

ACCC/C/2004/04**Communication by Clean Air Action Group (Hungary) regarding compliance by Hungary with the obligations under the Aarhus Convention in the case of Act on the Public Interest and the Development of the Expressway Network.****I. Introduction**

1. On 7 May 2004, the Hungarian non-governmental organization Clean Air Action Group submitted a communication to the Committee alleging non-compliance by Hungary with its obligations under article 6 and article 9, paragraphs 2 to 4, of the Aarhus Convention.
2. The communication concerned the alleged incompatibility of the new Hungarian Act on Public Interest and Development of the Expressway Network (hereafter Expressway Act) with the provisions of the Aarhus Convention. The alleged non-compliance related to the special process of decision-making established by the Act for construction of expressways. According to the communicant, the procedure established by the Act notably differs from procedures for decision-making on other specific activities with potential adverse effects of the same significance, inter alia with regard to decision-making authority, the practicalities of ensuring public participation procedures, the status of the decision, timeframes, and procedures for appeal. The full text of the communication is available at <http://www.unece.org/env/pp/pubcom.htm>.
3. The communicant submitted supplementary information on 16 September 2004 with regard to a new decree that was adapted by the Hungarian Ministry of Economic Affairs and Transport as an implementing regulation for the Expressway Act. The information provided was, in particular, related to the reduced role of and tighter deadlines for expert input by the environmental inspectorate in the decision-making process carried out by the transport authorities.
4. The communication was forwarded to the Government of Hungary on 18 May 2004. The secretariat received a letter from the Ministry of Environment of Hungary on 23 September 2004 indicating that the Party would require more time than the initial three-month period to respond. On 26 November 2004, the Party provided a full response disputing that the provisions of the Expressway Act challenged by the communicant were in non-compliance with the Convention.
5. The Committee at its fourth meeting (MP.PP/C.1/2004/4, paragraph 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. The overall admissibility of the communication was not challenged. The Committee therefore confirms the admissibility of the communication.
6. The Committee discussed the communication at its sixth meeting (15-17 December 2004), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

II. Summary of facts¹

¹ This section includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.

7. The matter concerns Act CXXVIII/2003 on Public Interest and Development of the Expressway Network in the Republic of Hungary. The Act establishes a special decision-making procedure for the construction of expressways. This procedure, according to the communicant, in some respects short-cuts the traditional permitting procedure by, inter alia:

- (a) establishing a special incorporated company responsible for the construction of expressways, thus allowing a higher possibility of commercial confidentiality provisions being applied, despite the significant public interest in and environmental impact of expressway construction;
- (b) reducing the permitting procedure by cutting out the preliminary environmental assessment (scoping) phase and therefore limiting public participation in the decision-making as a whole, notwithstanding the fact that general EIA legislation requires public consultation to commence in this phase of the process;
- (c) providing an insufficient and non-extendable time of 90 days for the decision-making procedure, and therefore failing to allow sufficient time for public participation in accordance with article 6, paragraph 3, of the Convention;
- (d) establishing that the final decision on the construction is taken by a ministerial decree and therefore limiting the possibility of appealing the decision under article 9, paragraph 2, of the Convention;
- (e) establishing that a first instance decision of an environmental authority can only be appealed within the same authority and that a second instance decision is immediately executable, thus undermining any future judicial appeal procedure and failing to ensure adequate and effective remedies and, in particular, injunctive relief, in accordance with article 9, paragraph 4, of the Convention;
- (f) establishing that for a court to suspend a decision the plaintiff must demonstrate a considerable interest or that the public interest is at stake, therefore also failing to ensure effective remedy in accordance with article 9, paragraph 4;
- (g) restricting the involvement of environmental authorities in the overall permitting process, in particular, after the decision on the environmental impact.

III. Consideration and evaluation

8. Hungary deposited its instrument of ratification of the Convention on 3 July 2001. The Convention entered into force for Hungary on 30 October 2001.

9. Establishment of a special company for construction of expressways does not in itself constitute a breach of obligations under the Convention, in the Committee's view. In this regard, the Committee takes note of the fact that the company is established by the Act, is state-owned and would, therefore fall under the decision of the public authority in accordance with article 2, paragraphs 1 (b) and (c). In Committee's view this in itself limits the scope of application of the commercial confidentiality exemption.

10. With regard to the issue of reduced environmental impact assessment procedure for modification of existing roads into expressways, the Committee notes that the Convention does

not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region. However, article 6, paragraph 4, requires early participation when all options are open and the participation can be effective. This requirement would clearly apply to the decision-making in question. Indeed, removing this phase might lead to removing the important opportunity for the public to participate in identifying the criteria on which to base the detailed EIA. However, in the absence of practice in implementing Section 4, paragraph 9 of the Act, it is difficult for the Committee to evaluate whether the new abridged procedure meets the requirements of article 6, paragraph 4.

11. With regard to the timeframe allocated for the decision-making, the Committee considers that ninety days provided for by the Act should, under normal circumstances be sufficient to provide for public involvement, in particular taking into account that this is currently the maximum deadline for such procedures under existing Hungarian legislation. The Committee, however, takes note of the communicant's arguments with regard to complexity of the subject matter of the decision-making and the difficulties authorities have to conclude the process within existing timelines. The provision of the Act and its application need to be kept under review by the Party and evaluated on the basis of the effectiveness of participation.

12. The Committee notes that in accordance with the Act, the final permitting decision is taken by a ministerial decree and that this limits the possibilities of appealing these decisions under article 9, paragraph 2, of the Convention. However, it does not believe that such a system necessarily conflicts with article 9, paragraph 2, as long as there are appeal possibilities with regard to the environmental part of the decision.

13. The Committee indeed has some concerns with regard to the effect of the combination of some of the Expressway Act provisions, in particular, those described in paragraphs 7 (e) and (f) above, might have on the adequacy and effectiveness of remedies, in accordance with article 9, paragraph 4, of the Convention. Where individual provisions are not in themselves in conflict with the requirements of the Convention, one cannot exclude a possibility that their cumulative effect might lead to non-compliance. However, in this particular case the Committee is not convinced that the cumulative effect provides sufficient grounds for establishment of non-compliance.

14. Exclusion of environmental authorities from the decision-making on construction permits for expressways can potentially have negative effect on the environmental quality of the final decision and various aspects of the construction. However, the matter as such falls outside of the scope of the Convention.

15. The Committee therefore believes that the Act does not, *prima facie*, fall below the standard set by the Convention's provisions. However, there is some uncertainty as to whether its practical application will ensure a process that is in line with the requirements of the Convention. This will depend to a great degree on the Party concerned.

16. Notwithstanding this conclusion, the Committee notes with some concern the fact that while not falling below the level of the Convention, the Act substantially reduces the level and quality of public participation in decision-making of this category in comparison with previous Hungarian legislation. It also appears to provide public participation opportunities which compare poorly with those established by administrative *lex generalis*. While certain special provisions might be required due to specifics of various types of decision-making, the rights of

the public should not be compromised to accommodate other interests, whether private or public, in particular with regard to projects of such potential environmental significance. The Committee, having in mind the objective of the Convention and the provisions of article 3, paragraphs 5 and 6, expresses its concern about such a tendency.

IV. Conclusions

17. Having considered the above, the Committee adopts the following findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

Summary of findings with regard to non-compliance

18. The Committee finds that while the contested new Hungarian legislation on the development of the expressway network reduces the opportunities for public participation in decision-making on this type of specific activity as well as the opportunities for access to justice in this regard in comparison with previously existing legislation in this field, it does not, *prima facie*, fall below the minimum level of public participation and access to justice required by the Convention. The Committee therefore suggests that the Government of the Republic of Hungary may wish want to keep the matter under review.

Recommendations

19. The Committee recommends that the Meeting of the Parties urge each Party to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision-making and access to justice in environmental matters, even where such measures would not necessarily involve any breach of the Convention.