VIA IURIS

Alternative report on the implementation of the Aarhus Convention in Slovakia

VIA IURIS has decided to submit an alternative ("shadow") report on the implementation of the Aarhus Convention in Slovakia. Our reasoning is that many parts of the report submitted by the Slovak government are **unclear**, some information is **incomplete,** and the text of the report is **not clearly arranged**.

In our alternative report we will focus on the issues that we consider to be the most serious and important at the present time. This report does not reflect on all the issues covered by the Aarhus Convention, but only on those areas where the biggest deficits in implementation exist in Slovakia.

Biggest problems in the implementation of the Aarhus Convention in Slovakia

A. Information on the implementation of the article 4 of the Aarhus Convention

The third National Report on the implementation of the Aarhus Convention (hereinafter referred to as „Report"), specifically its part concerning the implementation of the article 4 of the Aarhus Convention does not mention a total ban there exist on access to documentation related to permitting of nuclear instalments, according to Act no. 541/2004 Coll. on peaceful use of nuclear energy (hereinafter referred to as Nuclear Act) and Amendments and Supplementation of Certain Acts.

In order to assess whether the confidentiality of an information for protection of other constitutionally protected interests (e.g. Public and State safety) is really indispensable, it is to be considered whether the achievement of pursued objective was possible using other means or manners, which would have affected less and more carefully the fundamental right in question. It is generally recognized principle of proportionality. In the case of the right to information, it is necessary to assess whether there have existed a mean or a manner which would have achieved a pursued objective but which would have affected the right to information in lesser extent and more carefully. The requirement of indispensability is transposed into a principle that if an applicant for information applies for a document containing some confidential information, the access to entire document cannot be denied, only confidential information should be excluded (e.g. by blacking it out) and the rest of the document has to be accessible. This principle is embodied also in the Act no. 211/2000 Coll. on the free access to information, in provisions of the article 12 as follows: *„ All limitations of the right to information are carried out by a obliged person in a manner to make accessible the requested information...after excluding that information, in relation to which law stipulates so."*
Obviously an absolute ban to access the documentation on nuclear instalments **does not comply with the requirement of the proportionality** in a limitation of the right to information, considering that it is evident that mentioned documentation **includes even information whose publication cannot threat the public safety**. It is inadmissible that authorities might have a possibility of an absolute ban on the access to information and thus keep in confidentiality information whose publication cannot threat safety and to whose access the public has right.

The Aarhus Convention in its article 6 paragraph 2 and 3 imposes an obligation to guarantee to the public sufficient and timely information, in a manner that public concerned would have a possibility „to prepare and participate effectively during a decision-making process on the environment“. However, on the basis of above stated facts, we can conclude that the Slovak Republic does not comply with this obligation in the process of permitting of nuclear instalments.

B. Information on the implementation of the article 6 of the Aarhus Convention

Provisions of the article 6 paragraph 1 letter b) of the Aarhus Convention stipulate that so called „public concerned“ (according to the article 2 paragraph 5 of the Aarhus Convention non-governmental organizations promoting environmental protection are also considered as public concerned), within a proceeding relative to permitting of an activity which may have a significant impact on the environment, has to possess rights listed in the article 6 of the Aarhus Convention. As stipulated in the Aarhus Convention „For this purpose each Party will define whether these provisions apply to a proposed activity".

According to the Aarhus Convention Implementation Guide (p.92) „The subsection b) institutes for Parties an obligation to include under the article 6 other activities not listed in annex which may have a significant impact on the environment." According to the ACIG (p. 93) "It is also obvious that before the subsection b) will be applied, it is not necessary to define previously whether proposed activity will certainly have a significant effect on the environment. The convention provides that Parties will decide on the use of article 6 in cases where proposed activities, not listed in annex, may have a significant effect on the environment."

According to the article 6 paragraph 1 letter b) of the Aarhus Convention State within its national legislation has clearly an obligation to grant to public concerned (and thus to environmental NGOs as well) rights listed in the articles 6 and 9 during the permitting process of an activity which may potentially have a significant effect on the environment.

In the Slovak Republic various legal provisions regulate permitting proceeding concerning the environment. Nevertheless they do not regulate rights of public concerned to participate in these proceedings (it concerns for example the Forest Act, Water Act, Mining Act). It is than questionable whether the current state of the Slovak legislation permits to fulfil the purpose of the article 6 paragraph 1 letter b) of the Aarhus Convention.

C. Information on the implementation of the article 9 of the Aarhus Convention

According to our opinion, parts of the Report which concern the implementation of the article 9 of the Aarhus Convention should include:

1. **a manner how is ensured the access to court of law for members of public concerned in case where their rights guaranteed under the article 4 of the Aarhus Convention have been impaired, with purpose of their effective protection. In the context of the Slovak legal order it mainly refers to the access to court of law in case where an obliged person does not comply with his/her obligations according to Act no. 211/2000 Coll. on free Access to information,**

2. **a manner how is ensured the access to court of law for members of public concerned in case where their rights guaranteed under the article 6 of the Aarhus Convention have been impaired, with purpose of their effective protection. In the context of the Slovak legal order it particularly refers to access of public to court of law in case of a review of legality of a decision on activity permitting, which is preceded by a process of the environment impact assessment in accordance with Act no. 24/2006 Coll. on Environment Impact Assessment or other proceedings relevant for the environment protection (e.g. according to Act no. 543/2002 Coll. on Nature and Landscape Protection),**

3. **a manner how is ensured the fulfilment of the article 9 paragraph 3 of the Aarhus Convention (see above) and**
4. **a manner how are fulfilled the requirements arising from the article 9 paragraph 4 (also see above)**

C.1. Information on the implementation of the article 9.3 of the Aarhus Convention

The article 9 paragraph 3 in connection with the article 9 paragraph 4 of the Convention, institutes several obligations for the Party (the Slovak Republic) to the Convention,

- shall be determined **subjects** („members of public"),
- who **fulfil some criteria** (e.g. environmental NGO, operative since a certain period)
- have to have right **to challenge before a body meeting the requirements of the article 9 paragraph 4** (independent and impartial body, having an authority to provide effective and timely remedies and to order „injunctive relief"),
- **any (every)** violation of national law related to the environment (action or omission), committed either by administrative bodies or private persons

When searching for a response to the question, which body should be entrusted with authority to review violations of law related to the environment, following requirements set by the article 9 paragraph 4 of the Convention have to be taken into account:

- shall be provided „adequate and effective remedies",
- there shall exist a possibility to order „injunctive relief" – i.e. an order to take an action , to abstain from some action, to restore something into its original state,
- review has to be „fair" – in accordance to the Convention Implementation Guide it means it has to be „impartial", „free from prejudice", „favouritism" or „self-interest",
- review has to be „equitable" – i.e. „that which avoid the application of the law in an unnecessarily harsh and formal manner",
- review has to be „timely",
- review has to be „not prohibitively expensive".

The purpose of the article 9 paragraph 3 a 4 of the Aarhus Convention is to ensure a sufficient enforceability of law related to the environment. The legal order of the Slovak Republic does not contain provisions delimiting legitimate subjects (members of public) who could challenge before an independent body (court of law) any violation of national law related to the environment. The public has access to court only in well delimited cases where its status of a party to proceeding is granted (e.g. when are met the requirements of 24/2006 Coll. on Environment Impact Assessment or according to Act no. 543/2002 Coll. on the Nature and Landscape Protection).

Thus in the Slovak Republic there exist numerous proceedings, decisions and acts of administrative bodies with significant impact on the environment or on the population health , whose illegality cannot be challenged before an independent body (court of law) by any member of the public and in case where it is possible this is only a well delimited number of participants from a previous proceeding (in terms of article 14 paragraph 1 of Act no. 71/1967 Coll. on Administrative proceeding, only person whose rights may be directly impaired by a decision is a party to an administrative). Administrative bodies use to interpret this possibility of affectation in restrictive way, so for example NGOs working in the ambit of the environment cannot challenge an obvious violation of a right, for example in the case of proceedings according to Building Act, Waste Act, Air Protection Act, Forest Act etc. It is to be underlined that numerous decisions and acts are being issued in administrative proceedings without a participation of any member of the public or they are not issued in an administrative proceeding and thus any person is not a party to proceeding (either any member of public).

It consequently results into a situation where members of public (for example NGOs promoting the environment protection) cannot perform a function of public protectors of the environment and the enforcement of legal provisions related to the environment stays ineffective. The conception of the article 9 paragraph 3 of the Aarhus Convention is based upon the idea that the enforceability of legal provisions related to the environment (e.g. to file an action before a court of law in order to challenge an illegal decision) can be claimed by selected members of the public (legitimate subjects) regardless their subjective right has been directly affected or impaired by the illegal decision.

Mentioned information does not figure in the Report.

C.2 Information on the implementation of the article 9.4 of the Aarhus Convention

As stipulated in the article 9 paragraph 4 of the Aarhus Convention, court shall have a possibility to order an „injunctive relief" – i.e. to order to take an action , to abstain from some action, to restore something into its original state**.** In terms of the article 9 paragraph 4 of the Convention an „injunctive relief" constitutes, not only a **preliminary measure,** (issued before a judicial decision on the matter itself) but equally a consequent remedy measure ordered together with the final decision on matter itself. An injunctive relief has to be legally regulated in a manner it ensures adequate and effective remedies and timely judicial review- so to ensure that before court rules on matter itself, challenged activity is not irreversibly carried out. At the same time it has to relate to the administrative body (by staying the enforceability of the decision) and equally to the person who on the basis of the administrative decision carries out the activity in question (court orders to this subject to take an action, to abstain from some action or to tolerate something).

Current wording of article 250c par. 1 phrase 2 and 3 of the Code of the Civil Procedure contains such a regulation of the injunctive relief which allows only to stay the enforceability of the challenged administrative decision: *„Upon the request of a party to the proceedings, the presiding judge may suspend by a resolution the enforcement of the decision, should there be a threat of a serious damage if the decision contested was promptly enforced. If the presiding judge does not grant the request, he notify the participant."* Current regulation of the stay of the enforceability cannot be deemed as one fulfilling the requirements of effectiveness and timeliness of remedies, stipulated in the article 9 paragraph 4 of the Convention. It is in part due to the fact that requirements which court has to fulfil in order to stay the enforcement of an administrative decision are too vague. Other problematic aspect is

that court does not deliver a decision on the refusal to order the stay of the enforceability, and so there in no manner to challenge it. Moreover if court does not grant a request to stay the enforceability, it is not obliged to state its reasons. In practice courts usually notify by mean of a brief letter.
In practice it is rare that court stays the enforcement of a decision of an administrative body. In consequence, while reviewing the legality of a challenged decision and delivering its judgement, the decision is being carried out (for example on the basis of a building licence a construction is realized).

Nevertheless the Report does not contain the mentioned information.

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This alternative report on the implementation of the Aarhus Convention was written by VIA IURIS, Radničné námestie 9, 902 01 Pezinok, Slovakia.

Contact person: Imrich Vozár, + 421 907 042 567, imrich.vozar@gmail.com