

The progress report concerning the findings and recommendations of the Aarhus Convention Compliance Committee with regard to the case ACCC/2009/41/Slovakia

At its thirtieth meeting, held on 14 – 17 December 2010 in Geneva, the Aarhus Convention Compliance Committee (hereinafter referred to as „Compliance Committee“) concluded the case ACCC/2009/41/Slovakia, concerning public participation in decision-making process for the construction of the Mochovce Nuclear Power Plant (hereinafter referred to as „Mochovce NPP“) and endorsed the findings and recommendations which were sent by the letter of 13 January 2011 to the Slovak Republic through the Slovak National Focal Point for the Aarhus Convention.

The fourth session of the Meeting of the Parties to the Aarhus Convention, acting under paragraph 37 of the annex to its decision I/7 on the review of compliance, taking note of the report of the Compliance Committee and the corresponding addendum (ECE/MP.PP/2011/11 and Add.3) with regard to a case concerning public participation in the decision-making for the construction of the Mochovce NPP – ACCC/2009/41/Slovakia:

1. Endorsed the findings and recommendations of the Compliance Committee that the Party concerned, the Slovak Republic, by failing to provide for early and effective public participation in the decision-making leading to the decisions by the Slovak Nuclear Regulatory Authority (hereinafter referred to as „SNRA“) 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning the Mochovce NPP, failed to comply with article 6, paragraphs 4 and 10, of the Aarhus Convention;
2. **Recommends that the Slovak Republic review its legal framework so as to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Aarhus Convention;**
3. Invites the Slovak Republic to submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012 on achieving the recommendation above;
4. Requests the Aarhus Convention Secretariat and invites relevant international and regional organisations and financial institutions, to provide advice and assistance to the Slovak Republic as necessary in the implementation of the measures mentioned;
5. Undertakes to review the situation at the fifth session of the Meeting of the Parties to the Aarhus Convention.

The above mentioned, in accordance with the decision IV/9e on compliance by the Slovak Republic, registered under reference No. ECE/MP.PP/2011/L.16, was endorsed and adopted by the Parties at the fourth session of the Meeting of the Parties to the Aarhus Convention (Meeting of the Parties) on 27 June – 1 July 2011 in Chisinau.

Considering the non-confrontational, non-judicial and consultative nature of the findings and recommendations of the Compliance Committee (Article 15 of the Aarhus Convention; recalling the letter of Veit Koester, the Chair of the Compliance Committee of 25 February 2011 addressed to the Slovak Minister of the Environment), the Slovak Republic has taken note of these findings and recommendations and declared this fact at the Working Party on International Environment Issues (meeting of European Union member states) in Brussels on 25 May 2011.

I. Progress achieved with regard to the recommendations of the Compliance Committee

Based on the recommendations of the Compliance Committee, especially the „*recommendation that the Slovak Republic review its legal framework so as to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Aarhus Convention*“, as well as in accordance with the decision IV/9e on compliance by Slovakia registered under the reference No. ECE/MP.PP/2011/L.16 adopted at the fourth session of the Meeting of the Parties to the Aarhus Convention, the Slovak Republic has reviewed and is reviewing the legal framework since March 2010 and has carried out the following:

1. amendments to the legal instruments concerning public participation in decision-making processes:

- **Act 287/2009** amending the Act 24/2006 on environmental impact assessment and amending some other Acts as amended (hereinafter referred to as „the EIA Act“) (Annex 2 – Act)
- **Act 117/2010** amending the Act 543/2002 on nature and landscape protection as amended and amending the Act 24/2006 on environmental impact assessment and amending some other Acts as amended (Annex 3 – Act)
- **Act 145/2010** amending the EIA Act (Annex 4 – Act)
- **Act 258/2011** on permanent storage of carbon dioxide in the geological structures and amending some other Act (Annex 5 – Act)
- **Act 408/2011** amending the EIA Act (entering into force on 1 December 2011)
The Act 408/2011 also amends the Act 543/2002 on nature and landscape protection in the area of providing for public participation in decision-making and access to justices in environmental matters. (Annex 6 – Act)
- **Acts 350/2011** amending the Act 541/2004 on peaceful use of nuclear energy (Atomic Act) and amending some other Acts as amended (Annex 7 – Act)

The amendments **287/2009, 145/2010 and the last amendment 408/2011** are the most substantial from the point of view of the public participation in decision-making. The objective of these amendments was to gradually harmonise the rights of the public concerned with the European legislation and relevant international conventions and to open the environmental impact assessment process to the general public (from a natural person to non-governmental organisations and legal entities).

The rights of the **public concerned** were narrower than the rights of **the party to the proceeding**. **The public concerned** had a right to be informed on the beginning of the procedure and on other submissions by the parties to the proceedings, to take part in oral negotiation and local inspection, to submit proofs and additional information to the background for decision.

However, the public concerned (compared to the party to the proceeding) in the environmental impact assessment process did not have the rights mentioned below, resulted for the public from the Aarhus Convention:

- right to the information, to be included in the decision, how the administrative body took account of comments, objections and position of the public in the decision backgrounds,
- right to the entire full-text of the decision, including justification of the decision,
- right to the decision on the protest of the prosecutor to be delivered and the right to be notified of the correction of mistakes in writing, in numbers and other apparent inaccuracies in the written form of the decision, which caused that information on the final decision has not been ensured,
- right to submit an appeal against the decision or the right to propose a renewal of administrative proceeding, the public concerned did not have the right to access to the court in order to review the lawfulness of decisions by administrative bodies.

The amendments have specified precisely the term of the public concerned both for the natural and legal persons. As regards the provisions on public concerned, the restricting conditions have been dismissed (e.g. the number of persons/members of civic initiative) and the spectrum of administrative proceedings, where the civic initiative, civic association and non-governmental organisation can be a party to subsequent permitting procedures, has been extended. This is the important extension of the rights of the public that is interested in taking part in decision-making on environmental matters so that it has sufficiently efficient instruments to promote their requirements, so that it is notified of reasons of a refusal of such requirements and so that it has an opportunity to question the decision at a court. Both natural and legal persons should have an open access to the court, being one of the pillars of the Aarhus Convention.

Provisions affected:

The latest amendment **408/2011** in article 6a defines the participation of the public concerned in assessment of strategic documents and their rights.

In article 24, which lists particular categories falling under the term of the public concerned, provisions have been added for the legal person, specifying legal persons in general in article 24b and specifically non-governmental organisations promoting protection of the environment in article 27, for which a specific condition applies according to which they are not obliged to prove their interest in the decision.

Insertion of article 24b has specified conditions for participation of a legal person in the environmental impact assessment process and subsequent permitting procedures.

Article 26 has specified conditions for participation of a civic association in the environmental impact assessment process and subsequent permitting procedures.

A new article 27b has been inserted which summarises particular rights of the public concerned.

Paragraph 65 provides the public participation in decision-making processes relating to the old permits.

6a

Participation of the public concerned in the assessment of strategic documents

(1) The public concerned in the assessment of strategic documents means the public which is interested or having an interest in the preparation of strategic documents before their approval.

(2) The public concerned in the assessment of strategic documents includes

- a) a natural person older than 18 years,*
- b) a legal person,*
- c) a civic initiative pursuant to paragraph 3.*

(3) The civic initiative means natural persons older than 18 years who sign a common position to a draft strategic document. The civic initiative identifies itself by a signature document which includes name, surname, permanent residence and year of birth and signature of the persons supporting the common position.

(4) A plenipotentiary of the civic initiative authorised to act on behalf of the civic initiative and to receive documents is a natural person who is listed in the signature document as a plenipotentiary. If such a data is missing or is unclear, the plenipotentiary of the civic initiative is the natural person listed in the signature document on the first place.

(5) The public concerned in the assessment of strategic documents has the right to take part in the preparation and assessment of a strategic document up to the approval of the strategic document, including the submission of a written position pursuant to article 6 paragraph 6, article 8 paragraph 7, article 12 paragraph 2, participation in consultations and public hearing on a strategic document.

Footnote 9b) shall read:

9b) E.g. the Act 83/1990 on associations of citizens as amended, the Act 147/1997 on non-investment funds and amending the Act of the National Council of the Slovak Republic 207/1996 as amended, the Act 213/1997 on non-profit organisations providing public services as amended, the Act 34/2002 on foundations and amending the Civil Code as amended.

Article 24

The public concerned is the public that is interested or having an interest in environmental decision-making procedures. The public concerned includes in particular

- a) a natural person pursuant to article 24a,*
- b) a legal person pursuant to article 24b or article 27,*
- c) a civic initiative pursuant to article 25,*
- d) a civic association promoting environmental protection pursuant to article § 26.*

Article 24b

A legal person, who submits a written position pursuant to article 23 paragraph 4, article 30 paragraph 5, or pursuant to article 35 paragraph 3, showing that such a legal person is interested in a decision, will be in the subsequent permitting process under special law in a position of a party in the proceedings. Such a legal person is considered to be a public concerned whose right to a favourable environment may be affected by the decision. The legal person, registered in the Commercial Register or in a similar register, shall submit to the competent authority an extract from such a register, not older than three months, together with submission of the written position.

Article 26

A civic association established under special law for the purpose of environmental protection, which submits a written position pursuant to article 23 paragraph 4, article 30 paragraph 5, or pursuant to article 35 paragraph 3, will be in the subsequent permitting process under special in a position of a party in the proceedings. A civic association shall submit to the competent authority a document on registration of such a civic association together with submission of a written position. Such a civic association is considered to be a public concerned for the purposes of this Act whose right to a favourable environment may be affected by the decision.

Article 27b

The public concerned referred to in article 24 has a right to

- a) actively participate in the preparation and permitting of the proposed activity in the entire assessment process up to issuance of a decision on permission of a proposed activity, including submission of a written position pursuant to article 23 paragraph 4, article 35 paragraphs 2 and 3,*
- b) participate in the subsequent permitting procedure when conditions laid down in articles 24 to 27 are fulfilled,*
- c) submit comments pursuant to article 30 paragraph 5,*
- d) participate in consultations and the right to take part in public hearing on the proposed activity.*

Article 65

Transitional provisions for regulations effective from 1 December 2011

(1) The provision of article 65 paragraph 3 does not apply to assess the impact of strategic documents that were subject to preparation and approval from 21 July 2004 to 31 January 2006. Strategic Assessment of the effects of such documents shall be made in accordance with the law effective from 1 December 2011. Assessment of the effects of strategic documents that were subject to preparation and approval before 21 July 2004 and were approved by more than 24 months from 21 July 2004 shall be made only if the competent authority on a proposal from the contracting authority decides to assess the impact

of the strategy documentation is feasible. The competent authority shall publish its decision on the Ministry web site.

(2) If the written statement pursuant to article 23 paragraph 4, article 30 paragraph 5 or article 35 paragraph 3 cannot be given because the process of assessing environmental impacts under this Act was completed by 30 April 2010, involved the public pursuant to articles 24a and 24b is a participant in the subsequent licensing procedure, if during the licensing process submitted a written statement, which shows its interest in the decision and the interested public pursuant to article 25, articles 26 and 27, the participants follow the authorization procedure by special legislation, if during the licensing process submitted a written statement.

2. Establishing the Inter-ministerial working group dealing with public participation in decision-making and access to justice in environmental matters:

The management of the Ministry of the Environment of the Slovak Republic by the letter of the State Secretary No. 3190/2011-3 of 10 January 2011 established an Inter-ministerial working group which deals with public participation in decision-making and access to justice in environmental matters (hereinafter referred to as „Inter-ministerial working group“).

Up to now three meetings of the Inter-ministerial working group have been held (23 February 2011, 13 June 2011 and 28 October 2011). The meetings were addressing the issues of the public participation in decision-making and access to justice in environmental matters.

Participants of the Inter-ministerial working group are representatives of a number of the central state administration bodies: Ministry of the Environment of the Slovak Republic; Ministry of Transport, Construction and Regional Development of the Slovak Republic; Ministry of Justice of the Slovak Republic; Ministry of Interior of the Slovak Republic; Ministry of Economy of the Slovak Republic and the Slovak Nuclear Regulatory Authority.

The themes discussed at sessions of the Inter-ministerial working group include a broad spectrum of issues related to the Aarhus Convention and its particular articles, especially the articles 6 and 9, as well as providing for effective and transparent public participation in decision-making and access to justice in environmental matters.

3. The meeting with representatives of the non-governmental organisations (Greenpeace Slovensko, Via Iuris, Za Matku Zem, Friends of the Earth Europe):

With regard to the letter of Greenpeace and Via Iuris, as well as with regard to the session of the Meeting of the Parties to the Aarhus Convention which, acting under paragraph 37 of the annex to its decision I/7 on the review of compliance, taking note of the report of the Compliance Committee and the corresponding addendum (ECE/MP.PP/2011/11 and Add.3) with regard to a case concerning public participation in the decision-making for the construction of the Mochovce NPP – ACCC/2009/41/Slovakia, and also of the recommendation of the Aarhus Convention Secretariat to invite relevant international and regional organisations and financial institutions to provide advice and assistance to the Slovak Republic as necessary in the implementation of the measures mentioned, the Ministry of the Environment of the Slovak Republic on 8 November 2011 organised a meeting of the

representatives of the Ministry of the Environment of the Slovak Republic, the Slovak Nuclear Regulatory Authority and the developer (ENEL) with the representatives of the non-governmental organisations (Greenpeace Slovensko, Via Iuris, Za Matku Zem, Friends of the Earth Europe) on the findings and recommendations of the Aarhus Convention Compliance Committee concerning the case ACCC/2009/41/Slovakia.

This meeting offered an adequate platform for the discussion and exchange of views among representatives of the non-governmental organisations, representatives of the state administration and the developer on the findings and recommendations of the Compliance Committee with regard to the case ACCC/2009/41/Slovakia. However, it is necessary to state that despite the legally-based arguments provided by the state administration representatives on the one hand and also by the non-governmental organisations on the other hand, there are still differing views on the subject in question.

II. Comments on the findings of the Compliance Committee

Based on the finding of the Compliance Committee „*that the Party concerned, the Slovak Republic, by failing to provide for early and effective public participation in the decision-making leading to the decisions by the Slovak Nuclear Regulatory Authority 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning the Mochovce NPP failed to comply with article 6, paragraphs 4 and 10, of the Aarhus Convention*“ as well as in accordance with the decision IV/9e on compliance by Slovakia registered under the reference No. ECE/MP.PP/2011/L.16 adopted at the fourth session of the Meeting of the Parties to the Aarhus Convention, the Slovak Republic presents the following:

The Slovak Republic takes note of and respects the findings and recommendations of the Compliance Committee with regard to their non-confrontational, non-judicial and consultative nature (Article 15 of the Aarhus Convention; recalling the letter of Veit Koester, the Chair of the Compliance Committee of 25 February 2011 addressed to the Slovak Minister of the Environment) which was also declared at the Working Party on International Environment Issues (meeting of European Union member states) in Brussels on 25 May 2011.

At the beginning it is necessary to mention that the Slovak Republic through its central state administration body, the Slovak Nuclear Regulatory Authority, when issuing the above-mentioned three decisions (246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning the Mochovce NPP), proceeded in accordance with the legal instruments in force at that time and in accordance with the principle of legality of administrative procedure, laying down that the administrative body acts in accordance with the Acts and other legal instruments, in accordance with the Constitution of the Slovak Republic, the Acts and other regulations, complying so with procedural and material law in force in Slovakia at the time of issuance of the decision.

This is confirmed also in paragraph 66, where the Compliance Committee mentions that „nevertheless considers that the decision-making for the 2008 decisions on the Mochovce NPP appears to have been in accordance with Slovak national law. Yet, the case was a special case, where the obligation to provide for public participation under the Convention stems from the reconsideration and update of the operating conditions, as well as the change to and extension of the activity as compared to the one permitted in 1986. For that reason, on the basis of the information provided in this case, the Committee cannot conclude that Slovak law on public participation and EIA in general also fails to comply with article 6 of the Convention.“

The Slovak Republic is still of the opinion that the decisions 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning the Mochovce NPP in no case extend the activity nor change the principles of proposed activity. All changes approved in the 2008 decisions deal with building and technological nature and are focused on the increase of nuclear safety in accordance with the state-of-the-art science and technology.

With regard to the finding of the Compliance Committee in question, the Slovak Republic – the Slovak Nuclear Regulatory Authority currently does not see in the legal instruments of the Slovak Republic nor in the law of the European Union any adequate procedural tool applicable to achieve a progress/remedy in the three decisions already issued, other than that the Slovak court decides on the cancellation of the decision and returns the case back to the administrative body, which had issued the decision, for a new administrative procedure, or confirms the decision of the administrative body if illegality of the decision or procedure has not been detected. (Note: The Regional Court in Bratislava currently deals with a case No. 4 S 125/09 concerning the review of the decision and procedures by an administrative body).

The Slovak Republic – the Slovak Nuclear Regulatory Authority has therefore to wait till an independent decision of the court in this matter.

However, it is necessary to mention that the Slovak Republic – the Slovak Nuclear Regulatory Authority in the subsequent permitting procedure, namely official approval procedure (permitting to use the facility) pursuant to the Act 50/1976 on spatial planning and building code (Building Act) and in the procedure concerning putting the nuclear facility of the Mochovce NPP 3,4 into operation pursuant to the Act 541/2004 on peaceful use of nuclear energy (Atomic Act) and amending some other Acts, which starts based on the application submitted by the developer, shall provide for early and effective public participation, starting from non-governmental organisations up to natural persons, in accordance with the Act 24/2006 on environmental impact assessment and amending some other Acts as amended. **According to the legislation in force, the public concerned participating in environmental impact assessment is also party in subsequent decision-making procedure.**

The final record from environmental impact assessment for the Mochovce NPP 3,4 was issued on 28 April 2010. The above-mentioned subsequent permitting procedure pursuant to the Building Act and the Atomic Act can be expected approximately by the end of 2012. The subsequent procedure can only start on the request of the developer and the administrative body cannot start the procedure on its own initiative.

CONCLUSION

The Slovak Republic in the light of the findings and recommendations of the Compliance Committee, endorsed at the fourth session of the Meeting of the Parties to the Aarhus Convention, in accordance with the decision IV/9e on compliance by the Slovak Republic, registered under reference No. ECE/MP.PP/2011/L.16, hereby submits a progress report to the Secretariat of the Aarhus Convention, the Compliance Committee and the newly elected chair of the Compliance Committee Mr. Jonas Ebbesson, who became at the thirty-fourth meeting of the Compliance Committee a curator for the case ACCC/2009/41/Slovakia (see Report of the Compliance Committee on its thirty-fourth meeting – ECE/MP.PP/C.1/2011/8, V. par. 48).

Finally, the Slovak Republic declares that through the central state administration bodies involved – the Ministry of the Environment of the Slovak Republic as a body competent for the Aarhus Convention, the Ministry of Foreign Affairs of the Slovak Republic, the Ministry of Economy of the Slovak Republic and the Slovak Nuclear Regulatory Authority – consequently monitors and follows the development of the European legislation, actively takes part in working meetings and sessions of the Aarhus Convention and reflects changes and development in this area.