

RECHTSANWÄLTE  
**SIMONFAY & SALBURG**  
WIEN – BUDAPEST - VILNIUS

**TO:**

**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**

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**Ref. ACCC/C/2009/39**

Vienna, on 3<sup>rd</sup> of September, 2009  
09061 / US/SB/ 16

Dear Mr. Wates,

As legal representatives of the municipality of Szentgotthárd referring to the above reference number we reply to your letter dated 26<sup>th</sup> of August, 2009 .

**General Remarks:**

We understand that the Committee, has concerns whether the Municipality, falls within the definition of “the public” according to Article 2 paragraph 4 of the Convention, as the municipality could be also considered as “public authority” in the sense of Article 2 paragraph 2.a of the Convention.

In our point of view, the meaning “public authority” in Article 2 of the Convention is a “functional” one, and therefore means the authorities involved in the decision making according to Art. 6 of the convention, as public authority which have the legal power to permit, or at least participate in the procedure as authority to permit, activities falling within the scope of the convention. In other words we believe that public authority in the meaning of the convention only covers those authorities, which in respect of a procedure to permit an activity, falling within the scope of the convention, can act with the official powers or sovereignty of the state.

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That the meaning of “public authority” in the convention is “functional” as described above and not “formal” is underlined by the fact that according to Art. 2 paragraph 2b and c of the Convention also natural persons or (private) legal persons can be “public authority” if they perform public administrative functions or having public responsibilities.

Hence the applicant, the Municipality of Szentgotthard, could be a public authority in the meaning of the Convention, if for an activity within the territory of Szentgotthard, a permission for this activity of the Municipality would be required.

Hence regarding the waste incinerator in the Austrian province of Burgenland, the applicant is no public authority, as the procedure for permitting this waste incinerator is an Austrian Administrative procedure in which the applicant, a Hungarian Municipality, has no power as authority at all, and can not act at all with the power of sovereignty.

In this respect we would also like to stress, that as mentioned in the communication, according to Austrian law, Austrian municipalities neighbouring the municipality in which the waste incinerator is intended, have the right to join the procedure. Also these Austrian municipalities are no public authority in respect of the procedure to permit the intended waste incinerator, as their sovereign powers “end at the border of the municipality”. Hence the Austrian law (UVP-G, as mentioned in the communication) considers Municipalities, which have no discretion or authority in the administrative procedure on permitting an activity as “public”.

#### **To the questions in your letter of 26<sup>th</sup> of August 2009:**

##### **Ad point 1.**

###### **a. The Municipality as legal person:**

Bearing in mind that the article 2, paragraph 4 of the Aarhus Convention defines the term “the public” as natural or legal persons, as well as their associations, organizations or groups – we would kindly draw your attention to the following regulations of Hungarian law.

According to the instructions of article 28 of the Act on Hungarian Civil Law (Act Nr. IV. of 1959) local governments (i.e. municipalities) have to be considered as legal persons. With regards to the provisions of fore mentioned Act, legal persons have legal capacity extending to any rights and obligations that do not pertain to natural persons exclusively.

The article 9 of Act on Local Municipalities (Act Nr. LXV. Of 1990) declares also obviously the legal personality of local governments.

###### **b. The Municipality as representative of the interests of the population of the Municipality:**

Municipalities as local governmental organizations are entitled – occasionally obliged – to represent the interests of their citizens regarding issues with local interest, and are able to hold local referendums (see articles 1 and 2 of Act on Local Municipalities).

The decision Nr. 312/2006 of the Assembly of Local Deputies of Szentgotthárd – supported by a latter referendum in 2008 – the Assembly of Deputies unanimously agreed to object the intended waste incinerator in Heiligenkreuz, in the neighbourhood of Szentgotthárd. The Assembly also appointed certain officials to work out and perform the professional, political, and legal steps and actions in order to prevent any destruction concerning the environmental status of Szentgotthárd and its surrounding.

We like to add to the above last section that any decision of an assembly of local deputies accordingly to the Hungarian law must be regarded as binding source of law./

The referendum held in 2008 was a so called “opinion” referendum, i.e. the result of the voting did not bind legally the Municipality of Szentgotthárd, however it was recognised as the most democratic way to become acquainted with the opinion of the local population.

The referendum – accordingly to Hungarian law – was initiated and organized by the Municipality in order to be able to represent the valid and real interest of the resident people in the future.

The referendum consisted of four different questions, and the entire voting was valid and efficient, ca. 55% of the population took part on it.

One question was about the intended construction of the waste incinerator in Heiligenkreuz, one about the eventual destruction of the environmental status of Szentgotthárd, one about the eventual violation the right to healthy environment – declared by the articles 18 and 70/D of the Hungarian Constitution – through expected environmental damages from Austria, and the last question about the effects of the expected environmental damages from Austria on the future plans of Szentgotthárd concerning developments on thermal-bath and other tourism. According to the result, people reject the intended construction of waste incinerator and are against any environmental damages caused by constructions right next to the border. They formed their major opinion through the referendum, with regards to the number of the participating citizens and the rate of the votes – out of the participating 55% ca. 90% of the votes were against the intended waste incinerator.

Through the referendum the Municipality got the instruction of the citizens of Szentgotthard, to take all possible steps against the intended waste incinerator and to represent the interests of the population of Szentgotthard, in respect of the intended waste incinerator.

c.) Is the Municipality a public authority or public according to Hungarian law or practice?

We could not find any regulation in the Hungarian law and also no case law in respect of this question. But we are fully convinced because it is simply logical, that also according to Hungarian law, a Municipality is only considered a “public authority” regarding issues and procedures, concerning activities within the territory of the Municipality, where the Municipality has authority to act with sovereign or “official” powers, and that the Municipality is public regarding issues and procedures without the territory of the Municipality, where the Municipality has no “official powers”.

**Ad points 2.**

As already mentioned above we believe that a Municipality, which has the power to permit an installation as authority does not fall within the definition of the “public” set out in Article 2 paragraph 4 of the Convention, and therefore also has no rights under Art. 4 and 6 of the Convention. Which is logical, because the rights under Article 4 and 6 of the Convention are rights towards the Authority permitting an activity. If the Municipality is the authority (or one of the authorities) permitting an activity it can not claim any rights against itself.

Regarding the waste incinerator in Austria the applicant is no public authority but the public:

The Municipality of Szentgotthárd as a local public authority is obligated under the national law, especially because of the above mentioned referendum, to exercise and defend rights in the name and on behalf of the local population.

The article 2 paragraph 1 of the Act on Local Municipalities declares that the municipality asserts the sovereignty of the people, and represent as well as realises the local common will in local public issues in a public and democratic way.

The Municipality of Szentgotthárd is a local authority in Hungary according to the prevailing Hungarian law, but it has absolutely not any rights or authority on the grounds of Austrian law, i.e. in Austria. A Hungarian local governmental organization does have neither competency, nor authority in Austria.

The Municipality can exercise rights on access to information and justice, and on public participation in environmental matters in Austria exclusively by referring to the Aarhus Convention, or the Austrian law implementing the Convention, provided that the Municipality falls within the definition of “the public” set out in the Convention. Otherwise the Municipality would not be able to act all – and to represent the local population – in this environmental issue, in spite of the fact that – due to environmental effects and damages crosses borders – the population of Szentgotthárd is highly effected by the intended waste incinerator.

### **Ad point 3**

As mentioned above in our view a Municipality is a public authority in the meaning of the Convention, if the Municipality is participating in the relevant decision making as “authority” with official sovereign powers, and a Municipality is no public authority but part of “the public” if the authority has no official or sovereign powers in the decision making (e.g. because the activity is outside of the territory of the Municipality).

### **Ad point 4.**

Concerning the above we would complete this point with the legal fact that in any matter of local municipalities the scope of duty and competency is delegated to the assembly of local deputies and the assembly shall be represented by the mayor. Thus we state that the mayor can act and submit legal issues on behalf of the municipality (see article 9 of Act on Local Municipalities).

Anyhow the assembly of local deputies, supported by the above referendum, took the decision to take all possible steps against the intended waste incinerator.

**Ad. Power of Attorney:**

We will submit a Power of Attorney duly signed by the Mayor of Szentgotthard, as representative of the Municipality of Szentgotthard, before the twenty fifth meeting of the Committee. We kindly ask to send in the future all communication to us as legal representative.

Yours sincerely,

Dr. Géza Simonfay

Mag. Ulrich Salburg