Aarhus Convention Compliance Committee **April 21 2016**
Attn.: Ms Fiona Marshall
Environmental Affairs Officer - Secretary to the Compliance Committee
Convention on Access to Information, Public Participation in Decision-making
and Access to Justice in Environmental Matters
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
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RE: Communication ACCC/C/2014/105

Dear Ms. Marshall,

Having carefully studied the submission dated March 9, 2016, of the Communicants it appears to us that the Communicants dropped their case in terms of the cases N°1 through N°4 that the original Communication complained of. Apparently, the Complainers turned to focus instead on the general regime of implementation of Aarhus into Hungarian laws. Given this framework, let us make it clear that in a number of allegations we cannot but disagree with the opinions of the Communicants. This disagreement originates from the complexity of the issues which - in our view - cannot be observed in a simplified manner. Hungary wishes to make these comments on the Communicant's newest submission in order to provide the Committee with an objective legal approach. Hungary respectfully expects the Committee to continue studying these considerations on the merit.

I. Comments to Question 1-2 (page 2-12)

1. The Communicants said that *"However the Data Protection Act is the <u>only Hungarian legislation that contains the overall system</u> of access to environmental (and any other public interest) data and the term body that performs public tasks seem to cover <u>only the public authorities in narrower sense</u>"* (underline added). This statement is wrong.

2. In this regard, the implementation of the Aarhus Convention, on the one hand, is contained in the act 2011:CXII (the "Data Protection Act", as the Communicants referred to it; hereinafter referred to as the Freedom of Information Act) is obviously an important part of legislation transposing the right to access to public information in general. This act, inter alia, lays down the basic procedural rules of the access to public information, determines the scope of the obligations, defines public information and also provides for access to justice in case of ignorance or refusal of the data requester.

3. On the other hand, sector specific legislation supplements this general legislation. This is provided basically by the act 1995:LIII (on basic rules of environment protection) and also by Gov. Decree 311/2005. (XII.25.).

4. Art. 12 para. 3 of act 1995:LIII reads that "*State agencies and local governments – with the exception of the courts and legislative bodies in that capacity –, bodies discharging certain environment-related obligations or providing public services, and bodies and persons vested*

with public duties shall […] provide access to and make available the environmental information […]."

5. Accordingly, we hold that the Communicant statement on that the "*Data Protection Act is the only Hungarian legislation that contains the overall system of access to environmental data"* is blatantly inaccurate as the right to access to specifically environmental information is provided by a complex and comprehensive legal system containing both general and specific regulations[1].

6. Cited provisions of the Freedom of Information Act and act 1995:LIII do not cover *only the public authorities* and obviously not in a *narrower sense*, but more than satisfies the requirements laid down in the Convention. On this specific point see Case Nr. 13. GF.40.024/2011/4 – described in point 17-18 of our response sent March 9, 2016, – in which case the court finally ruled that MVM Paks NPP Ltd. was considered to be performing public functions. This ruling was based on the provisions of the act 1996:CXVI (on atomic energy) – regarded also as supplementary regulations in this sense. The Decision stated that "*following from the provisions of the highly protected social interest prevails in the peaceful uses of nuclear energy; the strict legal regime governs the peaceful uses of nuclear energy; the system of governance and regulation and also the related responsibilities of the Government and the Parliament, the MVM Paks NPP Ltd. – through its role in electricity production – is considered to be performing public duties."* Not only does this case show the complexity of the Hungarian legislation applies when we come to the implementation of the Aarhus Convention.

II. Comments to Question 3 (page 3-14)

7. *"This point of the Resolution should have served as the basis of the Parliament Resolution No. 25/2009. Ogy. Parliament Resolution No. 40/2008. (IV.17.) determined the framework of conditions needed for giving the consent pursuant to Article 7 (2) of the Atomic Energy Act."*

8. We are confident that this statement originates from erroneous reading of the legal requirements concerning an activity such the Paks II Project. As it was described in our response sent March 9, 2016, Parliament Resolution 25/2009. (IV.II.) is of a different legal nature. The decision in principle made by the Hungarian Parliament was required by the act 1996:CXVI (on atomic energy) in order to start the *preparatory* activities of the Paks II Project. This resolution obviously can neither be considered as a plan or program nor a final decision in the context of international environmental law.

9. Also, regarding the text of the Parliament Resolution 40/2008. (IV.17.) and the cited provisions of the act 1996:CXVI (text attached previously) there is no such legal relation as claimed by the Communicants.

10. *"Parliament Resolution No. 25/2009. Ogy is binding in a sense that it was the condition to start the actual planning of the extension of the power plant…"* As a matter of law, this statement is wrong, as discussed in details in our previous brief.

11. According to general interpretations, Parliament Resolutions do not have a legally binding nature, neither obliging the Government nor concerning the decision-making procedures of

[1] Some inconsistency in the Communicant's answer to Question 1, these supplementary regulations were also cited by the Communicants in their answer to Question 1 (see page 7-10)

the Paks II Project. According to art. 7 para. 2 of the act 1996:CXVI, in case one plans to carry out a nuclear project determined by law it is obligatory to have the Parliament's decision in principle, but the decision in principle does not have binding effect.

III. Comments to Question 4-6 (page 14-17)

12. Regarding the Communicants' understanding on whether any of the cited Parliament Resolutions should be considered as plan, programme or policy, our interpretation stands on a sound and different legal ground, however, we believe that our interpretation follows the guide on the Aarhus Convention (second edition, 2014)

13. The Convention does not define the terms "plans", "programmes", "policies", however, these terms do have common-sense and sometimes legal meanings throughout the ECE region. Accordingly, we consider the regulations of two important instruments: the Protocol on SEA to the Espoo Convention and also Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive). And we also take into consideration that policy-meaning proposed by the Implementation guide when considering these Parliament Resolutions legal nature.

14. Regarding the *"time factor"*: all the Parliament Resolutions quoted were adopted prior to the making of the actual decisions on the Project. In terms of the Aarhus Convention, those resolutions, each being of non-binding nature, might have been needed but do not constitute "the" decision. These are necessary but not sufficient conditions prior to the decision.

15. Regarding the *"location":* none of the Parliament Resolutions referred to have decided on the location of the site, i.e. where the new units are supposed to be built and operated. Please see point 62-63 and 74 below, under which the licensing procedure of the investigation and assessment of the site and the site licensing process is described. It is important that the Hungarian Atomic Energy Agency, an independent body in close cooperation with the International Atomic Energy Agency, is having the power to decide on the suitability of the site to host the new nuclear units. In support of the site licence application, the site investigation and evaluation program is currently in progress, being carried out by the MVM Paks II Ltd.

IV. Comments to Questions 10-13 (page 17-19)

16. Since adopting the new Freedom of Information Act, the stakeholders, the ombudsman (later its successor, the National Authority for Data Protection and Freedom of Information) and the courts started interpretation of its provisions from the early 2010s on. This evolution, consecrated by the Supreme Court, led to the interpretation that MVM Ltd., and MVM Paks NPP Ltd., as they perform public duties, fall within the realm of the Act even if this interpretation is not supported by the *expressis verbis* language of the Act.

17. Initially, MVM Ltd. in reliance of the language of the Freedom of Information Act and in lack of any judge-made law to the contrary, in cases relating to Lévai Project refused the data request on the ground of the protection of trade/business secret and on the consideration that MVM Ltd., a commercial company, did not perform public duties.

18. It is worth mentioning that according to information presented by MVM Ltd., Energiaklub based its first data request, upon which the law suit concerning certain data of the Lévai

Project was initiated, on Article 20 and 21 of Act 1992:LXIII on Freedom of Information (the old Freedom of information act), and on Article 29 of Act 2007:CVI (on state property)[2]. However, the indication of the legal ground of data request by the data requester is not required by the Hungarian provisions it is worth mentioning that in none of the cases when Energiaklub requested data of public interest has ever indicated that the data of public interest required is considered to be environmental information[3] which is incidentally subject to the release obligation of the relevant Hungarian regulations transposing the requirements of the Convention. (However *ignorante iuris non excusat* principle is well known, indicating the scope of the data request could have helped the data controller to consider the appealing legal obligations. Regarding this it is very difficult to decide whether these cases fall under the scope of the Convention, constituting the violation of it.)

19. As it was described in our response sent Marc 9, 2016, until 2012, courts ruled in different cases on specific grounds (such as the atomic energy and the environmental protection laws) that MVM Ltd. and MVM Ltd.'s affiliate companies (including MVM Paks NPP Ltd.) could be classified as legal persons which perform 'public functions' under national law therefore handle data of public interest.

20. Certainly, both MVM Ltd. and MVM Paks NPP Ltd. respected this evolutionary process and also the judgements and acted *bona fide*. Based on the information provided by MVM Ltd. and MVM Paks NPP Ltd., all the data required was provided by the data controller as ordered in the judgements with the exception of some undisputed business secrets as the Convention also clearly permits this.

21. The question of how and when a commercial company qualifies, if at all, as "public authority" in the meaning of Art. 2(2) Aarhus is not yet finally resolved by the European Court of Justice[4]. Having studied the implementation of the Convention by other State Parties, particularly the EU Member States it can be stated that commercial companies' approach – like MVM Ltd.'s and MVM Paks NPP Ltd.'s – to data requesting is not ostentatious.

22. Within the framework of the Aarhus regime a commercial company may qualify as "public authority" in case if some public power is vested in such company. Otherwise, even if the public may well be affected by any and all commercial company in the retail market, such market presence does not warrant for bearing of public responsibilities, functions, or providing public services in the realm of Aarhus.

23. Consequently, even if some Hungarian commercial companies in the energy sector may have been held liable by Hungarian courts for release of information, initial lack of such compliance while the law was yet in the making cannot be considered as *contra legem* in the meaning of Aarhus as the test developed by Hungarian courts are much beyond the Aarhus provisions.

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[2] According to this, any person or organisation entitled to manage or control State property shall be treated as a person or organisations performing public functions pursuant to the former Act on Freedom of information, and therefore is required to release the data of public interest it handles.

[3] This material scope is determined in Article 2 of Government Decree 311/2005 (XII. 25.) on public access to environmental information, and Article 12 paragraph 2 of the EPA states that everyone has the right to have access to environmental information as data of public interest in accordance with specific other legislation, thus indicating the rules of access procedures.

[4] The European Court of Justice has met several times – in preliminary ruling procedures – the same legal considerations, in many cases narrow understanding of public authority was advanced in the national proceedings. See Case C‑524/09 Ville de Lyon [2010] and Case C‑204/09 Flachglas Torgau

24. The four items signed red in Annex sent by the Communicant on March 9, 2016 the data controller provided the information below:
    24.1. ***Nr. 25.*** *Preparation of unit specific chapters of Preliminary Consultation Documentation as a preparation of the environmental licensing of new build units* – the document was handed over to Energiaklub and it is also available at http://www.mvmpaks2.hu/hu/Dokumentumtarolo/EKD-HUN.pdf
    24.2. ***Nr. 57.*** *Elaboration and implementation of special investigation and evaluation programs establishing the compilation of the environmental impact assessment* – the document was handed over to Energiaklub after Court decision of March 2015.
    24.3. ***Nr. 64.*** *Drafting further measures concerning waste management and disposal*– the document was not handed over as there was no request submitted.
    24.4. ***Nr. 66****. Detailed analyses of cooling alternatives with cooling towers that can fit into the landscape, related to the new nuclear power plant units to be installed on Paks site* – the document was not handed over as there was no request submitted.

25. Finally, as pointed out in Hungary's first brief and remained uncontested, Hungarian courts were unprecedently quick (each case was finally resolved in less than 1 year from filing) in interpreting and enforcing Hungarian laws. Consequently, we cannot accept that Hungary as a contracting party to the Aarhus Convention is accused of non-application of the Convention.

Sincerely,

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