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WIEN – BUDAPEST - VILNIUS

TO:

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Ref. ACCC/C/2009/39

Vienna, on 12th of March, 2010
09061 / US/SB / Answers

Dear Mr. Wates,

As legal representatives of the municipality of Szentgotthárd referring to the above reference number and your letter dated on the 29th of October, 2009 we would like to send you the answers relating to the questions posed by the Commission.

1. When and how did the Municipality of Szentgotthárd obtain information about the decision-making process relating to the intended construction of the incinerator?

The Municipality got acquainted with the fact of the permitting process concerning the intended construction of the incinerator by a fax message sent by the Municipality of Mogersdorf and by an official informing e-mail of the Hungarian Ministry of Environment and Water Management. **(Annex 3)**

The announcement sent by the Municipality of Mogersdorf, a village near by, on the other side of the border, concerned also by the eventual future construction, contains the substantial information about the request filed by the investor with the Government of the Federal Land of Burgenland. According to the announcement, the regional Austrian government recognized the possibility of potential effects on the Hungarian territory of

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the incinerator to be permitted and therefore deemed necessary a transboundary process involving Hungary as well. As to the proposals of the announcement referred, the proceeding authority assumed that a Hungarian environmental organization shall take part in the permitting process provided the construction affects any part of the environment of Hungary. The announcement has been forwarded to the relevant department of the Hungarian Ministry of Environment, and the Municipality of Szentgotthárd has been requested by a ministerial officer in the enclosed letter to announce the report on the environmental compatibility of the planned incinerator.

2. How was the Municipality of Szentgotthárd involved in the decision-making that took place in Hungary, to define Hungary's official position with regard to the construction of the incinerator by Austria?

Upon request the Municipality shared its view on the environmental compatibility of the intended waste incinerator with the regional competent authority. There was not any other way or method to involve the Municipality in the decision-making procedure of Hungarian governmental institutions.

The Municipality formed its own view on the planned construction of the incinerator on the occasion of the forementioned request and forwarded it to the competent authority, namely to the Inspectorate of Environment, Nature and Water of West-Transdanube.

Regarding the importance of the above mentioned opinion, we summarize its content as follows, as well as we enclose the opinion in its original language. (**Annex 4**)

First of all, it had to be noted that the report on environmental compatibility – as well as all of the relating documents – to be judged was sent to the Municipality in German language on the 24th of January, 2008. With respect to the deadline for sharing a view, the Municipality did not have enough time to create a profound opinion about the report. Despite of this fact they made all efforts to form and communicate a professional and valid opinion.

Briefly, the judgement is that the report on environmental compatibility is not acceptable due to taking no notice of any eventual effects on Hungarian environment, nature or population.

Detailed have been described other objections i.e. questions to the report, based on the lack of concrete and specified data of the research and of the expected environmental effect. The Municipality especially queried the statements concerning the transboundary effects because relating the report declares: the environmental effects of the project are confined within the borders of Austria. The 100 meters high chimney of the incinerator shall presumably affect the environmental status in the near, so in Szentgotthárd, with special respect to the air-pollution and the noise-protection. Besides the majority of the waste will have to be delivered through Hungary because the location of the incinerator is not reachable from other direction. NB. There are not any research data in the report concerning the transboundary territory, i.e. Szentgotthárd. Finally, the fact of the neighbourhood of three environmental areas had to be emphasized again.

3. How is the relationship between the obligations of the central government of Hungary and the Municipality of Szentgotthárd to represent the interest of the population in transboundary cases?

The central and local authorities shall cooperate and/or act separately and independently in respect of representing the majority of the Hungarian population or a determined but concerned minority of it, as the extracts of relating Hungarian acts also declare.

According to the Hungarian Constitution the Government of the Republic of Hungary should represent the interests of the whole Hungarian population, the local municipalities are entitled

and obliged to represent the interests of the local population.

Act on local self-government Art. 1

- (1) The self-governments of villages, the capital and the capital district shall elect independently in local public affairs within the scope of responsibilities and jurisdiction.*

In this respect the municipality of Szentgotthárd as communicant regarding this comunication by the public does not act as an organ authorized to represent the Republic of Hungary on the level of international. Of course regarding public international law (Völkerrecht) the Republic of Hungary respectively the government of the Republic of Hungary has the exclusive authority to act, but the municipality of Szentgotthárd as legal entity under Hungarian law is regarding this communication representing its own interests as described in the communication, in respect of the kinder garden, schools, etc. and also as legal entity authorized by the Hungarian constitution (as local self-government) to represent the interests of the population of Szentgotthárd.

In this respect the municipality of Szentgotthárd does not claim for itself in respect of this communication "special rights" as governmental institution (like the government of the Republic of Hungary could do) but is of the opinion that the municipality has the same rights as any other legal entity or natural person or as any NGO (environmental organisations) to submit to the AARHUS Compliance Committee a "communication from the public".

As the municipality of Szentgotthárd is regarding this communication respecting the principles of international law that only the government of the Republic of Hungary can act on the level of international law the municipality did of course not submit a "communication by the parties", but a communication by the public.

4. According to the Constitution and/or other legislation of Hungary, is the Government of Hungary responsible and/or authorized to represent the interests of all population of Hungary (and/or local self-governments) at the international level?

In this respect the communicant would like to refer to the answer to question 3.

As already mentioned, of course the municipality of Szentgotthárd as communicant is aware that it is the exclusive right of the Government of the Republic of Hungary to represent the Republic of Hungary on the level of international law, and not a municipality.

But as already mentioned above in respect of this communication the municipality of Szentgotthárd is not acting as "subject of international law" or "as party to the Convention", but as local self-government and in this respect the municipality is convinced that the local self-government has at least the same rights as any other legal entity or natural person or NGO and therefore is entitled to submit a communication by the public.

5. Do the institutions owned by the Municipality of Szentgotthárd (schools, kinder gardens, foster home and a day care centre for Elderly, etc.) constitute integral part of the municipal institution as a whole? Or do they constitute separate legal entities entitled to act as the public and participate in the decision-making process relating to the intended construction of the incinerator? And how does this consideration relate to the status of the public authority of the Municipality of Szentgotthárd?

The institutions founded, operated and financially supported by the Municipality of Szentgotthárd are legally separated i.e. have their own legal personalities. Besides they are integral parts of the system of local social institutions managed and instructed by the Municipality. The institutions themselves are naturally not entitled to represent the public or

any part of the population concerned. The institutions' operating is covered by the regional budget – participating also the Municipality of Szentgotthárd. The management or head of the institutions is to be appointed and employed by the representative body of the Municipality or by the regional joint council.

The institutions are *de facto* under the control and governance of the Municipality, their existence is the essential interest of the residence population, and hence their maintenance is a cardinal obligation of the Municipality.

6. *It seems from your response that the plans concerning the development of the thermal baths and other tourism activities in Szentgotthárd were the main reason for the Municipality of Szentgotthárd to participate in the decision-making process in Austria. Please explain whether the Municipality of Szentgotthárd is (or will be) involved in the planning (and/or permitting) of the development of thermal baths and other tourism activities in Szentgotthárd as the authority responsible of the decision-making or as a representative member of the public.*

The Municipality of Szentgotthárd is the shareholder of 100% of the shares i.e. the sole owner of the Gotthárd-Therm Kft. that operates the thermal bath called St. Gotthard Spa & Wellness. With regards to this fact the Municipality was entitled to participate in its planning as well as its permitting process. Currently an expansion investment is proceeding, namely the outdoor space of the bath is to be developed. These investment-workings have been supported by the Hungarian Government with HUF 300 Million. During the development proceedings the Municipality will (is obliged to) act in a responsible way, as investor, as constructor, as licensee. (**Annex 5** of the commercial register report concerning the above mentioned company i.e. Gotthárd-Term Kft. – according to its last notation under Nr. II. 1/3. the Municipality of Szentgotthárd is the sole owner of the company concerned)

7. *Please explain whether the Municipality of Szentgotthárd in its efforts to participate in the decision-making process concerning the intended construction of the incinerator was acting on behalf of the population (an/or the schools, kinder gardens, foster home, day care centre for Elderly, and other institution it owned) as their representative or as a legal person acting independently (in other words, please clarify who was the party to the legal relationship and whose rights were represented by the Municipality?). In case the Municipality of Szentgotthárd was acting on behalf of the population of Szentgotthárd (as their representative), please specify, if the Austrian authority responsible for the decision-making was informed about this fact and how. Please also clarify who is the communicant in this communication: the population of Szentgotthárd, represented by the Major (as a public authority) or the Municipality of Szentgotthárd as the owner of real estate.*

The municipality was acting, on the one hand, in its efforts to participate in the decision making process as legal person acting independently (inter alia as owner of the mentioned institutions, which are effected by the intended incinerator).

The Austrian authorities (Burgenländische Landesregierung) were informed of this with „Stellungnahme/Einwendungen“ comments and objections of March 13th, 2008, in which it is mentioned that the municipality is owner of the institutions mentioned.

The municipality was as owner of the mentioned institutions acting in its own interests on the base of § 19 Abs. 1 Z. 1 UVB-G, which gives neighbours the right to participate.

The municipality was of the opinion that due to the fact that the municipality is owner of several institutions which are effected by the intended incinerator, the municipality falls within the definition of neighbour according to § 19 Abs. 1 Z. 1 UVB-G.

But from the objections submitted to the Austrian Authorities of March 13th, 2008 (Annex 7) it is clear that the municipality was also acting on behalf of the population of Szentgotthárd as the objections also concern general effects on the territory of the municipality of Szentgotthárd and the population of Szentgotthárd, especially in respect of the effect on tourism of the region, agriculture and a nature park as well as a construction area.

Therefore the municipality was acting not just in its own interests as owner of the mentioned institutions, but also in the interest of the population of Szentgotthárd. This as already mentioned on the base of the Hungarian Constitution as it is the obligations of the municipality to protect the interests of the population of the municipality (Annex 7).

In this respect, the Municipality (acting in the interest of the population) is convinced, that the Municipality has to be granted the same rights as an Austrian Municipality, as Austrian Municipalities neighbouring the Municipality where the incinerator should be build have the right to participate in the procedure according to § 19 Abs. 1 Z 5 UVP-G, in order to be able to protect and represent the interests of their population. The Municipality of Szentgotthárd, neighbouring the Municipality where the incinerator is intended, requests the same rights, and possibilities to represent the interests of the population of Szentgotthárd, which the Austrian law grants to the neighbouring Austrian Municipalities.

8. In case the Government of the Federal Land of Burgenland has not considered admissible the appeal of the Municipality of Szentgotthárd, or in case any other administrative organ or court in Austria has denied access to review procedures for the Municipality of Szentgotthárd, please provide the Committee with a copy of the related administrative and/or juridical decisions that denied access to justice and a copy of the appeal documents as well.

The required decision of first instance was enclosed as Annex 2 (see our communication submitted in June, 2009 p. 163)

Annex 6 – appeal against the decision of first instance

9. Please provide the Compliance Committee with a copy of your correspondence with the Austrian authority regarding your participation in the decision-making procedure.

During the permitting process in front of the competent authority, the Government of the Federal Land of Burgenland Jarolim Flitsch Law Firm as legal representative of the Municipality of Szentgotthárd submitted a objection in March of 2008 on behalf of the Municipality as a party concerned (**Annex 7** The authority of first instance refused to consider the objections and comments of the Municipality, arguing that the Municipality does not have the status of a party to the proceeding (Annex 2, decision of February 5th 2009).

The communicant submitted an appeal (Annex 6) against this decision to the Environment Council of Austria, this appeal procedure is still pending.

On 9th of February, 2010 a statement has been submitted to the authority of the second instance (**Annex 8**).

10. Please provide the Compliance Committee with a copy of the normative acts and/or provisions of the normative acts you mentioned in your communication.

The mentioned articles of Hungarian normative acts declare some constitutional principles, define the rights and obligations and the scope of local self-governments (municipalities), and describe their constitutional and legal status.

The abbreviations are the followings:

- Const. – Act Nr. 20 of 1949 on the Hungarian Constitution
- CC. – Act Nr. 4 of 1959 on the Hungarian Civil Code
- LG. – Act Nr. 65 of 1990 on Hungarian Local Self-Governments

Annex 9 – extracts from the referred Hungarian acts in English and in Hungarian

11. Please provide the Compliance Committee with a copy of the decision of the referendum mentioned in your communication.

Annex 10 – Cumulative Report on Local Referendum

12. Please inform the Committee on how you reflect on the principle of international law that only governments can act against governments, and what in your view would be the impact of this principle in the present case.

Bearing in mind that the mentioned principle shall be considered as absolutely valid in international law, we refer to the unique compliance review mechanism relating to the Aarhus Convention which can be triggered in two different ways (excluded the process proposed by the Secretariat of the Convention), namely:

1. *submission of a Party* – in accordance with paragraphs 15 and 16 of the annex to decision I/7 of the first session of the Meeting of the Parties to the Aarhus Convention, a submission may be brought before the Committee by one or more Parties, concerning the compliance of themselves or of an other Party
2. *submission of the Public* – idiom applied for cases when a member of the public, could it be a natural or legal person e.g. individuals or authorities, submits a communication concerning the compliance of a party of the Convention.

Because the municipality of Szentgotthárd is aware of the principle of international law, that only Governments can act against Governments, the municipality is not considering itself entitled to make a submission by a party, or act in the name of the Republic of Hungary as party to the AARHUS Convention “against” the Republic of Austria as party to the AARHUS Convention, but the municipality of Szentgotthárd was submitting a communication by the public, and by this fully respecting the principle of international law that only a Government can act against a Government.

Supporting documents:

Annex 3: fax message of the Municipality of Mengersdorf (Austria) to the Municipality of Szentgotthárd (in German) and official informing letter of the Hungarian Ministry of Environment and Water Management (in Hungarian)

Annex 4: official opinion of the Municipality on the planned construction of the incinerator (upon request of the competent Hungarian administrative authority (in Hungarian)

Annex 5: commercial register report concerning the above mentioned company i.e. Gotthárd-Term Kft. – according to its last notation under Nr. II. 1/3. the Municipality of Szentgotthárd is the sole owner of the company concerned (in Hungarian)

Annex 6: appeal against the decision of first instance on behalf on the Municipality (in German)

Annex 7: claim to the process of first instance (in German)

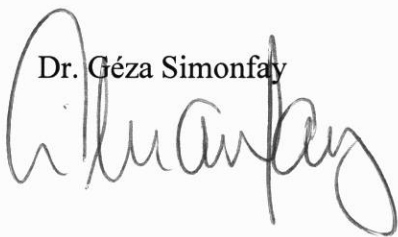
Annex 8: opinion in the procedure of second instance (in German)

Annex 9: extracts from the referred Hungarian acts (in Hungarian and in English)

Annex 10: Cumulative Report on Local Referendum about the environmental status of Szentgotthárd and expected effects of planned construction of the waste incinerator nearby (original in Hungarian and translated version in English)

For any further information or request we would kindly be helpful.

Yours sincerely,

Dr. Géza Simonfay


Mag. Ulrich Salzburg
