

Nuclear Regulatory Authority of the Slovak Republic
Statement concerning No. 4970/2019

Bratislava, 17 September 2019

Dear NRA Office Director,

As per your request, I am providing the Nuclear Regulatory Authority of the Slovak Republic (hereinafter referred to as the "NRA SR") with a statement concerning the cited part of my letter addressing the Members of three Committees of the National Council of the SR that discussed the member's draft amendment to the Atomic Act.

You ask me to specify in what specific cases the NRA SR erred in making decisions, including the violations of the legislation, and you also ask me to base my arguments on evidence.

The NRA SR is a public authority whose actions and decision-making should be in accordance with Art. 2 par. 2 of the Constitution of the Slovak Republic. The NRA SR makes decisions on matters and plants that have potentially serious adverse impacts on human health and also a serious environmental impact. The NRA SR's decision-making is therefore bound by the provisions of the Aarhus Convention, which was promulgated in the Collection of Laws under no. 43/2006 Coll., is part of Slovak legislation and is also an international treaty on human rights and fundamental freedoms, which takes precedence over laws based on Art. 7 par. 5 of the Constitution of the Slovak Republic.¹ The Aarhus Convention is also part of EU law, which was confirmed, for instance, by the judgment of the Court of Justice of the EU C-240/09, whereas under Art. 7 par. 2 of the Constitution of the Slovak Republic, EU legally binding acts take precedence over Slovak laws.

Any violation or even repeated failure to respect an international treaty binding on the Slovak Republic to which the Constitution, as the highest law of the country, gives priority over the law and which is part of European Union law can be considered a substantial error in a public authority's decision-making in a democratic EU Member State.

¹ The Notice of the Ministry of Foreign Affairs of the Slovak Republic on the publication of the Aarhus Convention in the Collection of Laws of the Slovak Republic under no. 43/2006 Coll states: "*The National Council of the Slovak Republic agreed to the Convention by its Resolution no. 1840 of 23 September 2005 and decided that the Convention is an international treaty under Art. 7 par. 5 of the Constitution of the Slovak Republic, which takes precedence over laws.*"

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I hereby provide examples of these errors constituting a violation of the Aarhus Convention, in particular its provisions on public participation in environmental decision-making, and in several cases also a violation of Act No. 24/2006 Coll. on environmental impact assessments (EIA) and the EU EIA Directive:

- The NRA's statement, delivered to the Regional Court in Bratislava², by which the NRA SR informs the Court that: "... the Aarhus Convention, its committee and opinions do not provide a legally binding and enforceable framework ..." provoked a negative reaction from the international Aarhus Convention Compliance Committee based in Geneva (hereinafter referred to as the "Aarhus Committee"). The latter expresses concern in its document "progress review"³ of 26 February 2019: "...not only does this demonstrate a clear misunderstanding by the Nuclear Regulatory Authority of the binding nature of the Convention's obligations..." and explains why the NRA SR's erroneous attitude is particularly worrying: "... 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." Moreover, the Aarhus Committee continues by repeatedly explaining that international law implies the binding force of the Aarhus Convention and the need to respect the opinions of the Aarhus Committee. It may be deduced that the Aarhus Committee considers such NRA SR statements in this context (judicial decision-making) particularly worrying because of the possibility of enforcing an incorrect judicial precedent in the Slovak Republic.
- Access to information which is particularly relevant in the related Mochovce 3,4 case contradicts the Aarhus Convention not only due to the existence of incompatible provisions of the relevant legislation but also due to the existence of the "Directive on the Identification and Removal of Sensitive Information in Documentation to be Made Available to the Public"⁴ as well as the interpretation and application of these policies by the NRA SR.
This fact was stated as early as in 2012 by the Supreme Court of the SR⁵, when they agreed with Greenpeace in a dispute with the NRA SR, which had arisen in 2009 when the NRA SR refused to disclose to the public the entire "Preliminary Safety Report of Mochovce NPP Units 3 and 4".

² A statement of March 2018 concerning an action brought by Global 2000 on 17 December 2017, a translation provided to the Aarhus Convention Compliance Committee by the NRA SR:

http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8i_Slovakia/Correspondence_with_Party/frPartyVI8.i_01.10.2018_first_progress_report_annex.pdf

³ <http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/implementation-of-decisions-of-the-meeting-of-the-parties-on-compliance-by-individual-parties/sixth-meeting-of-the-parties-2017/slovakia-decision-vi8i.html>

⁴ [https://www.uid.gov.sk/uid/WebStore.nsf/viewKey/SCI/\\$FILE/smernica_citlive_informacie.pdf](https://www.uid.gov.sk/uid/WebStore.nsf/viewKey/SCI/$FILE/smernica_citlive_informacie.pdf)

⁵ <https://domov.sme.sk/c/6507574/najvyssi-sud-podporil-aktivistov-ktori-ziadaju-spravu-o-mochovciach.html#ixzz5zmWf300>

Similarly, the Aarhus Committee has unequivocally stated that information from proceedings under the Atomic Act is treated as environmental information according to Art. 2 par. 3 of the Aarhus Convention and the dismissal of an application for such a piece of information may only occur for the reasons stated in Art. 4 par. 4 of the Aarhus Convention, whereas the reasons are to be interpreted restrictively. More specifically, the Aarhus Committee notes that the aforementioned NRA SR Directive does not meet the requirements of Art. 4 par. 4 of the Aarhus Convention.

- Unlawfulness of the permission to change construction before completion of NPP Mochovce 3,4 due to the violation of the right to public participation in decision-making: The Supreme Court of the SR decided in 2013 that the NRA SR had acted illegally, ignoring the parties to proceedings from the public. Both the authorization procedure and the environmental impact assessment that preceded it should have been repeated.
- The lack of public participation and a regular EIA process before the extension of NPP Jaslovské Bohunice V2 design lifetime: The original Decision of the NRA SR No. 275/2008 issued a permit for operation for a ten-year period, i.e. until 2018⁶. Following the 2013 Amendment to the Act, each decision under the Atomic Act became a decision without time limitation.

However, the Aarhus Committee made a very clear statement in a similar case that the duration of the activity is an important "operating condition for an activity" in accordance with Art. 6 par. 10 and therefore the provisions of Art. 6 par. 2 – 9 are to be applied accordingly.⁷ With respect to the Borselle PPT case, the Aarhus Committee decided: *"The Committee finds that, by not having at any stage provided for public participation, meeting the requirements of article 6, where all options were open, in regard to setting the end date of 31 December 2033 for the operation of Borselle Nuclear Power Plant, the Party concerned failed to comply with article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention with respect to the licence amendment of 18 March 2013."* And elsewhere the decision states: *"The Committee considers that, except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of duration to be subject to the provisions of article 6. In this regard, the Committee considers it inconceivable that the operation of a nuclear power plant could be extended from 40 years to 60 years without the potential for significant environmental effects. The Committee accordingly concludes that it was appropriate, and thus required, to apply the provisions of article 6, paragraphs 2-9."* In particular, as regards access to information in the context of continued nuclear operation, the Aarhus Committee states: *"The Committee points out that, in the context of decision-making on the extension of the design lifetime of a nuclear power plant,*

⁶ [https://www.uid.gov.sk/AMIS/dbrozhod.nsf/0/7a0ed0dc4e0b0104802574f9004e90f1/\\$FILE/275.pdf](https://www.uid.gov.sk/AMIS/dbrozhod.nsf/0/7a0ed0dc4e0b0104802574f9004e90f1/$FILE/275.pdf)

⁷ <https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-63/ece.mp.pp.c.1.2019.3.en.pdf>

article 6, paragraph 6(b), requires that information on the environmental effects of such a longer operation should be made available to the public concerned."

- The lack of public participation and insufficient information on synergistic or cumulative effects⁸ in making decisions on a change of activity stated as "Increasing the performance of the units of the EMO 1,2 NPP in Mochovce". In September 2018 the Ministry of the Environment of the Slovak Republic conducted investigative proceedings for several "changes in activity"⁹, which are subject to subsequent decision-making by the NRA SR under the Atomic Act. However, the EIA Act and the EU EIA Directive state that any modification of the construction of a nuclear power plant shall be subject to a mandatory environmental impact assessment. The Regional Court in Bratislava decided in a similar case related to a highway¹⁰ (this is also an activity included in column A of Annex 8 to the EIA Act, i.e. it also belongs to the activities for which an EIA process is mandatory ("without limits")) decided that for a change of activity, it was necessary to perform the entire EIA process, as such a change is subject to the procedure under Article 18 par. 1 d), and not the procedure under Article 18 par. 1 e) of the EIA Act.

Thus, in the above cases, in my opinion, the NRA SR has decided in contradiction to the law.

It appears to me, based on the facts, that the NRA SR is committing serious errors in its decision-making.

This type of error can be dangerous due to the fact that it curtails independent control of decision-making. It shows in several state administration areas that the control of decision-making, and mainly independent civilian control, plays a key role in ensuring the quality of decisions. And, in the relevant case, the NRA SR's decision-making is nothing less than decision-making related to plants that might cause a nuclear disaster.

At the same time, I would like to point out to the NRA SR that persons exercising their rights in accordance with the provisions of the Aarhus Convention should not be "penalized, persecuted or harassed in any way"¹¹ under Article 3 par. 8 of the Aarhus Convention. It appears to me that drawing attention to the violation of the Convention in legislative proceedings aimed at

⁸ It follows from Article 18 (4) of the EIA Act that several subsequent changes to the same activity must be considered one activity.

⁹ <https://www.enviroportal.sk/sk/eia/detail/zvysenie-vykonu-blokov-je-emo-1-2-v-mochovciach>

¹⁰ Judgment No. 6S/347/2016 of 22 November 2018

¹¹ According to Art. 3 par. 8 of the Aarhus Convention "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings", https://www.enviroportal.sk/uploads/scoredocument/aarhus2506_1998.pdf

further reducing the scope in decision-making for the public under the Atomic Act can be considered as exercising rights in accordance with the Convention.

Public criticism of the NRA SR's activities and decision-making is a legitimate exercise of my right to freedom of expression and is fully in compliance with Art. 26 of the Constitution of the Slovak Republic and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The judgments of the European Court of Human Rights in Strasbourg clearly show that speeches and arguments concerning public authorities, public figures or matters of public interest benefit from increased protection of the freedom of expression (e.g., the judgments *Castells v. Spain*, *Thorgeir Thorgeirson v. Island* or *Thoma v. Luxembourg*). In the judgment *Thorgeir Thorgeirson v. Island*, the European Court of Human Rights states that *"the actions of civil servants should be continually subject to scrutiny and debate and be open to criticism"*. In the judgment *Thoma v. Luxembourg*, the European Court of Human Rights states that *"civil servants acting in an official capacity are, in the same manner as politicians, subject to wider limits of acceptable criticism than private individuals."*

Therefore, my views, statements and value judgment, which are based on facts and officially declared opinions of competent institutions, can in no way be considered as "damaging to the reputation of the NRA SR". Please note that in its document entitled "progress review" cited above, the Aarhus Committee also gave its opinion on similar situations when the NRA SR's attitude is considered to "...clearly counter the spirit of the Convention..." and again expresses its "...serious concern...".

In conclusion, please allow me to remind you that this exchange occurred in the context of the most recent amendment to the so-called Atomic Act, which I criticised for its contradiction to international law based on expert legal analysis. Both controversial points of the amendment to the Atomic Act objected to by me have been reflected in the President's veto¹², which was unfortunately overridden by the NC SR. Given the history of the NRA SR's decision-making, the civilian public is concerned by the continued attacks against the space for public control of decision-making on nuclear plants. This is despite the fact that this space is protected by international law and the Constitution and despite the fact that the President is willing to defend this space as Head of State.

Yours faithfully,

Dana Mareková
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¹² <https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=7&ID=1564>