The answers must be sent , imperatively in English or in French, before the 15th August 2011 to Ms. Anna Mendel a.mendel@kssip.gov.pl.

Part A

I. How is the SEA-directive (Directive 2001/42/EC) implemented in your country? What is the scope of its implementation?

The SEA-directive is implemented primarily by the Act No. 100/2001 Coll. on Environmental Impact Assessment which came into force on 1 January 2002 and which has been amended several times in order to implement the EIA-directive as well as the SEA-directive.

Furthermore, special provisions are provided for the environmental impact assessment of a spatial development policy and land-use planning documentation. In this case the Construction Code (Act No. 183/2006 Coll.) and the Sec. 10i of the Act No. 100/2001 Coll. shall be applicable.

The SEA-directive has been fully implemented in national law.

In addition, it should be noted that the Act No. 114/1992 on Nature and Landscape Conservation regulates special type of environmental impact assessment with regard to sites of Community importance and implements the Habitats and Birds Directives.

II. What types of public plans and programmes are subject to a strategic environmental assessment in accordance with the SEA-directive?

Pursuant to Sec. 10a (1) Act No. 100/2001 Coll. the subject of environmental impact assessment of a conception[1] **shall be**

a) conceptions which set the framework for future permits of plans set forth in Annex 1 [of this Act], prepared in the field of agriculture, forestry, hunting, fishery, surface or groundwater management, energy industry, industry, transport, waste management, telecommunications, tourism, land-use planning, regional development and environment, including nature protection,

conceptions for which, in view of their possible effect on the environment, the necessity of their assessment follows from a special regulation

and furthermore conceptions co-financed by European Community funds;

[1] The term ”conception” used throughout the Act No. 100/2001 Coll. corresponds to the term ”plans and programmes” defined in Article 2 (a) of the SEA-directive. Pursuant to Sec. 3 (b) of the Act No. 100/2001 Coll. ”conceptions shall be strategies, policies, plans or programs prepared or farmed out by a public administration authority and subsequently approved or submitted for approval by a public administration authority”.

these conceptions shall always be subject to assessment if the affected territory is comprised of the territorial area of more than one municipality;

b) conceptions pursuant to letter a) if the affected territory is comprised of the territorial area of only one municipality, if so laid down in a fact-finding procedure pursuant to Sec. 10d;[2]

c) changes of conceptions pursuant to letters a) and b) if so laid down in a fact-finding procedure pursuant to Sec. 10d.

Pursuant to Sec. 10a (2) Act No. 100/2001 Coll. the subject of assessment **shall not be**

a) conceptions prepared only for the purposes of the state defence;

b) conceptions prepared for cases of extraordinary events which are likely to significantly and directly endanger the environment or the health, safety or property of persons;

c) financial and budgetary conceptions.

III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?

The authorities responsible for performing the duties arising from the SEA-directive and the Act No. 100/2001 Coll. are (1) the **Ministry for the Environment** and (2) the **regional authority** in delegated jurisdiction for the territorial administrative area of which the conception is being prepared [Sec. 3 (f) and Sec. 20].

The regional authorities shall provide for the assessment of conceptions in cases when the affected territory covers exclusively the territory of the region, unless the Ministry is competent pursuant to Sec. 21 (d) [Sec. 22 (b)]. Pursuant to Sec. 21 (d) the Ministry shall provide for the assessment of conceptions in cases when the affected territory comprises the whole territory of a region or extends to the territories of several regions or the territory of a national park or the protected landscape area or if the affected territory comprises the territory of the whole state.

The Act No. 100/2001 Coll. (Sec. 10j) stipulates special provisions for environmental impact assessment of a conception if the conception is being prepared by a central administrative authority. In this case the SEA shall be performed by the Ministry.

In case of the transboundary environmental impact assessment of a conception the relevant authority shall be the Ministry for the Environment and shall proceed in cooperation with the Ministry of Foreign Affairs. The regional authority shall be obliged to submit the assessment of a conception to the Ministry for the Environment if (a) the affected territory can extend beyond

[2] The term „fact-finding procedure" includes the screening and scoping. Pursuant to Sec. 10d the objective of the fact-finding procedure shall be to specify the content and scope for evaluating the impacts of the conception on the environment and public health. For a conception set forth in Sec. 10a (1) letters b) and c) the objective of the fact-finding procedure shall also be to determine, whether the conception or a change of the conception is to be assessed pursuant to this Act.

the territory of the Czech Republic, (b) the state, the territory of which can be affected by significant environmental impacts, so requests, or (c) the conception is planned to be implemented in the territory of another state and can have significant environmental impacts in the territory of the Czech Republic [Sec. 11 (1) and (3)].

IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?

After the notification of a conception has been submitted, the relevant authority shall within 10 days of obtaining the notification send a copy thereof for a viewpoint to the affected administrative authorities and affected territorial self-governing units. The regional authority shall send a copy of the notification to the Ministry within the same period of time [Sec. 10c (2)].

The viewpoints are then taken into account when the relevant authority carries out the fact-finding procedure [Sec. 10d (2)].

The relevant authority shall without delay send the conclusion of the fact-finding procedure to inter alia the affected administrative authorities and the affected territorial self-governing units [Sec. 10d (6)].

The reviewer (a person authorized to prepare the evaluation) shall be authorized to require information essential for the preparation of the evaluation from inter alia the affected administrative authorities and the affected territorial self-governing units and these shall be obliged to provide him with information to the necessary extent [Sec. 10e (4)]. Rejecting disclosure of information shall be possible only on conditions laid down in special regulations (e.g. Act No. 123/1998 Coll. on the Right to Environmental Information, Act No. 148/1998 Coll., on the Protection of Classified Information, or Act No. 101/2000 Coll., on the Protection of Personal Data).

After the submitter submits the draft conception, incl. evaluation prepared by the reviewer, to the relevant authority, the relevant authority shall send the draft conception within 10 days of the date of its receipt to the affected administrative authorities and affected territorial self-governing units for a viewpoint [Sec. 10f (1), (2)].

The relevant authority shall base its statement on the assessment of impacts on the environment and public health on the draft conception, the viewpoints submitted thereon and the public hearing [Sec. 10g (1)]. The relevant authority shall without delay send the statement on the conception inter alia to the affected administrative authorities and affected territorial self-governing units [Sec. 10g (3)].

The approving authority shall be obliged to publish the approved conception, its justification and measures for monitoring and analysis of the impacts of the approved conception on the environment and public health. It shall be also obliged to inform the relevant authority, the affected administrative authorities and affected territorial self-governing units on publishing of this information within 7 working days [Sec. 10g (5)].

The affected administrative authorities within their scope of responsibilities pursuant to special regulations shall monitor the impacts of the approved conception on the environment and public health and shall be entitled to suggest a modification of the conception, if, in agreement with the approving authority, unexpected significant impacts on the environment or public health cannot be averted or mitigated in a different way [Sec. 10h (2)].

V. What types of decision are resulting from a strategic environmental assessment proceedings?

The outcome from strategic environmental assessment proceedings is the statement on the assessment of impacts on the environment and public health by implementing the conception (hereinafter the "**statement on the conception**"; Sec. 10g). The statement shall be based on the draft conception, the viewpoints submitted thereon and the public hearing.

In its statement, the relevant authority may express disagreement with the draft conception from the point of view of potential negative impacts on the environment and public health, it may furthermore propose its completion, or, if appropriate, propose compensatory measures and measures for monitoring impacts on the environment and public health by implementing the conception.

The conception may not be approved without the statement on the conception. The approving authority shall be obliged to take the requirements and conditions resulting from the statement on the conception into account, or if this statement contains requirements and conditions and these are not included or only partly included in the conception, the approving authority shall be obliged to justify its procedure.

The approving authority shall be obliged to publish the approved conception, its justification and measures for monitoring and analysis of the impacts of the approved conception on the environment and public health.

VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?

The access of public to environmental information is ensured by the Act No. 100/2001 Coll. in several stages of the process:

(1) After the notification of a conception has been submitted, the relevant authority shall within 10 days of its receipt publish the **notification** on the internet and information on the notification pursuant to Sec. 16 [Sec. 10c (2)].

(2) The relevant authority shall publish in accordance with Sec. 16 the **outcome of the fact-finding procedure** [Sec. 10d (6)].

(5) After the submitter has submitted **the draft conception**, the relevant authority shall publish it on the internet and also information on the draft conception pursuant to Sec. 16 [Sec. 10f (2)].

(6) The submitter shall be obliged to publish **information on the place and time of the public hearing** on the draft conception on its official notice board, on the internet and in at least one

other way usual in the affected territory (e.g. in the press, etc.), within at least 10 days before its holding [Sec. 10f (3)].

(7) The submitter shall be obliged to publish on the internet the **minutes taken on this public hearing** at the latest within 5 days of the date of the public hearing [Sec. 10f (4)]. Facts protected by special regulations [e.g. Civil Code, Commercial Code, Penal Code, or the Act on Data Protection] shall not be the subject of a public hearing [Sec. 17 (7)].

(8) After the relevant authority has issued the **statement on the conception** it shall publish the statement pursuant to Sec. 16 [Sec. 10g (3)].

(9) The approving authority shall be obliged to publish **the approved conception**, its justification and measures for monitoring and analysis of the impacts of the approved conception on the environment and public health.

Publication of information on documents obtained during the assessment and on public hearings is regulated by Sec. 16 of the Act No. 100/2001 Coll. This provision lays down the range of information that the relevant authority shall publish, as well as place and method of publication:

"(1) The relevant authority shall ensure that information is published on

[...]

f. the notification of a conception and when and where it may be perused;

g. the draft conception and when and where it may be perused;

h. the consultation within transboundary assessment.

(2) The relevant authority shall also ensure that the conclusion of the fact-finding procedure, the EIA statement and statement on a conception are published.

(3) The relevant authority shall ensure that, information and statements referred to in paragraphs 1 and 2 are published

a. on the official notice boards of the affected territorial self-governing units,

b. on the internet, and

c. in at least one of the other ways usual in the affected territory (e.g. in the local press, on

the radio, etc.).

[...]

(5) Information that cannot be made public pursuant to a special regulation [e.g. Civil Code, Commercial Code, Penal Code, or the Act on Data Protection] shall be deleted from information and statements made available to the public pursuant to paragraphs 1 and 2."

To sum up, the public may peruse the published documents, make extracts and copies of them, and attend the public hearing.

Moreover, pursuant to Sec. 23 (1) the relevant authority, affected administrative authorities and affected territorial self-governing units shall be obliged to make all documents, prepared in the framework of the assessment according to this Act, available pursuant to special regulations – i. e. the Act No. 123/1998 Coll. on the Right to Environmental Information.

Information about the SEA procedure in individual cases may be find out also in the **information system on SEA** which is run by the CENIA (the Czech Environmental Information Agency; a state allowance organization reporting to the Ministry of the Environment). The information system is available at the following address: http://eia.cenia.cz/sea/koncepce/prehled.php

VII. Who is authorized to take part in a strategic environmental assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

The participation of public in the SEA procedure is ensured by the Act No. 100/2001 Coll. in several stages of the process:

(1) Every person may send his or her written viewpoint on the notification of the conception to the relevant authority within 20 days of the day when the notification was published [Sec. 10c (3)]. The viewpoints are then taken into account when the relevant authority carries out the fact-finding procedure [Sec. 10d (2)].

(2) Every person may attend the public hearing on the draft conception.

(3) Every person may send his or her written viewpoint on the draft conception to the relevant authority at the latest within 5 days of the date of the public hearing on the draft conception [Sec. 10f (5)].

(4) The relevant authority shall issue the statement on the conception on the basis of the draft conception, the viewpoints submitted thereon and the public hearing [Sec. 10g (1)].

Legal rights. The public can in the light of the above mentioned facts express their viewpoints which shall be taken into account by the relevant authority when carrying out the fact-finding procedure as well as when issuing the statement on the conception.

For the participation of affected administrative authorities see question IV above.

VIII. To what extent are the SEA and EIA procedures were integrated in your country? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give examples?

Given their different purpose, the EIA and SEA are two separate procedures. They are both regulated by the same law (the Act No. 100/2001 Coll.); however, they are being performed separately. We are not aware of any problems arising from the fact that the EIA and SEA are separate procedures.

The same documentation can be used as long as it fulfills the conditions laid down by the Act No. 100/2001 Coll. Pursuant to Sec. 10 (3) of this Act data of another assessment may be used in the assessment of a conception pursuant to this Act, if they correspond to the data defined pursuant to this Act.

Part B

I. How is the EIA-directive implemented in your country? What is the scope of its implementation?

The EIA-directive is implemented by the Act No. 100/2001 Coll.

The subsequent related procedures, for which the EIA statement is a mandatory precondition, are regulated in various specific laws, e.g. the Construction Code (Act No. 183/2006), Act No. 254/2001 Coll. on Waters, or Act No. 76/2002 Coll. on IPPC.

As regards the scope of implementation, it should be noted that there was an infringement procedure commenced by the Commission against the Czech Republic for not compliance with Article 10a of the EIA-directive, i.e. for not giving access to courts to affected public, especially NGOs. The ECJ in its judgment from 10 June 2010, *European Commission v Czech Republic*, C-378/09, declared that "by failing to adopt within the time-limit prescribed the laws, regulations and administrative provisions necessary to comply with the first, second and third paragraphs of Article 10a of the Council Directive 85/337/EEC [...], the Czech Republic has failed to fulfil its obligations under that directive".

As a reaction on the infringement procedure the Czech Republic adopted the amendment No. 436/2009 Coll. (effective since 10 December 2009) which introduced new paragraph 10 of Sec. 23 of the Act No. 100/2001 Coll. This provision gives standing to a civic association or generally beneficial society, whose sphere of activity is protection of the environment, public health or cultural monuments, or a municipality affected by the project if they have submitted a written viewpoint on a documentation or expert report within the time-limit laid down in the Act No. 100/2001 Coll. They can challenge at court the final decision issued in the subsequent related procedures which has been or should have been based on the EIA. This amendment seems to heal the lack of access to justice for which the infringement procedure was commenced. The Court nevertheless declared the failure of the Czech Republic pointing out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes.

However, even after the amendment there still remains a problem – the action brought by the civic association or generally beneficial society does not have suspensive effect. It is thus doubtful whether the access to justice provided by Sec. 23 (10) is effective and meaningful.

With the above mentioned exception, the EIA-directive has been fully implemented into national law.

II. What types of public and private projects are subject to an environmental impact assessment in accordance with EIA-directive?

The Act No. 100/2001 Coll. encompasses Annex 1 which divides the projects into two categories in accordance with the EIA-directive. Category I implements Annex I of the EIA-directive and includes those types of projects which are to be assessed under all circumstances. Category II implements Annex II of the EIA-directive and includes those types of projects which require prior screening.

Pursuant to Sec. 4 (1) of the Act No. 100/2001 Coll. the subject of the assessment **shall be**

"a) projects set forth in Annex 1 of this Act , Category I, and changes thereof if the change of the project reaches by its capacity or extent the relevant threshold, in case it is specified; these projects and changes of projects shall always be subject to assessment;

b) changes of a project set forth in Annex 1 of this Act, Category I, if its capacity or extent is to be increased significantly or if there is a significant change in the technology, management of operations or manner of use thereof and these changes are not covered by letter a); these changes of projects shall be subject of assessment if so laid down in a fact-finding procedure[3];

c) projects set forth in Annex 1 of this Act, Category II, and changes thereof if the change of the project reaches by its capacity or extent the relevant threshold, in case it is specified, or if their capacity and extent are to be increased significantly, or if there is a significant change in the technology, management of operations or manner of use thereof; these projects and changes of projects shall be subject of assessment if so laid down in a fact-finding procedure;

d) projects set forth in Annex 1 of this Act which do not reach relevant threshold, in case it is specified, and the relevant authority decides that they shall be subject to the fact-finding procedure; these projects shall be subject of assessment if so laid down in a fact-finding procedure;

e) constructions, activities and technologies which according to the statement of the nature conservation authority issued pursuant to the Act No. 114/1992 Coll. on Nature and Landscape Conservation can independently or in conjunction with other projects significantly affect the

[3] The term „fact-finding procedure" includes the screening and scoping. Pursuant to Sec. 7 "[t]he objective of the fact-finding procedure is to refine information that should be included in the documentation on the environmental impact, in relation to

a. the nature of the specific plan or kind of plan,

b. environmental factors referred to in Sec. 2 that could be affected by implementing the plan,

c. the current state of knowledge and assessment methods.

For plans set forth in Annex 1, Category II, and for changes in plans pursuant to Sec. 4 par. 1 letters c), d) and e), the objective of the fact-finding procedure shall also be determination of whether the plan or change therein is to be assessed pursuant to this Act."

sites of Community importance or birds areas; these constructions, activities and technologies shall be subject of assessment if so laid down in a fact-finding procedure."

Pursuant to Sec. 4 (2) of the Act No. 100/2001 Coll. the subject of assessment **shall not be**

"a project or part thereof about which the Government makes a decision in cases of emergency, state of danger and state of war, for urgent reasons of defence or to comply with international agreements binding the Czech Republic and when the plan is employed for immediate prevention or mitigation of unpredictable events that could seriously affect the health, safety or property of the population or the environment. This may not be laid down for projects that are subject to transboundary environmental impact assessment."

Furthermore, the obligation to undergo EIA can be excluded also by the regional authority which may decide not to assess a project if implementation of the project is necessary to mitigate or prevent the consequences of an event that seriously and immediately endangers the environment, or the health, safety or property of the population [Sec. 23 (7) of the Act No. 100/2001 Coll.].

III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?

The criteria for selection of projects requiring an EIA are included in Annex 2 of the Act No. 100/2001 Coll. and are divided in three categories (1) characteristics of projects, (2) location of projects, and (3) characteristics of potential impact on the population and the environment. These categories include further detailed criteria which are almost verbatim taken over from Annex III to the EIA-directive.

IV. What kind of authority (local, regional, central) is responsible for performing the duties arising from the EIA-directive?

The authorities responsible for performing the duties arising from the EIA-directive and the Act No. 100/2001 Coll. are (1) the **Ministry for the Environment** and (2) the **regional authority** in delegated jurisdiction in the territorial administrative area of which the project is proposed [Sec. 3 (f) and Sec. 20 of the Act No. 100/2001 Coll.].

Pursuant to Sec. 21 of the Act No. 100/2001 Coll. the **Ministry** shall

"a. be the central administrative authority in the field of environmental impact assessment;

b. execute supreme state supervision in the field of environmental impact assessment;

c. provide for assessment of projects set forth in Annex No. 1 [of this Act], column A, and for projects whose developer is the Ministry of Defence, also in columns B, and changes therein;

d. provide for the assessment of conceptions in cases when the affected territory comprises the whole territory of a region or extends to the territories of several regions or the territory of a

national park or the protected landscape area or if the affected territory comprises the territory of the whole state;

e. provide the European Commission, in conformity with regulations of the European Community [Union], with information in the field of environmental impact assessment;

f. provide for transboundary assessment of projects and conceptions;

g. provide for assessment of other plans, for which the competent authority is the regional authority, if it has reserved this jurisdiction in individual specific cases;

h. keep summary records of all commenced assessments and records of all conclusions of the fact-finding procedure and statements issued;

i. grant and withdraw authorization;

j. keep and once annually publish a list of authorized persons in its Bulletin;

k. by the end of February of each year publish a list of expert reports and the persons preparing these reports and furthermore a list of conceptions and their reviewers for the previous calendar year;

l. issue a statement on environmental impact assessment of a spatial development policy and spatial development principles."

Pursuant to Sec. 23 (4) the Ministry may in justified cases reserve the assessment of a project or a conception, where the regional authority is competent for the assessment. On the other hand, the Ministry may in justified cases and after agreement with the regional authority delegate the assessment of a project pursuant to Sec. 21 (c) or the assessment of a conception pursuant to Sec. 21 (d) to the regional authority, if that can contribute to the promptness and economy of the assessment.

Pursuant to Sec. 22 of the Act No. 100/2001 Coll. **the regional authorities** shall

"a. provide for the assessment of the projects set forth in Annex No. 1 [of this Act], Column B, and changes therein and projects set forth in Sec. 4 (1) (d) a (e);

b. provide for the assessment of a conceptions in cases when the affected territory covers exclusively the territory of the region, unless the Ministry is competent pursuant to Sec. 21 (d);

c. keep records of the statements issued thereby and send one copy of each conclusion of a fact-finding procedure and statement issued thereby to the Ministry for summary records;

d. by the end of February of each year publish a list of expert reports and the persons preparing these reports and furthermore a list of conceptions and their reviewers for the previous calendar year;

e. issue a statement on environmental impact assessment of a territorial plan.

V. When should an environmental impact assessment take place during the investment procedure?

The environmental impact assessment should take place prior to the issuance of a final development consent. In case where the Act No. 100/2001 Coll. requires that a project shall always be subject to assessment or that a project shall be subject of assessment if so laid down in a fact-finding procedure, the EIA statement is a mandatory precondition for the subsequent related procedures.

VI. Does the decision resulting from an environmental impact assessment grant the final development consent?

The outcome resulting from an environmental impact assessment, i.e. the statement on the environmental impact assessment (hereinafter „EIA statement"), is a basis for subsequent procedures on the final development consent according to special regulations, e.g. the Construction Code, the Act No. 254/2001 Coll. on Waters, or the Act No. 13/1997 Coll. on Roads.

Pursuant to Sec. 1 (3) of the Act No. 100/2001 Coll. the purpose of the environmental impact assessment shall be to obtain an objective professional background document for issuing a decision or measure pursuant to special regulations.

The relevant authority deciding on the final development consent shall always take into account the content of the EIA statement; however, the authority is not bound by the content of the EIA statement. In case the relevant authority does not include the requirements of the EIA statement in its decision or include them only partly, it is obliged to provide justification. Pursuant to Sec. 10 of the Act No. 100/2001 Coll. "(3) The EIA statement shall be a basic expert background document for issuing a decision or measure pursuant to special regulations. The statement shall be submitted by the developer as one of the basic background documents for related procedures or processes pursuant to special regulations. (4) In the absence of the EIA statement, it shall not be possible to issue a decision or measure required for implementing or carrying out the project in any administrative or other procedure pursuant to special regulations. In such procedures, the relevant authority shall be the affected administrative authority. An administrative authority that issues a decision or measure pursuant to special regulations **shall include**, in its decision or measure, requirements for protection of the environment set forth in the statement, if set forth therein, **or it shall state in its decision or measure the reasons why it did not do so or did so only partly**."

Therefore, the EIA statement is binding in the procedural sense, it is a necessary precondition for the procedures on the final development consent; however, it is not absolutely binding as regards the content. It is enough for the administrative authority deciding pursuant to special regulations to justify why it did not reflect the EIA statement.

VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?

The access of public to environmental information is ensured by the Act No. 100/2001 Coll. in several stages of the process:

(1) After the developer has submitted a notification of the project to the relevant authority, the relevant authority shall within 7 working days of obtaining the notification publish the **information on the notification** pursuant to Sec. 16 and shall further publish at least the textual part of the notification on the internet [Sec. 6 (6)].

(2) In case of notification of a project which does not reach the relevant threshold, the relevant authority shall publish on the internet the information as to whether this project shall be subject to the fact-finding procedure [Sec. 6 (3)].

(3) The relevant authority shall publish in accordance with Sec. 16 the **outcome of the fact-finding procedure** [Sec. 7 (3)].

(4) After the developer has submitted the documentation, the relevant authority shall publish the **information on the documentation** pursuant to Sec. 16 and shall further publish at least the textual part of the documentation on the internet [Sec 8 (2)].

(5) After the authorized person has submitted the expert report, the relevant authority shall publish the **expert report** on the internet and publish the information on the expert report pursuant to Sec. 16 [Sec. 9 (7)].

(6) After the relevant authority has issued the **EIA statement,** it shall publish the statement on the internet and pursuant to Sec. 16 [Sec. 10 (2)].

To sum up, the above mentioned provisions always specify which document shall be published on the internet as a whole (e.g. the expert report, EIA statement) and which at least partly (e.g. the textual part of the documentation). Besides that, they specify which information shall be published also by other means pursuant to Sec. 16 (see below).

Publication of information on documents obtained during the assessment and on public hearings is regulated by Sec. 16 of the Act No. 100/2001 Coll. This provision lays down the range of information that the relevant authority shall publish, as well as place and method of publication:

"(1) The relevant authority shall ensure that information is published on

a. the notification and when and where it may be perused;

b. the place and time of the public hearing pursuant to this Act;

c. returning documentation for reworking or supplementing;

d. the documentation and on when and where it may be perused;

e. the expert report and on when and where it may be perused;

[...]

h. the consultation within transboundary assessment.

(2) The relevant authority shall also ensure that the conclusion of the fact-finding procedure, the EIA statement and the statement on a conception are published.

(3) The relevant authority shall ensure that information and statements referred to in paragraphs 1 and 2 are published

a. on the official notice boards of the affected territorial self-governing units;

b. on the internet, and

c. in at least one of the other ways usual in the affected territory (e.g. in the local press, on the radio, etc.).

[...]

(5) Information that cannot be made public pursuant to a special regulation [e.g. Civil Code, Commercial Code, Penal Code, or the Act on data protection] shall be deleted from information and statements made available to the public pursuant to paragraphs 1 and 2."

Besides that, the public can access information on the EIA procedure at the **public hearing** (Sec. 17 of the Act No. 100/2001 Coll.):

"(1) The relevant authority shall be obliged to publish information on the public hearing pursuant to Sec. 16 at least 5 days prior to the holding thereof.

(2) The relevant authority shall be obliged to ensure that the public hearing is held at the latest 5 days after expiry of the period of time for stating a viewpoint on the expert report.

[...]

(5) The relevant authority shall draw up minutes of the public hearing, which shall contain in particular information on participation and the conclusions of the hearing, and shall also prepare a complete stenographic recording or audio-recording thereof.

(6) The relevant authority shall be obliged to send the minutes of the public hearing to the developer, the affected administrative authorities and the affected territorial self-governing units and to publish them on the internet.

(7) Facts protected by special regulations [e.g. Civil Code, Commercial Code, Penal Code, or the Act on Data Protection] shall not be the subject of a public hearing."

The public hearing may be omitted if the relevant authority has not received any justified negative viewpoint on the documentation [Sec. 9 (9)].

To sum up, the public may peruse the published documents, make extracts and copies of them, and attend the public hearing.

Moreover, pursuant to Sec. 23 (1) the relevant authority, affected administrative authorities and affected territorial self-governing units shall be obliged to make all documents, prepared in the

framework of the assessment according to this Act, available pursuant to special regulations – i.e. the Act No. 123/1998 Coll. on the Right to Environmental Information.

Information about the EIA procedure in individual cases may be find out also in the **information system on EIA** which is run by the CENIA (the Czech Environmental Information Agency; a state allowance organization reporting to the Ministry of the Environment). The information system is available at the following address: http://tomcat.cenia.cz/eia/view.jsp

VIII. Who is authorized to take part in environmental impact assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

The participation of public in the EIA procedure is ensured by the Act No. 100/2001 Coll. in several stages of the process:

(1) Every person may send his or her written **viewpoint on the notification** of the project to the relevant authority within 20 days of the day when the information on the notification was published [Sec. 6 (7)]. The viewpoints are then taken into account when the relevant authority carries out the fact-finding procedure [Sec. 7 (2) (c)].

(2) Every person may send his or her written **viewpoint on the documentation** to the relevant authority within 30 days of the day when the information on the documentation was published [Sec. 8 (3)]. The relevant authority can on the basis of the viewpoints return the documentation to the developer for reworking or supplementing [Sec. 8 (5)].

(3) Every person may send his or her written **viewpoint on the expert report** to the relevant authority within 30 days of the day when the information on the expert report was published or express his opinion during the public hearing [Sec. 9 (9)]. The authorized person shall prepare the expert report on the basis of the documentation or notification and all the viewpoints submitted thereon [Sec. 9 (2)]. Furthermore, the person preparing the expert report shall deal with the received written viewpoints on the expert report and the viewpoints which were raised during the public hearing and, if appropriate, modify the draft statement on the basis of these viewpoints [Sec. 9 (10)].

(4) The relevant authority shall issue an EIA statement on the basis of the documentation or notification, expert report, public hearing and the viewpoints submitted thereon [Sec. 10 (1)].

(5) Pursuant to Sec. 23 (9) the locally relevant unit of a civic association or generally beneficial society, whose sphere of activity is protection of the public interest protected pursuant to special regulations, or a municipality affected by the project shall become a **participant in the subsequent related procedures** pursuant to special regulations if

a. it has submitted a written viewpoint on a notification, documentation or expert report within the time-limits laid down in this Act,

b. the relevant authority stated in its statement pursuant to Sec. 10 (1) that this viewpoint is fully or partly included in its statement, and

c. the administrative authority making a decision in a related procedure did not decide that the public interests, defended by the civic association, are not affected in the related procedure.

Legal rights. The public can in the light of the above mentioned facts express their viewpoints which shall be taken into account by the relevant authority when carrying out the fact-finding procedure as well as when issuing the statement on the conception. Similarly, the authorized person preparing the expert report shall deal with the received written viewpoints and, if appropriate, modify the draft statement accordingly. For the right to access to courts see the following question.

The participation of affected authorities in the EIA procedure:

(1) After the notification of a project has been submitted, the relevant authority shall within 7 working days of obtaining the notification send a copy thereof for a viewpoint to the affected administrative authorities and affected territorial self-governing units. The regional authority shall send a copy of the notification to the Ministry within the same period of time [Sec. 6 (6)].

(2) The viewpoints are then taken into account when the relevant authority carries out the fact-finding procedure [Sec. 7 (2) (c)].

(3) After the documentation of a project has been submitted, the relevant authority shall within 10 working days of obtaining the documentation send a copy thereof for a viewpoint to the affected administrative authorities and affected territorial self-governing units [Sec. 8 (2)]. The relevant authority can on the basis of the viewpoints return the documentation to the developer for reworking or supplementing [Sec. 8 (5)]. In case the documentation has been reworked or supplemented, the relevant authority can send a copy thereof for a viewpoint to the affected administrative authorities and affected territorial self-governing units [Sec. 8 (6)].

(4) The authorized person shall prepare the expert report on the basis of inter alia all the viewpoints submitted thereon [Sec. 9 (2)].

(5) After the authorized person has submitted the expert report, the relevant authority shall send a copy thereof within 10 working days of its receipt to the affected administrative authorities and affected territorial self-governing units [Sec. 9 (7)]. The person preparing the expert report shall deal with the received written viewpoints on the expert report and, if appropriate, modify the draft statement on the basis of these viewpoints [Sec. 9 (10)].

(6) The relevant authority shall issue an EIA statement on the basis of the documentation or notification, expert report, public hearing and the viewpoints submitted thereon [Sec. 10 (1)]. The relevant authority shall send the EIA statement within 7 working days to the affected administrative authorities and affected territorial self-governing units [Sec. 10 (2)].

(7) The authority which issued the EIA statement shall be the affected administrative authority in the subsequent related procedures [Sec. 10 (4)]. It can thus express its opinion as to how the EIA statement was reflected.

IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceeding and the judgement.

As mentioned above (question VI), the EIA statement does not give the final development consent; it is merely a basis for subsequent procedures according to special regulations. Therefore, the EIA statement itself cannot be subject to court review in a separate procedure. However, it can be reviewed within the judicial procedure commenced against a decision adopted in an administrative procedure which was based inter alia on the EIA statement. Pursuant to Sec. 75 (2) of the Code of Administrative Justice "[t]he court shall review the contested statements of the decision within the scope of objections. If the binding ground for the decision under review were another act of the administrative authority, the court likewise reviews its lawfulness […]".

Generally, an action against a decision of an administrative authority can be brought by "[a]nyone who claims that his rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligation are created, changed, nullified or bindingly determined […]" [Sec. 65 (1) of the Code of Administrative Justice]. Furthermore, "[a]n action against a decision of an administrative authority can be brought even by a party to the proceedings before the administrative authority who is not entitled to file an action under paragraph 1 if the party claims that his or her rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision" [Sec. 65 (2) of the Code of Administrative Justice].

The Act No. 100/2001 Coll. provides for special rules as regards standing of NGOs. Pursuant to Sec. 23 (10) "[a] civic association or generally beneficial society, whose sphere of activity is protection of the environment, public health or cultural monuments, or a municipality affected by the project if they have submitted a written viewpoint on documentation or expert report within the time-limit laid down in by this Act can challenge at court, by means provided in the Code of Administrative Justice, the decision issued in the subsequent related procedures on grounds of breach of this Act." However, as pointed out in question I of Part B, the action does not have suspensive effect.

In the ***case No. 1 As 39/2006***[4] from 14 June 2007 the Supreme Administrative Court held that the possibility to challenge the EIA statement only within the judicial review of the subsequent decision giving final development consent is in accordance with the Aarhus Convention as well as with the EIA-directive. It is up to the Member States to determine at what stage the decisions, acts or omissions may be challenged (Article 10a of the EIA-directive). In addition, the Court held that both the EU law and the Aarhus Convention require that requests of the affected public to be given suspensive effect to their actions should be granted. Otherwise, it can happen that by

[4] The Supreme Administrative Court reitareted these conclusions in a number of other cases, e.g. No. 3 As 36/2008-57 of 23 October 2008; No. 2 As 59/2005-136 of 14 June 2006; No. 1 As 13/2007-63 of 29 August 2007; or No. 1 As 91/2009-83 of 19 January 2010.

the time the court decides about the contested decision, the project will be already realised and it would not be possible to reverse it. Thus the judicial protection would not be timely and fair.

X. What are the specific characteristics of the transboundary environmental impact assessment of certain public and private projects?

The transboundary environmental impact assessment is regulated by Sec. 11 to 14b of the Act No. 100/2001 Coll.

Pursuant to Sec. 11 (1) the subject of transboundary environmental impact assessment shall be

"a) a project set forth in Annex No. 1 of this Act and a conception pursuant to this Act, if the affected territory can extend beyond the territory of the Czech Republic;

b) a project set forth in Annex No. 1 of this Act or a conception pursuant to this Act, if the state, the territory of which can be affected by significant environmental impacts, so requests,

c) a project and a conception which are planned to be implemented in the territory of another state and which can have significant environmental impacts in the territory of the Czech Republic."

The relevant authority for transboundary assessment of projects and conceptions is the Ministry for the Environment and it shall proceed in cooperation with the Ministry of Foreign Affairs [Sec. 11 (2)]. The communication between the states often proceeds by means of diplomatic negotiations.

For a project set forth in Annex No. 1 to this Act, column B, the regional authority shall be obliged to submit its assessment to the Ministry, if it discovers that this is a project pursuant to Sec. 11 (1) [see above]. Furthermore, it shall be obliged to submit the assessment of a conception to the Ministry, if it discovers that this is a conception pursuant to Sec. 11 (1).

In transboundary assessment the Ministry may prolong the deadlines for viewpoints by up to 30 days if the affected state so requests. In such case the other deadlines shall be appropriately prolonged [Sec. 12 (1)].

In case of contention as to whether transboundary assessment shall be subject to the regulations valid in the territory of the affected state or the regulations valid in the state of origin, the legal regulations valid in the territory of the state of origin shall apply unless an international agreement binding the Czech Republic lays down otherwise [Sec. 12 (2)].

Another specific characteristic of the transboundary assessment is the **post-project analysis**. Pursuant to Sec. 12 (3) "[o]n the basis of a request from either of them, the state of origin and the affected state shall determine whether post-project analysis is to be carried out and, if so, to what extent, taking into account potential significant detrimental transboundary impact of the projects that was the subject of transboundary assessment. Any post-project analysis will include especially constant monitoring of the consequences of implementing the project and determination of any detrimental transboundary impact. This constant monitoring and

determination of impacts may be carried out for the purpose of achieving the following objectives:

a. monitoring of compliance with the conditions laid down in the decision or measure pursuant to special regulations and the effectiveness of mitigating measures,

b. examination of the impact of the project and dealing with questions arising during the post-project analysis,

c. verification of previous forecasts in an attempt to utilize the information gained in implementing similar plans in the future."

Furthermore, pursuant to paragraph 4 of Sec. 12 "[i]f, on the basis of the post-project analysis, the state of origin or affected state has justified reasons for concluding that there is a significant detrimental transboundary impact, or if factors have been determined that could lead to such an impact, it shall immediately inform the other state. After coming to an agreement, the state of origin and the affected state shall subsequently lay down necessary measures to decrease or prevent this impact."

We will be pleased if you could provide a summary of interesting cases which illustrate your answers.

Selected case-law of the Supreme Administrative Court (hereinafter also "the SAC" or "the Court"); the case-law is divided into three groups according to the subject matter: (1) the EIA statement; (2) access of affected public to justice; and (3) the SEA and NATURA 2000 assessment.

1) The EIA statement (its character and judicial review)

Judgment of the Supreme Administrative Court of 14 June 2006, No. 2 As 59/2005-136

The complainant (the municipality Troubsko) filed an action against the EIA statement issued by the Ministry for the Environment on environmental impacts of the project - extension of the highway D1. The action was dismissed as inadmissible since the Municipal Court in Prague concluded that the EIA statement cannot be subject to separate judicial review. The complainant therefore lodged a cassation complaint with the SAC.

The SAC upheld the decision of the Municipal Court and confirmed that the EIA statement represents merely a background document for the subsequent related procedures and cannot be reviewed by courts as such in a separate procedure. The EIA statement as such cannot prejudice the rights of natural or legal persons since the administrative authority deciding on the final development consent is not bound by it. The administrative authority is allowed not to include the requirements of the EIA statement in its decision or to include them only partly if it provides adequate justification. However, the EIA statement becomes part of the subsequent decision of the administrative authority which is subject to judicial review.

Therefore, the SAC dismissed the cassation complaint.

Judgment of the Supreme Administrative Court of 15 May 2008, No. 2 Aps 1/2008-77, No. 1623/2008 Collection of Reports of the SAC

The complainants (two natural persons) filed an action for protection against unlawful interference, instruction or enforcement from an administrative authority. They alleged that the relevant authority performing the EIA interferred with their rights when it included another variant (relocation of the road I/13 to a place which borders with the land of the complainants) in the project documentation. This variant was not included in the notification of the project and therefore the complainants did not have the possibility to express their viewpoint thereon. The Municipal Court in Prague dismissed their action as inadmissible and therefore they lodged a cassation complaint.

The SAC first reiterated its settled case-law that the EIA statement cannot be subject to separate judicial review. Therefore, the outcomes of the particular stages of EIA (e.g. the documentation of the project which was contested in the instant case) a fortiori cannot be subject to separate judicial review. Neither the EIA statement nor the outcomes of the particular stages of EIA cannot by themselves violate rights of individuals; therefore, it is not possible to challenge them at court by means of an action for protection against unlawful interference. If the complainants feel that the relevant authority interferred with their right to express their viewpoint on the project, they can raise this objection within the subsequent related procedures.

In the light of the above, the SAC dismissed the cassation complaint.

Judgment of the Supreme Administrative Court of 19 January 2010, No. 1 As 91/2009-83

The Agency for Nature and Landscape Conservation (hereinafter “the Agency”) approved pursuant to the Act No. 114/1992 Coll. on Nature and Landscape Conservation the construction of the highway D8. The appeal of the complainants (two NGOs) against that decision and their action filed with the Municipal Court in Prague were dismissed. The complainants therefore lodged a cassation complaint with the SAC maintaining that the municipal court erred in law concluding that the EIA statement was not a mandatory background document for the contested decision.

The SAC held that the contested decision of the Agency was a final decision which could be subject to judicial review and the Agency breached the law by not taking into account the EIA statement. The EIA statement shall be a mandatory background document for the decision-making of the Agency. The Court backed up his conclusion on the fact that the decision of the Agency shall be binding for the building authority (in case the construction or activity can adversely affect the landscape character or extends to the protected areas) which subsequently decides on the building permit. Therefore, if the EIA statement would not be included in the decision of the Agency, the building authority would not be able pursuant to the legislation effective at the relevant time to include the information and requirements of the EIA statement as regards the subject matter regulated by the decision of the Agency (e.g. the impact of the construction of the highway on specially protected areas) in its decision and the EIA statement would be thus deprived of any value.

In the light of the above mentioned facts the Court quashed the judgment of the Municipal Court in Prague and referred the matter back for further proceedings.

Judgment of the Supreme Administrative Court of 31 March 2010, No. 8 As 6/2010-246

The municipal authority in Znojmo decided on location of a publicly beneficial construction (a ring road of the town Znojmo) in 2005. The appeal of the complainant (a civic association) against the decision and its subsequent action filed with the Regional Court in Brno were dismissed. The complainant therefore lodged a cassation complaint with the SAC.

The SAC was invited to determine whether the EIA statement issued in 1994 pursuant to then effective legislation (the Act No. 244/1992 Coll.) can be used as a background document for the proceedings on location of a construction commenced in 2005 (i.e. three years after the new legislation – the Act No. 100/2001 Coll. – came into force). The previous legislation did not limit the validity of the EIA statement.

The SAC emphasized that the purpose of the EIA is the assessment of the environmental impacts which takes into account the achieved level on knowledge about the environment. Moreover, reflection of the current knowledge on the given territory as well as on the options available to protect the environment is an essential principle of the legislation. It is thus clear that the level of knowledge can be substantially different after 11 years. The fact that the legislation according to which the EIA statement was issued did not limit its validity cannot alter this conclusion. Therefore, if the validity of the original decision on location of the construction expired in 2001 and new procedure on location of that construction was commenced in 2005, the original EIA statement from 1994 could not have been used as a background document. A new EIA proceeding should have been commenced. This holds true especially in the case when there have been significant changes in the project since then.

Therefore, the Court quashed the judgment of the Regional Court in Brno and referred the matter back for further proceedings.

2) Access of affected public to justice

Judgment of the Supreme Administrative Court of 13 March 2011, No. 1 As 7/2011-397

In the instant case a civic association filed an action with the Municipal Court in Prague seeking to quash the decision of the Directorate of Roads and Highways of the Czech Republic which dismissed its appeal against a building permit for a road in Brno. The Municipal Court quashed the contested decision and referred the matter back for further proceedings.

The Directorate of Roads and Highways (hereinafter “the complainant”) lodged a cassation complaint alleging that a civic association participating in the proceedings on a building permit pursuant to Sec. 70 of the Act on Nature Conservation (which enables civic associations to participate in administrative proceedings where the interests of nature and landscape conservation protected under this Act may be affected) can only raise objections which have procedural character. Moreover, the objections which a civic association can make are further

limited by its scope of activities, which results from its statute. Therefore, the civic association was not allowed to raise objections pursuant to the Act No. 258/2000 Coll. on Protection of Public Health as regards protection against noise.

On the one hand, the SAC approved the opinion of the complainant that a civic association cannot claim that its substantive rights were violated. The civic association can effectively argue before the court only such a violation of its procedural rights which could have resulted in an unlawful decision in the matter. The procedural objections are further limited by the scope of activities of the civic association, which results from its statute. Therefore, only those objections which regard nature and landscape conservation are permissible. The SAC agreed with the complainant that the civic association (the plaintiff before the Municipal Court) lacked standing for raising objections regarding protection against noise pursuant to Sec. 70 of the Act on Nature Conservation.

However, the civic association had in the instant case standing pursuant to the Act No. 244/1992 Coll. on Environmental Impact Assessment (which was subsequently replaced by the Act No. 100/2001 Coll.) which extends the scope of protection to other components of the environment, such as protection of the population. Therefore, the objections of the civic association in relation to protection against noise were permissible.

The SAC therefore dismissed the cassation complaint.

Judgment of the Supreme Administrative Court of 13 October 2010, No. 6 Ao 5/2010-43, No. 2185/2011 Collection of Reports of the SAC

The petitioners (a civic association and a natural person) filed a petition against a measure of a general nature[5] - National Park Visitors Regulations issued by the Administration of the National Park Šumava. The petition to repeal a measure of general nature or its parts may be filed by those who claim that their rights were by the measure of general nature prejudiced (Sec. 101a of the Code of Administrative Justice).

The preliminary question in the instant case was whether the petitioners' rights were prejudiced by the National Park Visitors Regulations (hereinafter "Regulations"). They alleged that their right to a favourable environment was violated by the Regulations which permitted boating activities in a particular section of the river Vltava. In their opinion this permission represents a threat to populations of freshwater pearl mussel (Margaritifera margaritifera), which is a critically endangered species and its occurrence in the National Park Šumava is exceptional.

However, given that a civic association is a legal person, it cannot claim according to Czech legislation and case-law of the Constitutional Court violation of its right to a favourable environment. The other petitioner was a natural person who no doubt can assert her right to a favourable environment. However, it was questionable whether the threat to populations of

[5] A measure of a general nature is a new type of decision-making by administrative authorities, introduced into the Czech legal system by the Act No. 500/2004 Coll., Code of Administrative Procedure, and modelled on the "Allgemeinverfügung", existing in the Germanic legal culture (Germany, Austria and Switzerland).

freshwater pearl mussel is capable to interfere with the petitioner's right. The SAC concluded that neither of the petitioners can successfully claim violation of their right to a favourable environment in the instant case and therefore, the Czech legislation does not give standing to either of the petitioners.

However, the SAC pointed out that the European law should be taken into account since the relevant sector of the river Vltava is considered as a site of Community importance which is protected by the Habitats Directive and by Sec. 45h and § 45i of the Act on Nature Conservation which is implementing this Directive.

The Court distinguished the instant case from its previous case-law (e.g. case No. 1 As 39/2006, see above question IX) according to which Article 10a of the EIA-directive cannot have direct effect since it stipulates that it is up to the Member States to determine at what stage the decisions, acts or omissions may be challenged. In those cases the Court concluded that it is in accordance with the EIA-directive if the EIA statement is subject to judicial review only as part of the subsequent decision giving final development consent. The contested Regulations shall be based on the EIA statement pursuant to Sec. 45h of the Act on Nature Conservation. However, since the Regulations were issued in the form of a measure of general nature, there is no subsequent procedure which could be challenged before courts. Therefore, the question at what stage the decisions, acts or omissions may be challenged does not arise. Thus, Article 10a of the EIA-directive can be invoked in the instant case directly and the petitioner who is a civic association shall be given standing. In order to back up its conclusion, the SAC referred to the case-law of the ECJ, in particular to the case of 4 December 1974, *Van Duyn*, 41/74, and of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08.

The other petitioner, a natural person, is not covered by the Article 10a of the EIA-directive and therefore her petition was dismissed as inadmissible for the lack of standing.

Thereafter, the SAC proceeded to assess the merits. The civic association alleged that procedural laws were violated in the proceedings preceding the issuance of the contested Regulations. More specifically, it maintained that the EIA was unlawfully omitted. The boating activities in the particular section of the river Vltava can allegedly adversely affect the site of Community importance and therefore performing EIA was a mandatory precondition. The Court pointed out that this project can be assessed in two ways: first, through the EIA process pursuant to the Act No. 100/2001 Coll., or second, through the environmental impact assessment on the site of Community importance pursuant to the Act on Nature Conservation. The procedural rules are almost the same; however, the criteria for the assessment are different. Each project shall be at first submitted by the developer to the nature conservation authority which shall assess whether the project independently or in conjunction with other projects or conceptions can have a significant impact on the state of the protected subject or the integrity of sites of Community importance or bird areas. If the significant impact is not excluded, the environmental impact assessment pursuant to the Act on Nature Conservation shall take place. The question whether also an EIA pursuant to the Act No. 100/2001 Coll. shall be performed, will be answered in the fact-finding procedure pursuant to Sec. 45i (2) of the Act on Nature Conservation in conjunction with Sec. 4 (1) (e) of the Act No. 100/2001 Coll.

The respondent who issued the contested Regulations did not comply with its obligation to submit the project to the nature conservation authority in order to assess impact on the site of Community importance. Therefore, the respondent seriously erred if it concluded that neither of the types of the EIA was necessary.

In the light of the above mentioned facts, the SAC abolished the National Park Visitors Regulations in the contested part.

3) The SEA and NATURA 2000

Judgment of the Supreme Administrative Court of 20 May 2010, No. 8 Ao 2/2010-644, No. 2106/2010 Collection of Reports of the SAC

The petitioners (two authorities of municipal parts of Prague and six natural persons) filed with the SAC a petition to abolish a measure of general nature – the Principles of Spatial Development (hereinafter "the Principles") issued by the Prague City Assembly. The petitioners alleged unlawfullness of the Principles as regards the planned construction of a ring road of Prague. They argued that their rights to a favourable environment, rights to property and rights to fair trial were violated.

More specifically, they claimed inter alia that the SEA statement does not assess the environmental impacts with regard to their location. In the case of projects with linear structures (such as roads) effects in the individual parts of the territory can obviously vary. However, the SEA statement does not respect that each section of the ring road has specific effects on the environment. The petitioners further maintained that there exists a variant of the ring road with much smaller impacts on the environment. Furthermore, the SEA statement does not allegedly reflect possible cumulative and synergic effects of the ring road in conjunction with the Prague-Ruzyně airport. In addition, it is not possible to verify from the statement whether the Principles will not adversely affect any of the sites of Community importance in the relevant area.

According to the SAC the major problem rested in the absence of environmental impact assessment on the sites of Community importance. Relying on the case-law of the ECJ, the SAC held that if the Principles are effecting a site of Community importance, it is necessary to perform the environemental impact assessment even though the site has been so far included only in the national list of proposed sites transmitted to the Commission. The SAC referred to the case of 13 January 2005, *Dragaggi*, C-117/03, in which the ECJ concluded that "on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive." However, the ECJ continued, "[t]his does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission. [...] It is apparent, therefore, that in the case of sites eligible for

identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest."

Therefore, the SAC concluded that proposed sites of Community importance cannot be until their recognition by the Commission subject to measures which could irreversibily affect their integrity or adversely effect the protected subject. These proposed sites have to be given adequate protection since the time they have been included in the national list. Under the Czech legislation the adequate protection can be provided by means of Sec. 45i of the Act on Nature Conservation according to which a draft of a conception or a project shall be submitted to the nature conservation authority which shall assess whether the project or conception independently or in conjunction with other projects or conceptions can have a significant impact on the state of the protected subject or the integrity of sites of Community importance or bird areas. If the significant impact is not excluded, the environmental impact assessment pursuant to the Act on Nature Conservation shall take place. The assessment of the impacts on a proposed site of Community importance at the time when it is "merely" included in the national list is the most adequate measure with regard to prevention of environmental damage and the precautionary principle.

The Principles in the instant case failed to assess the impacts on the site "Kaňon Vltavy u Sedlce" which had been included in the national list of proposed sites of Community importance before the Principles were issued. This omission represents a serious procedural fault which by itself shall lead to the abolition of the relevant part of the Principles.

Nonetheless, the Court went further. In case the significant impact on the site of Community importance is not a priori excluded pursuant to Sec. 45i (1) of the Act on Nature Conservation, the conception shall be assessed pursuant to the second paragraph of the same provision. If the negative impact cannot be excluded the submitter of the conception shall include in the draft conception different variants. In case a variant without a negative impact on the site of Community importance does not exist, a variant with a negative impact can be approved only if there exist urgent reasons of public interest and only after compensatory measures have been ensured. In case of a locality with priority habitats, the conception can be approved only on the basis of exhaustively enumerated grounds of public health, public security or positive impacts of undisputed importance on the environment. Other grounds would have to be approved by the Commission.

The SAC pointed out that since 1 Decemeber 2009 the legislator has changed the above mentioned provision and added the adjective "significant" before the words "negative impact". It means that whereas before the 1 Decemeber 2009 the assessment on sites of Community importance was necessary if a "negative impact" thereon was not excluded, under the current wording the assessment on sites of Community importance shall take place only if a "significant negative impact" is not excluded. The Court found this change to be at variance with the Habitats Directive which in Article 6 speaks primarily about "negative impact".

Therefore, taking into account the purpose of the legislation and the requirements of the Habitats Directive, the Court concluded that if in the instant case the assessment of the

Principles had been performed and possible negative impact had not been excluded, other variants without a negative impact should have been sought. The Court further emphasised that precisely at the stage when the Principles are adopted, it is the most convenient time for searching for alternative variants. It can happen that in subsequent stages of the land-use process, it will not be possible to take alternative solutions into consideration.

The petitioners further objected that the SEA was unlawful. The Court first reiterated its settled case-law regarding the judicial review of the EIA statement according to which neither the Aarhus Convention nor the EIA-directive require the EIA statement to be judicially reviewed in separate proceedings. It is sufficient if it is reviewed at the stage when rights of natural or legal persons can be interfered with. This conclusion is applicable in case of assessment of a conception (SEA) as well. This holds true in the case of SEA even more since the SEA-directive does not stipulate any requirements for judicial review. The interference with rights of the petitioners cannot occur until a final binding act of an administrative authority has been issued - in this case, the issue of the Principles of Spatial Development. The contested SEA statement can be therefore reviewed only as a background document for the Principles.

The SAC concluded that the objection of the petitioners was well-founded since the Prague City Assembly which issued the Principles did not respect the requirements of the Ministry for Environment (the affected authority in this case) and did not justify why they were omitted.

The petitioners also alleged that the SEA statement does not reflect possible cumulative and synergic effects of the ring road in conjunction with the Prague-Ruzyně airport. The Court found also this objection well-founded since the procedure in which the Principles are to be adopted can be considered as the optimal moment when cumulative and synergic effects of projects envisaged in the conceptions should be assessed with regard to the individual components of the environment. At this stage it is still realistically possible to effectively deal with individual variants and thus to respond to any findings regarding the synergic effects of individual projects. The omission to consider the cumulative and synergic effects was therefore another substantial procedural error.

Finally, the petitioners argued that the SEA statement in the instant case does not assess the environmental impacts with regard to their location. However, in case of projects with linear structures (such as roads) the effects in the individual parts of the territory can obviously vary.

The SAC emphasised that the purpose of the SEA is inter alia to provide to the affected subjects sufficient expert information on potential impacts of the conception on the environment. Therefore, it must be clear from the SEA statement what are the conclusions and how these conclusions have been reached. The SEA statement in the instant case indeed does not assess the environmental impacts with regard to their location. As a consequence, it does not provide to the authority deciding about the conception and also to the affected public sufficient expert information on potential impacts.

In the light of all the above mentioned facts, the SAC abolished the relevant part of the Principles of Spatial Development.