


3-2015

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Recommended Citation

Veronika Tomoszkova, *Implementation of the EU Directive on Environmental Impact Assessment in the Czech Republic: How Long Can the Wolf Be Tricked?*, 6 Wash. & Lee J. Energy, Climate & Env't. 451 (2015), <http://scholarlycommons.law.wlu.edu/jece/vol6/iss2/5>

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Implementation of the EU Directive on Environmental Impact Assessment in the Czech Republic: How Long Can the Wolf Be Tricked?

Veronika Tomoszkova*

Abstract

After the Velvet Revolution in 1989, the former Czechoslovakia experienced the most enthusiastic wave of environmental law drafting in its history.¹ The Czech Act on Environmental Impact Assessment (“EIA Act”) was among the first new environmental statutes adopted already in 1992 with the intention to harmonize Czechoslovakian law with European Union (“EU”) law and to prevent exploitation and pollution of the environment in Czechoslovakia, which in the early 1990s counted for one of the worst in the world.² The hardship of transition process that hit Czechoslovakia in 1992 caused a shift from enthusiastic pro-active environmental movement towards more pragmatic approach that there must be first the economic growth before focusing on environmental protection.³ Unfortunately this approach still dominates the Czech politics and adversely affects the Czech performance in meeting the obligations arising from the EU membership,

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1. See Petr Jehlicka & Jan Kara, *Ups and Downs of Czech Environmental Awareness and policy: Identifying Trends and Influences*, 4 REGIONAL POLITICS & POLICY 153 (Mar. 1994) (noting that the barriers to environmentally friendly practices no longer faced barriers after the 1989 revolutionary changes).

2. See *id.* at 161–63 (indicating an institutional change in the early 1990s including an investment in environmental causes).

3. See *id.* at 163 (describing how the split of Czechoslovakia had negative implications on environmental efforts because the economic reform was not positive for the economic structure).

namely the obligation to implement the EU environmental law.⁴

After more than twenty years of applying EIA, the Czech law is still not in compliance with the EU law.⁵ For more than ten years Czech politicians have successfully resisted the need for compliance with the EU requirements on public participation and access to justice.⁶ This active resistance is subject of relentless criticism from the environmental non-governmental organizations (“NGOs”) and lately also from the EU Commission.⁷ The Czech attitude towards its EU membership duties can be characterized by one Czech proverb that gained popularity during the Soviet rule: to trick the regime, act cunningly so as the hungry wolf fills up but the goat he wanted to eat remains unharmed.⁸ In this respect the Czechs often act as though they have fulfilled all their duties properly (so the hungry wolf filled up), but nothing has in fact changed (the goat remained whole).

This article traces development of environmental impact assessment law in the Czech Republic during its preparation for the accession to the EU and then during EU membership and uses an example of environmental impact assessment law to show how the post-communist legacy lead the Czech Republic from an ambition to be a leader in

4. See John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227, 252–53 (1995) (emphasizing that environmental reforms and political agendas changed with the predominance of economies along with the reduction of resources from external programs).

5. See László Szegedi, *The Eastern Way of Europeanisation in the Light of Environmental Policymaking? Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe*, 1 ELTE L.J.117, 130 (2014) available at http://eltelawjournal.hu/wp-content/uploads/2014/10/8_Laszlo_Szegedi.pdf (explaining that post-accession compliance still plagues the Czech Republic as indicated by recent CJEU case law and the Compliance Committee) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

6. See *id.* (stating that the CJEU held that “due to the general restrictive practice based on the procedural legislation of the Czech Republic—only a part of public concern had access to judicial review in environmental matters.”).

7. See *id.* (describing that NGOs could only state infringement of procedural rights as indicated in the European Commission action against the Czech Republic).

8. See *id.* (explaining that the Czech Republic never made climate change policy a high priority and only part of the public had access to judicial review in environmental matters).

environmental policymaking to a position of a laggard.⁹ It concludes that for the post-Communist countries, such as the Czech Republic, the EU membership plays an important role of a stabilizing factor and the only driving force for enhancing environmental standards.¹⁰

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I. Introduction

Behind every law there is more than just words of legal rules, there is a story and a context in which that particular law was adopted.¹¹ Since 1992, Environmental Impact

9. See *id.* at 133–34 (asserting that the implementation of EIA regulations were reduced to a restrictive use or interpretation, which resulted in backsliding in certain areas).

10. See *id.* at 118 (explaining a theory that the adoption of EU-related laws did not always correlate with the transposition of such laws and that EIA can indicate whether post-Communist regimes are capable and willing to fulfill post-accession requirements in their public-participations and decision-making).

11. See *Economic Aspects of Sustainable Development in Czech Republic*, SUSTAINABLE DEVELOPMENT (April 1997), <http://www.un.org/esa/agenda21/natlinfo/countr/czech/eco.htm> (describing the story of environmental legislation in the Czech Republic, which began in

Assessments have been recognized globally as one of the most important tools for integrating environmental considerations into decision-making.¹² Moreover, the environmental impact assessment creates opportunities for citizens, local communities and non-governmental organizations representing public to express their concerns when a project with negative impacts on environment or human health is proposed.¹³ By bringing all stakeholders together to express their concerns, interests and wishes the environmental impact assessment contributes to 'good governance' and by integrating public participation requirements it serves as a democracy indicator.¹⁴

The idea of environmental impact assessment comes from the U.S. National Environmental Policy Act of 1969 ("NEPA") which introduced the requirement that all federal agencies prepare detailed environmental impact statement for each major federal action significantly affecting the quality of human environment.¹⁵ The U.S. environmental impact assessment spread all over the world.¹⁶ NEPA inspired the European Economic Community ("EEC," now "EU") to adopt

the 1990s, as provided by the Government of the Czech Republic to the 5th session of the United Nations Commission on Sustainable Development) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

12. See United Nations Conference on Environment and Development, June 3-14, 1992 The Rio Declaration on Environment and Development, Principle 17, U.N. Doc. A/CONF.151/26 ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.").

13 See United Nations Conference on Environment and Development, June 3-14, 1992 The Rio Declaration on Environment and Development, Principle 10, U.N. Doc. A/CONF.151/26 (noting that all concerned citizens should participate in handling environmental issues).

14. See Szegedi, *supra* note 5, at 117, 120 (stating that environmental impact assessment can broaden the "worlds of compliance" model and channel post-Communist administrative regimes into a decision-making process of public participation).

15. See National Environmental Policy Act of 1969 §102(C), 42 U.S.C. § 4331 (2014) ("[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . .").

16. See Jennifer C. Li, *Environmental Assessments in Developing Countries: An Opportunity for Greater Environmental Security?* United States Agency of International Development, Working Paper No. 4, 1 (2008) (explaining that the Environmental Impact Assessment began in the United States and was adopted by the rest of the world).

the Environmental Impact Assessment Directive¹⁷ (“EIA Directive”) in 1985 although at that time the EEC had no explicit authority to adopt environmental legislation.¹⁸ By unanimous vote among the EEC Member States, the adoption of the EIA Directive was justified by the fact that divergence of environmental impact assessments in the Member States may produce disparities in investment conditions and create distortions of competition with negative effects on the functioning of the common market.¹⁹ From the beginning, the environmental impact assessment in the EU is more a “flexible procedure designed to ensure consideration of environmental effects by both the sponsor of a project and the competent national authority” rather than “a notion of an impact statement contained in a single document.”²⁰

Adopting the EIA Directive was one of the smartest and boldest moves the European Union has ever done in improving environmental decision-making.²¹ In 2003, the EIA Directive was significantly amended in regards to the public participation, primarily due to the ratification of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“Aarhus Convention”) by the EU.²² The ratification of

17. See Council Directive 85/337 of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 5, 7, 40–48 (1985) (discussing the EU’s environmental protection plants resulting in Environmental Impact Assessment).

18. See Howard L. Brown, *Expanding the Effectiveness of the European Union’s Environmental Impact Assessment Law*, 20 B.C. INT’L & COMP. L. REV. 313, 351–52 (1997) (noting that the 1957 Treaty of Rome established the EEC and implicitly recognized EU authority over environmental issues).

19. See Commission Proposal for a Council Directive Concerning the Assessment of the Environmental Effects of Certain Public and Private Projects, Point 10 at 5, COM(80) 313 final, (June 27, 1985).

20. Compare Louis L. Bono, *The Implementation of the EC Directive on Environmental Impact Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 PACE ENVTL. L. REV., 155, 155–86 (1991), with William Murray Tabb, *Environmental Impact Assessment in the European Community: Shaping International Norms*, 73 TUL. L. REV. 923, 923–60 (1999) (comparing the environmental impact assessment in the U.S. and EU).

21. See William Murray Tabb, *Environmental Impact Assessment in the European Community: Shaping International Norms*, 73 TUL. L. REV. 923, 929 (1999) (stating that the EIA Directive was an important step in international practices of environmental assessments).

22. See Szegedi, *supra* note 5, at 123–24 (asserting that the EU law is mobilized as an international fight against global problems through the Aarhus Convention).

the Aarhus Convention and implementation of its requirements into the EIA Directive was a turning point in ensuring environmental justice and “good governance” all over the EU.²³

The environmental impact assessment was incorporated into the Czech law during the enthusiastic early 1990s with the aim to be ahead with the implementation of the EU law before the EU accession.²⁴ Since the split of Czechoslovakia in 1993 till today, the Czech Parliament merely implemented the EU law.²⁵ Moreover, as this article attempt to show, meeting the requirements of proper and correct implementation of EU environmental law usually takes the Czech Republic more time than mandated, and when it comes to granting rights to the citizens it takes a lot of effort from the EU Commission to force the Czech Republic to comply with the EU standards.²⁶

Although the initiative of the first Czech minister for environment, Josef Vavroušek, led to the adoption of the Aarhus Convention, which the Czech Republic signed in 1998, the implementation of its standards, mandated later by the EU via the 2003 amendment of the EIA Directive, is still disputed and opposed by many influential groups.²⁷ The Czech politicians long neglected or even ignored the notices from the

23. See Jona Razzaque, *Environmental Governance in Europe and Asia: A Comparative Study of Institutional and Legislative Frameworks*, 1 (2013) (“[a]t the heart of any ‘good governance’ is the engagement of public and inclusive decision-making process with transparent and accountable policies to reconcile differences among various interest holders . . .”).

24. See Casalino, *supra* note 4, at 248 (describing that the Czech Republic adopted legislation conforming with the European Agreements).

25. See *id.* at 227 (noting the Central and European Eastern Countries including the Czech Republic entered into European Agreements to become EU members and must develop environmental legislation based on EU law).

26. See *id.* at 249–54 (describing the difficult problems associated countries encounter in implementing and enforcing environmental protection based on EU policy such as inadequate policy and regulatory frameworks, poor monitoring systems, human resource and institutional weakness, changing political agendas and insufficient awareness of environmental issues, and scarce financial resources).

27. See Council Directive 2003/35, 2003 O.J. (L 156) (EC) (seeking to align the provisions on public participation with the Aarhus Convention on public participation in decision-making and access to justice in environmental matters); see also Jennifer C. Li, *supra* note 16, at 4 (stating that EIA’s scope quality, public participation, and actions are debated worldwide).

EU Commission that the Czech EIA legislation was not in compliance with the EU law till the European Court of Justice in 2010 made it clear in its judgment.²⁸ The shortcomings of the Czech law were also reiterated by the Aarhus Convention Compliance Committee in 2012.²⁹ Finally in 2013, the Commission initiated the infringement procedure in which the Czech Republic faces high financial penalties along with a threat to lose access to substantial amount of the EU funds for the ongoing and future major projects such as traffic infrastructure.³⁰ Under such circumstances the Czech government proposed a bill that would mend all the deficiencies.³¹ But will it finally address them for the sake of all stakeholders?³²

This article analyzes experience of the Czech Republic as a post-communist EU Member State with implementation of the EU environmental law and argues that in case of the Czech Republic the main reasons for struggling with the duty to implement the EIA Directive result from its post-communist culture that creates: (1) a disrespect for law and overly critical attitude towards the European Union; (2) diminishing value of civil society and treating the active citizens as a irreconcilable opposition, not a partner; and (3) a lack of constructive communication among politicians, administrative authorities, and all stakeholders (citizens,

28. See C-378/09, *Comm'n v. Czech Republic*, 2010 E.C.R. I-00078 (holding against the Czech Republic for failing to transpose Article 10a(1-3) of the Council Directive).

29. See Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, United Nations Economic and Social Council, ECE/MP.PP/C.1/2012/11, at 2 (June 29, 2012) available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-50/Findings/ece_mp_pp_c.1_2012_11_eng.pdf (stating that the Czech courts held that provisions of the Aarhus Convention cannot be directly applicable) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

30. See European Parliament, *Infringement No. 2013/2048, Comm'n v. Czech Republic*, 2013 available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2014-006493&language=EN> (stating that the Commission opened the infringement, and that the Court of Justice will carry out the procedure as soon as possible to identify the impact on the environment).

31. See Zákon č. 39/2015 Sb. (Czech) (amending Czech licensing proceedings and involving more public participation and changing Czech Environmental Impact Statement laws to comply with EU EIA law).

32. See Szegedi, *supra* note 5, at 117 (outlining the "Europeanisation" of post-communist countries by assessing the impact of EU requirements specifically the EIA and the Aarhus Convention).

businesses, etc.).³³ The EIA is publicly presented as a mere “hurdle” for the execution of various projects that needs to be overcome.³⁴ As a result of these practices, the implementation of the EIA Directive especially in regards to the public participation seems to be a formal sham.³⁵ On a deeper level, it mirrors that the Czech political culture is still immature and sometimes far from the ideals of democracy.³⁶

II. Czech Republic Before and After the Velvet Revolution (1989)

Czech Republic is a medium-sized country³⁷ located in Central Europe. Prior to 1918 the Czech lands³⁸ were part of the Austrian-Hungarian Empire, and they represented the most economically developed part of the Empire.³⁹ After the collapse of the Austrian-Hungarian Empire in 1918, the independent Czechoslovakia came into existence.⁴⁰ In the

33. See Casalino, *supra* note 4, at 247–54 (discussing the success and obstacles of the EU in directing the environmental laws of Associate Member States).

34. See *id.* at 253–54 (explaining that the EU funds certain projects while the country is responsible for environmental compliance).

35. See *id.* at 245 (describing the problem with the EU’s role in shaping environmental policy).

36. See *id.* at 251 (outlining the issues with Eastern European regulatory and enforcement frameworks).

37. See EUROPEAN ENVIRONMENT AGENCY, COUNTRY FACTSHEET ON SUSTAINABLE CONSUMPTION AND PRODUCTION POLICIES: THE CZECH REPUBLIC 4 (2010) (noting that the Czech Republic has slightly over 10 million inhabitants and area of approximately 78000 square kilometers) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

38. See Jaroslav Rousar, *The Czech Republic and Its Professional Armed Forces*, MINISTRY OF THE CZECH REPUBLIC 7 (2006) available at http://www.army.cz/images/id_7001_8000/7420/crapa-en.pdf (stating that the Kingdom of Bohemia, Margraviate of Moravia and Duchy of Silesia were three “Czech” lands of the Austrian-Hungarian Empire) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

39. See Petr Jehlicka & Jan Kara, *supra* note 1, at 154 (emphasizing that the developed parts of the Austro-Hungarian empire became what is the old industrial region).

40. See Katarina Mathernova, *Czecho? Slovakia: Constitutional Disappointments*, 7 AM. U. J. INT’L. L. & POL’Y. 471, 473–74 (1992) (stating that the first Czechoslovakian Republic came into being); see also Rousar, *supra* note 38, at 26 (conveying that the representatives of the Czech lands, namely Tomas Masaryk, had to cooperate with representatives of Slovak lands, to be able to make a case for their independence in a common state).

inter-war period, Czechoslovakia was able to maintain democracy and was one of the leading industrial countries in Europe.⁴¹ After World War II, Czechoslovakia fell into the Soviet sphere of influence and the communist party seized political power for forty years.⁴² This chapter provides historical, political, and cultural context for the Czech Republic's current performance in EU membership duties, which is deeply influenced by the legacy of the forty years of totalitarian regime.⁴³

A. During Communist Regime (1948 – 1989)

Since 1948 Czechoslovakia experienced an authoritarian regime with a centrally planned and controlled economy oriented on rapid expansion of heavy industry basically at any expense.⁴⁴ The heavy industry was fuelled by low-quality brown coal and lignite.⁴⁵ Unlike in other communist countries (e.g. Poland),⁴⁶ private property in Czechoslovakia was confiscated, officially banned by the 1960 Constitution,⁴⁷ and practically reduced only to housing and personal property.⁴⁸ All the farmland was declared to be part of collective property managed by the united agricultural cooperatives (*jednotná zemědělská družstva*).⁴⁹ The state

41. See Petr Jehlicka & Jan Kara, *supra* note 1 at 154; see also Andrzej K. Kozminski, *Restitution of Private Property: Re-privatization in Central and Eastern Europe*. 30 COMMUNIST AND POST-COMMUNIST STUDIES 95, 99 (1997) (noting that Czechoslovakia remained capitalistic and democratic).

42. See Kozminski, *supra* note 38, at 99 (describing how the communist coup in Czechoslovakia happened in 1948).

43. See Petr Jehlicka & Jan Kara, *supra* note 1, at 153 (“The geopolitical settings (including the influence of the EU) with their important environmental dimension seemed to serve as a stabilizing factor in this respect; that have no allowed the ‘pendulum’ to swing back fully.”).

44. See *id.* at 155 (stating that beginning in 1948 the country experienced an authoritarian regime).

45. See Petr Pavlínek, Czech Republic, in Frank Carter & David Turnock, ENVIRONMENTAL PROBLEMS IN EAST-CENTRAL EUROPE 119 (2nd ed, 2001) (describing how the heavy industry was fueled).

46. See Kozminski, *supra* note 38, at 96 (1997). (describing the anti-private ownership campaigns in other communist countries).

47. See Ústavní zákon ze dne 11. července 1960 č. 100/1960 Sb., Ústava Československé socialistické republiky [Constitution of the Czechoslovak Socialist Republic].

48. See Kozminski, *supra* note 38, at 96–97 (1997) (describing the waves of expropriations and confiscations).

49. See *id.* at 96 (noting that farmland was often owned collectively).

owned all natural resources (forests, water, and mineral resources), means of industrial production (factories), mass transportation and post offices, banks and insurance companies, radio, television, film industry, medical care facilities, schools, and scientific institutes.⁵⁰ Private undertaking was not allowed.⁵¹ The regime systematically worked on elimination of elites and intelligence and intentionally destroyed social hierarchy.⁵²

The socialist state ruled by the communist party built a social security net for all of its citizens. Everybody had a job⁵³ and wages were not high, but people could make a living. People “knew they would be hospitalized if needed and would receive cheap or free medication. Their children could go to school and even to university for free, and at age of 55 – 60, or earlier if necessary, they could retire with a modest but guaranteed pension.”⁵⁴

With the exception of Nature Protection Act of 1955/1956,⁵⁵ the legislation that would deal with environmental protection was not on the agenda.⁵⁶ During 1960s Czechoslovakia faced stagnation of economic growth, so the reforms were urged. Then during the late 1960s and early 1970s the first signs of serious environment degradation began to show up.⁵⁷ Attention that the environmental deterioration was catching among the citizens alarmed the regime leaders because “inability to redress environmental problems undermined the legitimizing claim of Communist rule to be the guarantor of human well-being.”⁵⁸

50. See Constitution of the Czechoslovak Socialist Republic art. VIII part 2.

51. See Kozminski, *supra* note 38, at 99 (describing the legislation’s attack on privatization).

52. See *id.* at 99 (explaining the way the system got rid of social hierarchy).

53. See Constitution of the Czechoslovak Socialist Republic art. VIII part 2. (stating that everybody had to work under the threat of criminal punishment for social parasitism (*příživnictví*)).

54. Ivan T. Berend, *Social Shock in Transforming Central and Eastern Europe. Communist and Post-Communist Studies* 270, 275 (2007).

55. See Jehlička, *supra* note 1, at 156.

56. See *id.*

57. See *id.* at 155 (noting that up to 1960 there was economic development without addressing environmental problems and in the 1960s the first signals of degradation appeared).

58. Susan Baker & Petr Jehlička, *Dilemmas of Transition. The Environment, Democracy and Economic Reform in East Central Europe* 9 (1998).

So the regime started to adopt environmental legislation that would address the pressing environmental problems to legislate them away because the environmental pollution did not fit the socialist ideology.⁵⁹ Along with the relatively liberal mood of the 1960s, the Public Health Act of 1966,⁶⁰ Act on Protection of Farmland⁶¹ and the Air Purity Act of 1967⁶² were adopted. Despite the events of 1968 (Warsaw pact armies' invasion of Czechoslovakia) that radically suppressed liberalization of Czechoslovakia, other environmental laws were passed, namely Water Act of 1973⁶³ and Forestry Act of 1977.⁶⁴

But no matter how strict the environmental laws during the communist regime were, they were basically ineffective for two reasons.⁶⁵ Every strict rule was followed by exceptions rendering it virtually ineffective and there was a lack of enforcement (or will to enforce).⁶⁶ Obviously when all environmental pollution came from the state owned factories (because there were no other than state owned) and state activities the environmental laws were not only unenforced, they were systematically ignored.⁶⁷ As Pavlínek aptly describes, the communist government "had not been efficient in enforcing its own strict pollution limits. The state socialist planners had always considered production to be primary and feared that too much environmental consideration would endanger the plan fulfillment."⁶⁸

The environmental crisis culminated in the early 1980s and the regime could no longer keep the call unanswered, primarily because the communists realized that environmental disaster could threaten the regime's survival.⁶⁹

59. See Ruth Greenspan Bell, *Environmental Law Drafting in Central and Eastern Europe*, 22 E.L.R. 10597 (1992) available at <http://elr.info/sites/default/files/articles/22.10597.htm>.

60. See Zákon č. 20/1966 Sb., o péči o zdraví lidu.

61. See Zákon č. 53/1966 Sb., o ochraně zemědělského půdního fondu.

62. See Zákon č. 35/1967 Sb., o opatřeních proti znečišťování ovzduší.

63. See Zákon č. 138/1973 Sb., o vodách.

64. See Zákon č. 61/1977 Sb., o lesích.

65. See Jehlicka, *supra* note 1, at 156–57.

66. See *id.* at 156.

67. See *id.* at 158 (explaining that the activities were not completely illegal and people could ignore them).

68. Frank Carter & David Turnock, *Environmental Problems in East-Central Europe* 119 (2nd ed. 2001).

69. See Interview with Petr Pavlínek, *The Communist and the Environment: Was it All Bad?*, RADIO PRAHA (Aug. 8, 2003),

Despite all the efforts to limit pollution, by 1989 Czechoslovakia had the worst environmental conditions in Europe and one of the most devastated environments globally.⁷⁰

B. High Hopes and Hard Realities (1990s)

The so-called Velvet Revolution⁷¹ that took place in November 1989 started the process of transformation and strong yearning for the West.⁷² The accession to the European Union was perceived as the “only chance to modernize and enter the system of Western values” and “a national priority and strategic goal”.⁷³

The change of political regime gave rise to many hopes and expectations.⁷⁴ Ivan T. Berend accurately describes that “[p]eople and politicians felt that their country deserved immediate acceptance by the EU. They felt that financial aid and help to reach Western living standard should be forthcoming. They nurtured idealistic views about the West. They admired attractive consumerism, rich supply and high living standard.”⁷⁵ People hoped that the Western economic success can be instantly replanted in Czechoslovakia and expected that new democracy will bring greater living

<http://www.radio.cz/en/section/corraffrs/the-communists-and-the-environment-was-it-all-bad> (“[T]he regime actually realized in the early 1980s the danger that the environmental disaster could pose for its long-term survival. So actually in about the mid-1980s the regime decided to spend a lot of money to improve the environment . . . And I would also argue that some of the successes in the environmental clean-up that we saw in the early 1990s were based on the policies that were initiated by the communist government.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

70. See FRANK CARTER & DAVID TURNOCK, ENVIRONMENTAL PROBLEMS IN EAST-CENTRAL EUROPE 119 (2d ed. 2001).

71. See TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE 1945, at 620 (2006) (describing the Velvet Revolution of 1989 as a non-violent transition of power from one-party communist regime to democracy that took place in the former Czechoslovakia in November 1989).

72. See *id.*

73. Bogdan Góralczyk, *The EU Accession and Euro-Atlantic Integration of Central and Eastern European Countries 2* Y.B. POLISH EUR. STUD., 57, 57–58 (1998).

74. See Ivan T. Berend, *Social Shock in Transforming Central and Eastern Europe*, 40 COMMUNIST AND POST-COMMUNIST STUDIES 271 (2007) (explaining the rise of exaggerated expectations of post-communism “transformation fatigue”).

75. *Id.*

standard for all.⁷⁶ In terms of environmental quality, the change of regime was perceived as an opportunity to “hit the ground running,” i.e. clean up the environment building on experience from the Western democracies and avoiding costly mistakes to find a new, better path toward sustainable development.⁷⁷

From 1990 till 1992, many important environmental statutes were passed on both federal and state level. The main reason why the environmental drafting was so plentiful in the early 1990s was: (1) the urging need to deal with the communist past “once and for all” and (2) the active political role of environmentalists.⁷⁸ The communist regime did not persecute the environmentalists as harsh as e.g. human rights activists so they were ready to get involved in politics when the Velvet Revolution came.⁷⁹

However the general concern for the environment and the active political participation of environmentalists did not last long and was soon replaced by more pragmatic approach.⁸⁰ The whole society was shattered by hard consequences of regime change, and the initial euphoria was replaced by huge disappointment, partially because the expectations people had were exaggerated.⁸¹ The transition to constitutional democracy, market economy, and development of functional democratic government and civil society were not going to happen “overnight.”⁸²

76. See *id.* (noting that people disbelieved negative propaganda about capitalism and wanted the Western-living standard).

77. See Margaret Bowman & David Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921, 924 (1991-1992) (urging new lawmakers to develop systems that would make laws work to invest in democracies and the environment).

78. See Petr Jehlicka & Jan Kara, *supra* note 1, at 159 (indicating that the public was more aware of environmental issues after 1989 and the Green party asserted itself concerned with the devastation of the Bohemia area).

79. See *id.* at 158 (stating that people wanted to be involved because of personal passion against the degradation of the environment).

80. See *id.* at 160 (noting that the pragmatic period of environmental policy began after the 1992 elections along with the economic reforms).

81. See *id.* at 159 (detailing the change from a loose movement to a central movement and a loss of interest after advocates were not effective.).

82. See *id.* at 161–63 (summarizing the changes in the institution and legislation while environmental concern changed).

With the vision to join the EU as soon as possible, the law was changing too rapidly and legal system was not ready.⁸³ As Zdeněk Kühn points out, “[t]he mixture of often incompetent drafting of post-communist law, the immaturity of post-communist legal systems and judges adhering to textual positivism, has produced a deepening of the post-communist legal crisis.”⁸⁴ In other words, Czechoslovakia was just like other post-communist countries in the Central and Eastern Europe confronted with hard reality of restructuring the whole economic, political, and social system.⁸⁵ With this overwhelming task “a decrease in popular concern for the environment and increasing political pressure to delay any new environmental protection measures until the economy improves. For many environmentalists in the region, the high hopes for developing an environmentally sustainable economic system have been replaced with the desire simply to put some environmental controls in place and worry about improving the system later.”⁸⁶

The elections to the Czech National Council in June 1992 clearly demonstrated a shift from politics based on high values to a more pragmatic approach which assumes environmental quality depends on economic prosperity and the economy had to be fixed first.⁸⁷ It is sad that even 20 years later the race for economic prosperity is still dominating Czech politics even though recent economic data shows that the Czech Republic is economically indistinguishable from

83. See Joann Carmin & Stacy D. Vandevener, *Enlarging EU Environments: Central and Eastern Europe from Transition to Accession*, 13 ENVIRONMENTAL POLITICS 3, 11 (2004) (emphasizing that states and structures did not have the necessary resources to make the required changes as highlighted by environmental issues).

84. Zdeněk Kühn, *The Application of European Law in the New Member States: Several (Early) Predictions*, 6 GERMAN L. J. 563, 564 (2005); see also Mark N. Salvo, *Constitutional Law and Sustainable Development in Central Europe: Are We There Yet?* 5 S. C. ENVTL L. J. 141 (1996-1997).

85. See Mark N. Salvo, *Constitutional Law and Sustainable Development in Central Europe: Are We There Yet?* 5 S. C. ENVTL L. J. 141, 149 (1996-1997) (asserting that the entire region formerly Eastern Europe is struggling with the legal framework for sustainability).

86. Bowman and Hunter, *supra* note 77, at 924.

87. See Adam Fagin, *Environmental protests in the Czech Republic: three stages of post-communist development* [draft], UNIVERSITY OF PORTSMOUTH (1999) available at <http://ecpr.eu/Filestore/PaperProposal/16429f9b-b049-450f-89ca-4967b342ea04.pdf> (discussing the history of environmental protest in the Czech Republic after communism) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

other countries at comparable stages of economic development.⁸⁸

In the 1990s, Czech society, used to egalitarian social security net from the times of the Communist regime, struggled with unemployment, lower income, fall of the GDP level, rise of consumer prices, and decline of agricultural production.⁸⁹ Privatization of the state enterprises in particular led to increased unemployment rates and resulted in strengthened power of the “old elites” often referred to as “dinosaurs” or *nomenklatura*.⁹⁰ A new rich class emerged, which was painful for those who struggled with poverty because they expected that the events of 1989 would bring immediate improvement of living standard for everybody.⁹¹ The economic hardship that hit the majority of people resulted in deep disappointment, public skepticism about the reform process, and a craving for the security of the previous regime.⁹² This political environment created the opportunity for the rise of Communist successor parties who gained support by blaming capitalism and the reforms for all existing problems.

88. See Andrei Shleifer & Daniel Treisman, *Normal Countries: The East 25 Years After Communism*, (2014) available at <http://www.foreignaffairs.com/articles/142200/andrei-shleifer-and-daniel-treisman/normal-countries> (looking at the development of Eastern European countries after the fall of communism) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

89. See Vaclav Klaus, *The Economic Transformation of the Czech Republic: Challenges Faced and Lessons Learned*, CATO INST., (2006) available at <http://www.cato.org/publications/economic-development-bulletin/economic-transformation-czech-republic-challenges-faced-lessons-learned> (summarizing the history of the Czechs after the fall of communism) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

90. See Montree Patthamadilok, *A Decade of Conflicts in Czech Economic Transformation*, J. OF ECON. ISSUES 315, 315 (1999) (explaining the economic issues of post-communist Czechoslovakia) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

91. See Susan Baker & Petr Jehlicka, *Dilemmas of Transition: The Environment, Democracy and Economic Reform in East Central Europe* 5 (1998) (discussing the expectations of the working class during the political reform of the 1990s).

92. *Id.*

C. Joining the EU and Beyond

Accession to the European Union for post-communist countries like the Czech Republic was not only important from an economic perspective of joining the single European market but also symbolic in terms of separating from the communist past.⁹³

Czechoslovakia started to negotiate an association agreement with European Communities shortly after the 1989 political regime change.⁹⁴ The first association agreement⁹⁵ between the Czechoslovakian Federal Republic, the European Communities, and EC Member States was signed on December 16, 1991 and was approved by the EC Council in February 1992.⁹⁶ However, it was never ratified by Czechoslovakia because of the division of the country into two independent states in 1993.⁹⁷ One of the successor states, the Czech Republic, signed the association agreement (the so-called Europe Agreement)⁹⁸ in October 1993 and it entered into force on February 1, 1995.⁹⁹

The European Agreement between the EC and the Czech Republic laid down in Article 69 that “the major precondition for the Czech Republic’s economic integration into the Community is the approximation of the Czech Republic’s existing and future legislation to that of the Community. The Czech Republic shall endeavor to ensure that

93. See John Phillips & Jerry Wheat, *The Hidden Business Costs of European Union Enlargement: The Case of the Czech Republic*, 3 INT’L BUS. & ECON. RESEARCH J. 27, 30 (2004) (explaining the costs and benefits of the Czech Republic joining the European Union).

94. See *id.* at 27 (noting that the European Union began negotiations for many treaties with former Communist countries around 1989).

95. See Tom Lansford, *Political Handbook of the World 2014* 376 (2014) (giving an overview of the political history of the Czech Republic and other countries).

96. See *id.* (noting the status of the first attempted association agreement).

97. See *id.* (mentioning the split of the Czechoslovak Federal Republic into two distinct countries).

98. See Rojer J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 Int’l L. Rev. 15, 22 (2004) (noting that Europe Agreements were a standard form for the pre-accession arrangements with candidates for EC membership and that such standard forms were devised by the EC Council in 1991).

99. See Lansford, *supra* note 95 (summarizing the complicated process of the Czech Republic joining the European Union).

its legislation will be gradually made compatible with that of the Community.”¹⁰⁰ Article 70 of the European Agreement specified in which particular areas the approximation of laws shall take place and included, among other EC law in the area of the environment, protection of human health and life, animals and plants, and consumer protection.¹⁰¹

The European Agreement established the official Association of the Czech Republic with the European Community.¹⁰² The associated countries were required to satisfy certain conditions for the accession to the EC.¹⁰³ These conditions are known as “Copenhagen Criteria” and are commonly categorized into three groups: (1) political (stability of institutions guaranteeing democracy, rule of law, human rights and respect for human rights, and protection of minorities); (2) economic (functioning market economy and capacity to cope with competitive pressure and market forces with the European Union); and (3) relating to the policies and infrastructure (the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union).¹⁰⁴

The associated countries had to satisfy the political criterion before the opening of the accession negotiations.¹⁰⁵ The accession negotiations with the Czech Republic along with the other eight associated countries were opened in early 1997.¹⁰⁶ The final two criteria were to be satisfied by the end of the negotiations.¹⁰⁷ Regarding the economic criterion, the Commission in its report “Agenda 2000 – For a Stronger and Wider Union”¹⁰⁸ published in 1997, concluded that “[t]he applicant countries have made considerable progress in the

100. Europe Agreement Between the European Communities and the Czech Republic art. 69, Oct. 4, 1993, 34 I.L.M. 3.

101. *Id.* at art. 70.

102. *Id.*

103. See Rojer J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 INT'L L. REV. 15, 22 (2004) (discussing the requirement procedures for accession).

104. See *id.* at 24, 29 (discussing the various conditions that needed to be met during negotiations to gain admittance into the EC).

105. See *id.* (noting the requirements of admittance to the EC).

106. See *id.* (mentioning the timing of the negotiations between the Czech Republic and the EC).

107. See *id.* (going over the final two criteria and when they had to be met).

108. European Commission, *AGENDA 2000 For a Stronger and Wider Union*, BULLETIN OF THE EUROPEAN UNION, Supp. 5/97 (2000).

transition to a market economy, including with privatization and liberalization, although their economic situations vary considerably. For all of them the break-up of the CMEA, the former Communist trading bloc, and the beginning of market reforms implied a major initial shock.”¹⁰⁹ Due to economic mismanagement and reckless fulfillment of the plan dictated from Moscow, the average Czech GDP per inhabitant in 1997 was still only one third of the EU average.¹¹⁰ The Agenda 2000 concluded that the Czech Republic did not satisfy either of the two economic criteria.¹¹¹ Under such circumstances one can imagine how enormous an effort had to be placed in meeting the economic criteria for the EU accession.

The third criterion required the candidate countries to have adequate administrative and judicial infrastructure for the aims of political, economic and monetary union and the ability to adopt the *acquis communautaire*.¹¹² For the purposes of negotiations, the *acquis communautaire* was divided into 31 chapters, which the candidate countries had to “close” before the EU accession.¹¹³

The negotiations concerning the accession of the Czech Republic to the EU were opened on 31 March 1998 and were commenced by the screening of the Czech laws regarding its compatibility with the EU law and evaluation of whether the Czech Republic would be able to undertake all the EU membership obligations.¹¹⁴ Based on the results of the screening and evaluation, the actual talks on the terms of future Czech membership were started.¹¹⁵ The talks were concluded at the Copenhagen summit of the Council of Europe held on 13 December 2002.¹¹⁶ The Treaty of Accession of the Czech Republic to the European Union was signed on April

109. *Id.*

110. *See id.* (explaining why the Czech Republic failed the economic portion of the negotiation requirements).

111. *See id.* at 42 (concluding that the Czech Republic failed to meet all of the accession criteria).

112. *See* Rojer J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 Int'l L. Rev. 15, 34 (2004) (explaining the concept of *acquis communautaire*).

113. *See id.* (mentioning the simplification of the process).

114. *See id.* (describing the process of the negotiations by the Czech Republic).

115. *See id.* (outlining the results and process of the overall negotiation).

116. *See id.* (discussing the conclusion of the negotiation talks between the Czech Republic and the EC).

16, 2003 and the Czech Republic officially joined the EU on May 1, 2004.¹¹⁷

The accession to the EU required that the candidate countries adopt the whole *acquis communautaire* comprising several thousand legislative measures (including over 200 environmental directives and regulations) in many different fields which demanded many costly changes (institutional, legal, economic etc.).¹¹⁸ The financial aid became an inevitable step if the Central and Eastern European Countries were to join the EU.¹¹⁹ They received financial and technical help from three pre-accession funds: the PHARE Programme, SAPARD and ISPA.¹²⁰ According to official documents, the Czech Republic received € 212.2 million.¹²¹

After the accession to the EU, the new Member States have been supported in the implementation of the EU environmental policy and law from the EU funds (e.g. LIFE, European Regional Development Fund, European Social Fund or Cohesion Fund).¹²² The Member States co-operate with the Commission on allocation of some of these funds to concrete environmental projects in terms that the funds are first transferred to the Member States whose authorities administer project selection; other funds are allocated directly

117. See *id.* (noting the timetable of the treaty negotiations).

118. See Patrick J. Kapios, *Environmental Enlargement in the European Union: Approximation of the Acquis Communautaire and the Challenges That It Presents for the Application Countries*, 2 SUSTAINABLE DEV. & POLICY 2, 8 (2002) (explaining the concept of *acquis communautaire*).

119. See *id.* (discussing the need for financial aid in order to join the EC).

120. See *id.* (explaining that the PHARE Programme was a pre-accession instrument financed by the European Communities to assist the candidate countries of Central and Eastern Europe to prepare for joining the EU. It was created originally in 1989 as “Poland and Hungary: Assistance for Reconstructing their Economies”, but later it expanded from Poland to Hungary to include ten countries, eight of them joined the EU in 2004 and the remaining two (Bulgaria and Romania) in 2007).

121. See Comm’n of the European Communities, *Report from the Commission: General Report on Pre-accession assistance (PHARE – ISPA – SAPARD) in 2002*, 844 COM 24 (2003) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0844&from=en> (noting the amount of financial aid received by the Czech Republic) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

122. See Jiří Zicha & Oldřich Hájek, *Právní souvislosti legislativy Evropské unie ve vztahu k Operačnímu programu Životní prostředí v České republice*, 35 ČESKÉ PRÁVO ŽIVOTNÍHO PROSTŘEDÍ 39 (2014) (explaining the EU Environmental policy funding).

by the Commission.¹²³ As of 2013, the Czech Republic has received 57 billion CZK (approx. € 2.3 billion) for environmental projects.¹²⁴ However, the effect of spending these funds was lowered by the fact that the Czech Republic was not able to spend all the money allocated to it by the Commission and this trend unfortunately continues.¹²⁵

D. Communist Legacy and Post-Communist Culture

The famous Polish historian and former dissident Adam Michnik once stated that “the worst thing about communism is what comes after.”¹²⁶ Even though the Communist regime in the Czech Republic lasted “only” forty years, it was successful in destroying the civil society and deeply affecting peoples’ beliefs.¹²⁷

The paternalistic socialist state that cherished egalitarian society with low but guaranteed living standard and well-functioning social security net “*did not require much individual initiative.*”¹²⁸ Two generations of people who raised their children during the Communist regime were taught that if they stayed in line, everything would be just fine.¹²⁹ And the Czechs did, because throughout the history they lacked courage to actively resist the oppression and fight for their independence and freedom.¹³⁰ On a more personal level, people who grew up during Communism lacked skills necessary for successful performance in competitive market

123. See *id.* (discussing the terms of the environmental funding practices).

124. See *id.* (noting the amount of funds given to the Czech Republic).

125. See *id.* (explaining that due to problems with administering the EU funds in 2013, the Czech Republic lost 6 billion CZK (approx. € 240 million) allocated for environmental projects). In 2014 it was another 13 billion CZK (approx. € 520 million) and for 2015 it is estimated that the Czech Republic will not be able to spend another 5 billion CZK allocated for environmental projects. *Id.*

126. TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 665 (2006).

127. See Richard Janda, *Something Wicked That Way Went: Law and the Habit of Communism*, 41 MCGILL L. J. 253 (1996) (explaining the true impact of communism even on countries with limited exposure).

128. Ivan T. Berend, *supra* note 75, at 275.

129. See *id.* (discussing the effects of communism on peoples’ behavior and understanding of the world).

130. See *id.* (mentioning the cultural history of the Czech Republic and its impact on adapting to communism).

economies.¹³¹ The generation who were raised during Communism also lost the sense for individual land ownership, especially for farmland.¹³² After the Communists confiscated all the farmland and put it into collective management of united agricultural co-ops, the people whose families had been farming for generations found jobs in factories and state-owned enterprises and gradually gave up on returning to long family living habits.¹³³ When the land was returned to its owners after 1989, most of them either sold the land or leased it.¹³⁴

The Czech experience with the Communist regime and subsequent hard times of transformation created a culture of complaint and constant discontent.¹³⁵ Only a small portion of society got rich.¹³⁶ The unscrupulous public appearance and activities of former members of *nomenklatura*, who after 1989 became active politicians or managers of privatized enterprises, kept irritating the ordinary citizens and creating begrudging feelings.¹³⁷ General distrust in politics, law, and government keeps public participation in political life low and civil society weak.¹³⁸ Moreover, the politicians on all levels (national, regional and local) keep the Communist habit of treating the active citizens as irreconcilable opposition and not as a partner.¹³⁹ Just like in the Communist times “the citizens better stay in the line and let the politicians and authorities rule.”¹⁴⁰

The post-communist culture in the Czech Republic also disregards the foreign authorities who are treated as the wolf in proverb “feed the wolf so as that the goat stays unharmed”

131. *See id.* (explaining the lasting effects of communism on a post-communist society).

132. *See id.* (noting the effect of communism on the concept of property and ownership).

133. *See id.* (summarizing the history of farmland ownership in the Czech Republic and the effect of communism).

134. *See id.* (mentioning the return of property after the end of communism).

135. *See id.* (discussing the problems faced by the people who were used to a communist society).

136. *See id.* (discussing the ramifications of the fall of communism in the Czech Republic and other countries).

137. *See id.* (mentioning the continuing actions of the elite).

138. *See id.* (noting the general unrest in the population after the fall of communism).

139. *See id.* (explaining the ill will generated by the actions of the political elite).

140. *See id.* (noting the continued communist policies about obeying those in power).

or in other words the Czechs participate in the European project only with a minimal effort.¹⁴¹ If they do what they are told (by the EU), they always try to find a way around to do it their way.¹⁴² The problems with proper implementation of the EU Directive on environmental impact assessment (“EIA Directive”) described in the chapter IV clearly show the Czech attitude towards the EU – “we like the EU money, and only if these are at stake we do what we are supposed to.”

III. Environmental Impact Assessment in the EU

An environmental impact assessment is one of the most important tools for integrating environmental considerations into decision-making. It was first introduced in the U.S. National Environmental Policy Act of 1969 (“NEPA”), and it successfully spread around the world (both horizontally to other states and vertically to international level).¹⁴³

The European Community (now EU) adopted the Environmental Impact Assessment Directive in 1985 although at that time it did not have any explicit authority to adopt environmental legislation.¹⁴⁴ There were concerns that diverging regimes of impact assessment that the EEC Member States started to introduce during 1970s and 1980s would distort the functioning of the internal market, so the EEC decided to step in and set the minimum requirements.¹⁴⁵

The scope and extent of the original EIA Directive of 1985 expanded over time to set common standards with regard to types of projects subject to the impact assessment, duties of developers, content of the assessment, and the participation of the competent authorities and the public.¹⁴⁶ After the 2014 amendment by the Directive 2014/52/EU, the

141. *See id.* (describing the complex avoidance of obeisance to an authority higher than the national level).

142. *See id.* (discussing the efforts of the Czech Republic to maintain supreme sovereignty).

143. *See* Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY L.Q.* 1295, 1306 (2001) (outlining NEPA’s emergence and expansion).

144. *See id.* (noting the time of the adoption of EIAs).

145. *See id.* (explaining various concerns about EIA adoption).

146. *See* European Parliament, *European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive 2* COM (2009) 378 (discussing Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC).

current EU definition of the environmental impact assessment (EIA) is included in the Art. 1 par. 2 letter g):

Environmental impact assessment means a process consisting of:

- i. The preparation of and environmental impact assessment report by the developer;
- ii. The carrying out of consultations (with the competent authorities and with the public);
- iii. The examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer, and any relevant information received through the consultations ad ii.;
- iv. The reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination ad iii. and where appropriate, its own supplementary examination;
- v. The integration of the competent authority's reasoned conclusion into any decisions that grant development consent (or in other words license) for the project in question.¹⁴⁷

The EIA Directive does not cover the so-called "strategic documents," i.e. various plans and programs. These are subject to the environmental impact assessment under the Directive 2001/42/EC (hereinafter referred to as "SEA Directive"). The SEA Directive covers only public plans and programs, unlike the EIA Directive it does not apply to private plans and programs and it does not refer to the policies.¹⁴⁸

Besides two general regimes set up by the EIA Directive and the SEA Directive, there are several other, mostly sectorial EU directives that require impact assessment to be conducted, namely Natura 2000 Directives,¹⁴⁹ Water

147. *Id.*

148. *See* Directive 2001/42, art. 2(a), Strategic Environmental Assessment, 2001 O.J. (L 197) (EC) (defining "plans and programs" as "plans and programmes, including those co-financed by the European Community).

149. Council Directive 2009/147, 2009 O.J. (L 20/7) (EC); Council Directive 92/43, 1992 O.J. (L 198) (EEC).

Framework Directive,¹⁵⁰ Waste Framework Directive,¹⁵¹ Landfill Directive,¹⁵² Industrial Emissions Directive,¹⁵³ Seveso II Directive¹⁵⁴ and Carbon Capture and Storage Directive.¹⁵⁵ Requirements of these sectoral directives shall, on national level, be integrated into the environmental impact assessment of both projects as well as of plans and programs.

To set the stage, some general features about the EU and development of its environmental policy will be mentioned to provide a necessary context for describing the EU law on environmental impact assessment.

A. Context

The EU has quite the unique character that blends supranational and intergovernmental elements. Stephen C. Sieberson describes this blend in the following way, “[l]ike an IGO [intergovernmental organization], the Union is treaty-based and is characterized by voluntary membership and unanimity requirements for treaty amendments and other key decisions. Like a vertically stacked national federation, the EU has an independent and multi-institutional central government, its laws have primacy over Member State law, and many of its legislative enactments are approved by a form of majority vote.”¹⁵⁶

The European Court of Justice already in 1964 in the famous decision *Costa v. ENEL* stressed that “by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign

150. Council Directive 2000/60, 2000 O.J. (L 327) (EC).

151. Council Directive 2008/98, 2008 O.J. (L 143/56) (EC).

152. Council Directive 1999/31, 1999 O.J. (L 182) (EC).

153. Council Directive 2010/75, 2010 O.J. (L 182) (EU).

154. Council Directive 96/82, 1996 O.J. (L 010) (EC) (explaining the control of major-accident hazards involving dangerous substances). This so-called Seveso II Directive of 1996 will be as of 1 June 2015 replaced by the Seveso III Directive – Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

155. Council Directive 2009/31, 2009 O.J. (L 211/55) (EC).

156. Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 930 (2010).

rights and have thus created a body of law which binds both their nationals and themselves.”¹⁵⁷

The EU exercises the powers conferred upon it by its Member States in varying extent. In some areas, the EU has an exclusive power to “legislate and adopt legally binding acts” while the Member States can do so “only if so empowered by the Union or for the implementation of Union acts.”¹⁵⁸ In the areas where the European Union shares the legislative power with the Member States, the Member States “exercise their competence to the extent that the EU has not exercised it.”¹⁵⁹ Once the EU legislation has been adopted, it must be applied by all national authorities, even when it has not yet been transposed into national law.¹⁶⁰ In the case of conflict between national law and EU law, the EU law prevails because of the principle of supremacy.¹⁶¹

The EU must exercise its competences in accordance with the principle of subsidiarity and proportionality.¹⁶² Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹⁶³ Under the principle of proportionality, the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Founding Treaties.¹⁶⁴

The relationship between EU law and national law is also governed by the principle of sincere cooperation¹⁶⁵ under which the EU and its Member States collaborate to achieve

157. Case C-6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585.

158. Consolidated Version of the Treaty on the Functioning of the European Union art. 2, May 9, 2008, 2008 O.J. (C 115) 47.

159. *Id.*

160. See Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* 256-301 (2011) (describing in detail the supremacy principle).

161. See *id.* (explaining the supremacy principle in terms of the EU).

162. See *id.* (noting that all EU countries must follow such treaties).

163. See Craig, *supra* note 158, art. 5(3).

164. See *id.* art. 5(4).

165. See *id.* art. 4(3).

goals laid down by the Founding Treaties.¹⁶⁶ The TFEU further states that “the Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.”¹⁶⁷

The EU embraces fundamental values shared by its Member States. TFEU enumerates the basic values and objectives on which the EU is founded. One of the primary goals of the EU, expressed as early as the 1950s, is the establishment of an internal market in which the free movement of goods, persons, services and capital is ensured.¹⁶⁸ The European Union “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”¹⁶⁹

As Art. 3 par. 3 of TFEU cited above states, the environmental protection belongs to the EU objectives. European environmental policy dates back to 1970s. In October 1972, the heads of the EEC Member States and the heads of their governments met in Paris. At the Paris Summit, they agreed on the necessity to draw up the EEC environmental action program. The Statement from the Paris Summit declared, “economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind”

The first EEC environmental action program was adopted in the form of a joint declaration by the EEC and its Member States in 1973. Furthermore, the task force within the Commission that drew up the first action program eventually led to the formation of a Directorate General for

166. See *id.* (noting that the Founding Treaties are international treaties between EU Member States which establish the constitutional basis of the European Union).

167. *Id.* art. 5.

168. See TFEU *supra* note 158, at art. 26(2) (describing the goals of the European Union).

169. *Id.* art. 3 par. 3.

the Environment (the so-called “DG Environment”). So far, there are seven EU Environmental Action Programs.¹⁷⁰ They formulate the EU environmental policy for a certain period of time. Based on Arts. 7 and 11 of the TFEU, the European Union must ensure consistency between its policies and activities and see that they integrate environmental protection requirements (integration clause).¹⁷¹ The EU Member States are responsible for financing and implementing them in national environmental policies.¹⁷²

From a legal perspective, environmental protection did not feature in the Founding Treaties until 1987 when the Single European Act was adopted. It amended the Treaty Establishing the European Economic Community and officially introduced a new chapter on environment, which gave the EEC power to adopt environmental legislation.

B. EU Directive on Environmental Impact Assessment

The Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (“EIA Directive”) was adopted in 1985. By the time the EIA Directive entered into force (1988), there were twelve Member States of the EEC who had to implement it. Before the EIA Directive was adopted, several Member States (United Kingdom, Ireland, Germany, Denmark, France and Luxemburg)¹⁷³ introduced various models of impact assessments and the Commission was concerned that different rules would distort the competition and would adversely affect the functioning of the common market.

The EIA Directive was based on the Commission’s proposal from 1980¹⁷⁴ which referred to the first two environmental action programs adopted in 1973 and 1977.

170. See Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet,' OJ L 354 (2013) (discussing how the 7th Environmental Action Program guides the EU environmental policy from 2014 to 2020).

171. See Thomas Schumacher, 3 ENVTL. L. REV. 29, 29–43 (2001) (discussing integration clause of the Art. 11 TFEU).

172. See TFEU, *supra* note 158, art. 192(4).

173. See Proposal for a Council Directive Concerning the Assessment of the Environmental Effects of Certain Public and Private Projects. COM(80) 313 final 6–7.

174. Proposal for a Council Directive Concerning the Assessment of the Environmental Effects of Certain Public and Private Projects. COM(80) 313 final.

The proposal specifically highlighted the need to anticipate and take into account environmental concerns when the public authorities license public or private projects with negative impacts on the environment. It also emphasized that the economic activities and population put an increasing pressure on natural resources and result not only in pollution but due to poor land-use management also in industrial accidents.¹⁷⁵ Under such conditions, the system of regulatory instruments (standard-setting and inspections) that focus only on remedying the damage done must be complemented by preventive instruments such as environmental impact assessment.¹⁷⁶

The preamble of the original text of the EIA Directive clearly gave priority to the harmonization of “disparities between the laws in force in the various Member States with regards to the assessment of the environmental effects of public and private projects” which “may create unfavorable competitive conditions and thereby directly affect the functioning of common market” over necessity “to achieve one of the Community’s objectives in the sphere of the protection of the environment and the quality of life.”

The EIA Directive required that the development consent (or in other words license) for public and private projects¹⁷⁷ which are likely to have significant impacts on the environment shall be only granted after prior assessment of its “likely significant” environmental impacts. The directive provided two sets of projects in the Annex I and II. The nine categories of projects listed in the Annex I were to be automatically subject to the environmental impact assessment.¹⁷⁸ The twelve categories listed in the Annex II were subject to the screening set up on the national level to determine whether the environmental impact assessment will be required or not.¹⁷⁹ Pursuant to the Art. 3 of the EIA Directive the environmental impact assessment shall

175. See *id.* at pt. 2 of the Explanatory Memorandum (outlining the environmental concerns and how they would exacerbate other pressures).

176. See *id.* at pt. 3 of the Explanatory Memorandum (describing possible solutions for the existing regulatory regime).

177. See EIA Directive art. 1(2)(a) (describing the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources).

178. *Id.*

179. *Id.*

“identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors: human beings, fauna and flora; soil, water, air, climate and the landscape; the inter-action between the factors mentioned in the first and second indents; material assets and the cultural heritage.”¹⁸⁰

The developers were to be required to provide “appropriate information” concerning their project¹⁸¹ and this information was to be supplemented by the additional information from the public authorities and by the comments from the public who may be concerned by the project. The EIA Directive required explicitly that the information provided by the developer, public authorities, and the public “must be taken into consideration in the development consent procedure.”¹⁸²

Unlike the requirement of preparing the Environmental Impact Statement (EIS) under the U.S. National Environmental Policy Act, the EEC regime was designed more as a process of gathering the information about the project and its impacts on the environment and assessing it in the licensing procedure before the license is issued.¹⁸³ The EIA Directive allowed the Member States discretion whether to integrate the process of environmental impact assessment into the existing licensing procedures or to introduce a separate EIA procedure.¹⁸⁴

As the original EIA Directive was adopted prior to the Single European Act of 1987, it shared some common features with the other “early” environmental directives of the 1960’s and 1970’s. First, the EEC chose a form of a directive which is binding only upon the Member States who are responsible for

180 *Id.* art 3.

181. *See id.* art. 5 (describing: (1) a project description specifying the site, design and size of the project; (2) a description of measures to avoid, reduce or remedy significant adverse effects; (3) the date required to identify and assess the project’s impacts; and (4) a non-technical summary of information under 1 to 3.)

182. *Id.* art. 8.

183. *See* Louis L. Bono, *Implementation of the EC Directive on Environmental Impact Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 PACE ENVTL. L. REV. 1, 174, 175 (1999) (distinguishing the two environmental impact assessment regimes).

184. *See* EIA Directive art 2. pt. 2 (noting the flexibility of the EU’s EIA Directive).

transposing it into national law rather than a regulation which is directly applicable in all Member States.¹⁸⁵

The “early” environmental directives, including the EIA Directive were based mostly on two provisions of the TEEC, namely Art. 100a (now Art. 114 TFEU) on approximation of laws for the purpose of establishment and functioning of the internal market and the flexibility clause of the Art. 235 (now Art. 352 TFEU).¹⁸⁶ These two provisions that formed the legal basis of the EEC environmental directives required unanimous approval from all the EEC Member States, so they were always a result of a compromise and set therefore only minimum standards that would “allow the less advanced Member States to catch up and to increase their degree of environmental protection” rather than setting stricter standards for all the Member States.¹⁸⁷

The lack of explicit environmental authority also resulted in lax monitoring of the EU law application, poor enforcement and high level of tolerating non-compliance of the Member States by the Commission who is responsible for initiating the enforcement measures such as the infringement procedure.¹⁸⁸ There were in particular two reasons for these problems in the area of environmental impact assessment, namely in the way the EIA Directive was drafted¹⁸⁹ - too broad and general language, especially the categories of projects subjected to the environmental impact assessment requirement¹⁹⁰ – and the fact that the EEC lacked specific authority to adopt and therefore enforce the environmental law. As Ludwig Krämer commented, “[t]he result of this lax monitoring of the application of Community environmental law was that the Member States took considerable liberty in

185. See TFEU, *supra* 158, art. 288 (discussing the mandate of the TFEU).

186. See *id.* at art. 352 (“If action by the EU should prove necessary, within the Framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt appropriate measures.”).

187. Ludwig Kramer, *Differentiation of EU Environmental Policy*, 9 EUR. ENVTL. L. REV. 133, 133 (2000).

188. See *id.* at 135 (outlining that the infringement procedure is regulated in the Art. 258 and 260 of the TFEU).

189. Richard C. Visek, *Implementation and Enforcement of EC Environmental Law*, 7 GEO. INT'L ENVTL. L. REV. 377, 396 (1995)

190. Malcolm Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 CONN. J. INT'L L. 463, 465 (1989).

applying or not applying the directives. In part, they considered directives rather as recommendations than as legally binding instruments... the price for EC-wide environmental provisions was thus a loose drafting of texts, a considerable number of legal or factual variations according to specific situations in Member States, and the absence of any serious monitoring of the application of the provisions which had been adopted.”¹⁹¹

The initial EIA Directive of 1985 was amended three times (1997, 2003, and 2009), then codified (2011) and amended again (2014). The amendments and dates when they were adopted and entered into force are summarized in the following table.

Year	Directive	Adopted on:	Entered into force:	Implemented by the MSs by:
1985	Directive 85/337/EEC	27 June 1985	5 July 1985	3 July 1988
1997	1st amendment: Directive 97/11/EC	3 March 1997	3 April 1997	14 March 1999
2003	2nd amendment: Directive 2003/35/EC	26 May 2003	25 June 2003	25 June 2005
2009	3rd amendment: Directive 2009/31/EC	23 April 2009	25 June 2009	25 June 2011
2011	Codification of the Directive 85/337/EEC → Directive 2011/92/EU	13 December 2011	17 February 2012	No changes in the text, therefore no need to implement on national level.
2014	1st amendment of the codified EIA Directive: Directive 2014/52/EU	16 April 2014	15 May 2014	16 May 2017

The 1997 amendment was intended to bring the EIA Directive in line with several other directives¹⁹² and with the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) which the EC signed in 1991 and ratified in 1997. The 1997 amendment significantly expanded the list of projects subject to environmental impact assessment and clarified methods of screening or determining the projects that shall be subject to the assessment.

191. Kramer, *supra* note 187, at 136.

192. Specifically, the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and the Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control were significant.

The 2003 amendment was a reaction to the ratification of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”) by the EC. The 2003 amendment refined the rules on public participation in decision-making regarding the project subject to environmental impact assessment and added the provision on access to justice in terms of a right to initiate a review procedure before a court or another independent and impartial institution established by law to challenge the substantive or procedural legality of decisions, acts or omissions associated with the project in question.

The 2009 amendment was based on the Directive 2009/31/EC on the geological storage of carbon dioxide, which only expanded the lists of projects subject to environmental impact assessment or screening by clarifying the existing categories and adding new, e.g. CO₂ storage sites.

Already the original version of the EIA Directive required: (1) the Member States to inform the Commission of the implementing measures regarding national selection criteria for projects subject to impact assessment; (2) the Commission and the Member States to exchange the experience with applying the EIA Directive; and (3) the Commission to prepare a report on the application of the EIA Directive in five years after its official publication.¹⁹³ Based on continuous exchange of information with the Member States and public consultations with other stakeholders, the Commission is responsible for proposing changes of the EIA Directive. The last change proposed by the Commission took place in 2014.

The 2014 amendment intended to simplify the rules for environmental impact assessment in the EU region and reduce unnecessary administrative burdens while keeping high level of environmental protection. It brings more attention to new challenges and threats (e.g. resource efficiency, climate change, protection of biodiversity etc.) that were not appropriately addressed in the previous version of the EIA Directive. It tries to address the major shortcomings of the EIA Directive that create incentives for problematic implementation on national level, e.g. the screening process which was criticized for leaving too much discretion for the Member State, overlapping assessment requirements under

193. See the Art. 11 of the EIA Directive.

other EU directives,¹⁹⁴ insufficient quality of the EIA process and the EIA report resulting thereof, lack of specific time frames creating uncertainty for businesses and other stakeholders participating in the EIA process or no obligation for assessing project alternatives.

Although the last amendment of the EIA Directive clarifies and refines several problematic parts of the EIA Directive, it is still being criticized for too much detail and for creating unnecessary administrative burdens rather than streamlining and lightening the EIA process. The EU Member States will have to implement the 2014 amendment by May 2017. The new “tightened” rules will sooner or later lead to new infringement procedures against the Member States who will not be able to transpose the amended EIA Directive into their national law properly.

The insufficient or incorrect implementation of the EIA Directive by the EU Member States constitutes the major problem and a cause for lower effectiveness of the EU environmental impact assessment. Despite the fact that the EIA Directive is in force over 25 years and that there is numerous case law of the European Court of Justice interpreting the EIA Directive, the official statistics from 2007 to 2014 show that the infringements in the area of environmental impact assessment make up around 10% of all newly opened environmental infringements each year.¹⁹⁵

Year	Total number of open env. infringements	Waste	Water	Impact assessment	Air	Nature	Other
2014	334	102	67	33	51	63	18
2013	353	112	80	29	44	64	24
2012	296	56	79	34	37	69	21
2011	339	76	80	43	35	76	29
2010	445	65	136	42	56	89	57
2009	451	86	90	50	72	92	61
2008	481	111	95	50	65	105	55
2007	479	93	74	57	83	121	51

194. Other impact assessment regimes are created under the Habitats Directive 92/43/EC, Directive 2001/42/EC on strategic environmental assessment or under the Directive 2010/75/EU on industrial emissions.

195. See *Legal Enforcement*, European Commission, <http://ec.europa.eu/environment/legal/law/statistics.htm> (last updated Mar. 25, 2015); see also *Legal Enforcement: Statistics on environmental infringements*, http://ec.europa.eu/environment/legal/law/pdf/statistics_sector.pdf.

The most significant and recurring problem consists in failures as to the screening process in which the Member States exercise a wide discretion to determine on a case-by-case basis and based on national thresholds or criteria whether an EIA is required for projects listed in the Annex II of the EIA Directive.¹⁹⁶ In too many cases, the Member States either let the projects with significant environmental impacts escape the assessment requirement (death by a thousand cuts approach), or projects with no significant impact are subjected to the impact assessment, unreasonably increasing not only the administrative burden, but also the project's cost.

The official figures presented by the Commission in 2012¹⁹⁷ show that the average number of environmental impact assessments conducted each year in the EU is between 15,000 and 26,000. Each year the average number of screenings ranges between 27,400 and 33,800 projects. The EU average duration of the EIA process is 11.6 months and the average costs borne by the developer due to environmental impact assessments are estimated to be € 41,000.¹⁹⁸ The main concerns presented by businesses are additional costs due to project delays and to legal disputes arising from the improper application of the EIA law.

The implementation of the EU environmental law is ensured by the Member States and currently presents the biggest challenge to EU environmental law.¹⁹⁹ Of course the implementation is difficult—environmental protection in the EU is already subject to extensive EU legislation, with the

196. See Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC). COM(2009) 378 final, p. 5.

197. See Commission Staff Working Document. Executive Summary of the Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. COM(2012) 628 final, p. 1.

198. *Id.*

199. See Markéta Whelanová, Presentation at Brussels: Implementation of EU Law in the Czech Legal Order – Methods and Problems, Jan. 30, 2009, lecture slides available at http://ec.europa.eu/dgs/legal_service/seminars/cz_whelanova_slides_en.pdf (explaining the challenges of implementing EU law and proposed methods for effectively doing so) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

exception of soil protection.²⁰⁰ Much of this legislation is long established.²⁰¹ Thus, the main challenge is timely and proper implementation on the national level.²⁰² As one the recent Commission report states:

Implementation has a cost. But the cost of non-compliance is very often much higher . . . The costs of not implementing current legislation are broadly estimated at around €50 billion a year. These relate not just to environmental but also to human health impacts. For example, 20% to 50% of the European population lives in areas where air quality breaches European limit values and the estimated annual costs in terms of health expenditure or days of work lost run to billions of Euros.²⁰³

The following chapter will describe the evolution of the Czech law on environmental impact assessment that was enacted in early 1990s to properly implement the EIA Directive. The following chapter will further analyze the difficulties with proper and timely implementation that led the Commission to initiate two infringement procedures for non-compliance of the Czech law with the EU law.

200. See EUROPEAN COMMISSION, *Soil*, EUROPEAN COMMISSION: ENVIRONMENT, Mar. 18, 2015, http://ec.europa.eu/environment/soil/index_en.htm (“Soil is not subject to a comprehensive and coherent set of rules in the Union.”).

201. See EUROPEAN COMMISSION, *Legal Enforcement*, EUROPEAN COMMISSION: ENVIRONMENT, Mar. 30, 2015, <http://ec.europa.eu/environment/legal/law/index.htm> (providing an overview of the complex and wide-reaching legislative measures regulating environmental law) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

202. See EUROPEAN COMMISSION, *Implementation*, EUROPEAN COMMISSION: ENVIRONMENT, Mar. 25, 2015, http://ec.europa.eu/environment/legal/implementation_en.htm (outlining the necessity for proper and timely implementation) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

203. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Improving the Delivery of Benefits from EU Environmental Measures: Building Confidence Through Better Knowledge and Responsiveness*, at 2, 3, 11 COM (2012) 095 final (July 3, 2012).

IV. Czech EIA Law

The Czech Republic adopted the EIA legislation in the early 1990s. In 1992, the first environmental impact assessment Act was adopted, Act No. 244/1992 Coll.²⁰⁴ This Act regulated both EIA and later also the SEA procedure. In 2001, a new act, Act No. 100/2001 Coll., was adopted in order to fulfill all the requirements set by the EIA Directive.²⁰⁵ Initially, that act regulated only the EIA procedure while Act No. 244/1992 Coll. contained the legal regulation of the SEA procedure. In May of 2004, the SEA procedure was integrated into Act No. 100/2001 Coll., which now regulates both EIA and SEA procedures.²⁰⁶ Act no. 244/1992 Coll. was abolished.²⁰⁷

A. EIA Act of 1992

After the implementation of the first Czechoslovakian democratic government in 1989, environmental protection became a top priority.²⁰⁸ Before the 1992 elections²⁰⁹ and the

204. See IMPLEMENTING STRATEGIC ENVIRONMENTAL ASSESSMENT, 193–96 (Michael Schmidt, et al., eds., 2006) (providing an overview of the evolution of Czech EIA and SEA law).

205. See EU Forum of Judges for the Environment Conference 2011, Warsaw Oct. 14–15, 2011, *Annual Country Report: Czech Republic*, 1 available at <http://www.eufje.org/images/docConf/war2011/CZ%20war2011.pdf> (explaining the implementation of the SEA directive in the Czech Republic) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

206. See BARRY DALAL-CLAYTON AND BARRY SADLER, STRATEGIC ENVIRONMENTAL ASSESSMENT: A SOURCEBOOK REFERENCE GUIDE TO INTERNATIONAL EXPERIENCE 194 (2005) (“In 2004, Czech EIA legislation was consolidated and amended as part of the transposition of the SEA Directive.”).

207. See Convention on Biological Diversity, *Sectoral Integration of Biodiversity in Czech Republic*, RESOURCE MOBILIZATION INFORMATION DIGEST, 4 (Feb. 2013) (explaining that the 2004 act “regulated the assessment of environmental impacts of concepts and abolished the valid Czech National Council Act No. 244/1992 Coll.”).

208. See Marián Čalfa, Program Declaration of the Czechoslovakian Federal Government at 5, Jun. 27, 1990–July 2, 1992, <http://www.vlada.cz/assets/clenove-vlady/historie-minulych-vlad/prehled-vlad-cr/1990-1992-csfr/marian-calfa-2/ppv-1990-1992-calfa2.pdf> (available in Czech only) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

209. See INTER-PARLIAMENTARY UNION, *Czechoslovakia: Elections Held in 1992*, PARLINE: CZECH REPUBLIC – SENATE 1992, http://www.ipu.org/parline-e/reports/arc/2084_92.htm (explaining that in June 1992, elections to the Czech and Slovak National Councils took place)

1993 split of Czechoslovakia, many important environmental laws were passed based on examples and inspiration from abroad and with substantial help of foreign experts.²¹⁰ For example, the Czech Act on Environment²¹¹ was modeled after the U.S. National Environmental Policy Act (NEPA) as an “environmental policy act” and was intended to serve as an “umbrella” environmental law that would define key terms and set basic principles and rules that shall be reflected in all implementing laws.²¹²

The federal government planned to introduce the umbrella Act on Environment to the Federal Assembly for approval at the end of 1990.²¹³ However, the government did not meet any of the deadlines set by the Federal Assembly.²¹⁴ Moreover, the governmental bill was being revised and supplemented by so many details that it eventually drowned in the disputes over jurisdictions between the Czech and

(on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

210. See Explanatory Memorandum, Bill No. 921 presented by a group of deputies. In Czech: Důvodová zpráva k návrhu poslanců Ondřeje Humla, Miloslava Soldáta, Vladimíra Savčinského a Petra Gandaloviče na vydání Zákona o životním prostředí.

211. Act No. 17/1992 Coll.,. In Czech: Zákon č. 17/1992 Sb., o životním prostředí.

212. See Joint Meeting of the House of the People and House of the Nations of the Federal Assembly of the Czech and Slovak Federal Republic, 19th Joint Meeting Report, <http://www.psp.cz/eknih/1990fs/slsn/stenprot/019schuz/s019005.htm> (available in Czech only). In Czech: Federální shromáždění České a Slovenské Federativní Republiky. Zpráva o 19. společné schůzi Sněmovny lidu a Směnovny národů. 1. den – úterý 3. 12. 1991, bod programu 3: Návrh zákona o životním prostředí (tisk 921) a návrh usnesení SL a SN (tisk 1062).

213. See Country Factsheet on National SCP Policies: the Czech Republic, EUROPEAN TOPIC CENTRE ON SUSTAINABLE CONSUMPTION AND PRODUCTION 4 (Jan. 11, 2010) available at http://scp.eionet.europa.eu/facts/factsheets_waste/fs_scp/pdf/CZ1 (explaining that the changes to environmental policy in the early 1990s were intended “to establish a comprehensive, transparent and consistent system of environmental legislation) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

214. See REGIONAL ENVIRONMENTAL CENTER FOR CENTRAL AND EASTERN EUROPE, *Czech Republic: Political, Economic and Social Impacts on Environmental Protection at the Spring of 1994*, STRATEGIC ENVIRONMENTAL ISSUES IN CENTRAL AND EASTERN EUROPE (Aug. 1994) (Vol. 2), <http://archive.rec.org/REC/Publications/StratIssues/FeeBased/Czech.html> (explaining that the deadlines for implementation were short) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

Slovak Republics.²¹⁵ In May 1991, a group of deputies presented their bill. It was quietly held up until December 1991 when it became clear that the federal government would not present the governmental bill.

The version of the bill presented by the deputies in December 1991 was based on a biocentric approach to environment; it introduced the concept of sustainable development, defined the key terms and principles of environmental protection, and set the obligations of natural and legal persons, including the liability for environmental harm.²¹⁶ Despite the fact that the Act on Environment was broadly supported, it became the subject of heated debates over whether it should include provisions on the environmental impact assessment.²¹⁷

One part of the political spectrum supported the idea of a brief, simple, and general umbrella law on environment, along with a separate act concerning environmental impact assessment. The other part of the political spectrum felt the need to introduce the basics of the environmental impact assessment already in the Act on Environment to make sure that at least some rules will be in place before more detailed legislation is passed. The main concern was that if the rules on environmental impact assessment were not passed quickly, Czechoslovakia would be flooded by outdated technologies that are not permitted in other countries due to strict EIA rules. The proponents of including the EIA provision in the Act on Environment also stressed the importance of prompt transposition of the EU law on environmental impact assessment (the EIA Directive) and of the United Nations Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context.²¹⁸ During debate in Federal Assembly concerning the

215. See *id.* (stating that the short deadlines for environmental compliance can prompt poorly thought-out policies to be adopted).

216. See Ladislav Miko, et al., *Environmental Enforcement in the Czech Republic: The EU Pre-Accession Phase*, Report from FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 117, 119–120 (Nov. 16–20, 1998) available at <http://www.inece.org/5thvol2/cizkova.pdf> (detailing the main problems in environmental enforcement) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

217. See *id.* at 118 (outlining the tensions involved with adopting environmental legislation).

218. See *Introduction to Espoo Convention*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (last visited Apr. 4, 2015), <http://www.unece.org/env/eia/eia.html> (explaining that the Espoo (EIA)

proposed Act on Environment, Zdeněk Masopust, deputy of the Federal Assembly from 1990 to 1992 stressed: “We shall regard this act not only as a way of dealing with our past, what I personally hold for necessary, but above all as an act of our, hopefully already European future”²¹⁹

The Act on Environment was passed on December 5, 1991, and published in the Collection of Laws of the Czech and Slovak Federal Republic in January 1992 under the number 17/1992.²²⁰ According to the explanatory memorandum associated with this law, the Act on Environment set a new philosophy and built a framework for a construction of modern environmental law.²²¹ As a reaction to concerns expressed during the debates in the Federal Assembly, the Act on Environment was approved with the provisions on domestic and transboundary environmental impact assessment and with a list of projects subject to the EIA requirement. Because the Act on Environment was a federal law, it anticipated that both national councils would pass the implementing laws.

The Czech National Council adopted the implementing law shortly after the Federal Assembly adopted the Act on Environment. It was presented as a governmental bill, which was debated in the Czech National Council and approved on April 2, 1992; it was promulgated in the Collection of Laws on April 15, 1992, and entered into force on July 1, 1992.²²² In scope, the Czech Act on the EIA was even more progressive than the EIA Directive. In the Article 1, par. 1, it declared the constructions and changes thereof, and that other activities and technologies listed in Annex I are subject to the

Convention “sets out the obligations of Parties to assess the environmental impact” of state activities at an early stage of the activity planning) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

219. Joint Meeting, *supra* note 213.

220. See ED BELLINGER, ENVIRONMENTAL ASSESSMENT IN COUNTRIES IN TRANSITION, 45–46 (2000) (highlighting the key provisions of Act No. 17/1992).

221. See “Preamble” Act No. 100/2001, Coll. This Act is still in force and clearly expresses this new philosophy. The laws enacted during the enthusiastic early 1990s, including the Act on Environment or the Act against Animal Torture contain the preambles. These preambles are not binding part of the law, but express the values and philosophy underlying a particular piece of legislation. Since 1993, none of the Czech laws contain a preamble.

222. Act No. 244/1992 Sb., on environmental impact assessment (*in Czech*: Zákon č. 244/1992 Sb., o posuzování vlivů na životní prostředí).

environmental impact assessment and development plans, programs, and products.

The explanatory memorandum accompanying the Czech Act on environmental impact assessment emphasized that the Act introduces the environmental impact assessment as an effective instrument of prevention successfully applied in developed countries since 1969.²²³ It also concluded that the existing Czechoslovakian legislation regarding construction activities or environmental protection did not explicitly require the environmental impact assessment. The adoption of the Act on environmental impact assessment was presented as a necessary step before Czechoslovakia could become a party to the Espoo Convention and a requirement for foreign financial support of environmental projects that was absolutely indispensable due to the economic crisis that hit Czechoslovakia in the early years of transition to market economy. The explanatory memorandum also mentions that the Czech environmental impact assessment law was inspired explicitly by the Austrian and Dutch laws with special regard to the Council Directive 85/337/EEC on environmental impact assessment (EIA Directive).²²⁴

Looking back at the first Czech law on environmental impact assessment from 1992, it is not hard to notice that the basics of the procedural design remained the same. The Act on environmental impact assessment contained a list of projects subject to the EIA requirement. The list was divided into two Annexes (1 and 2) based on the competent authority.²²⁵ Everyone who intended to construct a building, conduct an activity, or use a technology listed in Annex 1 or 2 of the Act on environmental impact assessment had to submit a notification and EIA documentation to the competent authority, which separate from the licensing authority.²²⁶ The EIA documentation was to be reviewed by an independent

223. See Explanatory Memorandum Accompanying the Governmental Proposal of the Act on Environmental Impact Assessment, http://www.psp.cz/eknih/1990cnr/tisky/t0658_03.htm (available in Czech only) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

224. Council Directive 85/337, 1985 (EC).

225. See Annex 1–2, Act No. 17/1992, Coll. (explaining that, for projects listed in the Annex 1, the competent authority was the Ministry of Environment, and for projects listed in the Annex 2 the competent authority was the district office).

226. See Annex 1–2, Act No. 17/1992, Coll. (laying out the process for complying with the Act).

expert chosen by the competent authority. After receiving the review report, the competent authority had to hold a public hearing and, afterwards, issue an environmental impact statement (EIS). The authority responsible for licensing the project subject to EIA could not grant the license without considering the EIS.

The Act on environmental impact assessment allowed the public to inspect the EIA documentation submitted by the developer and to submit written comments on such documentation.²²⁷ The members of public could also attend a public hearing on the issue.²²⁸ The Act on environmental impact assessment specifically mentioned a citizens' initiative and a civic association as formalized groups of the public who could also submit their written comments regarding the EIA documentation.²²⁹ Based on their participation in the EIA process, the civic association had a standing in the subsequent licensing process.²³⁰

B. EIA Act of 2001

Since 1998, the Czech government started to prepare a new EIA Act that would reflect major changes of the EIA Directive as a result of its amendment in 1997.²³¹ The original version of the governmental bill from January 2000 was presented to the Parliament in spring 2000. It intended to transpose the amended EIA Directive and also included provisions on strategic impact assessment of plans and programs because, at that time, the EU was preparing the SEA Directive. However in the legislative process conducted by two houses of the Czech Parliament the original governmental bill was changed significantly.²³² The final version that was passed by the Parliament on February 20,

227. Act No. 17/1992, Coll., Art. 7, Par. 3.

228. Act No. 17/1992, Coll., Art. 10.

229. See Act No. 17/1992, Coll., Art. 8, Par. 1. (stating, at minimum, 500 members of public older than 18 years could form a citizens' initiative). The citizens' initiative was represented by a proxy who could submit comments on the EIA documentation and attend the public hearing on behalf of the citizens' initiative.

230. Act No. 17/1992, Coll., Art. 8, Par. 5.

231. See Dvořák, Libor, Posuzování vlivů koncepcí na životní prostředí. In *České právo životního prostředí* Vol. 27, No. 1/2010, p. 29.

232. The two houses of the Czech Parliament are: the House of Deputies and the Senate.

2001, and promulgated in March 2001 only conserved the outdated features of the previous EIA Act of 1992.

The new EIA Act basically copied the regime that only allowed public participation at the end of the EIA procedure and had short deadlines and other obstacles that rendered the public's participation ineffective and enhanced the risk of subsequent litigation.²³³ It was also criticized for being incompatible with the EIA Directive and with the Aarhus Convention which the Czech Republic already signed in 1998.²³⁴

The provisions on strategic impact assessment were left out with the reasoning that the SEA Directive had not yet been adopted, despite the fact that the final text of the SEA Directive was already known. The SEA Directive was adopted on June 27, 2001, three months later than the Czech EIA Act of 2001, and entered into force on July 21, 2001. Instead of being ahead with the implementation of the EU law, the Czech politicians decided to conserve the outdated, very brief version of the strategic impact assessment contained in the EIA Act of 1992²³⁵ and be forced to transpose the SEA Directive by the latest possible date, which was May 1, 2004, when the Czech Republic officially joined the EU.

In 2004, the Act of 1992 was abolished. Since then, the EIA Act of 2001 has regulated both the EIA and SEA. As indicated above, the whole design of the EIA procedure and its relation to licensing procedures was copied from the EIA Act of 1992 without ever trying to come up with a more integrated version of decision-making that would be more cost-efficient and less time-consuming for all the stakeholders and public authorities. The EIA Directive does not specifically dictate how the EIA fits into the national system of licensing projects; it gives the Member States a choice. According to the Art. 2, par. 2 and 2a of the EIA Directive, the environmental impact assessment may be integrated into the existing licensing

233. See, e.g., Společnost pro trvale udržitelný rozvoj. Stanovisko č. 91 k projednávání zákona EIA. Available in Czech only at <http://www.stuz.cz/Zpravodaje/Zpravodaj011/75.htm>.

234. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998).

235. After the project impact assessment was moved to the new EIA Act of 2001 only curtailed version of the EIA Act of 1992 remained in force (in particular only Art. 1, 14, 23 and 24). See Dvořák, Libor. Posuzování vlivů koncepcí na životní prostředí. In *České právo životního prostředí* Vol. 27, No. 1/2010, p. 30.

procedures or may be designed as a separate procedure which shall then be carried out before the license is granted.

Since the first EIA Act of 1992 the Czech environmental impact assessment is established as a separate procedural step that has to take place before the administrative authorities grant a license for a specific project. The main disease of the Czech licensing system is that it is overly complicated. It has always been designed in a piecemeal fashion by adding more and more administrative steps to be taken before the project might actually be carried out. In this manner, the Czech Republic implemented all the relevant EU environmental directives, including the EIA Directive.

According to the EIA Act of 2001, the EIA procedure encompasses six stages:

1. Project notification, which is submitted by the developer to the competent authority with content specified in Annex 3 of the EIA Act and disclosed to the public, who is allowed to comment thereon within set time limit;
2. Screening and/or scoping;
3. EIA documentation with contents specified in Annex 4 of the EIA Act, which is elaborated by an authorized expert paid by the developer, submitted to the competent authority for review, and disclosed to the public, who is allowed to comment thereon within set time limit;
4. Expert review of the EIA Documentation, which is elaborated by an independent expert chosen by the competent authority. The expert review is also disclosed to the public and the public can comment on it within a set time limit;
5. Public hearing, which only takes place if the competent authority receives at least one justified written comment criticizing the EIA documentation;
6. Environmental Impact Statement (EIS), which is elaborated by the competent authority based on the EIA documentation, its expert review, and based on the result of the public hearing, if applicable.²³⁶

236. See Veronika Tomoszková, *Environmental Impact Assessment in the Czech Republic*, in IMPLEMENTATION AND ENFORCEMENT OF EU ENVIRONMENTAL LAW IN THE VISEGRAD COUNTRIES, Palacky University in

Based on the Czech law, the Environmental Impact Statement (EIS) resulting from the EIA procedure does not constitute a separate administrative decision that may be appealed or separately challenged before court. It serves as a mere background material for decision-making of licensing authority. Until the end of March 2015, the EIS was not binding as to the licensing authority, which had to consider the EIS, but could deviate from it. Based on the newest amendment of the EIA Act, the EIS will be binding for decision-making of the licensing authority that will have to respect it. This means if the EIS is negative, stating that there will be too many significant negative impacts on the environment, the licensing authority will not be allowed to grant the license.

The scope of the environmental impact assessment is determined by the list of the projects subject to EIS requirement automatically (Category I projects) or subject to the screening that determines whether the EIS for that particular project is required (Category II projects).²³⁷ Moreover, an impact assessment is obligatory for changes of the projects listed in Category I if the change, by its own capacity or extent, reaches or exceeds the limits specified in for that specific project in Annex 1. The changes of projects in Category I that do not reach the limits specified in Annex 1 are subject to the screening procedure if their capacity or extent is significantly increased or if the technologies, operations control, or usage changes significantly.²³⁸

Projects listed in Category II are subject to screening procedure where the competent authority determines whether the project needs an EIS.²³⁹ In reality, there are also many projects that do not reach the limits specified in Annex 1 but might have significant impact on human health or the environment, especially in connection with already existing and operating projects. According to Art. 4 par. 1(d) of the EIA Act of 2001, if the competent authority determines so in pre-screening, then these so-called under-limit projects are

Olomouc 188-94 (2014) (giving more details on the individual stages of the Czech EIA procedure).

237. See 100/2001, Coll., Annex 1 (showing the list of projects of the EIA Act of 2001; it transposes the Annex I and II of the EIA Directive).

238. See Tomoszková, *supra* note 236, at 185 (2014).

239. See 100/2001 § 4(b) (explaining a fact-finding procedure pursuant to § 7 is used to determine the need for an EIA under Category II).

subject to screening where it will be determined whether they require the EIS or not.²⁴⁰

The most contested and criticized part of the EIA Act of 2001 is the provisions on public participation. The criticism regarding public participation opportunities in the EIA procedure and in subsequent licensing procedures was not new; it was heard since the mid-1990s, after some initial experience with the EIA Act of 1992 in practice.²⁴¹

Leading experts on environmental policy and law, including the first federal minister for environment, Josef Vavroušek, complained in 1994 that the poor design of the EIA Act of 1992 and the lack of information on the importance and essence of EIA both contribute to the overall unpreparedness of those who participate in the EIA. As a result, the investors or developers view the EIA as an obstructing formality. Competent authorities lack sufficient skills and knowledge to manage EIA effectively and by proceeding in an overly bureaucratic manner they over-complicate it. Experts elaborating EIA documentation and reviews see the EIA merely as an opportunity for profit.²⁴² Municipalities more often stand up for the interest of the investors and developers than for the local communities, and the local communities remain rather passive.²⁴³ The lack of sufficient and comprehensible information on projects contributed to the overall agony of the local communities affected by the investor's project. Under these circumstances, the environmental non-governmental organizations (NGOs) were the last ones with enough courage to stand up for the

240. See *id.* at 186.

241. See Branis, Martin, *The environmental impact assessment act in the Czech Republic: Origins, introduction, and implementation issues*, 14 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 195 (stating that public participation is limited, even though it is recognized as an important part of the Act).

242. See T.C. Telfer et al., *Review of environmental impact assessment and monitoring in aquaculture in Europe and North America*, UN FOOD AND AGRICULTURE ORGANIZATION, 285, 367 (2009) available at <http://www.fao.org/3/a-i0970e/i0970e01d.pdf> ("In addition, even where there is a mechanism for implementation of the EIA procedure, this is over complicated and often too bureaucratic in many countries.") (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

243. Josef Vavroušek, "Stanovisko č. 22 k proceduře EIA," SOCIETY FOR SUSTAINABLE LIFE (Společnost pro trvale udržitelný život), Jan. 14, 1994, available at http://www.stuz.cz/index.php?option=com_content&view=article&id=33:stanovisko-c-22-k-procedure-eia&catid=33&Itemid=33 (available in Czech only).

environment. No matter how noble the intentions of those who drafted the early Czechoslovakian environmental laws were, the public affected by the projects and the environmental NGOs that stood up for them, have always been treated as an irreconcilable opposition and never as a valuable partner in decision-making.

Contrary to the requirements of the Aarhus Convention and the EIA Directive, the Czech EIA Acts never included a definition of the “public concerned,”²⁴⁴ causing lack of uniform practices and restrictive interpretation of the scope of those who are entitled to standing and a right to challenge decisions of competent authorities. Lack of a precise definition also paradoxically led to the situation in which natural persons, as members of the concerned public who would apply for standing in subsequent licensing procedures, were left out with no standing right.²⁴⁵

According to the EIA Act of 2001, public participation during the EIA procedure takes place in form of submitting comments. Anyone is allowed to submit his or her comment to the project notification, and to the EIA documentation and its expert review, if the two latter stages take place. As the EIA procedure is separate from the licensing procedure, the public participation requirements of the EIA Directive and the Aarhus Convention shall stretch out to the licensing taking place after the environmental impact assessment.²⁴⁶

The EIA Act of 2001 anticipates public participation in subsequent licensing procedure with the ability to grant NGOs and affected municipalities standing in such

244. See UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Art. 2, Par. 5 (stating that the “public concerned” means “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”).

245. See Michal Sobotka and Petra Humlíčková, *Rozšíření účasti veřejnosti (?) aneb několik poznámek k jedné zbytečné novele zákona o posuzování vlivů na životní prostředí*, ČESKÉ PRÁVO ŽIVOTNÍHO PROSTŘEDÍ, 96, 2010 (Vol. 27, No. 1/2010); see also Z Adameová, *Účast veřejnosti v procesu EIA – případ České republiky*, ČESKÉ PRÁVO ŽIVOTNÍHO PROSTŘEDÍ 9, 2011 (Vol. 30, No. 2).

246. See Ekologický právní servis. *Analýza transpozice a implementace Směrnice ES o posuzování vlivů na životní prostředí (2006)* available at http://frankbold.org/sites/default/files/publikace/smernice_eia_v_cr_1.pdf (available in Czech only).

proceedings and, since 2009, the opportunity to access the courts.²⁴⁷ Based on Art. 23 pt. 9 of the Act on EIA/SEA, a local office of two types of NGOs,²⁴⁸ must focus on protection of public interests pursuant to the special laws,²⁴⁹ or municipality affected by the investor's project have standing in subsequent licensing procedure if the following conditions are cumulatively met:

1. The NGO has submitted a written comment regarding the project notification, EIA documentation or its expert review within the set time limits,
2. the competent authority stated in the EIS that the opinion of that particular NGO is fully or at least partially included therein, and
3. the licensing authority has not decided that the interests protected by the NGO in question are not affected in the permitting procedure.²⁵⁰

The requirement of previous activity in the EIA procedure complies with the EIA Directive. The other two requirements, however, are too restrictive and leave too much discretion to public authorities in determining who is granted standing in licensing procedure. Since the accession of the Czech Republic to the EU, the Commission has criticized the Czech law and practice of public authorities regarding public participation. In 2006 it launched the first infringement proceeding against Czech Republic for failure to comply with the requirements of the EIA Directive, namely of then Art. 10a.²⁵¹

247. See Act No. 100/2001 Coll. § 9–10, available at <http://faolex.fao.org/docs/html/cze74060.htm> (describing opportunities for review of decisions and setting timelines for opinions and decisions).

248. See *id.* at § 23 (describing when a civic association may become part of an action). The EIA Act specifically mentions a civic association (občanské sdružení) and a generally beneficial society (obecně prospěšná společnost) as subjects entitled to standing in subsequent licensing process.

249. See Act No. 114/1992 Coll. (dealing with Nature and Landscape Protection); see also Act No. 20/1987 Coll. (discussing State Cultural Monuments Care).

250. Veronika Tomoszková, *Environmental Impact Assessment in the Czech Republic*, in VERONIKA TOMOSZKOVÁ ET AL., IMPLEMENTATION AND ENFORCEMENT OF EU ENVIRONMENTAL LAW IN THE VISEGRAD COUNTRIES, 197 (2014).

251. See Part IV(C) *infra* (describing the infringement proceedings brought against the Czech Republic in response to failure to implement the EIA directive).

*B. Czech EIA Act Under Fire? (C-378/09,
ACCC/2010/50 and infringement no. 2013/2048)*

Article 10a of the original version of the EIA Directive²⁵² requires that the relevant law in the Member States ensures that the:

members of the public concerned (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive.²⁵³

The EIA Directive explicitly states that a sufficient interest and impairment of right shall be defined by the Member States consistently with the objective of giving the public concerned wide access to justice.²⁵⁴ NGOs meeting the national requirements shall be automatically deemed to have a sufficient interest and rights capable of being impaired.²⁵⁵ The EIA Directive also requires that the review procedure shall be “fair, equitable, timely and not prohibitively expensive.”²⁵⁶

On July 3, 2006 the Commission sent its letter of formal notice concerning an alleged infringement of the Art. 10a par. 1-3 of the EIA Directive and gave the Czech Republic

252. The former Art. 10a of the EIA Directive before its codification in 2011 is now Art. 11 of the codified EIA Directive (Directive no. 2011/92/EU). The wording of the former Art. 10a and of the current Art. 11 are the same.

253. Council Directive 2011/92, art. 11, ¶3.

254. *See id.* (describing the rights of the member states in relation to implementing the directive).

255. *See id.* (explain the standing of NGOs within the directive and their rights according to it).

256. *See id.* ¶ 4 (including the possibility of administrative review and maintaining exhaustion requirements before judicial review procedures).

two months to respond.²⁵⁷ The Czech Republic responded to the Commission's letter of formal notice by admitting its failure and promised to amend the EIA Act.²⁵⁸ However the amendment was not passed, so on June 29, 2007 the Commission moved to the next stage of the infringement procedure and issued the reasoned opinion. The first bill proposing amendment of the EIA Act was presented to the Czech Parliament in September 2008, but it was declined in the third reading in spring 2009. The Czech Republic informed the Commission and tried to explain why the amendment of the EIA Act was not passed.

In its letter from March 10, 2009 the Czech Republic reassured the Commission that new bill will be presented to the Parliament and hopefully passed soon.²⁵⁹ However then on March 24, 2009 the Czech Parliament voted down the government and political crisis froze all attempts to deal with the infringement. After the last letter from the Czech Republic sent in March 2009 the Commission did not receive any update, so on September 23, 2009 it filed an action for failure of the Czech Republic to fulfil its obligations as an EU Member State to the European Court of Justice.

In the Czech Republic, parliamentary elections were about to be held in October 2009. Under time pressure of the upcoming elections, the third bill proposing the amendment of the EIA Act was presented to the House of Deputies. During its last meeting before the elections, the Czech Parliament finally approved the bill. Unexpectedly, the President of the Czech Republic (Václav Klaus at that time), who signs all the bills that are passed by the Parliament, vetoed the bill amending the EIA Act, despite having knowledge of the action filed against the Czech Republic. The House of Deputies

257. See Press Release, European Comm'n, Environmental Impact Assessment: Comm'n Takes Legal Action to Improve Implementation in 10 Member States (July 3, 2006) (describing the reason for the letter to the Czech Republic as improper rules restricting the public's right to go to court to assert right to participate in EIA procedures).

258. See *Czech Republic: New EIA legislation may slow down the building-permit procedure*, SCHOENHERR, available at <http://www.schoenherr.eu/knowledge/knowledge-detail/czech-republic-new-eia-legislation-may-slow-down-the-building-permit-procedure/> (stating the Czech Republic's response) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

259. See Stejskal, Vojtěch. Rozsudek Soudního dvora EU proti České Republice ve věci EIA. In *České právo životního prostředí*. Vol. 27, No. 1/2010, p. 124.

overturned the President's veto by 117 votes.²⁶⁰ So the bill amending the EIA Act was finally passed and on December 11, 2009 promulgated under no. 436/2009 Coll.²⁶¹

Based on the established case law, the European Court of Justice (ECJ) cannot regard any changes subsequent to time period laid down in the Commission's reasoned opinion.²⁶² Therefore, after the action was filed with the ECJ, the adoption of the EIA Act amendment was inconsequential and the ECJ had to rule against the Czech Republic. In its judgment from June 10, 2010 the ECJ ruled:

by failing to adopt within the time-limit prescribed the laws, regulations and administrative provisions necessary to comply with the Art. 10a par. 1-3 of the Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, the Czech Republic has failed to fulfill its obligations under that directive²⁶³

and therefore ordered the Czech Republic to pay the costs.²⁶⁴

In the meantime the EIA Act amendment aiming to set aside the shortcomings of public participation and access to

260. Overturning the President's veto according to the Czech Constitution requires an absolute majority of votes by 200 Deputies, i.e. at least 101 votes. See Art. 50 pt. 2 of the Constitution of the Czech Republic.

261. See *Overview of Legislative Changes in November and December 2009*, NWD LEGAL, 3–4, available at http://www.nwd-legal.com/data/documents/_135.pdf (giving an overview of 436/2009) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

262. See, e.g., Case C-111/00 Commission v. Austria, 2001 I-07555 (“[T]he question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, . . . the Court may not take account of any subsequent changes.”); see also Case C-23/05 Commission v. Luxembourg, 2005 I-9535 (stating it is settled law that the Court must consider the Member State's situation as it was at the end of the period and may not consider changes made after that time).

263. Case C-378/09, Comm'n v. the Czech Republic, 2010 E.C.R. I-00078.

264. See *id.* (providing a resolution for the Czech Republic's infringement).

justice regarding the EIA and subsequent licensing procedures entered into force.²⁶⁵ From the moment the amendment was passed the experts on environmental and administrative law criticized the language of the law. Experts believed it would not set aside any of the deficiencies that led to the condemning judgment by the ECJ. Experts predicted that the Commission would go after the Czech Republic again.²⁶⁶ As predicted²⁶⁷ the Commission initiated a “second round” of infringement procedure according to the Art. 260 TFEU.²⁶⁸ In November 2012 the “second round” proceedings were stopped due to the Commission’s plans to initiate new, “broader” infringement procedure against the Czech Republic regarding the incorrect transposition of the EIA Directive. The “second round” infringement proceedings are limited by the scope of the action brought by Commission in the “first round”. If the Commission continued it could only contest the non-

265. See Ceske Noviny, *Czech Republic: EIA Law Now Complies with the EU*, ESMERCK, (Jan. 23, 2012) (describing the changes made to the EIA law and the new provisions for access to justice, while also commenting on he hopes that the new law would end the four year struggle with the European Commission).

266. See Press Release, European Comm’n, Env’t: Commission Asks Czech Republic to Comply with Ruling on Environmental Impact Assessments (Nov. 24, 2010) (expressing doubts as to the actual implementation of the directive despite the ruling of the European Court of Justice).

267. See Sobotka, Michal; Humlíčková, Petra. Rozšíření účasti veřejnosti (?) aneb několik poznámek k jedné zbytečné novele zákona a posuzování vlivů na životní prostředí. In *České právo životního prostředí*. Vol. 27, No. 1/2010. p. 94-98. Stejskal, V. Rozsudek Soudního dvora EU proti České Republice ve věci EIA. In *České právo životního prostředí*, Vol. 27, No. 1/2010, 125 available at http://www.cspzp.com/dokumenty/casopis/cislo_30.pdf.

268. See Martin Hedemann-Robinson, ENFORCEMENT OF EUROPEAN ENVIRONMENTAL LAW. LEGAL ISSUES AND CHALLENGES, ROUTLEDGE-CAVENDISH 27-205 (2007); Pål Wennerås, THE ENFORCEMENT OF EC ENVIRONMENTAL LAW 251–308 (Oxford University Press, 2007); Jan H. Jans & Hans H. B. Vedder, EUROPEAN ENVIRONMENTAL LAW: AFTER LISBON, 170–78 (4th ed., Europa Law Publishing, 2012); Ludwig Krämer, EU ENVIRONMENTAL LAW 406–10 (7th ed., Sweet & Maxwell, 2012). The infringement proceedings can take place in two litigation rounds. The first round laid down in the Art. 258 TFEU results in the judgment of the ECJ in which it determines whether and in what extent the Member State in question had failed to fulfill its obligations under the TFEU. The Member State is then ordered to comply with the judgment of the ECJ. If it fails to do so, the Commission may according to the Art. 260 TFEU bring the matter back to the ECJ and initiate the second round “infringement proceeding in which the ECJ may impose the financial sanctions. More on the infringement proceedings based on the TFEU.

compliance with the Art. 10a of the EIA Directive and nothing else.

The shortcomings of the Czech EIA Act regarding the public participation and access to justice were reiterated in June 2012 by the Aarhus Convention Compliance Committee in its findings and recommendations with regard to communication ACCC/2010/50.²⁶⁹ Based on the communication from one of the Czech environmental NGOs the Aarhus Convention Compliance Committee found *inter alia* that the Czech EIA Act fails to provide for effective public participation during the whole decision-making process, to ensure that the outcome of the public participation in the EIA is duly taken into account in the subsequent licensing procedures, to ensure that all the members of public concerned have an access to review procedures, and fails to ensure that the NGOs meeting the requirements for being regarded as public concerned can seek review not only on procedural, but also on substantial grounds.²⁷⁰

On April 25, 2013 the Commission launched the new infringement action (no. 2013/2048) against the Czech Republic due to incorrect transposition of the Art. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 13 and Annexes I, II, III and IV of the EIA Directive in the Czech law. In its formal notice, the Commission criticized the entire design of the Czech EIA procedure. The Commission emphasized, in particular, that the regulation of subsequent licensing procedures did not reflect the requirements of the EIA Directive. This was despite the fact that the EIA Directive requirements allow flexible licensing procedure if the Member State has chosen to introduce a separate model of the EIA procedure.²⁷¹ In

269. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n Economic Comm'n for Europe, Compliance Comm., *Findings and Recommendations with Regard to Communication ACC/C/2010/50 Concerning Compliance by the Czech Republic*, ¶ 1-12, U.N. Doc. ECE/MP.PP/c.1/2012/11 (Oct. 2, 2012) (outlining the basis for the complaint and the allegations therein).

270. See *id.* ¶ 89-90 (explaining the Czech Republic's shortcomings in meeting the requirements and offering recommendations on procedures to amend the failures).

271. See Explanatory Memorandum to the Bill proposing amendment of the EIA Act elaborated by the Czech Ministry for Environment. In Czech: *Důvodová zpráva k návrhu zákona, kterým se mění zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí a o změně některých souvisejících zákonů (zákon o posuzování vlivů na životní prostředí), ve znění pozdějších předpisů, a další související zákony.*

particular the Commission criticized the most the following features of the Czech EIA Act:

- The outcomes of the EIA procedures are not binding in its content for the subsequent licensing process.
- After the EIA of a project is concluded the project the Czech law allows for substantial changes of project during the subsequent licensing procedures rendering the result of the EIA ineffective.
- There are still insufficient guarantees for public participation in the subsequent licensing procedures and for timely and efficient access to justice for members of public concerned.²⁷²

The Commission asked the Czech Republic to redress all the shortcomings mentioned in its formal notice from April 2013 by the end of 2014. All the legislative changes had to be in force by January 1, 2015 otherwise the Commission would proceed to the next stage of the infringement procedure, i.e. to a reasoned opinion. Issuing a reasoned opinion in this matter would have serious consequences for the Czech Republic because the Commission indicated that it would stop the access of the Czech Republic to the money from EU funds not only for future project, but also for the projects in progress. Besides that the Czech Republic could also face financial sanctions for non-compliance of the Czech EIA law with the EIA Directive. The financial sanctions could amount € 2 million (lump sum) and a penalty payment up to € 10.000 per day.²⁷³ Only under such threatening circumstances did the Czech politicians finally state that complying with the requirements of the EIA Directive was the Czech Republic's highest priority.

C. New Amendment of the Czech EIA Law: Major Problems Finally Addressed?

On 3 September 2014 the Czech government approved the bill proposing amendment of the EIA Act and other related laws prepared by the Ministry for Environment in cooperation with other ministries.²⁷⁴ The bill was then

272. *Id.* at 2.

273. *Id.* at 5.

274. See Esmerck, *Czech Republic: Ministry Prepares Law Amendment on EIA*, ESMERCK, (May 6, 2014) (explaining the legislature's adoption of an amendment to the Czech EIA law to be in compliance with

presented to the House of Deputies and afterwards to the Senate. Both of the houses of Parliament pushed through some changes of the bill. Finally on February 10, 2015, the House of Deputies passed the bill by 104 votes from the 168 deputies present. After signature by the President and the Prime Minister the new law was promulgated under no. 39/2015 in the Collection of Laws (*Sbírka zákonů*). The amendment came into force on April 1, 2015.²⁷⁵

The amendment brings significant changes in an attempt to bring the Czech EIA Act in compliance with the EIA Directive. After the changes, however, the resulting amendment has also created several complications not only for public participation, but also to the licensing system.²⁷⁶ It is therefore questionable whether it will in effect remedy the shortcomings criticized by the Commission.

From perspective of this paper, it is interesting to look at the recording of debates in both of the houses of the Czech Parliament when the Czech political representation discussed the EIA amendment. The bill was introduced by the Minister for Environment who himself stated that the bill was prepared solely to promptly respond to the requirements of the EU Commission. The EU Commission had lost its patience with the Czech Republic and threatened to block EU funds unless the Czech Republic brought its EIA law in compliance with the EIA Directive. The Minister for Environment also assured the Senate that the amendment brought only temporary changes; the government planned to prepare a complex conceptual change of project licensing that would streamline the existing multilayer decision-making into single licensing procedure.

The main changes that came into force on April 1, 2015 are as follows:

The environmental impact statement (EIS) as a result of the EIA procedure will be binding in its content for the licensing authority deciding in the subsequent proceedings whether to grant a permit or not.

the EU directive) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

275. See *id.* (stating the effective date as April 1, 2015).

276. See Esmerck, *Czech Republic: New EIA Law Perceived Critically*, ESMECK, (Dec. 15, 2014) (explaining the construction industry's discontent with the requirements of the new law) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

The projects will require the so-called coherence stamp. At least 30 days prior to submitting an application for license (or permit) the applicant has to submit the project documentation which will be part of the license application to the EIA authority who will certify that the project documentation is in line with the EIS and that the project has not significantly changed since the EIS was issued. If the EIA authority finds out that the project has changed it will issue a negative statement, which will block issuing the license.

The EIA Act explicitly says that the licensing authority has to take into account the EIA documentation and eventually also the public comments.

There is finally a definition of public concerned. The Art. 3 letter i) of the amended EIA Act defines the public concerned as (1) a person whose rights or duties could be impaired by licensing the project, or (2) non-profit entity whose main purpose of activities as defined in the statutes is protection of environment or public health and which exists at least three years prior to licensing of the project or which is supported by at least 200 people. Members of public concerned have a standing in the subsequent licensing procedure.

The amended EIA Act explicitly mentions that the members of public concerned may challenge procedural and substantive legality of the project license in court proceedings. Without a need to file a motion the court will always have to consider granting a suspensory effect to the action filed by the members of public concerned. The governmental bill proposing amendment of the EIA Act originally included a provision on automatic suspensory effect of the action filed by public concerned. This was changed during legislative process. The court will grant the suspensory effect only if there is a risk that carrying out the project will lead to serious harm on environment. The critics of this provision rightly point out that without any motion filed, the court will have no evidence as to whether there is a risk of environmental harm so it will be hard to judge rightly whether to grant the suspensory effect or not. Therefore the provision on suspensory effect may not be that effective as originally intended.

The licensing procedures are opened to wide public. The amended EIA Act sets what documents and information regarding the subsequent licensing procedure must be disclosed. Members of wide public do not have a standing in licensing procedure unless they qualify as public concerned. The members of wide public may lodge their comments on

documents and information disclosed by the licensing authority.

Despite the fact that among the EU Member States the Czech Republic is a straggler when it comes to the implementation of EU environmental policy and law, the Czech politicians dared to say publicly when debating over the EIA Act amendment that “*we are again unnecessarily too strict*” and that “*it is not necessary to set stricter rules than the EU commands. We do not have to be more papal than the Pope, as it is usual here in the Czech Republic . . .*”²⁷⁷ Czech politicians also warned openly that the amendment gives the environmental associations and environmental activists too much power over the fate of various “strategic” projects. The concern being that the amendment will allow activists to lodge frivolous court petitions. Some politicians do not even hesitate to label the environmental NGOs as “eco-terrorists, a special brand of terrorists who block important projects, e.g. construction of new highways and by doing so cause damages worth millions CZK and are responsible for deaths of those who died in car accidents due to lack of quality infrastructure.”²⁷⁸ Such a resistance against doing anything above the EU environmental requirements and ignorance of democratic values shows that the Czech democracy and politics are still very immature.

VIII. Conclusion

The environmental impact assessment is globally recognized to be one of the most important tools for integrating environmental considerations into decision-making and by doing that it helps to prevent environmental harm and contributes to sustainable development.²⁷⁹ Inherently the environmental impact assessment requires the participation of all stakeholders, including citizens, local

277. See, e.g., Speeches of the Czech senators Pavel Eybert and Petr Gawlas during Senate debates regarding the amendment of the EIA Act in Protocol from the 5. 1st day of meeting of the Senate (Jan. 14, 2015). *available at* <http://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=74955> (Czech only).

278. *Id.*; see also speeches of Pavel Eybert, Petr Šilar and Jaroslav Kubera.

279. See *supra* Part I (explaining the history and importance of EIAs and their high regard among nations).

communities and non-governmental organizations.²⁸⁰ The extent to which the public is allowed to participate in decision-making and the law enforcement regarding environmental protection is an important democratic indicator. In the countries with strong post-Communist culture, the implementation of public participation standards, including access to information and legal remedies, proves to be the hardest part.

History matters, but can forty years of experiencing the Communist regime's influence on the country's democratic performance so heavily that no other historical experience matters?²⁸¹ After the change of regime in 1989 the Czech Republic experienced a couple of enthusiastic years full of determination to reconnect with its pride of being once the most developed part of the Austrian-Hungarian Empire and living in a prosperous democracy in the inter-war period.²⁸² During a short wave of enlightened law drafting, many important environmental laws were adopted and the ambition to be a leader in environmental policymaking was nurtured, e.g. by initiating process Environment for Europe that led to the adoption of the UNECE Convention on the Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).²⁸³

Soon after 1989 the enthusiasm was replaced by a culture of constant discontent and blaming others for the hardship of transformation despite the fact that there was a substantial foreign financial and technical support. The high hopes for setting an example in environmental protection were struck down by a pragmatic politics oriented towards economic growth. After June 1992 the environmental protection was no longer a number one priority of the Czech political representation, but the importance of environmental protection for the EU accession proved to serve as a stabilizing factor guaranteeing that the Czechs will have to meet at least the minimum requirements set by the EU. The changes of existing laws and adoption of new ones was often too fast and uncritical transplantation without sufficient time to absorb

280. *Id.*

281. *See supra* Part II (providing a background of the Czech Republic's political history).

282. *See supra* Part IV (describing the Czech Republic's adoption of E.U. directives regarding EIA law and other environmental measures).

283. *Id.*

the changes and gain support from all stakeholders. The Czech governments have tended to interpret the 'minimum' requirements in their own way and instead of exercising greater effort to implement the EU law correctly they have kept blaming the EU for redundant administrative burdens and costly changes of law.

The story of Czech environmental impact assessment law, especially the part concerning public participation clearly demonstrates that the Czech democracy is still rather immature and will need more time and effort to overcome the old Communist-regime habits that project themselves into disrespect for law, ignorance of citizens' view and lack of constructive communication between public authorities, businesses and citizens.