

Observer statement concerning Slovakia's implementation of the UNECE decision VI/8i.

Dear sir or madam,

we would like to provide you with our observer statement concerning Slovakia's implementation of the UNECE decision VI/8i and with our comments related to the subject of the decision – declaring information/documents as confidential and, subsequently, public access to information and effective public participation in decision-making processes. Two comments are related to the recent attempts to change the Slovak legislation which could illustrate the potential future development. We are very concerned about these proposals.

I. The new Building Act(s) proposal – exclusion of general public/NGOs from the decision-making process

On 06.05.2021 the Slovak government published the new Building Act(s) proposal for the inter-departmental commenting procedure. The new Building Acts include the Construction Act¹ and the Spatial planning Act². The proposal was prepared without relevant previous discussion and reviewing of the proposal by the public, NGOs and other affected entities which were given only 15 working days (the legal minimum) to read through the proposals and comment on them during the inter-departmental commenting procedure. Therefore we do not consider the public participation in the legislative process as effective.

The proposal represents a major change in the field, since unlike the previous modifications of the current legislation in the form of amendments, the new laws were written from scratch. The significant changes include e.g.:

1. public/NGOs protecting the environment will be excluded from the construction authorization processes including also authorization of construction of nuclear installations (unless they own a neighbouring property)
2. the participants will no longer have the right to request free of charge reconsideration of the decision by the public appeal body. The only option for decision review/reconsideration will be to appeal to the court of law, which is not free of charge and also the accusing party is required to be represented by a licensed lawyer.
3. the deadlines are short and if a participant does not manage to express its opinion within the deadline, it shall be deemed to have given its consent.
4. when deciding on construction, a substantial part of the decision-making is up to the project designer, not to the state (or self-governing) body.

A wider and more detailed set of objections, including also those based on the Aarhus convention, is summarized in the collective comment prepared by the Slovak NGO VIA IURIS³ which got supported by more than 11 000 citizens within a few days.

We consider the Building Act(s) proposals as non-compliant with the Aarhus convention, e.g. the article 9 "Access to justice" (see e.g. point 2 above) and article 6(4) "*Each Party shall provide for early public participation, when all options are open and effective public participation can take place*", since the general public will not be allowed to participate in the construction authorization

1 available at (in Slovak): <https://www.slov-lex.sk/legislativne-procesy/SK/LP/2021/226> . The page displays also all comments sent during the inter-departmental commenting procedure.

2 available at (in Slovak): <https://www.slov-lex.sk/legislativne-procesy/SK/LP/2021/218> . The page displays also all comments sent during the inter-departmental commenting procedure.

3 available (in Slovak) at <https://www.mojapeticia.sk/campaign/hromadna-pripomenka-k-navrhom-zakonov-v-oblasti-uzemneho-planovania-a-vystavby/ed0ec26b-cb5a-4940-8cb6-599f8109a648>

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processes including also construction authorization processes for nuclear installations (held by the Nuclear regulatory authority of the Slovak republic (NRA SR)).

Even the current Building Act (No. 50/1976 Coll. as amended) does not explicitly guarantee the right of public/NGOs interested in environmental protection to participate in the construction authorization and similar processes (unless these processes preceded by an EIA process and the public participated in that EIA process). There are rulings of the Supreme Court of the Slovak republic⁴ concluding that, based on the article 9(3) of the Aarhus convention, the public has the right to participate in the decision-making processes even if such right has not been implemented explicitly in the national legislation yet⁵. However, based on our own experience (unrelated to the nuclear sector), some administrative authorities deny the general public (that does not own a neighbouring property) the right to participate in the construction authorization and similar processes while these authorities are well aware of the rulings of the Supreme court.

II. New reason for declaring documents as confidential according to the Atomic act - the "intellectual property".

On 26.02.2021 two coalition MPs (Mrs. Zemanová and Mr. Kazda) proposed in the Slovak parliament an amendment of the Atomic act⁶ that focuses mainly on significant changes in authorization of nuclear reactor installations, but also introduces a new reason for declaring documents as confidential - the "*intellectual property*" (in Slovak: "*právo duševného vlastníctva*"). Fortunately, the proposal was withdrawn on 16.03.2021.

The proposed amendment included e.g.:

1.) a precursor stage in nuclear reactor installation authorization by NRA SR with extremely reduced requirements on the project documentation.

4 rulings no. 5SŽp/41/2009 and 5SŽp/21/2012

5 ruling no. 5SŽp/41/2009 from 12.04.2011 (translation from Slovak): „*With respect to the above conclusions, it is then quite logical to state that the Slovak Republic, among other things, has assumed an international obligation to ensure, in accordance with the Article 9(3) of the Aarhus Convention, public access to administrative and judicial procedures, and if the legislative or the executive authority did not carry out the respective normative (generally legally binding) steps to create suitable conditions for the implementation of this subjective right of an individual in the Slovak legal system, then the judiciary, based on the constitutional criteria for the primacy of Community law (Article 7 (2) of the Constitution) and the principle of loyal cooperation (Article 4 (3) of the Treaty on the European Union) and respect for the rule of law (Article 1 (1) of the Constitution), must grant the right of public access to administrative and judicial procedures to an individual who demands the right in an individual case.*“ Original text in Slovak: „*Vzhľadom na hore uvedené závery je potom celkom logické konštatovanie, že Slovenská republika okrem iného prevzala na seba medzinárodný záväzok zabezpečiť v zmysle čl. 9 ods. 3 Aarhuského dohovoru prístup verejnosti k správnym a súdnym konaniam, a pokiaľ zákonodarná alebo výkonná moc nevykonala príslušné normotvorné (všeobecne záväzné) kroky k vytvoreniu vhodných podmienok na implementáciu tohto subjektívneho práva jednotlivca v slovenskom právnom poriadku, potom súdna moc na základe ústavného kritéria prednosti komunitárneho práva (čl. 7 ods. 2 ústavy) a zásady lojálnej spolupráce (čl. 4 ods. 3 Zmluvy o Európskej únii) a rešpektovania princípu právneho štátu (čl. 1 ods. 1 ústavy) musí v prípade jednotlivca dovoľávajúceho sa v konkrétne prejednávanej veci na právo prístupu verejnosti k správnym a súdnym konaniam toto právo mu v individuálnej veci priznať*“.

6 available at (in Slovak): <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=8149>

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This precursor stage is introduced solely for the nuclear installations that include a nuclear reactor, not other types of nuclear installations. Currently, according to the Slovak EIA law the environmental impact statement (EIS) expires after 7 years if a subsequent authorization process does not start. In order to start the authorization process of a new reactor installation, detailed project documentation must be submitted to the NRA SR. According to some sources, it is allegedly unrealistic to expect that detailed project documentation required by NRA SR in case of the new nuclear reactor in Jaslovské Bohunice (EIS from 2016) will be prepared before the 7-year deadline expires (2023). On the other hand, it might be possible to prepare the reduced documentation needed for the precursor authorization and thus meet the 7-year deadline. However, this might also lead to e.g. 10, 15, or more years between EIS and start of the nuclear reactor authorization based on the detailed project documentation. After such a long time the EIS might be at least morally obsolete (with regard to technological as well as social development). Therefore, in our opinion, the effective public participation in the decision-making process would not be guaranteed.

2.) modification of the paragraph of the Atomic act that is a subject of the decision VI/8i.

Although the postal and telecommunication secret is withdrawn from the set of reasons allowing declaring documents as confidential, a new reason is introduced - "the intellectual property" (in Slovak: právo duševného vlastníctva). Firstly, the term "intellectual property" is vague, not precisely defined and, secondly, one can easily imagine declaring e.g. the project documentation as confidential reasoning that it is the intellectual property of the project designer or project proposer.

III. Obstacles in access to information due to JAVYS not being a liable entity according to the Freedom of information Act

The state-owned company JAVYS (Jadrová a vyrad'ovacia spoločnosť = nuclear and decommissioning company) that holds a de facto monopoly position in management of radioactive waste (RAW) and spent nuclear fuel (SNF) in Slovakia (responsible e.g. for interim storage of SNF and the project of the Slovak deep geological SNF repository) is not an entity that according to the Slovak Freedom of information act is obliged to reply to public requests of information (as explicitly confirmed also by JAVYS). The public therefore, even without explicitly declaring information/documentation as confidential, cannot effectively access some information about the deep geological SNF repository project and RAW and SNF management in Slovakia. We were able to obtain limited amount of information from NRA SR, but many of our questions/requests of information remained unanswered, since NRA SR did not have the requested information.

For example, on 23.02.2021 we unsuccessfully requested from NRA data about RAW incineration in Slovakia in 2020, including the volume and activity of the input RAW (both before and after preconditioning) divided by origin (individual producers from Slovakia, foreign producers), volume and activity of the ashes and the secondary RAW. On 27.11.2021 we unsuccessfully requested from NRA the data about how much radioactivity is carried to the waste water from wet filtration of flue gases from RAW incineration. We also requested, mostly unsuccessfully, data about radioactivity streams during RAW preconditioning, incineration and post-treatment, in order to analyse the fraction of foreign radionuclides that remain in Slovakia and how these missing radionuclides are replaced by Slovak radionuclides. We find these data crucial in order to analyse the impact of the foreign RAW treatment, especially by incineration. Such analysis is needed not only due to the ongoing EIA process for the RAW treatment and conditioning centre of JAVYS in Jaslovské Bohunice, but also because of claims of the Minister of economy "*not a single gram of foreign radioactivity remains in Slovakia*" (and similar statements of other authorities). In fact e.g. waste water from wet filtration of flue gases from RAW incineration that can contain significant share of foreign radionuclides ends up permanently in the RAW storage facility in Mochovce. Also the ratio of radioactivity retained in ash after incineration compared to radioactivity of the input RAW is variable and on average approx. 65% (2020).

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The public access to similar data is crucial for effective public participation in the decision-making processes. For example, during the public hearings in August and December 2019 which were a part of the EIA process for the RAW treatment and conditioning centre of JAVYS in Jaslovské Bohunice, the representatives of JAVYS claimed that the foreign RAW treatment is just a complementary activity and that the foreign RAW share at incineration is only 12%. Only in June 2020 we were able to prove that in fact during 2015-2019 this share varied between approx. 35-45% in the respective years.

As a result, due to the inability to obtain some necessary information in time or at all, we do not consider our participation in the decision-making processes as effective.

IV. Other obstacles in effective public access to information

Based on our own experience we also consider the following to be relevant obstacles in effective public participation in the decision-making processes:

1. the documentation of the authorization processes held by NRA SR is not published online and is also not available in the electronic form (source electronic document). In order to study the documentation, the participant of the process must visit the NRA office (office hours 9:00-14:00 on workdays), identify the documents or their parts he is interested in and later he is provided with paper copies of the documents where sensitive information (building identification codes, people's names) are blackened out. In my case each such visit at NRA means that I have to take a day off from my regular work. One may obtain scans of the documents also by sending a request of information according to the freedom of information act, but processing of the request can take up to 16 working days.
2. in some cases (e.g. the authorization process of early commissioning of the 2nd RAW incinerator in Jaslovské Bohunice) the only opportunity to study the documentation is during the local inspection of the respective facility. However, this event represents also the last opportunity to raise any objections. Assuming the extent of the documentation (usually thousands or hundreds of pages) and the limited time (a few hours), it is physically impossible to read through the documentation and properly react to it.
3. in some cases (e.g. documentation related to the SNF containers of the extension of the interim SNF storage in Jaslovské Bohunice) the entire set of documents (i.e. instead of only those selected parts of these documents that contain confidential or very sensitive information) is classified and the public cannot access it.

Written on 30 May 2021.

Kind regards,

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