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EINSCHREIBEN

Mr.

Jeremy Wates

Secretary to AARHUS convention

United Nations

Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais de Nations

CH-1211 Geneva 10

SCHWEIZ

e-mail: jeremy.wates@unecfe.org

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**COMMUNICATION
TO THE AARHUS CONVENTIONS COMPLAINTS COMMITTEE**

1. Information on correspondent submitting the communication:

The Municipality of Szentgotthard

Szentgotthard város

Szell K. tér 11, 9971 Szentgotthard/Hungary

Represented by the Major Mr. Tibor Viniczay

2. Representatives:

1.) Dr. Géza Simonfay

Andrássy út 36 II, em 5

H-1061 Budapest

2.) Mag. Ulrich Salburg

Neustiftgasse 3/6, 1070 Vienna/Austria

Tel. 0043/1/403 66 05, Fax: 0043/1/526 58 58

e-mail: office@simonfay.at

to represent the correspondent in respect of the communication with
the AARHUS convention compliance committee

MAG. DR. GÉZA SIMONFAY
selbständiger Rechtsanwalt in Österreich
beeideter Gerichtsdolmetscher
für Englisch, Französisch u. Ungarisch
auch in Ungarn eingetragener Rechtsanwalt

Honorarkonsul
der Republik Litauen
MAG. ULRICH SALBURG
selbständiger Rechtsanwalt
Vertrauensanwalt der Botschaft
der Republik Litauen in Wien

RAA MAG. EVA LANGER
RAA. MAG. MICHAEL KRENN

Büros:
Neustiftgasse 3/6
A-1070 WIEN
Tel: 0043/1/403 66 05
0043/1/403 66 06
Fax: 0043/1/526 58 58
e-mail: office@simonfay.at
homepage: www.simonfay.at

Andrássy út 36.II.em.5
H-1061 BUDAPEST
Tel: 0036/1/301 80 80
Fax: 0036/1/269 53 92
e-mail: office@simonfay.hu
homepage: www.simonfay.hu
in Kooperation mit den Rechtsanwältinnen

DR. IUR. DR. MED. ADAM HANTOS

DR. SZILVIA IZELI

DR. GABRIELLA FÜRI

Rechtsanwaltsanwörter
DR. VERA NAGY LL.M.
DR. LINDA MEGYERY LL.M.

Tilto g. 8/Ž.Liauksmينو g. 3
LT-01101 Vilnius
Tel: 0037/05/261 04 35
Fax : 0037/05/260 86 95
e-mail : office@bishops.lt
in Kooperation mit
DR. RAMUNE DULEVICIENE

Member of



Bankverbindung: Bank Austria Creditanstalt (BLZ: 12000), 240-115-135/00
IBAN: AT35 1200 0240 1151 3500, BIC: BKAUATWW
ATU 13372107

II Party concerned:

Republic of Austria

III. Facts of the communication

General information on the intended installation:

The municipality of Szentgotthard is a municipality according to the Hungarian constitution and therefore represents the interests, on the administrative level closest to the citizen, of the people living in the territory of the Municipality of Szentgotthard. Szentgotthard is located on the Austrian boarder, bordering the federal land of Austria Burgenland and also neighbouring the Austrian municipality Heiligenkreuz. The Correspondent, the Municipality, is owner and operates several institutions, in Szentgotthard, in very close distance to the Austrian Border, inter alia, schools, a kinder garden, a foster home and a day care centre for Elderly.

The RVH ReststoffverwertungsgmbH. (a limited liability company under Austrian law), which is a 100 % subsidiary of the BEGAS Kraftwerk GmbH. (BEGAS stands for Burgenländische Erdgasgesellschaft), which is 51 % owned by the municipalities of Burgenland and 49 % by the Burgendland Holding AG, intends to build just a view meters from the Austrian-Hungarian boarder, therefore also view meters from the municipality of Szentgotthard, the communicant, a waste incinerator mainly for the thermal use of household garbage and commercial garbage as well as sludge.

The thermal heat generated should be mainly used for a factory located close to the indented incinerator, Lenzing Fibers GmbH., which is producing cellulose fibers. The indented construction time is two years and the intended operating time of this incinerator is 50 years minimum. The indented incinerator has a capacity of up to 325 thousand tons of waste a year.

Permission of February 5th, 2009 issued by the Government of the Federal Land of Burgenland and the procedure regarding the issuing of this permission

With permission of the Government of the Federal Land of Burgenland (Amt der Burgenländischen Landesregierung) of February 5th 2009, the intended incinerator was permitted. The permission was issued in accordance with the Austrian UVP-G (Environmental Impact Assessment Law) covering also the permission according to the Austrian Gewerbeordnung (Law on Commercial Activities) and although the permission according to several different laws, concerning environmental protection (Emmissionsschutzgesetz, water protection law, law on protection on nature, and so on).

The procedure regarding the issuing of this permission was initiated by a letter of the RVH ReststoffverwertungsgmbH. of April 30th, 2007 explaining the basics of the intended incinerator and a concept for the environmental protection assessment procedure.

After the comments of the authority the environmental protection assessment concept (UVE-Konzept) was amended and newly submitted to the authorities.

This concept was also submitted in Hungarian language to the central Government of the Republic of Hungary and to the Government of Slovenia. In respect of Slovenia the Austrian authorities submitted to the Slovenian Government, a “No-Impact Statement” therefore stat-

ing that there is no impact on Slovenia (Slovenia is also rather close to the intended incinerator). The Slovenian authorities finally accepted this “No-Impact Statement” and further on did not participate in the procedure regarding permitting this incinerator.

Further the UVE concept was available for the public at the, Government of the Federal Land Burgenland, the District Authority Jennersdorf and the municipality of Heiligenkreuz in the time of June 1st, 2007 to June 22nd. At the homepage of the Federal Land of Burgenland and in newspapers the public was informed of the possibilities to get access to the environmental protection concept of the intended incinerator.

All these information was published in German.

On July 17th, 2007 a bilateral meeting of Austrian and Hungarian civil servants took place.

With letter of July 16th, 2007 the Republic of Hungary made comments to the UVE concept via the Austrian Federal Ministry of Environmental Protection.

After the above described preliminary proceedings, with formal application of October 19th, 2007, addressed to the Government of the Federal State of Burgenland the RVH ReststoffverwertungsgmbH. applied formally for the permission to construct and operate the intended incinerator.

The authority (Government of the Federal Land of Burgenland) informed the in § 5 (3) (4) and (5) UVP-G (Austrian Environmental Assessment Law) mentioned authorities and parties about the application and gave these authorities and parties the possibility for a statement. According to § 5 (4) UVP-G also the Municipality of Heiligenkreuz where the intended incinerator is located, was informed and asked for comments, but the communicant the Municipality of Szentgotthard, which is just a few meters away from the intended incinerator, was not informed and not invited to provide comments.

There was no additional information to the public concerned in Hungarian language.

With formal information of the authority (Edikt of January 21st, 2008), published in the Wiener Zeitung and the daily papers Kronenzeitung und Kurier (all Austrian papers) the public was informed about the possibilities to get access to the project documents between January 30th, 2008 to March 13th, 2008 at the Government of the Federal Land of Burgenland and the Municipality of Heiligenkreuz, this information was only published in German. No information was published in Hungarian language and/or in Hungarian papers.

Despite the fact that the information was not published in Hungarian hundreds of persons mainly from Hungary and mainly citizens of the municipality of Szentgotthard, the communicant, raised objections and comments to the intended project and stated that for several reasons they are against this project.

Besides the above comments and objections made by Hungarian citizens, also several municipalities of Hungary (including Szentgotthard and the municipality of the capital Budapest) and the “Komitat” (district administration) of Vas raised their concerns and their disagreement with the project.

One of the main points of these concerns of Hungarian citizens and also Hungarian municipi-

palities was that alternatives were not properly described and the data on the potential emissions, especially emissions to the air are not sufficient.

Further several persons including the municipality of Szentgotthard raised that the applied technology is not the best available technology.

With decision (Umweltverträglichkeitsprüfung/Genehmigungsbescheid) of February 5th, 2009 the Government of the Federal State of Burgenland permitted the construction and operation of the intended incinerator. On page 74 under “A IV.2” it is mentioned that the comments and objections of the municipality of the capital Budapest, the comitats administration (district administration) Vas and the municipality of Szentgotthard (the communicant) are rejected as inadmissible.

On page 163 the authority (Government of the Federal Land of Burgenland) is explaining why the comments and objections of the Hungarian municipalities and the comitat Vas were considered inadmissible.

The authority comes to this conclusion based on § 19 Abs. 1 Z. 1 UVP-G, which provides that neighbours, therefore persons living not just temporary close to the intended incinerator have the right to participate in the administrative procedure regarding the permission of the indented installation. In this respect the Government of the Federal Land of Burgenland also grants neighbours from Hungary the right to participate in the procedure as party.

Further under the headline “parties according to the applicable administrative rules” (§ 19 Abs. 1 Z. 2 UVP-G) the authority comes to the conclusion, that only Austrian authorities, which according to Austrian administrative laws have a right to participate in the procedure as party, have to be considered as party to the procedure, and that this does not apply for “foreign authorities” as the Austrian administrative law does not foresee the participation as party to the procedure of authorities of foreign states. On this base the authority came to the conclusion that the municipality of Szentgotthard, the communicant has no right to participate in the procedure.

Further the authority explains that according to § 19 Abs. 1 Z. 3 UVP-G the Austrian authority “Umweltamt” (Environmental Protection Agency) has the right to participate in the procedure and as in Hungary not such authority is existing, no Hungarian authority has the right to participate in the procedure on this base.

The same applies according to, the decision of 5th of February 2007, to the “water authority” as the authority is of the opinion that only the Austrian “water authorities”, not a Hungarian “water authority” is legitimate to participate in the procedure as party.

The authority mentions in respect of “Hungarian parties” to the procedure § 19 Abs. 1 Z. 6 UVP-G according to which citizens initiatives have the right to participate in the procedure, but the authority comes to the conclusion that this is only applies for Austrian citizens initiatives, not for Hungarian citizens initiatives, because the Austrian UVP-G does not mention “foreign citizens initiatives”.

Only in respect of environmental NGO’s the authority comes to the conclusion that also Hungarian environmental NGO’s like Austrian NGO’s have the right to participate in the procedure. So finally the authority came to the conclusion that only Hungarian natural persons (neighbours) living close to the intended installation and environmental NGO’s from Hun-

gary, have the right to participate in the procedure regarding permitting the intended incinerator, and therefore only comments from neighbours (natural persons) from Hungary and NGO's from Hungary are eligible, but not the objections of the communicant, the Hungarian Municipality neighbouring the intended installation, and no comments from other Hungarian Municipalities or district authorities.

Further it is important to mention that the Austrian authority on page 163 to 166 of the decision is mentioning the Hungarian parties to the procedure on the base of § 19 of the Austrian Environmental Impact Assessment Law (UVP-G), but does not mention § 19 Abs. 1 Z. 5, which states that municipalities according to §19 Abs. 3 UVP-G have the right to participate in the procedure, which are all Austrian municipalities neighbouring the municipality, in which the intended installation should be built.

As the communicant was not accepted as party to the procedure on permitting the waste incinerator in Heiligenkreuz, the comments and objections of the communicant, were rejected as not admissible and furthermore as the municipality of Szentgotthard is not party to the procedure, the communicant has also no possibility to appeal against the decision permitting the waste incinerator in Heiligenkreuz.

Beside the fact the communicant was not considered as party to the procedure, the communicant raised an appeal to the Government of the Federal Land of Burgenland with February 25th, 2009. Mainly challenging the decision that the communicant was not accepted as party to the procedure. This appeal is still pending.

IV. Nature of alleged non-compliance

The Austrian authorities were denying the right of the municipality of Szentgotthard, which has its own interest as owner and operator of several schools, a kindergarten, a foster home and a Elderly day care centre to participate in the procedure in respect of the permission of the waste incinerator of Heiligenkreuz.

Further it has to be taken into account that the communicant was not just indenting or trying to participate in the procedure on permitting the intended waste incinerator as owner and operator of institutions (schools, etc.) but also as representative of the inhabitants of the municipality of Szentgotthard and was by this fulfilling its duties as municipality according to the Hungarian Constitution to represent in the best possible way the interests of the inhabitants of the municipality. The communicant was hence not just acting in respect of the participation in the procedure to permit the intended waste incinerator, in its own interest but also as lawful representative of the citizens of the Municipality Szentgotthard, according to the Hungarian Constitution.

The Austrian authorities denied the communicant, the municipality of Szentgotthard, to participate in the procedure on permitting the intended waste incinerator despite the fact that this waste incinerator should be built on Austrian territory, but just a few meters away from the territory of the Municipality Szentgotthard.

Therefore the nature of alleged non-compliance is the refusal by the Austrian authorities, to allow the public concerned in the sense of Art. 2. 5 of the Aarhus Convention to participate in a procedure according to Art. 6 of the Aarhus Convention, thereby infringing the communicants right, according to Art. 6. 4 of the Aarhus Convention, to be granted a possibility of early and effective participation in the decision making, and further infringing the communicants right, according to Art. 9 of the Aarhus Convention to access to Justice, as the commu-

nicant can not appeal without being recognised as party to the procedure.

The communicant is without doubt part of the public concerned according to Art. 2.5 of the Aarhus Convention, because the municipality itself is affected as owner and operator of the above mentioned institutions (schools, etc.) and further as the municipality is representing the inhabitants of the municipality which are without any doubt the public concerned, as it is not denied by the Austrian authorities that the intended installation has an effect on Hungarian territory, therefore of course especially on the territory directly neighbouring the intended installation, the Municipality of Szentgotthard, the communicant.

Furthermore it is clear from § 19 Abs. 1 Z. 5 UVP-G (Austrian Environmental Assessment Law) on which base the decision to permit the incinerator in Heiligenkreuz was based, and hence also the decision to refuse the communicant the possibility to participate in this procedure, that the communicant as Hungarian municipality was discriminated. An Austrian municipality boarding the municipality, in which the intended installation is located, would have by law the right to participate in the procedure as party, but the communicant as Hungarian municipality also boarding the municipality in which the intended incinerator is located, does not have this right.

The Austrian law therefore recognises actually municipalities neighbouring, the municipality in which an installation should be built, as public concerned, and therefore provides that this municipalities are granted the position as party to the procedure, but denies this right to municipalities of neighbouring countries. There is no justification, why not to grant this right to a municipality of a neighbouring state, in this case Hungary, as of course a Hungarian municipality, very close to the intended installation, is as much affected by the intended installation as an Austrian municipality close to the installation. The border between Austria and Hungary does not reduce the environmental impact of the intended installation on the communicant and the people living in Szentgotthard.

Therefore the nature of the alleged non-compliance is that the legislation of Austria § 19 Abs. 1 Z. 5 UVP-G in connection with § 19 Abs.3 UVP-G excludes municipalities effected by an installation of neighbouring states from participation in the procedure on permitting an activity listed in Annex I of the convention and thereby discriminates municipalities of neighbouring states, as Austrian municipalities are granted the right to participate in the procedure. In this respect the nature of the communication is, that Austrian law is in conflict with the Aarhus Convention.

Further the communication also concerns a wrong application of the AARHUS Convention by the administrative authority (Government of the Federal State of Burgenland) as the administrative authority denied the communicant the right to participate in the procedure although the communicant as owner and operator of several institutions, which are effected by the intended installation, is for sure part of the “public concerned” and further the fact, that the municipality is also the lawful representative of the inhabitants of the municipality, which are effected by the intended installation and therefore part of the public concerned was not recognized by the administrative authorities of Austria.

V. Provisions of the convention relevant for the communication

The provision mainly concerns **Art. 2 point 5 of the Convention**, the definition of “public concerned”, especially if a municipality owning and operating several institutions (schools, etc.) very close to an intended installation and representing according to the national law the interests of the inhabitants of this municipality, is “public concerned” or not.

Further the communication concerns the question, if it is in line with the Convention that the national laws of a party to the Convention provide that municipalities neighbouring the municipality in which the intended installation is located, are ex lege granted (as public concerned) the right to participate in the procedure permitting an installation, but the same right is denied to municipalities neighbouring the municipality in which the installation is located, of other parties to the Convention (neighbouring states). Therefore providing that a municipality in a neighbouring state is no public concerned although this municipality is just a few meters away from the intended installation.

As result of the in the view of the communicant wrong application of Art. 2 point 5 of the Convention the communication also concerns Art. 6 and 9 of the Convention the rights granted to the public concerned by this provisions of the Convention were denied to the communicant.

VI. Use of domestic remedies or other international procedures

The communicant did not initiate any other international procedure in this respect, but the communicant appealed against the decision of the Government of the Federal State of Burgenland of February 5th, 2009 mainly because the communicant was refused to participate in the procedure and the communicant’s objections to the installation were declared non eligible. This appeal is still pending.

As § 19 Abs. 1 Z. 3 in connection with § 19 Abs. 3 UVP-G provides that only Austrian municipalities neighbouring the municipality in which the intended installation is located have the right to participate in the procedure and therefore exclude municipalities from neighbouring states, it is very doubtful if the appeal of the communicant will be successful.

VII. Confidentiality

The correspondents **do not** request confidentiality regarding the content of this communication or regarding the identity of the correspondents and their representatives.

VIII. Supporting documents

Annex 1: Map showing the intended installation and the Austrian/Hungarian border, therefore also the border to the communicant, the municipality of Szentgotthard

Annex 2: Extract of the decision of the Government of the Federal State of Burgenland of February 5th, 2009, permitting the intended waste incinerator, page 1 to 10, and page 76 on rejecting the comments of the communicant and several other Hungarian institutions and page 163 to page 166 on the rights to participate in the procedure of Hungarian citizens and institutions.

Annex 3: § 19 UVP-G (Austrian Environmental Impact Assessment Law)

The above documents are in German, if a translation into English is necessary, the communicant kindly asks the Committee to inform the communicant respectively.

IX. Signatures

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Dr. Géza Simonfay

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Mag. Ulrich Salburg