PRE/ACCC/C/2019/169
Response on the questions posed by the Compliance Committee

Jan Haverkamp – representing the Communicants
28 October 2019

Dear members of the Compliance Committee,

I hereby send you the response from the Communicants on the questions you posed to us on 4 October 2019.

We would like to stress that, as you can see in the answers, the Communicants have gone out of their way to enter local remedies and to establish how they could do so. They formed a coalition, so that any reasonable costs could be covered and in their quest spent the budget they were able to bring together; they sought information in Hungary with the help of a renowned Hungarian lawyer; they sought information over their own governments; they cooperated in assessing the information they found and were provided; they prepared material for a court appeal. On the other hand, they did not receive any information as part of the normal EIA procedure on possibilities of appeal for them in their specific case, they had to interpret difficult accessible Hungarian language legal responses, which left in their view no doubt that they, as category, were not eligible for local remedy (acceptance of the status of "client").
Article 9(2) and article 9(3) of the Aarhus Convention in conjunction with art. 9(5) and art. 3(2) oblige the Parties to make justice accessible in a way that does not throw the public that wants to use that right in complete confusion. That is exactly what happened here. The system of access to justice in Hungary, based on the "client" registration system, throws up barriers to the public for that access that are difficult to overcome for Hungarians dealing with them in their own language (see under in the answers on the questions 4, 6 and 7) – they are even more difficult to meet for foreigners struggling with the Hungarian language – even in translation – and not familiar with the complexity of the system. Hungary did not provide the Communicants with clear information on how appeal could be made against the acceptance of the EIA, it did not help them getting this information – neither pro-actively, as should be the default under Aarhus art. 9(5) in conjunction with art. 3(2), nor re-actively in the form of clear explanation of the legal situation and instructions to follow. We conclude that this – even if it appears to be the case that on paper there still may have been possibilities – constitutes a *de facto* lack of access to local remedy as defined for communications to the Aarhus Convention Compliance Committee. We are of the opinion that we as Communicants have done all that could have been expected and that a larger effort would have been disproportional. We therefore kindly and sincerely ask the Compliance Committee to accept admissibility of our Communication and assess it on its merits concerning procedural and content matters.

1. Did any of the communicants file administrative or judicial review proceedings to challenge the permitting decision of 29 September 2016? If so, on what date was the proceeding filed and what is the status of the case, including any outcome?

As was explained in the Communication of 20 May 2019, several of the communicants tried unsuccessfully to enter administrative or judicial review proceedings, or receive information about such procedures, as described in the points 17 – 19 of the Communication, and in the section on use of domestic remedies.
This means that, in the end, none of the communicants was able to file administrative or judicial review proceedings to challenge the permitting decision of 29 September 2016.

The *Österreichisches Ökologie-Institut* (further: *Ökologie-Institut)* tried for nearly a year to solve the problem via the Austrian Espoo contact point as explained in detail below. After that, the Communicants prepared for a legal complaint in Hungary with a renowned Hungarian lawyer, but when this was almost ready for submission, the Curia decision of Jan 2019 halted our efforts.
The *Ökologie-Institut* complained in a letter to the Austrian Minister of Environment and in a letter to the Austrian Espoo contact point, both dated 7 February 2017. In these letters it indicated that

NGOs participating in the transboundary EIA were not informed about or offered a proper opportunity to appeal the environmental permit, and that the *Ökologie-Institut* did not accept the conclusion drawn in this permit that countries outside of Hungary were not affected and therefore would not get the option to appeal. The *Ökologie-Institut* asked Austria to take steps to halt the EIA procedure and demand publication of the environmental permit in such a way that people in all affected countries would be informed in time about possibilities to appeal against this permit.
No direct answer was received from the Austrian Ministry. The Espoo contact point sent an answer on 2 March 2017. In this letter, the *Ökologie-Institut* was informed that the Hungarian Espoo contact point sent the environmental permit on 21 Dec. 2016 to the Austrian Espoo contact point. Dr. Platzer-Schneider, the Austrian Espoo contact point, also informed that she was aware of the problem and had tried to clarify legal matters with Hungary, but had not received a satisfying answer from the Hungarian side. She informed the *Ökologie-Institut* that the Austrian Environment Minister DI Andrä Rupprechter would therefore submit a request to the Hungarian Minister of Environment, Dr. Sándor Fazekas, to enable the Austrian public the right to review the environmental permit.
In a second letter of 22 June 2017, the *Ökologie-Institut* asked about results of this request between the Ministers of Environment. This was provided several weeks later with a copy of a letter from the Hungarian Minister of Environment to the Austrian Minister of Environment dating from 19 June 2017 (see Annex VIII of the Communication – first letter). This letter states, among others, that the Hungarian legislation was in line with respective rulings of the European Court. It states that relevant legal information could be found in the text of the EIA decision (page 23, 112) and in the text of the EIA decision of the competent environmental authority of second instance (page 4, and 76-77). However:

- In the EIA decision (unofficial English translation) it is written on page 24 (!) that the decision may be appealed in a period of 15 days of receipt to the National Inspectorate for Environment and Nature. A service fee charged for appeals was named. On page 112 or around that, no additional information for appealing is given.
- The EIA decision of the competent environmental authority of second instance was not made available to the *Ökologie-Institut*.

2. Did Oesterreichisches Oekologie Institut submit the information requested by the Baranya County Government Office within the 30-day deadline stipulated by that entity's ruling of 22 March 2017?[1] If so, what was the outcome of its application?

The *Österreichisches Ökologie-Institut* received the information from the Baranya County on 27 March 2017 by registered mail. It took several days to find someone to translate this information out of Hungarian, and the *Ökologie-Institut* then sought for information how long translation of its statutes would take and how much this would cost. It appeared that it was not possible to arrange this within the given deadline. Hence, the *Ökologie-Institut* had to refrain from providing the requested information.
The *Ökologie-Institut* furthermore noticed in the letter that Austria was not included by the authority as affected by the proposed activity, which would according to legal advice exclude success of registration of the *Ökologie-Institut* as "client".[1] This together with prohibitive costs lead the *Ökologie-Institut* after discussion with the other Communicants to the conclusion that pursuing far more expensive express translation and express translation certification services were not warranted.

1 Annex VIII with the Communication, page 22: "Pursuant to the last sentence of Paragraph 7. (3) of the R., the scope of the impact area shall be defined in accordance with the provisions of Annex 7. According to the environmental impact study and its annexes, submitted in the case by the User of the Environment, the impact area of the planned activity will affect the town of Paks, as well as Dunaszentbenedek, Uszód, Foktő and Gerjen as per the location of the installation."

3. Did any of the other communicants submit a fully completed application for client status either during the EIA procedure or since the 29 September 2016 permitting decision was taken? If so, what was the outcome of their application?

None of the other communicants was made aware of the necessity to register as "client". They presumed they were participants in the procedure by submitting their viewpoints and appearing (and registering) at the public hearings.
The letter with the decision that CALLA, *Terra Mileniul III* and the *Österreichisches Ökologie-Institut* received from the Pest County Government Office on 3 March 2017 (see Annex 8 of the communication, second letter) is written in a for lay-people barely understandable language. The communicants understood from that language that they were not allowed "client" status, that their submissions were not considered as lodged inside the statutory deadline, and that "no appeal may be brought against the present decision." Hence they were not aware that they still could apply for "client" status, nor is it described in this letter, that if so, what they should have done.
The other communicants did not receive any information on which they could have reacted.
Therefore none of the communicants submitted a fully completed application for "client" status.

4. Please provide evidence to substantiate your claims that "Hungarian authorities were not ready to grant environmental organisations with a scope of activity in neighbouring countries nor individuals living in a distance of more than 30 km from the Paks site" either:
(a) "the status of a legal client";
(b) "a remedy against the permitting decision".

Concerning organisations: We refer here to the points 8, 13 and 15 of our Communication. We were already informed by our legal advisors in Hungary during our initial exploration talks about the possibilities to file appeal against the environmental permit, that the Hungarian law[2] explicitly prescribes that only "associations formed by the citizens for the representation of their environmental interests and other social organizations not qualifying as political parties or interest representations – **and active in the impact area**" [emphasis added, JH] are entitled the status of "client" and that only "clients" have standing in appeal procedures. Because none of the involved organisations is active in central Hungary (e.g. the municipalities of Paks and surrounding municipalities – see also footnote 1), our legal advisors made clear to us that we had no right on applying for the status of "client" and hence could not file an appeal. We agreed then to seek remedie by intervention into the court procedures of the appeal by the Hungarian NGOs *Energiaklub* and Greenpeace Hungary in a later stage, which, as explained, did not take place because of a procedural error in the earlier stages of appeal (see response to questions 6 and 7 under). We received no indication from the side of either the responsible authorities or other Hungarian involved authorities that we would have the right to register as "client", nor information on how to do so.
Also, the explicit text of the law referring to the criterion of being active in the "area of impact" did not leave us much space to doubt our legal advisors.
This assessment was confirmed when gaining access to the English translation of the final decision from the authority (Annex I of our Communication). Under point 5, on page 85, it is made clear that the NGO *Egészséges Ivóvízért és Környezetért Egyesület* (Association for Healthy Drinking Water and the Environment, 7145 Sárpilis, Zrínyi utca 3., hereinafter: EIKE) was refused the status of "client" because it was not active in "the impact area which is subject to this procedure". EIKE appealed and the appeal was dismissed, even in second instance. When even a Hungarian NGO is

2 Act LIII of 1995, Article 98 para. 1, as mentioned by Hungary in their Reply to the Communication ACCC/C/2019/169 Hungarian view concerning the admissibility of the Communication on 28 June 2019

not allowed the status of “client” on the basis of not being active in the impacted area, in spite of having the protection of the right to a healthy environment in its statute, there was no reason for the organisations among the Communicants to believe they would be accepted.
The only comprehensible communication we then received from the Hungarian authorities about potential possibilities to still register as “client” was the communication from the Baranya County Authority to the *Österreichisches Ökologie-Institut* (the last letter in Annex VIII of our communication) after intervention of the Minister of Environment of Austria. But even here, the “impacted area” criterion is mentioned (see footnote 1) and in our assessment this letter did not warrant us a chance on recognition as “client”!

Concerning individuals: Information received from local lawyers when discussing why there was only a hearing in Paks and not in – among others – Budapest (which contains 1/3 of the Hungarian population) stated to us that under the Hungarian legislation only the public concerned was allowed to participate (and to be considered a “client” in the procedure – At that time, we understood that to mean “to be a participant”, because we were not aware yet of the need to formally register as “client”), and that only the public in the municipalities of Paks and its direct surrounding municipalities were considered to have an interest. Questions on this issue were also submitted by Jan Haverkamp during the hearings in Paks and Vienna, but no clarity was given during the hearings themselves, nor did he ever receive a written response.
When we communicated with the NGOs *Energiaklub* and Greenpeace Hungary about their appeal, the idea of asking citizens from, for instance, Budapest (potentially impacted by a severe accident), Debrecen (potentially impacted because of transports of radioactive material, or by a severe accident) or Pecs (potentially impacted because of a potential radioactive waste depository, or by a severe accident) to join the appeal, this was dismissed by their legal advisors on the basis of the fact that these individuals would not have standing or be able to register as “clients” because of residing outside of the “area of impact” and hence lack of interest. All three towns are outside the in the procedure defined “impact area” of Paks and the surrounding municipalities.
This was further illustrated by the exclusion of the Hungarian NGO EIKE (see above) because it was not active in the municipality of Paks or one of the directly surrounding municipalities.
When we sought advice from several legal experts in Hungary about the possibilities of appeal for individuals from outside the country, we received the same response from them that under Hungarian law, only interested citizens, in this case citizens of the Paks municipality and the municipalities directly surrounding that, were considered as having an interest. For that reason, we prepared steps (intervention in the appeal by *Energiaklub* and Greenpeace Hungary, and later a court appeal) based on international conventions and law.
In the decision on the environmental permit, no individual citizens are mentioned participating in the procedure as “clients” or otherwise. It is unknown to us whether any individuals participated as “clients”, and whether this includes any individuals outside of the “impact area”. We kindly request the Compliance Committee in our Communication to investigate this issue of potential exclusion of individuals outside the very limited defined “impact area”, which is in our view too small for an ultra-hazardous activity like a nuclear power station.

Concerning not being able to search for *“a remedy against the permitting decision”*, we refer to our failed attempts to get clarity about who can appeal when and where (see above), and our Communication point 19, describing our efforts to start a late appeal procedure on the basis of not having been timely informed about the decision and appeal possibilities, and the impossibility to do so because of the mentioned *Curia* decision as we have been made to understand.

5. Please comment on the statement of the Party concerned that the communicants did not use all remedies because they did not use the possibility of an application for an excuse pursuant to article

66(1) of Act CXL of 2004 on the General Rules for Administrative Proceedings and Services (the Ket).

On the basis of article 3(2) of the Aarhus Convention, *"Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters."* and article 9(5) of the Convention, *"In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."*
In our case, Communicants have received either no information at all concerning access to justice, or the information other Communicants received was incomprehensible (see the letters in Annex VIII to *Terra Mileniul III*, Calla and the *Österreichisches Ökologie-Institut*), or did not mention the possibility of an application for an excuse as mentioned by the Party (the decision received by the *Ökologie-Institut*), nor the way how to make such an application for an excuse as mentioned by the Party (see the letters in Annex VIII of our Communication).
The appeal the Communicants prepared with support from legal advice in Hungary was made on the possibility to launch an appeal because of not being able to keep a deadline or time limit for reasons beyond control. As we explained in point 19 of our Communication and again in the section on local remedy, at the time we were finalising this appeal, we were informed of the *Curia* decision that makes it, according to the legal advice we received, impossible to file such an appeal on these grounds when the time-limit expired more than six months. We were advised that submitting such an appeal anyway, under our circumstances, would amount to starting a frivolous procedure and contempt of court with potential consequences for our legal representation. After having heard an (oral) second confirming opinion on that advice, the Communicants decided not to choose this avenue, but concluded there appeared to be no possibility for local remedy.

6. On what grounds was the administrative appeal of Energiaklub and Greenpeace Hungary against the permitting decision for the new reactors at the Paks NPP dismissed by the responsible authority?

7. Regarding the court appeal brought by Energiaklub and Greenpeace Hungary against the permitting decision for the new reactors at the Paks NPP:
(a) On what date did Energiaklub and Greenpeace Hungary file their court appeal?
(b) On what date was Energiaklub and Greenpeace Hungary's court appeal rejected?

(Input from *Energiaklub*, which is not a Communicant in this case)
Greenpeace Hungary and *Energiaklub* have submitted an action for judicial review of an administrative decision in an environmental clearance license – the decree PE-KTF/203-40/2017. The deadline for the start of legal actions was 22 May 2017. Despite the fact that Greenpeace Hungary and *Energiaklub* posted the claim on time (19 May 2017), it was not submitted to the authority of first instance (Baranya County Government Office Pécs District Office) but to the defendant (Pest County Government Office). Although the Pest County Government Office received the claim before 22 May 2017 (the deadline) and resent it to the authority of first instance, the Baranya County Government Office Pécs District Office only received it a week after the deadline. After the lawyer of Greenpeace Hungary and *Energiaklub* realized that the claim was submitted to a wrong authority, the lawyer submitted a request for attesting on June 2, 2017. The reasoning was that, although the claim form was duly addressed, there was a formal error in the address details of the postal envelope. The name of the first instance authority had changed three times since the beginning of the case, the name of the second instance authority has changed once, both within a five month time frame, and the former county court of first instance became a national

court of second instance with the same name. The request for certification of the mistake was rejected on 7 August 2017, and in appeal the claim was transferred from the *Curia* of Hungary to the General Court of Pécs. The verdict of non-acceptance was upheld by the court of second instance (General Court of Pécs) on 5 October 2017.

8. You claim that decision No. 1/2019, KMJE of January 2019 of the Curia has "changed the rules of operation vis-à-vis appeals where the complainant argues he could not keep prescribed time limits because he was not properly informed". What is the basis for your assertion that the Curia's judgment is applicable to a case in which the complainant alleges it was not notified in due time by the authority who took the challenged decision? Assuming that the Curia's judgment would indeed be relevant to the present case, what end date for filing an appeal does it set? Please provide references to the relevant part of the judgment or to subsequent caselaw of the Party concerned's courts to support your answers.

The Communicants only claim what has been communicated to them by their Hungarian legal advisors. As far as we understood from our legal advisor and an oral second opinion, the end date for an appeal is six months after the initial time-limit / deadline has run out.
The Communicants only had / have limited financial and organisational means to seek remedy, and an official legal assessment of the *Curia* decision and its consequences for the Communicants' concrete case is way beyond our means, and, in our view, way beyond what may be expected from citizens in their quest for justice in matters concerning the environment. We only could rely on the final legal advice we received in Hungary. The legal text from the *Curia* is far beyond our lay-people legal understanding.

We as Communicants would like to point out, that we have tried our very best from the start to seek remedy, but the largely unclear appeal procedure and the unhelpful information stream from the side of the Party has brought us to the point that we did not see any avenue in which we could find remedy in Hungary. Hence we turn to the ACCC to receive more clarity in this case, as well as a more helpful attitude from the side of the Party.