Public Participation and Access to Court Rules

The fundamental change in public participation rules that occurred in 2014 stemmed from the recommendations and findings of the Aarhus Convention Compliance Committee (ACCC). These findings have informed the European Commission's investigation into the Czech Republic's implementation of the EU Environmental Impact Assessment Directive. In 2014, the European Commission began to condition funding to the Czech Republic on changes to national public participation and access to justice rules. In the following paragraphs, we describe the situation before 2014.

The first ACCC finding was delivered on 29 June 2012 and adopted by the Meeting of the Parties in June 2014.[4] The first Czech submission to the ACCC was made by Environmental Law Service in June 2009. The submission did not relate to any particular case. On the contrary, it was a very complex document based upon many years of experience with the application of the *Aarhus Convention* in the Czech Republic. Environmental Law Service, a non-governmental Czech organisation, claimed the Czech Republic was not complying with obligations arising from *Aarhus Convention* articles 3(1), 6(3), 8, 9(2), 9(3) and 9(4).

The ACCC and European Commission addressed some of the concerns of Environmental Law Service. They found the Czech definition of 'the public concerned' too narrow and restrictive in light of the impairment of rights doctrine. Many land-use plans and building projects need only consider interferences with property rights. There is no need to consider the rights of tenants. Tenants also have limited rights to object to plans or projects. In fact, the Building Code expressly excludes tenants from participating in land-use planning and

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[3] Amendment No. 229/2014 Coll.

[4] ACCC/C/2010/50; The full text of findings (including all documents submitted during the compliance mechanism) is available for free download here:
http://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html.

decision-making. These matters are particularly worrying as about 22% of Czech households live in rented flats. More troubling is the validation of the Building Code by the Czech Supreme Administrative Court,[5] and the Supreme Administrative Court rules that exclude tenants from proceedings even when the Building Code does not.[6] The Supreme Administrative Court has ruled that 'the tenant of real property on the area regulated by the land-use plan does not have standing to sue for abolishing of the respective land-use plan or its part' because the rights of tenants 'are not related directly to the area (land) in question, but to the person (owner) who enabled them to use it on the base of contract'. Another problem is the status of non-profit organisations (NGOs). In Czech legal theory, environmental NGOs have no rights to life, privacy or a favourable environment.[7] This limits the standing of NGOs in environmental proceedings.

Land-use and building projects that have, or could have, a negative impact on the environment are often permitted in the Czech Republic via a multilayer decision-making process that involves environment impact assessments (EIAs).[8] EIA findings are not decisions in themselves, but a basis for subsequent permit decision-making. EIA procedures are open participatory processes, whereas participation in subsequent decision-making is limited to members of the public recognised by law as 'the public concerned' with the proceedings. The *Building Act* limits 'the public concerned' to natural persons whose rights are affected or likely to be affected by the decision.[9] This means that tenants and NGOs have limited rights to participate in procedures that occur after the EIA process because the law does not recognise them as parties to those subsequent procedures. The ACCC and European Commission noted that environmental decision-making is not limited to EIA processes, but also applies to permit decision-making as long as the planned activity has an impact on the environment. This means that the public must have an opportunity to participate in subsequent decision-making processes. Also, as the results of the EIA are taken into account in subsequent decision-making phases, members of the public must be able to examine and comment on EIA elements that contribute to the final decision.

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[5] See Supreme Administrative Court decision No. 2 As 1/2005–62 of 2 March 2005.

[6] See Supreme Administrative Court decision No. 1 Ao 1/2009–120 of July 2009.

[7] At the first time, the Constitutional Court expressed this view in its Decision dated 6 January 1998, ref. no. I. ÚS 282/97.

[8] The building permit constitutes the final permit/decision in the context of article 6 of the Convention.

[9] See e.g. § 85 sec. 2 let. b Building Act: persons whose property or other property right to neighbouring buildings or adjacent land or buildings on them may be directly affected by land-use decisions.

The Commission also noted that although the multi-layer decision-making rules provide for fairly extensive public participation during the EIA stage, there is no requirement for decision-makers to take public participation results into account. NGOs and tenants are also excluded from attending follow-up stage meetings and cannot require consideration of their comments. Further, only the public concerned can challenge land-use and building decisions and the law generally defines the public concerned as property owners who can demonstrate that their rights are affected ('impairment of rights doctrine'). [10] Although individual persons have procedural and substantive rights that include rights or interests relating to the environment,[11] NGOs as legal persons only have procedural rights. They do not have substantive rights such as the right to a healthy environment. This reduces the status of NGOs before the courts because NGOs can only enforce procedural rights, not substantive rights.

Another concern is that proceedings before the Czech courts take a very long time, and the criteria for granting injunctive relief of suspensory effect are interpreted and implemented in a very limited way. This constitutes non-compliance with the requirements for effective judicial protection. The criteria did not change with new legal conditions for granting suspensory effect and a shift in case law. [12] For example, in 2007 the Supreme Administrative Court stressed that courts should grant suspensory effect if requested by a

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[10] See Supreme Administrative Court decision No. 1 Ao 1/2009–120 of July 2009.

[11] The Constitutional Court has ruled that "NGOs cannot claim a right for a favourable environment, as it can self-evidently belong only to natural, not legal persons . . . In the administrative procedure concerning permission for starting the operations in thenuclear power plant, rights of an environmental NGO for protection of life, privacy or favourable environment could not be affected, because these rights cannot belong to legal persons. Therefore, they also cannot claim violation of the right for access to court (due process of law) with that respect." Decision of the Constitutional Court No. I ÚS 2660/08 of 2 September 2010.

[12] Compare the wording of § 73 paragraph 2 of Act No. 150/2002 Coll., on Administrative Procedure after the amendment effective from 1st January 2012: *"The court at the request of the applicant after the response of defendant admits suspensory effect, if the execution or other legal consequences of the decision meant for the applicant disproportionately greater harm than may occur to others by granting suspensory effect, and if it does not conflict with important public interest. "*and the version prior to this amendment*," the Court at the request of the applicant after the response of defendant admits suspensory effect, if the execution or other legal consequences of the decision meant irreparable harm to the applicant, the granting of suspensory effect will not unreasonably affect the rights acquired by third parties and is not contrary to the public interest."*

member of the public concerned in judicial proceedings relating to environmental protection.[13]

A separate question arose with regards to the approach of the Supreme Administrative Court to the scope of judicial review proceedings. The Supreme Administrative Court had ruled that 'article 9 of the *Aarhus Convention* shall not be interpreted in a way that it requires separate review of any decision, act or omission in the scope of permitting the activities subject to article 6 in a separate review procedure', and that 'it is sufficient if such acts are subject to the review procedure at the stage when they can infringe the subjective rights of the affected persons'.[14] Specifically, the Supreme Administrative Court stated that in general there is no need to separately examine decisions about whether or not a land-use or building proposal came under the EIA Directive or *Aarhus Convention*, and that EU law leaves it to member States to decide at what stage decisions, acts or omissions can be challenged.[15] The ACCC and European Commission stated that access to justice necessarily includes a review of decisions about whether or not a project is subject to the *Convention* or Directive. Therefore, members of the public concerned should have access to a review procedure to challenge the legality of the screening process.

In response to the above described failures, the Czech Ministry of Environment prepared a draft amendment to the Czech EIA rules.[16] The amendment was approved by the Government on 3 September 2014, and has since been approved by the Chamber of Deputies. The amendment shall apply from the 1 March 2015. We will outline the amendment in the discussion that follows, although we are aware of possible changes that may occur during the final approval process. We are convinced that most of the changes suggested by Government are necessary to comply with international and EU law. We alternatively argue that even if the amendments are not adopted, it is necessary to apply and interpret current legislation in a similar way.

The permit system, in terms of the EIA Directive, comprises several successive phases. The multi-layer decision-making process was evaluated by the Court of Justice of EU in relation to its compliance with the EIA Directive. Under Czech legislation, EIA statements prepared

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[13] See for example the judgments of the Supreme Administrative Court of 28 June 2007 No. 5 As 53/2006-46 or 29 August 2007, No. 1 As 13/2007-63. Available from: http://www.nssoud.cz .

[14] See Supreme Administrative Court decision No. 1 As 13/2006–63 dated 29 August 2007.

[15] See Supreme Administrative Court decision No. 1 As 13/2006–63 dated 29 August 2007 and No. 2 As 68/2007–50 of 5 September 2009.

[16] Act No. 100/2001 Coll.

during the multi-layer decision-making process are considered expert opinions, non-binding for the purposes of later proceedings regarding land-use or building decisions. The draft amendments to the EIA Act change the legal status of EIA statements to binding opinions.[17] This will make EIA statements a compulsory consideration in subsequent proceedings. The draft Act also requires the content of EIA statements to meet the basic requirements of administrative decisions. That is, statements must not be formulated in general terms and must include the reasons, documents and considerations which directed the administrative authority in the evaluation and interpretation of the relevant legislation. In subsequent proceedings, public authorities would be obliged to base their decisions not only on the EIA statement itself, but also on the other documents and data obtained during the EIA process. The draft Act also eliminates the exclusion of the Administrative Code so that EIA processes will be part of normal administrative proceedings based upon the Administrative Code.

The draft Act makes changes to the EIA process to help ensure the project assessed in the EIA process is the same as the realised project. The aim here is to guarantee that the assessed and realised projects are identical, or have minor changes that will not cause any new negative effects on the environment. This will be verified through a binding opinion that culminates in a 'coherence stamp'. The stamp is only granted once the EIA public authority confirms there are no changes to the project or plan which could have a significant negative impact on the environment.[18] If the EIA authority finds that changes with possible significant negative impacts occurred in the project, the authority takes a negative binding opinion which prevents realisation of the project. At that stage, the applicant must either modify the project or reassess the project through the EIA process. The identity of the project and the conditions in the affected area are also checked when applications are made to extend the validity of EIA statements. The validity of statements is 5 years from the date of issuance. Validity may be extended by 5 years at the request of the developer, and even repeatedly. The developer must demonstrate that there have been no significant changes in project implementation, and provide information on conditions in the affected area and the development of new technologies applicable to project. The draft Act allows for judicial review of this assessment procedure, as the assessment may result in a finding that there is no reason to undertake an EIA. Access to justice requires, and the EIA Directive guarantees, that the public be able to participate in the making of such decisions.

The draft Act redefines the 'public' and 'the public concerned'. 'Public' means one or more legal or natural persons. The draft Act grants the public the right to participate in the EIA

[17] Pursuant to § 149 of Administrative Code.

[18] See art. §9a par. 4 of the amended Act EIA.

process and subsequent procedures. In subsequent procedures, the public will only have a consultative role, being the right to information and to make comments. This excludes the right to lodge applications for administrative or judicial review of decisions. The 'public concerned' will be entitled to participate in subsequent procedures. The public concerned will be:

- subjects whose rights will be affected by decisions, primarily the owners of land or buildings in the neighbourhood of project;
- environmental NGOs, being, NGOs existing for more than 3 years; and
- ad hoc environmental NGOs whose legitimacy to tackle the decisions is declared by a supporting signature list of 200 unverified signatures.

The rights of legitimised NGOs as a public concerned under the EIA Directive will be guaranteed through full participation in subsequent proceedings. These entities will be parties to the proceedings, meaning they will have the same rights as a developer or neighbouring owner. A legitimised NGO will have the right to appeal against a decision, regardless of previous participation in the proceedings, and the right to access the court. Legitimised NGOs will also be entitled to bring actions to protect the public interest. All members of the public concerned will be able to challenge the substantive and procedural legality of decisions. Actions against decisions will always have a **s**uspensory effect, meaning a permit decision cannot be issued or executed until a final court ruling. The draft Act will help fulfil the requirements of EU law concerning timely and effective judicial protection.

Recent Case Law

A new trend in terms of NGO access to justice in environmental matters is seen in a recent Constitutional Court case:

> *[A]ccording to the above described evolution of the international obligations of the Czech Republic, EU law and Czech regulation of environmental NGO status, the older practice of the Constitutional court (case No. I. ÚS 282/97) can be seen as outdated. Individuals, which associated to the form of NGO, whose purpose is the nature and landscape protection, may realize their right to a favourable environment (enshrined in Art. 35 of the Charter of Fundamental Rights and Freedoms) through this NGO.*[19]

[19] Case No. I. ÚS 59/14.

The Constitutional case was approved by the Supreme Administrative Court.[20] The Court stated that NGOs have the right to access court in land-use cases. This was not possible until this ground-breaking judgment. However, the Court did start to define the conditions under which an NGO has legal standing, including that the NGO must have a concern in the project.

Critical Consideration of Recent Developments

The year 2014 was a breakthrough year for the Czech Republic, specifically with regards to public participation and access to justice in land-use planning. First, the Constitutional Court recognised the standing of NGOs to take action against planning decisions, a right which up until that time they had not had. In the next few years we can expect further discussion about the precise scope of NGO standing, and the conditions NGOs must meet.

The second major change was the draft amendments to the EIA Act. The draft Act guarantees public participation and access to justice rights for NGOs in subsequent procedures, and in related procedures such as land and building management. NGOs will have the right to challenge the procedural and substantive legality of decisions, and such actions will have a suspensory effect. However, this may change as the obligatory suspensory effect has been the most discussed question during the draft legislative procedure.

The proposed changes can significantly improve public participation and access to justice in the Czech Republic, although they are unlikely to solve all problems. For example, they are unlikely to protect against omissions of public authorities. The effectiveness of any changes will very much depend upon the details of approved laws and the application of these laws in practice.

[20] Case No. 5 Aos 3/2012-70.