

Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**First progress review of the implementation of decision VI/8i
on compliance by Slovakia with its
obligations under the Convention**

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I. Introduction

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), 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 VI/8i on compliance by Slovakia with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1).

II. Summary of follow-up

2. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed the implementation of decision VI/8i in open session with the participation by audio conference of representatives of Slovakia and the communicant of communication ACCC/C/2013/89.

3. On 1 October 2018, Slovakia submitted its first progress report on decision VI/8i on time.

4. On 5 October 2018, the secretariat forwarded the first progress report to the communicants of communication ACCC/C/2013/89, inviting their comments by 1 November 2018. No comments were received.

5. After taking into account the information received from Slovakia and the communicant of communication ACCC/C/2013/89, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 21 February 2019. The Committee thereafter requested the secretariat to forward the first progress review to Slovakia and the communicant of communication ACCC/C/2013/89.

III. Considerations and evaluation by the Committee

6. In order to fulfil the requirements of paragraph 2 of decision VI/8i, Slovakia would need to provide the Committee with evidence that it had taken the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that when providing access to nuclear-related information within the scope of article 2(3) of the Convention, any grounds for refusal under article 4(4) of the Convention are interpreted in a restrictive way and taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

General observations

7. The Committee welcomes Slovakia's first progress report which was submitted on time. It also welcomes the detailed nature of the first progress report. However, before examining in detail the progress made, it considers it important to make the observations in paragraphs 8-14 below.

8. In its first progress report, Slovakia states that "it is not entirely clear why the ACCC claims that the Directive on Sensitive Information is inconsistent with Act No.211/2000 Coll. on free access to information and on amendments to certain laws (Freedom of Information Act) as amended".¹ This is a misunderstanding of the Committee's wording in paragraphs 84 and 103(a) of the findings on communication ACCC/C/2013/89. In fact, the phrase "contrary to" as used in paragraphs 84 and 103(a) means "in contrast to".

9. Likewise, Slovakia's assertion that decision VI/8i introduces a new term not found in the Convention of "nuclear-related environmental information" is incorrect.² The key term is "environmental information", as defined in article 2(3) of the Convention. Decision VI/8i addresses "environmental information" within the scope of article 2(3) that is nuclear-related.

¹ Party's first progress report, p. 4.

² Ibid.

10. In its first progress report, Slovakia cites jurisprudence of the European Court of Human Rights which it claims shows that “nuclear facilities and information on them, by their nature and security aspect, are largely out of the nature of common information”.³ The Committee cannot see any statement to this effect in the jurisprudence of the European Court cited by the Party concerned. In any event, this would not impact upon the Committee’s review of decision VI/8i. The European Court’s role is to review compliance with the provisions of the European Convention of Human Rights; the role of the Compliance Committee is to review compliance with the provisions of the Aarhus Convention.

11. On this point, Slovakia annexes to its first progress report its statement of March 2018 to the Regional Court of Bratislava.⁴ In that statement, the Nuclear Regulatory Authority informs the Court that “the Aarhus Convention, its committee and opinions do not provide a legally binding and enforceable framework, unlike Directive 2003/4/EC.”⁵ The Committee does not express any view on the substance of the court proceedings themselves as these are outside the scope of the Committee’s review of decision VI/8i.

12. However, the Committee expresses concern that as recently as March 2018 the Nuclear Regulatory Authority apparently holds the view that the Convention’s obligations are not binding. Not only does this demonstrate a clear misunderstanding by the Nuclear Regulatory Authority of the binding nature of the Convention’s obligations, it is also of concern should that incorrect understanding be accepted by the Court, either in that particular proceeding or in other procedures in the future. In this regard the Committee adds that, not only are the Convention’s obligations indeed binding as a matter of international law, the Committee’s findings on communication ACCC/C/2013/89 were endorsed by the Meeting of the Parties at its sixth session and through this endorsement acquired a new legal status in accordance with article 31(3) of the Vienna Convention on the Law of Treaties.

13. Also in its March 2018 statement to the Regional Court of Bratislava, the Nuclear Regulatory Authority asserts that the Committee, in its findings on communication ACCC/C/2013/89, “stated that the Slovak Republic acted in accordance with its legal framework”.⁶ This is incorrect. Nowhere in the findings does the Committee state that Slovakia “acted in accordance with its legal framework”.

14. Lastly, the Committee expresses its serious concern that in the same statement, the Nuclear Regulatory Authority’s prayer for relief requests that “if the court decides that the documentation in question should be made available to the Plaintiff in its entirety, to oblige the Plaintiff [GLOBAL 2000] to compensate the costs actually paid to increase the protection of the nuclear installation in question, until the need for increased protection ceases to exist”.⁷ In addition, elsewhere in its statement, the Nuclear Regulatory Authority requests that, if the court were to decide to grant the plaintiff’s request that the court seek a preliminary ruling from the Court of Justice of the European Union, the Court of Justice should be asked “to give its opinion on the fact that the applicant should also be held responsible for possible negative consequences for public security, caused by dissemination of information, which has been obtained in terms of free access to information and its dissemination.”⁸ Again, the Committee does not express any view on the substance of the court proceeding as these are outside the scope of decision VI/8i. However, it expresses its serious concern at the Nuclear Regulatory Authority’s approach to a member of the public seeking to exercise its rights under the Convention. That approach is clearly counter to the spirit of the Convention. Without making a finding on this point in the scope of this review, the Committee points out to Slovakia that such actions may amount to non-compliance with article 3(8) of the Convention.

³ Party’s first progress report, p.12.

⁴ Annex to the Party’s first progress report.

⁵ Ibid., p. 6.

⁶ Ibid.

⁷ Ibid., p. 23.

⁸ Ibid., p. 20.

Paragraph 2 of decision VI/8i

15. Concerning paragraph 2 of decision VI/8i, in its first progress review Slovakia reported that on 23 March 2017, the Slovak Parliament adopted an amendment to the Atomic Act, which inter alia, redefined access to documentation in nuclear activities. The amendment was published in the Collection of Laws (No.96/2017 Coll.) and entered into force on 1 August 2017. Section 3(16) of the Atomic Act now reads:

“Documentation containing sensitive information is considered documentation, the disclosure of which could be used to plan or carry out activities aimed at disruption or destruction of a nuclear activity, and thus adversely affect the public safety and cause ecological or economic damage. This documentation shall be made available following the exclusion of sensitive information.”⁹

16. The Party concerned explains that amended section 3(16) of the Atomic Act makes clear that it is not the entire licensing documentation referred to in the individual points of Annex I to the Atomic Act that is to be inaccessible to the public. Rather, any documentation containing sensitive information will be disclosed after the identified sensitive information has been removed from it.¹⁰

17. The Committee welcomes the clarification in amended section 3(16) that documentation containing sensitive information will be disclosed following the redaction of sensitive information within it. This amendment appears a positive development to further the implementation of article 4(6) of the Convention.

18. However, the amendment to section 3(16) does not alter the list of information deemed to be “sensitive information” under sections 3.1 and 3.2 of the Directive on Sensitive Information. This means that the types of environmental information included in the lists of sensitive information in sections 3.1 and 3.2 remain automatically exempted from disclosure in full.¹¹ As a consequence, the Directive on Sensitive Information still does not meet the requirements of article 4(4) of the Convention.

19. Under article 4(4)(b), environmental information may be exempted from disclosure if its disclosure would adversely affect public security. However, article 4(4) requires the exemption to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”. In its findings on communication ACCC/C/2013/89, the Committee found that:

“The Party concerned has not provided the Committee with any evidence to show that its legal framework requires that the exemptions on disclosure in section 3, paragraph 14 (on disclosure to the public), and section 8, paragraph 3 (on disclosure to the parties to the procedure), of the Nuclear Act, and the accompanying Directive on Sensitive Information (which implements both these provisions) are to be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment, as expressly required by the final clause of article 4, paragraph 4, of the Convention.”¹²

20. Based on Slovakia’s first progress report, the situation remains unchanged. Slovakia has provided no evidence that it has taken any legislative, regulatory and administrative measures and practical arrangements to ensure that, with respect to the environmental information included in the list of sensitive information in sections 3.1 and 3.2 of the Directive on Sensitive Information, public authorities are required to interpret any grounds exempting it from disclosure restrictively, taking into account:

- (a) The public interest served by disclosure; and

⁹ Ibid., p. 4.

¹⁰ Ibid.

¹¹ ECE/MP.PP/C.1/2017/13, para. 83.

¹² Ibid., para. 82.

- (b) Whether the information requested relates to emissions into the environment.

21. In its progress report, Slovakia describes in some detail the opportunities that have been provided to the public to participate in the ongoing administrative procedure for issuing the authorization for the commission of Mochovce Units 3 and 4.¹³ It also describes in some detail the Nuclear Regulatory Authority's handling of a request by GLOBAL 2000 on 30 August 2017 for access to various parts of the pre-operational safety report for Mochovce Units 3 and 4, which is currently before the Regional Court of Bratislava.¹⁴ While the Committee appreciates the effort made in the first progress report to explain the actions Slovakia has taken since the Committee's findings on communication ACCC/C/2013/89 to provide for access to information and public participation in practice with respect to the authorization procedure regarding Mochovce Units 3 and 4, these details do not address the Committee's findings of non-compliance. To reiterate, the Committee's findings, endorsed through paragraph 1 of decision VI/8i, were that the legal framework of Slovakia for handling requests for nuclear-related environmental information fails to comply with articles 4(4) and 6(6) of the Convention. Accordingly, to fulfil paragraph 2 of decision VI/8i, Slovakia must take the necessary legislative, regulatory and administrative measures and practical arrangements to amend the non-complying aspects of its legal framework. This means that, even if Slovakia were to have provided for exemplary access to information and public participation with respect to the case of the authorization procedure for the commission of Mochovce Units 3 and 4, this does not change the fact that, to fulfil paragraph 2 of decision VI/8i, it must amend the non-complying aspects of its legal framework.

22. In the light of the above, while welcoming the 2017 amendment of section 3(16) as a positive step to furthering the implementation of the Convention more generally, the Committee finds that Slovakia has not shown that it has taken any measures to fulfil the requirements of paragraph 2 of decision VI/8i.

IV. Conclusions

23. The Committee finds that Slovakia has not yet fulfilled the requirements of paragraph 2 of decision VI/8i.

24. As an initial step in order to make progress, the Committee invites Slovakia, together with its second progress report due on 1 October 2019, to identify which of the types of information listed sections 3.1 and 3.2 of the Directive on Sensitive Information it considers may include environmental information within the scope of article 2(3) of the Convention.

25. The Committee also invites Slovakia, together with its second progress report due on 1 October 2019, to provide evidence of the legislative, regulatory and administrative measures and practical arrangements it has by then taken to ensure that, when providing access to nuclear-related information within the scope of article 2(3) of the Convention, any grounds for refusal under article 4(4) of the Convention are interpreted in a restrictive way, taking into account:

- (a) The public interest served by disclosure; and
- (b) Whether the information requested relates to emissions into the environment.

¹³ Party's first progress report, pp. 5-10.

¹⁴ Ibid., pp. 10-12 and annex.