



Economic and Social Council

Distr.: General
20 June 2014

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Fifth session

Maastricht, the Netherlands, 30 June and 1 July 2014

Item 5 (b) of the provisional agenda

**Procedures and mechanisms facilitating the implementation
of the Convention: compliance mechanism**

Compliance by Slovakia with its obligations under the Convention*

Report by the Compliance Committee

Summary

The present document was prepared by the Compliance Committee pursuant to the request set out in paragraph 10 of decision IV/9 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (see ECE/MP.PP/2011/2/Add.1) and in accordance with the Committee's mandate set out in paragraphs 13 (b), 14 and 35 of the annex to decision I/7 on review of compliance (ECE/MP.PP/2/Add.8).

The document reviews the progress made by Slovakia in the intersessional period in implementing decision IV/9e of the Meeting of the Parties on compliance by Slovakia with its obligations under the Convention (see ECE/MP.PP/2011/2/Add.1).

* The present document has been submitted late due to the need for further consultation on the document before its submission.



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I. Introduction — decision IV/9e

1. At its fourth session (Chisinau, 29 June–1 July 2011), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision IV/9e on compliance by Slovakia with its obligations under the Convention (see ECE/MR.PP/2011/2/Add.1).
2. Through decision IV/9e, the Meeting of the Parties endorsed the findings of the Compliance Committee on communication ACCC/C/2009/41 (ECE/MR.PP/2011/11/Add.3) in relation to public participation in the decision-making concerning the restarted construction on reactors 3 and 4 of the Mochovce nuclear power station, and in particular three decisions of the Slovak Nuclear Regulatory Authority: decisions 246/2008, 255/2008 and 267/2008 of 14 August 2008 (the 2008 decisions). The Committee had found that the Party concerned had failed to comply with article 6, paragraphs 4 and 10, of the Convention with respect to the 2008 decisions. Since its findings were adopted shortly before the fourth session of the Meeting of the Parties, the Committee had made its recommendations directly to the Meeting of the Parties.
3. In decision IV/9e, the Meeting of the Parties also recommended that the Party concerned 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 Convention.
4. The Meeting of the Parties also invited the Party concerned to submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012 on achieving the recommendations above.

II. Summary of follow-up action on decision IV/9e

5. On 1 December 2011, the Party concerned submitted its progress report,¹ as required through paragraph 4 of decision IV/9e, including the texts of the various legislative amendments undertaken since 2009 concerning public participation in decision-making. In its report, it referred, inter alia, to the following actions:

- (a) *The adoption of Legislative Amendment Act 408/2011 of 21 October 2011*, amending Act 24/2006 on Environmental Impact Assessment (EIA) and also Act 543/2002 on nature and landscape protection. According to the Party concerned, Act 408/2011 contains a number of amendments related to public participation in decision-making and access to justice in environmental matters. It entered into force on 1 December 2011. Of relevance to decision IV/9e, article 65b of Act 408/2011 is a transitional provision on public participation in decision-making on old permits;
- (b) *Establishment of an interministerial working group on public participation in decision-making and access to justice in environmental matters*. The interministerial working group was established by letter No. 3190/2011-3 of the State Secretary of 10 January 2011. In 2011, three meetings of the interministerial working group were held, attended by representatives of the Ministry of the Environment, the Ministry of Transport, Construction and Regional Development, the Ministry of Justice, the Ministry of Interior,

¹ Documents concerning implementation of decisions on compliance by the Meeting of the Parties regarding compliance by individual Parties are available from <http://www.unece.org/env/pp/ccimplementation.html>.

the Ministry of Economy and the Nuclear Regulatory Authority. Themes discussed included a broad spectrum of issues related to the Convention, including providing for effective and transparent public participation in decision-making and access to justice in environmental matters;

(c) *A meeting with the communicants of communication ACCC/C/2009/41.* On 8 November 2011, the Ministry of the Environment organized a meeting of representatives of the Ministry of the Environment, the Nuclear Regulatory Authority, the developer (ENEL) and non-governmental organization (NGO) representatives (Greenpeace Slovakia, Via Iuris, Za Matku Zem and Friends of the Earth Europe) to discuss the findings and recommendations on communication ACCC/C/2009/41. The Party reported that, despite the discussion, the NGOs and the Government continued to hold differing views on the Committee's findings.

6. By e-mail of 9 December 2011, Oekobuero, an Austrian environmental NGO alliance, on behalf of the communicant of ACCC/C/2009/41, expressed its concerns over whether the Party concerned would allow the public to participate in the further permitting procedures for Mochovce reactors 3 and 4. It called upon the Committee to request the Party concerned for clarification on whether it is guaranteed that the public concerned would have the right to participate in an early and effective manner in the outstanding permitting procedures before the nuclear power plant entered into operation and whether effective legal remedies existed, including injunctive relief, in accordance with article 9, paragraphs 2 and 4, of the Convention.

7. At its thirty-fifth meeting (Geneva, 13–16 December 2011), the Committee reviewed the progress report and agreed to ask the Party concerned to provide translations of the relevant parts of the legislation annexed to the progress report in a working language of the Committee. It agreed to review the materials received in further detail at its thirty-sixth meeting.

8. By e-mail of 28 March 2012, Oekobuero, on behalf of the communicant, expressed its concern that the Party concerned was still continuing with the construction of Mochovce reactors 3 and 4 despite the findings of the Compliance Committee. It reiterated the call contained in its e-mail of 9 December 2011 and asked the Committee to closely monitor the progress made by the Party concerned.

9. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee noted the additional information provided by the communicant; it recalled that the Aarhus Convention compliance mechanism was not a remedy mechanism and requested that the communicant provide a more precise evaluation and analysis of the Party's report. A representative of the Party concerned mentioned that they would provide translations of the annexes to their report shortly and suggested that experts could be present at the Committee's next meeting to provide clarifications for the Committee, as needed. The Committee welcomed the initiative by the Party concerned and agreed that it would be useful, after the communicant's comments were received, to discuss the follow-up with both parties at its thirty-seventh meeting.

10. On 3 May 2012, the Party concerned responded to Oekobuero's message of 28 March 2012, contesting Oekobuero's comments and providing a translation of some of the recent legislative amendments undertaken with regard to public participation.

11. On 22 May 2012, the Party concerned provided English translations of several of the legislative amendments annexed to its report of 1 December 2011.

12. At its thirty seventh-meeting (Geneva, 26–29 March 2012), the Committee welcomed the additional information submitted by the Party concerned, and noted that the communicant had not commented on the Party's report. It agreed that it would review the

situation, after it had received the implementation report due by the Party concerned on 1 December 2012.

13. On 30 November 2012, the Party concerned submitted its implementation report, as requested by decision IV/9e, on the ongoing legislative amendments undertaken to reach compliance with the Convention.

14. On 12 December 2012, the communicant provided its comments on the Party concerned's implementation report. It contended that, while the report contained many positive changes with regard to standing and public participation rights, most of them did not address the issues at stake in the current case. In particular, the recent legislative changes had not remedied the fact that public participation was triggered only by an EIA procedure, whereas for Mochovce reactors 3 and 4 there had been no EIA before the 2008 decisions were issued.

15. At its thirty-ninth meeting (Geneva, 11–14 December 2012), the Committee took note of the information received. At that meeting, the Committee discussed the matter with representatives of the Ministry of the Environment and the Nuclear Regulatory Authority of the Party concerned, representatives of the communicant and an observer, Via Iuris, which participated in the session by teleconference.

16. During the discussion, the Party concerned reported that it had extensively reviewed its legal framework and had introduced amendments to its legislation that ensured broader rights of the public to participate in the decision-making processes in accordance with the Convention. It also reacted to the comments submitted by the communicant on 12 December 2012, and stressed that according to national legislation only the courts could annul the permits at issue.

17. The communicant and observer noted that there was uncertainty as to the possibility for members of the public to participate in the ongoing decision-making processes with respect to the issuance of a building permit for an operator; and a lack of clarity as to the implementation of the building, nuclear and EIA legislation and public participation rights. They also noted that recent jurisprudence had demonstrated that the Convention was not properly implemented by the Party concerned.

18. The Committee took note of the submissions from the Party concerned, the communicant and the observer. It agreed that it would send additional questions to the Party for it to address and invite the communicant and observers to comment on the Party's response, and that it would review the situation at its next meeting. The Committee's questions were sent on 22 January 2013.

19. On 28 February 2013, the Party concerned provided information addressing the Committee's questions. It confirmed that no procedure had yet been launched for public participation concerning the operation of the facility. It referred the Committee to the legislative amendments described in its progress report of 30 November 2011 and implementation report of 2012, and noted that it was not aware of recent examples of updated permits, where public participation was necessary. It finally affirmed its position that during the intersessional period it had taken all the measures necessary to comply with the decision's recommendations.

20. On 8 March 2013, the communicant commented on the information provided by the Party concerned. It noted that it was formally correct that members of the public who had participated in the EIA procedure were able to participate in the subsequent permitting phases, but, in matters of nuclear safety, the Atomic Act provided for the non-disclosure of information to parties to the proceedings if disclosing such information could adversely affect public safety. In practice, this meant that the public might be entitled to participate, but not to have access to the relevant information to enable them to participate effectively. It further contended that the Party concerned had failed to implement the recommendations

contained in decision IV/9e, since no measures had been taken with regard to updating old permits and in the light of the Party concerned's assertion that existing permits could not be interfered with because of the legislative principle of non-retroactivity.

21. In its letter of 8 March 2013, the communicant also contended that if the 2008 decisions were to be taken today, under the current legal framework, the Party concerned would still not provide for public participation on those decisions:

In other words — if the decisions of the Slovak Nuclear Regulatory Authority issued in 2008 were issued today, the process would be the same as in 2008 to 2010 and the public would not be granted [the] right to participate in the procedure. In other words: if there are old permissions issued during the period when there was no EIA Act valid in the Slovak legislation and they are reconsidered nowadays the administrative procedure would be held without public participation, unless the EIA precede[s] such reconsidering of the old permit ... To state it shortly: nothing has changed in the Slovak legislation in this regard.

22. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee took note of the information provided. It noted that the situation with respect to old permits was not clear and decided to ask the Party concerned to clarify that issue. The Committee agreed that it would review the information again at its forty-first meeting.

23. On 14 June 2013, the Party concerned provided information seeking to clarify the legal situation with respect to the possibility of reopening the 2008 decisions.

24. On 26 June 2013, the communicant and other supporting NGO observers commented on the Party concerned's response, positing that it had still not answered the question as to how it ensured that public participation took place in cases where no EIA was carried out, as had been the case with the 2008 decisions.

25. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee took note of the information provided and observed that the Party concerned had still failed to provide clear information with respect to old permits. The Committee instructed the secretariat to urge the Party concerned to clarify the issue. It agreed that it would review the information again at its forty-second meeting and thereafter consider its recommendations to the Meeting of the Parties at its fifth session.

26. By letter of 11 July 2013, the Committee requested the Party concerned to provide clarification by 15 August 2013 in relation to the legal framework in Slovakia for the update of old permits — not limited to the permits in respect of the Mochovce nuclear power plant.

27. On 15 August 2013, the Party concerned provided its response. The Party concerned reiterated the important extension of the rights of the public in decision-making through recent legislative amendments and noted that old, still valid, permits were not affected by any subsequent legislative amendments since, consistent with the principle of legal certainty, laws did not have a retroactive effect. It provided an overview of the legislative framework for amendments to permits under the Building Act and the Atomic Act and informed the Committee of the judgment of the Supreme Court of Slovakia dated 27 June 2013, which awarded Greenpeace Slovakia the status of a party with all rights in the proceedings relating to the construction of Mochovce reactors 3 and 4 and ordered the Nuclear Regulatory Authority to re-discuss the matter and deal with all relevant objections of participants to the administrative procedure.

28. In its letter of 15 August 2013, the Party concerned also stated that if the 2008 decisions were taken today, under the current legal framework, they would be subject to public participation:

In the event that at the present there would be a situation that the old valid permit is going to be revised, then it shall be proceeded according to the law in force at the time, when this permit is to be amended, supplemented or repealed, i.e., under the current legislation. In that case, for the old valid permits the current provisions of amended laws on ensuring active public participation in the decision-making process is applied.

29. On 19 September 2013, Greenpeace Slovakia provided information with respect to communication ACCC/C/2013/89 (Slovakia), which also concerns the construction of Mochovce reactors 3 and 4, and by e-mail of 26 September 2013, the communicant of communication ACCC/C/2013/89 asked that the information also be considered by the Committee with respect to decision IV/9e. The communicant informed the Committee that, further to the Supreme Court's recent judgment in favour of Greenpeace, ordering that the procedure to authorize Mochovce reactors 3 and 4 should be repeated, to avoid the suspension of the building work, the Slovakian Nuclear Supervisory Commission had subsequently issued a notice ordering the annulment of the suspensive effect of Greenpeace's appeal. On 9 September 2013, Greenpeace Slovakia had filed a petition against the notice of the Slovakian Nuclear Supervisory Commission.

30. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee commenced preparation of its draft report to the Meeting of the Parties at its fifth session regarding the implementation of decision IV/9e.

31. At its forty-third meeting (Geneva, 17–20 December 2013), Oekobuero submitted that while the Party concerned had made a number of positive changes to its legislation, it had failed to address the recommendations of decision IV/9e, as it still provided for public participation in the reconsideration or updating of old permits only if an EIA was carried out, whereas no EIA had been carried out for the 2008 decisions.

32. Following the forty-third meeting, the Committee completed its draft report on the implementation of decision IV/9e using its electronic decision-making procedure. The draft report was then sent to the Party concerned and the communicant of communication ACCC/C/2009/41 on 3 March 2014 for their comments by 24 March 2014. The Party concerned provided its comments on 24 March and the communicant on 19 March 2014. At its forty-fourth meeting (Geneva, 25–28 March 2014), the Committee, taking into account the comments received, finalized its report for submission to the Meeting of the Parties at its fifth session.

III. Consideration and evaluation by the Committee

33. The Committee welcomes the ongoing constructive engagement of the Party concerned in the compliance process throughout the intersessional period.

34. In order to fulfil the requirements of decision IV/9e, the Party concerned needed to provide the Committee with evidence that it had reviewed 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 Convention.

35. With respect to steps taken by the Party concerned to review its legal framework, the Committee has taken note of the following actions by the Party concerned:

(a) Various legislative amendments to improve its legal framework on public participation in decision-making and access to justice (see para. 5 above);

(b) The establishment of an interministerial working group on public participation and access to justice (see para. 5 above);

(c) A meeting between the Ministry of Environment, the Nuclear Regulatory Authority and relevant NGOs in November 2011 (see para. 5 above).

36. The Committee also welcomes the helpful progress reports provided by the Party concerned during the intersessional period, including the provision of English translations of relevant legislation. Of these, the Committee finds the following to be of particular relevance to its examination as to whether the Party concerned has ensured 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:

(a) Act No. 287 of 19 June 2009 amending and supplementing Act No. 24/2006 Coll. on environmental impact assessment as amended by later regulations;²

(b) Act No. 50/1976 Coll., on land use planning and building code (Building Act);³

(c) Act No. 541/2004 Coll.1 on the peaceful use of nuclear energy (Atomic Act).⁴

37. In the light of the above, the Committee considers that the Party concerned has taken some steps to review its legal framework with respect to public participation in decision-making when old permits are reconsidered or updated, or the activities are changed or extended compared to previous conditions, as required by paragraph 3 of decision IV/9e. The Committee is not, however, convinced that the Party has sufficiently reviewed its legal framework so as to ensure early and effective public participation in decision-making in such cases. In particular, the Committee is not persuaded that, if a similar decision as those taken in 2008 on the Mochovce reactors 3 and 4 — the subject of the Committee's findings on communication ACCC/C/2009/41 — were taken again today under the current legal framework, the public would be entitled to participate in those decisions. In this regard, the Committee notes that the Party concerned and the communicant hold opposing views on this point.

38. Given the conflicting views of the Party concerned and the communicant as to whether public participation would be provided for on the 2008 decisions if they were taken today under the current legal framework (see paras. 21 and 28 above), the Committee considers that it is for the Party concerned to show that if the 2008 decisions were to be taken again today, early and effective public participation would indeed be ensured. The Committee considers that the Party concerned has not to date made it sufficiently clear to the Committee that this would indeed be the case. In so finding, the Committee wishes to make clear that it is not asking the Party concerned to retake the 2008 decisions, but simply to show that if a similar decision was taken today, early and effective public participation would be provided. The Committee notes that both the Party concerned and the communicant have made extensive efforts before the Committee to clarify issues outside the scope of decision IV/9e, namely, the status of court proceedings with respect to 2008 decisions and the ongoing legal reform aimed at reaching adequate transposition of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the effects of certain public and private projects on the environment into Slovakia's domestic legislation. On the other hand, information that would address the core issue of decision IV/9e has been insufficient.

² English translation provided as annex 2 to the Party concerned's letter of 1 December 2011, available on the web page for follow-up on decision IV/9e.

³ English translation of relevant excerpts provided in Party concerned's letter of 15 August 2013, available on the web page for follow-up on decision IV/9e.

⁴ Ibid.

39. The Committee considers that the Party concerned could have referred to specific provisions of its legislation applicable in cases when old permits concerning activities under article 6 of the Convention are reconsidered or updated, or the activities are changed or extended compared to previous conditions, and explained to the Committee how these provisions would be applied in such procedures so as to ensure early and effective public participation.

40. On the basis of the above, the Committee concludes that the Party concerned has not yet fulfilled the recommendation in paragraph 3 of decision IV/9e to 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 Convention.

IV. Conclusions and recommendations

41. The Committee welcomes the engagement of the Party concerned in the compliance review process during the intersessional period, including its efforts to meet the deadlines set by the Committee and decision IV/9e.

42. Based on its considerations and evaluation the Committee finds that, while the Party concerned has taken some steps to review its legal framework with respect to public participation in decision-making when old permits are reconsidered or updated, or the activities are changed or extended compared to previous conditions, it has not made it sufficiently clear to the Committee that its legal framework ensures early and effective public participation in decision-making in such cases. In particular, the Party concerned has failed to demonstrate that if the 2008 decisions were to be taken today, under the current legal framework, the public would be entitled to participate in an early and effective manner on those decisions. The Committee thus finds that the Party concerned has not sufficiently fulfilled the requirements of paragraph 3 of decision IV/9e.

43. In the light of the above, the Committee, pursuant to paragraph 35 of annex to decision I/7, recommends that the Meeting of the Parties:

- (a) Endorse the above report of the Committee with regard to compliance by Slovakia;
- (b) Recommend that the Party concerned take the necessary legislative, administrative or practical measures 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 with previous conditions, in accordance with the Convention, unless the Party concerned has by 5 May 2014, to the satisfaction of the Committee, referred the Committee to specific provisions of its legislation applicable in cases when old permits concerning activities under article 6 of the Convention are reconsidered or updated, or the activities are changed or extended compared with previous conditions, and explained to the Committee how these provisions should be applied in such procedures so as to ensure early and effective public participation;
- (c) Invite the Party concerned to provide detailed progress reports to the Committee by 31 December 2014, 31 October 2015 and 31 October 2016 on the measures taken and the results achieved in implementation of the above recommendations, unless the measures referred to in paragraph 43 (b) above have been taken by 5 May 2014 to the full satisfaction of the Committee.