I

Pursuant to Art. 102 par. 1 o) of the Constitution of the Slovak Republic, I return to the National Council of the Slovak Republic the Act of 27 June 2019 which alters and amends Act No. 541/2004 Coll. on the Peaceful Use of Nuclear Energy (the Atomic Act) and on alterations and amendments to some acts, as amended, and amending and supplementing Act No. 50/1976 Coll. on Land-Use Planning and on Construction Order (the Building Act), as amended (hereinafter referred to as the "Adopted Act").

I propose that the National Council of the Slovak Republic, during subsequent discussion, approves the Act with the alterations specified in Part IV.

II

The adopted Act has been presented for discussion in the National Council of the Slovak Republic as a parliamentary draft amendment to the Act. Despite the fact that it was the subject of an accelerated inter-departmental consultation process, broader professional discussion for the proposed legislation was absent, which could be one of the causes of the defects of the adopted Act highlighted by me in the text below. Moreover, some of the alterations commented on by me were approved in the adopted Act based on approved amendments in a common report of the Committees.

In Art. 1 of the fourth subparagraph of the adopted Act, new paragraphs 11 to 13 have been added in Article 8 of the Atomic Act which, according to the submitters, regulate the process of the handling of information that should have special protection granted by the Nuclear Regulatory Authority of the Slovak Republic (hereinafter referred to as the "Authority") under the adopted Act. The information is sensitive under the Atomic Act, classified information, a bank secret, tax secret, trade secret, telecommunications secret and a postal secret according to special regulations.

Article 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter referred to as the "Aarhus Convention") defines the international commitment of the Slovak Republic to ensure access to environmental information. In national legislation, Act No. 211/2000 Coll. on the free access to information and on amendments and supplements to certain acts (the Freedom of Information Act), as amended, is a general regulation for making information available. However, this Act does not provide a telecommunications or a postal secret with special protection on the grounds that it is the content of transmitted reports and the secret can only be legally interfered with in real time by opening letters, interception or recording of telecommunications, not *ex post* through a request for access to information.

The Authority does not perform such activities as interception or examination for the purpose of identifying unlawful conduct. Therefore, it is practically impossible to imagine that they would come into contact with the content of messages that are confidential as a telecommunications or postal secret; therefore, such new legislation is unreasonable and undesirable in terms of the protection of participants in proceedings.

Moreover, such new paragraphs of the Atomic Act are materially indefensible as an administrative authority cannot inform and ask a legal or natural person to give reasons for the existence of a postal secret, a telecommunications secret, a bank or tax secret. They exist for objective reasons, outside those stated by the relevant person, and the administrative authority cannot form an opinion about their existence based on subjective arguments of the person concerned. These types of secrets do not have a subjective component according to their definitions in special regulations. Only a trade secret has a subjective component according to Article 17 of the Commercial Code, whereas an entrepreneur must be able to give reasons for its existence under the Commercial Code. Only then can the administrative authority grant such a piece of information protection as a trade secret.

III.

In Art. 1 of the sixth subparagraph, the adopted Act excludes the possibility of applying extraordinary remedies under the Administrative Code; in particular, in proceedings to issue permission to commission a nuclear installation, permission for preliminary use of a structure, consent to the trial operation of a nuclear installation, consent to the temporary use of a structure for trial operation, permission to operate a nuclear installation, final building approval and any changes thereof, it will not be possible to make use of a new trial and the review of a decision outside the appeal proceedings.

According to the explanatory memorandum, "*the possibility of filing extraordinary remedies will be kept including the possibility of a judicial review within administrative justice and including the possibility for the court to award a suspensive effect for an administrative action. Thus, the legislation respects the right of participants in proceedings to the judicial review required by the Aarhus Convention, recommendations of the Committee of Ministers of the Council of Europe or other international documents".* Excluding the application of extraordinary remedies under the Administrative Code in administrative proceedings before the Authority with such justification is not a factually accurate argument.

According to the Administrative Code, extraordinary remedies are not replaceable by regular appeal, let alone by any judicial means of protection. If it were otherwise, there would be no need to enshrine them in the Administrative Code. Therefore, in this context, the argument of the possibility of applying "even" the judicial means of protection is fully irrelevant. Courts do not materially substitute for the activity of an administrative authority, which is the only one that is competent to decide in the matter, regardless of the subsequent

subject-matter jurisdiction of administrative courts. The clear principle of the subsidiarity of judicial protection is applicable (see, for instance, the judgments of the Supreme Court of the Slovak Republic 1 Sžz/6/2014, 10 Sžz/5/2014, 1 Sžz/10/2014).

A new trial and a review of the decision outside the appeal proceedings has a special significance and sense as expressed by their regulation in the Administrative Code. An appellate body is, for example, obliged to review even a delayed appeal from this point of view for whether there are reasons for a new trial or a change or termination of a decision outside the appeal proceedings.

The material and legal problem is that if a special law aims at excluding the application of Administrative Code provisions, such general provisions of the Administrative Code should be replaced by its own special regulation. In other words, the general regulation can be replaced in a special regulation, but not excluded. This determines the *lex specialis* and *lex generalis* relation. The argument that an appeal and a judicial review are sufficient to replace extraordinary remedies under the Administrative Code does not imply that the submitter performed his/her obligation to include special regulation in the special law. With respect to this particularly sensitive area of regulation, it would be necessary to give specific reasons for which only a reduced possibility for reviewing a valid decision is provided within proceedings. It is not necessary to be concerned about obstructions because a new trial and a review outside the appeal proceedings is only possible if they are permitted by the competent administrative authority and they have no impact on the validity and enforceability of the contested decision during the proceedings concerning extraordinary remedy.

The purpose of the concept of a new trial and extraordinary remedy is, inter alia, to remedy the situation when it is identified after the decision becomes valid that the decision is not based on reliably detected facts of the case, e.g., if new facts or evidence have arisen which could have a significant impact on the decision and which could not have been considered during the proceedings without the party's involvement (Article 62 par. 1 a) of the Administrative Code) or the decision is based on evidence which has turned out to be untrue (Article 62 par. 1 e) of the Administrative Code).

However, it would be impossible to lodge a regular remedial measure or an administrative action against such defects of the decision resulting in its unlawfulness, if the defects of the decision became evident only after the decision had become valid and at the same time after the lapse of the period for lodging an administrative action against a valid decision, which is two months.

Moreover, the cancellation of the possibility to use extraordinary remedies under the Administrative Code is, in my opinion, in contradiction to the international commitments of the Slovak Republic, mainly Article 9 of the Aarhus Convention. The only way to fulfil the requirements of the Aarhus Convention for a reasonable, effective, adequate and timely remedial measure and allow for the contestation of such defects resulting in the unlawfulness of a decision in an independent court is to allow the participants in the proceedings to file a motion to renew proceedings under Article 62 par. 1 of the Administrative Code. A decision on the motion to renew proceedings is subsequently subject to judicial review in administrative justice, which ensures access to a judicial review according to Article 9 of the Aarhus Convention.

As a result of excluding the possibility to file a motion to renew proceedings, a situation may occur where participants in the proceedings (the involved public) would be deprived of the right to legal protection against valid decisions issued under the Atomic Act if they were unlawful and the unlawfulness came to light only after the lapse of the period for filing an administrative action. This would be in contradiction to the requirements of Article 9 of the Aarhus Convention.

Following the comments specified in Part II and III, I propose that the National Council of the Slovak Republic, during its subsequent discussion, approves the Act with the following alterations:

1. In Art. 1 of the fourth subparagraph of Article 8 par. 11 of the adopted Act, after the words “trade secret” the comma is deleted, and the words “telecommunications secret, postal secret” are deleted.
2. In Art. 1 of the fourth subparagraph of Article 8 par. 12 of the adopted Act, the words “classified information, a bank secret, tax secret” are deleted, and the words “telecommunications secret, postal secret” are deleted.
3. In Art. 1 of the fourth subparagraph of Article 8 par. 13 of the adopted Act, the words “classified information, a bank secret, tax secret” are deleted, after the words “trade secret”, the comma and the words “telecommunications secret, postal secret” are deleted.
4. In Art. 1 of the fourth subparagraph of Article 8 par. 13 of the adopted Act, in the second sentence, the words “classified information, a bank secret, tax secret” are deleted, after the words “trade secret”, the comma and the words “telecommunications secret, postal secret” are deleted.
5. In Art. 1 of the sixth subparagraph of Article 35 par. 1 of the adopted Act, letter f) is deleted. The footnote to reference 45ac is deleted.

Bratislava, 17 July 2019