

Findings and recommendations with regard to communication ACCC/C/2014/105 concerning compliance by Hungary

Adopted by the Compliance Committee on 26 July 2021¹

I. Introduction

1. On 11 June 2014, non-governmental organizations Hungarian Greenpeace Association and Energiaklub Climate Policy Institute and Applied Communications (Energiaklub) (the communicants) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Hungary to comply with articles 3 (1), 4 (2) and (3) (c), 5 (7) and 7 of the Convention in connection with plans to build new units at Paks Nuclear Power Plant (NPP).
2. At its forty-fifth meeting (Maastricht, the Netherlands, 29 June–2 July 2014), the Committee determined on a preliminary basis that the communication was admissible and requested the secretariat to forward the communication to the Party concerned and to seek further information from the communicants with respect to the use of domestic remedies.²
3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention (ECE/MP.PP/2/Add.8), the communication was forwarded to the Party concerned on 15 September 2014. On the same day, questions concerning the use of domestic remedies were sent to the communicants.
4. On 23 September 2014, the communicants provided additional information on their use of domestic remedies.
5. The Party concerned provided its response to the communication on 23 March 2015.
6. The Committee held a hearing to discuss the substance of the communication at its fiftieth meeting (Geneva, 6–9 October 2015), with the participation of representatives of the communicants and the Party concerned.
7. The Committee sent written questions to the parties on 3 February 2016. Both parties' replies were received on 9 March 2016.
8. On 24 March 2016, the communicants provided comments on the Party's replies and on 21 April 2016, the Party concerned provided comments on the communicants' replies.
9. On 5 November 2016, the Committee sent further questions to the Party concerned. The Party concerned provided its replies on 29 November 2016. On 3 December 2016, the communicants provided comments on the Party's replies and on 12 December 2016, the Party concerned provided comments on the communicant's comments.
10. On 11 March 2021, the Committee sent further questions to the parties. On 7 April 2021, the Party concerned provided its reply to questions 5 and 6. On 12 April 2021, the communicants provided their reply. On 7 May 2021, the Party concerned provided its response to the remaining questions.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

² See ECE/MP.PP/C.1/2014/7, para. 35.

11. The Committee completed its draft findings through its electronic decision-making procedure on 14 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date to the Party concerned and the communicants for their comments. Both were invited to provide comments by 23 July 2021.

12. On 23 July 2021, the Party concerned provided comments on the Committee's draft findings. On 24 July 2021, the communicant stated that it did not have any comments on the draft findings.

13. The Committee proceeded to finalize its findings in closed session, taking account of the comments received and adopted its findings through its electronic decision-making procedure on 26 July 2021. The Committee agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

II. Summary of facts, evidence and issues³

A. Legal framework

Legislation on bodies or persons performing public responsibilities

14. Article 5 (2) of Act CVI on State Property (the State Property Act) provides that all persons or organizations managing or ruling over state property shall qualify as a body or person performing public responsibilities within the frame of the 1992 Data Protection Act.⁴

Legislation regarding new nuclear power plants or adding units to an existing facility

15. Article 7 (2) of Act CXVI of 1996 on Atomic Energy (Atomic Energy Act) states that a preliminary consent in principle of the Parliament is a prerequisite for the commencement of preparatory actions for the expansion of an existing nuclear power plant.⁵

Legislation regarding draft bills and regulations and consultations thereon

16. Section 43 (1) of the Environmental Code states that the drafters of bills and other legal regulation related to the protection of the environment, the country's social and economic plans and regional development concepts, and decisions resulting in regional impacts, shall assess and evaluate the effects of measures on the environment and summarize them in an assessment analysis.⁶

17. Section 44 (2) of the Environmental Code provides that, prior to submitting the drafts and assessment specified in Section 43 (1) to the relevant decision-maker, they shall be submitted to the National Environmental Council (NEC) for evaluation.⁷

Legislation regarding legislation

18. According to articles 23-24 of Act 2010:CXXX on Legislation (Legislation Act), the Parliament adopts normative and individual resolutions in addition to acts.⁸ Normative resolutions contain internal normative provisions, organizational and operational rules relating solely to the issuer or subordinated bodies or persons. They cannot be qualified as legally binding abstract norms and cannot determine the rights and obligations of citizens or

³ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

⁴ Communication, annexes 2 and 3, p. 2.

⁵ Party's reply, 9 March 2016, para. 35.

⁶ Communication, p. 9 and annex 12, p. 17.

⁷ Communication, annex 12, pp. 17–18.

⁸ Party's reply, 9 March 2016, para. 32.

other bodies not subordinate to the Parliament, nor conflict with other legal norms.⁹ The Parliament may also adopt individual resolutions, which do not contain normative provisions at all and are not binding.¹⁰

B. Facts

Decision-making for the development at the Paks NPP

Procedures in 2005-2006

19. In 2005-2006, an expert committee prepared the “2006-2030 Thesis of the new Hungarian Energy Policy” (2006 Thesis), with the participation of selected stakeholders.¹¹ It mentioned the possibility of building additional units at the Paks NPP before 2030.¹²

Resolution 40/2008 on the 2008-2020 Energy Policy

20. In accordance with articles 43 (1) and 44 (2) of the Environmental Code (see paras. 16 and 17 above), a proposal of a resolution on a new energy policy and an “assessment analysis” were sent to the NEC, which provided comments.¹³

21. On 4 February 2008, the proposal was submitted to Parliament and made available on the Parliament’s website.¹⁴ From 5 February to 15 April 2008, different parliamentary committees negotiated the proposal.¹⁵

22. On 17 April 2008, the Parliament adopted the 2008-2020 energy policy through Parliamentary Resolution No. 40/2008 (IV. 17.) Ogy on the Energy Policy of Hungary in the Period 2008-2020 (Resolution 40/2008).¹⁶ Pursuant to section 12 (f) of the Resolution, Parliament “invites the Hungarian Government to start preparatory works for the decision-making on new nuclear capacities.”¹⁷

23. Between 15 June and 15 July 2008, the concept of the energy policy was published on the competent ministry’s website for commenting. After this period, three section meetings with the participation of interested experts and organizations were held.¹⁸

Resolution 25/2009

24. In 2009, a proposal for a parliamentary consent in principle pursuant to article 7 (2) of the Atomic Energy Act was discussed by Parliament and published on its website.¹⁹

25. In April 2009, Parliament adopted Parliamentary Resolution No. 25/2009 (IV. 2.) Ogy (Resolution 25/2009), giving its preliminary consent to start preparatory activities for new nuclear power plant block(s) on the site of the Paks nuclear power plant.²⁰ The Resolution stated it was “in harmony with” Resolution 40/2008.²¹

⁹ Ibid., para 32.

¹⁰ Ibid., para. 33.

¹¹ Party’s response to the communication, para. 26.

¹² Ibid.

¹³ Party’s reply, 29 November 2016, para. 19.

¹⁴ Ibid., para. 20.

¹⁵ Ibid., para. 21.

¹⁶ Communication, p. 9.

¹⁷ Party’s reply, 29 November 2016, annex 1, pp. 2–3.

¹⁸ Communicant’s reply to questions, 9 March 2016, p. 15.

¹⁹ Party’s reply, 9 March 2016, para. 51.

²⁰ Party’s response to the communication, para. 28.

²¹ Communication, p. 9, and annexes 5 and 6, p. 2.

26. On 28 May 2009, Energiaklub unsuccessfully complained to the Constitutional Court alleging Resolution 25/2009 was ambiguous as to whether it related to preparations of the decision to permit these units, or to the construction itself.²²

27. On 28 May 2009, Energiaklub filed a complaint with the Office of the Parliamentary Ombudsman for Future Generations (Ombudsman) regarding Resolution 25/2009.²³

28. On 12 April 2011, the Ombudsman issued a statement in which it found the draft resolution was not “sufficiently specific and well-founded.”²⁴ It concluded that Resolution 25/2009 implemented section 12 (f) of Resolution 40/2009, yet had not been prepared in accordance with that provision.²⁵ It invited the Government to publish the results of environmental impact assessments, if any, and fully include the public in the NPP extension preparatory work.²⁶ It received no answer from the Government.

29. Energiaklub sent several letters to the competent minister asking how the minister planned to react to the Ombudsman’s recommendations but received no reply.²⁷

Resolution 77/2011 on the national energy strategy

30. In 2011, the Parliament adopted Resolution 77/2011 approving the national energy strategy, which modified and superseded Resolution 40/2008.²⁸

Energiaklub’s information requests

The Teller Project

31. On 24 June 2010, Energiaklub requested information concerning the Teller Project from Paks Ltd. under sections 19 and 20 of the Data Protection Act.²⁹ On 5 July 2010, the company refused to provide the information based on the State Property Act, stating that information can only be requested from public authorities or organizations performing public functions.³⁰

32. On 11 August 2010, Energiaklub sent a repeat information request, referring to domestic jurisprudence according to which all state-owned companies are deemed to perform public functions. On 30 August 2010, Paks Ltd. again rejected the request based on the State Property Act.³¹

33. On 15 September 2010, Energiaklub challenged Paks Ltd.’s refusal in court, which dismissed the case.³² On appeal, this ruling was overturned, and an order issued on 27 April 2011 to provide all requested information except some technical data.³³

34. On 30 May 2011, Paks Ltd. provided some information to Energiaklub in response to the judgment. Energiaklub considered information which was not sensitive technological information had been blacked out or was missing. On 20 July 2011, it made a new request. On 4 August 2011, Paks Ltd. sent most of the missing data, indicating it would send more in September. On 30 September 2011, it sent additional documents but Energiaklub considered major documents had been omitted. On 19 October 2011, Energiaklub requested seventeen

²² Communicants’ reply to questions, 23 September 2014, paras. 2–3.

²³ Ibid., para. 5.

²⁴ Communicants’ reply, 9 March 2016, p. 14.

²⁵ Ibid., p. 13, and Party’s reply, 9 March 2016, para. 82.

²⁶ Communicants’ reply, 23 September 2014, para. 5; and Party’s reply, 9 March 2016, para. 82.

²⁷ Communication, p. 10 and communicants’ reply, 23 September 2014, paras. 5–6.

²⁸ Party’s response to the communication, para. 30.

²⁹ Communication, p. 3, and annex 7, p. 2.

³⁰ Communication, p. 3, and annex 7, p. 3.

³¹ Communication, p. 4, and annex 7, pp. 4–7.

³² Ibid.

³³ Communication, p. 5.

documents. On 29 November 2011, Paks Ltd. sent further information but seven of the seventeen requested documents were missing. On 30 November 2011, Energiaklub turned again to court.³⁴

35. On 11 January 2012, the first-instance court ordered Paks Ltd. to send all requested information. Following several appeals, on 19 June 2013, the Tolna County Court ordered Paks Ltd. to send five of the requested seven documents. The information withheld in the remaining documents contained business secrets that were, according to the court, not possible to separate. Energiaklub received the five documents on 2 August 2013.³⁵

The Lévai Project

36. On 18 January 2011, Energiaklub sent information requests to MVM Hungarian Electricity Ltd. (MVM) concerning the Lévai Project, a continuation of the Teller Project.³⁶

37. On 2 March 2011, MVM refused to provide the requested information, stating that the Lévai Project was ongoing and the requested information was “data under preparation” under section 19 (a) (1) of the Data Protection Act or business secrets within the meaning of section 19 (6) of that Act, and that the holder of information is not obliged to produce new and qualitatively different documents solely to satisfy an information request.³⁷

38. Energiaklub successfully challenged the refusal in court, which on 11 September 2011 ordered MVM to disclose the information with the possibility to black out personal data and classified information. On appeal on 16 February 2012, this decision was upheld.³⁸

39. On 2 March 2012, MVM sent part, but not all, of the information. On 10 April 2012, Energiaklub sent another request concerning the missing information, updated versions of data sent previously and contracts concluded in the interim. MVM provided some but not all documents, so Energiaklub sent several further requests. In November 2012, MVM refused to provide the remaining documents, saying the information constituted business secrets. Energiaklub applied to the National Data Protection Agency (NDPA) for advice.³⁹

40. In March 2013, the NDPA issued a non-binding statement that MVM had to issue the remaining documents. MVM sent thirteen of the seventy-two documents in autumn 2013.⁴⁰

Nuclear energy governmental council

41. Between 20 March and 2 September 2013, Energiaklub repeatedly requested information under section 28 (1) and 29 (1) of the 2011 Information Act on a nuclear energy governmental council (the Council). Energiaklub was informed that the Council had not yet met, that it was a decision-preparing, not a decision-making committee, and that under section 27 (5) of the 2011 Freedom of Information Act, authorizations for access to information on its activities were subject to the discretion of the competent executive of the responsible body. Energiaklub was informed of its right to submit an application to the Metropolitan Court or to request an investigation from the NDPA.⁴¹

C. Domestic remedies and admissibility

42. With respect to their information requests regarding the Teller (see paras. 33 - 35 above) and Lévai Projects (see paras. 38-40 above), the communicants submit that, while

³⁴ Communication, pp. 5–6, and annex 7, pp. 8–16.

³⁵ Ibid.

³⁶ Communication pp. 6-7 and annex 7, pp. 17–18.

³⁷ Communication p. 7 and annex 7, p. 19.

³⁸ Communication, p. 7.

³⁹ Communication, pp. 7-8, and annex 7, pp. 20 and 21.

⁴⁰ Communication, p. 8, and communicants’ reply, 9 March 2016, p. 18.

⁴¹ Communication, pp. 8–9 and annex 9, pp. 2–11.

almost all review procedures they used were formally successful, the actual implementation of these remedies failed.⁴² Regarding their information request regarding the Council, the communicants claim that the formal arguments of the representative of the Prime Minister does not constitute a legal remedy.⁴³

43. Regarding their public participation claims, the communicants submit that no legal remedies were available.⁴⁴ They refer to their challenge Constitutional Court challenge regarding Resolution 77/2009 (see para. 26 above) and submit that there were no legal remedies to challenge the government's inaction regarding the Ombudsman procedure (see paras. 27-28 above).⁴⁵

44. The Party concerned states Energiaklub brought numerous court proceedings regarding its requests for access to information regarding the Teller and Lévai Projects.⁴⁶ It does not comment specifically on domestic remedies regarding the communicants' public participation allegations. The Party concerned requests that the Committee determine the communication to be inadmissible.⁴⁷

D. Substantive issues

Article 2 (2) – public authority

45. The communicants point out that the courts considered that Paks Ltd. and MVM were performing public tasks and were therefore subject to information disclosure requirements.⁴⁸

46. The Party concerned submits that the communicants' information requests were made to commercial companies which are not "public authorities" under article 2 (2).⁴⁹ It provides that its courts have held commercial companies can be performing public duties under section 19 (1) of the 1992 Data Protection Act and therefore must provide information,⁵⁰ but that courts have thereby created an interpretation that goes further than the Convention,⁵¹ and that it falls beyond the Committee's competence to examine whether commercial companies are performing public duties.⁵²

47. Observer Greenpeace Central and Eastern Europe submits that the Government's full control over the Teller and Lévai Projects supports the courts' conclusion that Paks Ltd. and MVM were public authorities.⁵³

Article 2 (3) – environmental information

48. As to why their requests were framed as information requests generally, rather than environmental information requests, the communicants claim that at the time of their 2010

⁴² Communication, p. 14.

⁴³ Communicant's reply, 23 September 2014, annex, pp. 1–2.

⁴⁴ Ibid., para. 4.

⁴⁵ Ibid., paras. 2–6.

⁴⁶ Party's response to the communication, paras. 12 and 15.

⁴⁷ Ibid., para. 20.

⁴⁸ Communicants' reply, 9 March 2016, pp. 2 and 11.

⁴⁹ Party's response to the communication, para. 10.

⁵⁰ Ibid., para. 11, and Party's reply, 9 March 2016, paras. 16–25.

⁵¹ Party's response to the communication, para. 11, and Party's reply, 9 March 2016, para. 15.

⁵² Party's reply, 9 March 2016, para. 29.

⁵³ Observer statement at Committee's fiftieth meeting (Greenpeace Central and Eastern Europe), 9 October 2015, p. 2.

information requests, they did not know what information the Party concerned possessed and accordingly framed their requests more broadly.

49. The Party concerned claims the material scope of article 2 (3) of the Convention is reflected in article 2 of the Decree on Environmental Information Access and article 12 of the Environmental Code.⁵⁴ It submits that Energiaklub's claims concerning the Teller and Lévai Projects were not based on these provisions nor on the fact that the data was environmental information. It concludes that the requests and litigation regarding the Teller and Lévai Projects do not fall within the scope of the Convention.⁵⁵

Article 4 (2)

50. The communicants claim the delay of three years in receiving much of the Teller Project information made some of the information received superfluous and futile, and that they were repeatedly confronting false arguments and spending large resources on legal remedies.⁵⁶ They claim the delay in accessing information practically excluded all those who could have given an opinion on the Paks NPP expansion plans from participating in the decision-making process. They submit that, when the requested information was received, all issues had been decided and the future of the energy policy of Hungary determined.⁵⁷

51. While acknowledging that all the requested information relating to the Teller Project was finally received, the communicants submit that seventy-two contracts concerning the Lévai Project were not received despite Energiaklub's successful litigation.⁵⁸ They submit that, after turning to the NDPA, MVM released thirteen, leaving fifty-nine undisclosed, four of which contain environmental information.⁵⁹

52. The Party concerned claims that, following the final court decisions, Energiaklub obtained almost all the documents requested in a fairly short time considering that their requests sought the release of thousands of pages, including information protected by intellectual property rights and confidential commercial information.⁶⁰

53. With respect to the four contracts the communicants allege contain environmental information, the Party concerned claims that one had been provided to Energiaklub, one was provided after the 2015 court decision, and the other two were not requested.⁶¹

Article 4 (3) (c)

54. Regarding the Lévai Project, the communicants submit that the authorities wrongfully applied the materials in the course of completion exemption since the refusal was based on the entire decision-making processes. They claim that this interpretation makes articles 7 and 8 "futile," because these provisions by their very nature concern preparations for future activities.⁶² The communicants, citing *The Aarhus Convention: An Implementation Guide*⁶³ (Implementation Guide),⁶⁴ claim that, once a document is provided to other bodies within or outside the organization in question, the "course of completion" exception cannot be used anymore.⁶⁵

⁵⁴ Party's response to the communication, para. 56.

⁵⁵ Ibid.

⁵⁶ Communication, pp. 11–12.

⁵⁷ Communication, p. 12.

⁵⁸ Communicants' reply, 9 March 2016, p. 17.

⁵⁹ Ibid., pp. 17-18.

⁶⁰ Party's response to the communication, para. 54.

⁶¹ Party's comments on the communicants' reply, 21 April 2016, para. 24.

⁶² Communication, p. 12

⁶³ Aarhus Convention: An Implementation Guide, second edition, 2014, United Nations publication, Sales No. E.13.II.E.3.

⁶⁴ Communication, p. 13.

⁶⁵ Communication, pp. 12-13.

55. The Party concerned submits that the information requests were refused because the requested information contained business secrets.⁶⁶

Article 3 (1)

56. The communicants submit that their access to information cases reveal structural problems contravening article 3 (1), and that institutional and procedural guarantees to ensure expedited handling of access to information cases and effective tools for the implementation of decisions are lacking.⁶⁷

57. The Party concerned states that it has taken adequate measures to establish and maintain a clear, transparent and consistent framework with proper enforcement measures. It submits that, while inconsistent judicial decisions may have occurred, most of the requested information was finally made available.⁶⁸ It refers to its 2014 National Implementation Report for legislative details.⁶⁹

Article 5 (7) (a)

58. The communicants claim that the Party concerned failed to actively disseminate information related to energy policy plans.⁷⁰

59. The Party concerned contends that decision-making processes on energy policy strategies require active dissemination,⁷¹ and that extensive studies and analyses supporting its energy policy have been publicly available.⁷²

2006 Thesis

60. The communicants claim that the public participation procedure on the 2006 Thesis is irrelevant, since their communication concerns the process starting in 2007, leading to Resolution 40/2008.⁷³

61. The Party concerned submits that the 2006 Thesis, which served as background to Resolution 40/2008,⁷⁴ was published on the competent ministry's website and sent to various NGOs for comment.⁷⁵

Resolution 40/2008

62. The communicants contend that Resolution 40/2008 was based on undisclosed materials from the Teller and Lévai Projects,⁷⁶ and the only information released was a draft energy policy concept published on the competent ministry's website (see para. 23 above).⁷⁷

⁶⁶ Party's response to the communication, para. 55.

⁶⁷ Communication, p. 13.

⁶⁸ Party's response to the communication, paras. 51–52.

⁶⁹ *Ibid.*, para. 53.

⁷⁰ Communicants' reply, 9 March 2016, p. 19.

⁷¹ Party's response to the communication, para. 57.

⁷² *Ibid.*, para. 24.

⁷³ Communicant's comments on Party's reply, 3 December 2016, p. 2.

⁷⁴ *Ibid.*, paras. 17-18, and Party's comments on the communicants' comments, 12 December 2016, paras. 5–8.

⁷⁵ Party's reply, 29 November 2016, paras. 13–15.

⁷⁶ Communicants' reply, 9 March 2016, pp. 16, 18 and 19.

⁷⁷ *Ibid.*, p. 15.

63. The communicants allege that, according to the Ombudsman, the draft resolution and a strategic environmental assessment, were sent to the NEC for comments⁷⁸ but that “neither [an] SEA nor an ‘environmental assessment’...was ever made available” to the public.⁷⁹

64. The Party concerned states the draft 2008-2020 energy policy and the “assessment analysis” required under article 43 (1) of the Environmental Code,⁸⁰ were sent to the NEC, which provided NGOs an opportunity to comment on “the document,” and that subsequently “the documents” were made available on the websites of the ministry, with an opportunity for public to comment, and the parliament.⁸¹

65. The Party concerned submits that no strategic environmental assessment (SEA) was undertaken on Resolution 40/2008,⁸² nor was this legally required.⁸³

Resolution 25/2009

66. The communicants submit that Resolution 25/2009 was based on materials from the Teller and Lévai Projects,⁸⁴ but that no documents were published prior to the proposal for the Resolution⁸⁵ and that the proposal, which was a one-and-a-half-page justification without background studies,⁸⁶ only became public a few weeks before the actual parliamentary procedure.⁸⁷

67. The Party concerned submits the proposal for the Resolution was discussed by two parliamentary committees and published on the Parliament’s website.⁸⁸

Article 7 – applicability

68. The communicants cite six factors which they claim support their allegations that Resolutions 40/2008, 25/2009 and 77/2011 fall under article 7, namely that the resolutions preceded the decisions on the actual project (time), determined the extension should be at Paks NPP without specifying the exact location (location), created the background upon which technical details, design and responsible entities could be discussed (subject), were first steps of a tiered decision-making procedure (stage), were preceded by scientific and policy developments, namely the Teller and Lévai Projects (nature of the decision) and concerned key environmental protection issues (environmental nature).⁸⁹

69. The communicants claim the government is “responsible” to Parliament under article 15 of the Fundamental Law, and that Parliament approved the resolutions proposed by the government.⁹⁰ The communicants claim that article 46 (1) of the 1987 Legislation Act, in force at the time of Resolutions 40/2008 and 25/2009, clearly provided that Parliament “shall regulate...the plans that belong to their tasks in decisions”.⁹¹

⁷⁸ Ibid., p. 16.

⁷⁹ Communicant’s comments on Party’s reply, 3 December 2016, p. 1.

⁸⁰ Party’s reply, 7 May 2021, pp. 1-2.

⁸¹ Party’s reply, 9 March 2016, para. 50, and Party’s reply, 29 November 2016, para. 19.

⁸² Party’s reply, 29 November 2016, para. 1, and Party’s comments on communicants’ comments, 9 December 2016, para. 1.

⁸³ Party’s reply, 29 November 2016, paras. 1, 2 and 5.

⁸⁴ Communicants’ reply, 9 March 2016, p. 16.

⁸⁵ Ibid., pp. 16, 18 and 19.

⁸⁶ Communicants’ comments on Party’s reply, 24 March 2016, p. 3.

⁸⁷ Communicants’ reply, 9 March 2016, p. 18.

⁸⁸ Party’s reply, 9 March 2016, para. 51.

⁸⁹ Ibid., pp. 14–15.

⁹⁰ Communicants’ comments on the Party’s response, 24 March 2016, p 2.

⁹¹ Ibid., pp. 2–3.

70. The Party concerned submits that Resolutions 40/2008, 25/2009 and 77/2011 are neither plans, programmes nor policies but pure political statements without legal consequences,⁹² and that energy strategy documents are adopted by non-binding normative and individual resolutions (see para. 18 above).⁹³

71. The Party concerned observes that the Convention lacks definitions of a “plan”, “programme” or “policy” relating to the environment.⁹⁴ It submits the definitions in article 2 (a) of the SEA Directive⁹⁵ and article 2 (5) of the Kyiv Protocol⁹⁶ are relevant, which state that plans or programmes are, inter alia, “subject to preparation and/or adoption by an authority” or “prepared by an authority for adoption” through a formal or legislative procedure by a parliament or a government and “required by legislative, regulatory or administrative provisions”.⁹⁷ It claims the Resolutions do not fulfil these criteria because parliamentary resolutions are not adopted through a legislative procedure and not required by legislative, regulatory or administrative provisions,⁹⁸ and that this interpretation is consistent with the Implementation Guide.⁹⁹

72. Concerning “time” (see para. 68 above), the Party concerned notes that the Resolutions are necessary but insufficient conditions prior to the decision on the project.¹⁰⁰ Regarding “location”, it submits that none of the Resolutions decided the location, which is decided later.¹⁰¹

Resolution 40/2008

73. The communicants submit that Resolution 40/2008 is a policy.¹⁰² They claim that section 12 (f) of the Resolution determined the conditions needed for giving the consent pursuant to article 7 (2) of the Atomic Energy Act and therefore should have served as basis for Resolution 25/2009.¹⁰³

74. The Party concerned submits that Resolution 40/2008 may be a policy but that this was unclear due to the Convention’s lack of a definition.¹⁰⁴

Resolution 25/2009

75. The communicants claim that Resolution 25/2009 is a plan under article 7 of the Convention. They state, firstly, that the Resolution is not a project-level decision, as the EIA procedure started afterwards; secondly, that the Resolution was required by article 7 (2) of the Atomic Energy Act (see para. 15 above); thirdly, that it is a “decision in principle”, with further permitting envisaged for the specific project; and lastly, that it relates to the environment.¹⁰⁵

⁹² Party’s reply, 9 March 2016, para. 45.

⁹³ Ibid., paras. 32–33.

⁹⁴ Ibid., para. 39.

⁹⁵ 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.

⁹⁶ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kjiv, 21 May 2003.

⁹⁷ Party’s reply, 9 March 2016, paras. 39–41.

⁹⁸ Ibid., para. 42.

⁹⁹ Party’s comments on the communicants’ reply, 21 April 2016, paras. 12–13.

¹⁰⁰ Ibid., para. 14.

¹⁰¹ Ibid., para. 15.

¹⁰² Communicants’ reply, 9 March 2016, p. 15.

¹⁰³ Ibid., p. 13.

¹⁰⁴ Party’s reply, 29 November 2016, para. 4.

¹⁰⁵ Communicants’ reply, 9 March 2016, p. 15.

76. The Party concerned submits that Resolution 25/2009 has a completely different nature and legal basis than Resolutions 40/2008 and 77/2011.¹⁰⁶ It concedes that the preparatory work for nuclear power projects can only be commenced if the Parliament gives its consent in principle but states that the two-sentence long Resolution was neither adopted through a legislative procedure nor sets the framework for development consent.¹⁰⁷ It contends that the Ombudsman erred in determining that the Resolution was the implementation of the task determined in Resolution 40/2008 and required a SEA.¹⁰⁸

Article 7 – opportunities for public participation

2006 Thesis

77. The communicants contend that public participation on the 2006 Thesis is irrelevant to their claim (see para. 60 above).

78. Regarding public participation on the 2008-2020 energy policy, the Party concerned submits that in 2005-2006 it had already provided adequate public participation during the preparation of the 2006 Thesis (see para. 61 above).

Resolution 40/2008

79. The communicants submit public participation with respect to Resolution 40/2008 was limited to the draft energy policy paper which was only annexed to the final resolution, and this was also the only document published on the website of the competent ministry for commenting between 15 June and 15 July of 2007. The communicants contend, however, that the Resolution was based on studies, analyses and materials resulting from the Teller Project, none of which was provided.¹⁰⁹

80. The communicant states that, while three section meetings were held by the ministry with the participation of interested members of the public after the commenting period, the actual resolution, which was approved by the Parliament, and to which the energy policy paper was attached as an annex only, was never discussed in the public participation process, which was limited to the energy policy paper only. The communicants submit further that the preparation of the final text of the energy policy and decision-making structure were not clear and that it was unclear whether any comments were taken into account and how those were included in the text.¹¹⁰

81. The communicants further claim that the environmental assessment was never provided to the public.¹¹¹ The communicants submit that the NEC cannot be considered a body to facilitate public participation but is rather an advisory agency of the government. The communicants add that there are no legal requirements for NEC's positions to be taken into account by the government.¹¹²

82. The Party concerned states that the draft 2008-2020 energy policy was sent, along with an environmental "assessment analysis", to the NEC for comments, which provided the NGO members of the NEC an opportunity to comment. It submits that subsequently the documents were made available on the websites of the ministry and the parliament.¹¹³ The Party concerned observes that the NEC partially consists of delegates from NGOs, and

¹⁰⁶ Party's reply, 9 March 2016, para. 43.

¹⁰⁷ *Ibid.*, para. 43.

¹⁰⁸ *Ibid.*, para. 82.

¹⁰⁹ Communicants' reply to Committee's questions, 9 March 2016, pp. 15-16 and 18.

¹¹⁰ *Ibid.*, pp. 15-16.

¹¹¹ *Ibid.*

¹¹² Communicants' comments on the Party's reply to questions, 3 December 2016, pp. 1-2.

¹¹³ Party's reply to Committee's questions, 9 March 2016, para. 50.

disagrees with the communicant's assertion that this body cannot be regarded as a body to facilitate public participation.¹¹⁴

83. The Party concerned submits no SEA was prepared for the Resolution, as this was not required under law and that it is beyond the competence of the Committee to assess whether a SEA was carried out.¹¹⁵

Resolution 25/2009

84. The communicants submit the proposal for Resolution 25/2009 was published on the parliament's website only a few weeks before its adoption and that the proposal was accompanied by a one-and-a-half page justification only.¹¹⁶

85. The communicants contend that only after the Resolution's adoption did it become clear that it was based on documents produced in the framework of the Teller Project. Because this information was only disclosed after Energiaklub's long litigation, the public had no opportunity to effectively participate in the preparation of the Resolution.¹¹⁷

86. The Party concerned submits that the proposal for Resolution 25/2009 was published on the parliament's website and discussed by parliamentary committees, some of which included the participation of interested stakeholders.¹¹⁸

Resolution 77/2011

87. The communicant claims that the public participation on Resolution 77/2011 was also flawed.¹¹⁹

88. The Party concerned refutes the communicants' claims regarding Resolution 77/2011 and states that a full SEA with public participation was carried out.¹²⁰

III. Consideration and evaluation by the Committee

89. Hungary ratified the Convention on 3 July 2001. The Convention entered into force for Hungary on 30 October 2001, the date of the Convention's general entry into force.

Admissibility

90. With respect to their allegations under article 4, the communicants used domestic remedies regarding their information requests to MVM and Paks Ltd. but not regarding the Council. As regards their allegations under article 7, the communicants sought recourse with the Ombudsman for Future Generations and explained that further domestic remedies with respect to these claims do not exist, none of which has been rebutted with supporting arguments by the Party concerned.

91. In the light of the above, the Committee finds the communication to be admissible, save for the allegations concerning the information requests regarding the Council, which is

¹¹⁴ Party's comments on communicants' comments, 12 December 2016, paras. 3–6 and annexes 1 and 2.

¹¹⁵ Party's reply, 29 November 2016, paras. 1 and 6.

¹¹⁶ Communicants' comments on the reply of the Party concerned, 24 March 2016, pp. 3–4.

¹¹⁷ Communicants' reply to Committee's questions, 9 March 2016, p. 16.

¹¹⁸ Party's reply to Committee's questions, 9 March 2016, para. 51.

¹¹⁹ Communicants' reply, 9 March 2016, pp. 16–17.

¹²⁰ Party's reply, 9 March 2016, paras. 53 and 55.

inadmissible under paragraphs 20 (d) and 21 of the annex to decision I/7 for a failure to exhaust available domestic remedies.

Scope of the Committee's considerations

92. The Committee will not examine the decision-making on the 2011 Resolution, since the communicants do not allege breaches of the Convention with respect to the 2011 Resolution in the communication, but only in their subsequent correspondence to the Committee.

Article 4 (1)

93. In their communication, the communicants refer to various requests that they made to Paks Ltd and MVM for environmental information regarding the Teller and Levai projects. Of these requests, the Committee focuses on those for which the communicants have demonstrated that they used domestic remedies, namely the requests of 22 June and 11 August 2010 to Paks Ltd seeking information on the Teller project and the request of 18 January 2011 to MVM seeking information on the Levai project.

94. Article 4 applies to requests for “environmental information”, as defined in article 2 (3) of the Convention, held by a “public authority”, as set out in article 2 (2) of the Convention. The Committee thus examines below whether article 2 (2) and article 2 (3) apply to the communicants' 22 June and 11 August 2010 information requests to Paks Ltd and their 18 January 2011 request to MVM.

Article 2 (2) – public authority

95. The parties do not dispute that Paks Ltd. and MVM are commercial companies. Accordingly, it is clear they do not fall within the definition of public authority under article 2 (2) (a). Nor is there clear evidence before the Committee that Paks Ltd. and MVM are performing public administrative functions pursuant to national legislation. Accordingly, article 2 (2) (b) is also inapplicable to these entities. The question thus arises if Paks Ltd. and MVM fall under article 2 (2) (c).

Public responsibilities or functions, or provide public services

96. The courts of the Party concerned have found that both Paks Ltd. and MVM perform public responsibilities or services. As these courts observed, the Paks NPP is the only NPP in Hungary and plays a significant role in electricity production.¹²¹ A court of the Party concerned further found that its conclusion that Paks Ltd. performed public duties was supported by the Atomic Act and “the provisions of the highly protected social interest [that] prevails in the peaceful uses of nuclear energy; the strict legal regime [that] 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.”¹²² The Committee agrees that these characteristics demonstrate that Paks Ltd. and MVM indeed have public responsibilities or functions, or provide public services.

In relation to the environment

97. The phrase “in relation to the environment” should be interpreted in a manner consistent with the objectives of the Convention. As nuclear power stations are clearly an activity within the scope of the Convention (paragraph 1 of annex I to the Convention), entities engaged in activities involving nuclear power stations, such as the construction of

¹²¹ Party's reply to the Committee's questions, 9 March 2016, paras. 20 and 22.

¹²² Ibid., para. 18.

new reactors as in the present case, that are providing a public service, do so “in relation to the environment.”

Under the control of a body or person falling within subparagraphs (a) or (b)

98. The Party concerned states that Paks Ltd. is a corporation fully owned by MVM Ltd, a corporation 99.91% of whose shares are held by MNV Ltd, a fully state-owned corporation.¹²³ On this fact alone, it is clear that both MVM and Paks Ltd. are under the control of a body falling within article 2 (2) (a) of the Convention.

99. The Committee accordingly finds that Paks Ltd. and MVM are public authorities within the scope of article 2 (2) (c)) and are therefore subject to the requirements of article 4 of the Convention.

Article 2 (3) – environmental information

100. At this point, it is not necessary to examine in detail whether each piece of information requested is “environmental information” within the meaning of article 2 (3) (b) of the Convention in order to establish the applicability of article 4 to Energiaklub’s information requests. Rather, it is sufficient if at least part of the requested information falls within this provision.¹²⁴ In this regard, the Committee notes that the studies and analyses requested by Energiaklub, such as the feasibility study, waste strategy, as well as the “preparation of specific chapters concerning new units of the environmental licensing documentation (with option)”¹²⁵ may include information on “the state of elements of the environment, such as air and atmosphere, water, soil, land”, etc., under article 2 (3) (a). Such information may also fall under article 2 (3) (b) as cost-benefit and other economic analyses and assumptions used in environmental decision-making. Finally, such information can also concern “the state of human health and safety, conditions of human life... inasmuch as they are or may be affected by the state of the elements of the environment”.

101. Accordingly, the Committee considers that at least some of the requested information was environmental information within the meaning of article 2 (3) (b) and thus subject to the requirements of article 4 of the Convention.

Article 4 (1) in conjunction with article 2 (2) – information regarding the Teller project

102. On 5 July and 30 August 2010, Paks refused Energiaklub’s information requests in their entirety on the ground that Paks did not perform public responsibilities.

103. Since article 4 applied to Energiaklub’s information requests, the Committee considers that Paks’ refusal of the information requests on the ground that the company did not perform public responsibilities would have been a breach of article 4 (1) in conjunction with article 2 (2) of the Convention.

104. The Committee notes, however, that the courts of the Party concerned subsequently held that Paks Ltd. did indeed perform public responsibilities and ordered the company to disclose the requested information. The Committee thus considers that the issue was remedied through domestic procedures prior to the submission of the communication.

105. Given the foregoing, the Committee finds that, based on the evidence before it, the Party concerned is not in noncompliance with article 4 (1) in conjunction with article 2 (2) of the Convention.

¹²³ Party’s response to the communication, para. 9.

¹²⁴ See ACCC/C/2013/89 (Slovakia), (ECE/MP.PP/C.1/2017/13), para. 83.

¹²⁵ Communicants’ reply to the Committee’s questions, 9 March 2016, annex, item 25.

Article 4 (1) in conjunction with article 4 (3) (c) and article 4 (4) (d) – information regarding the Teller project

106. On 2 March 2011, MVM refused Energiaklub’s 18 January 2010 information request on the ground that the requested information are “decision-preparing” data regarding an ongoing project and also constitute trade secrets.

Materials in the course of completion – article 4 (3) (c)

107. The Committee makes clear that the phrase “materials in the course of completion” in article 4 (3) (c) of the Convention relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared.¹²⁶ Accordingly, MVM’s refusal to provide information merely because the entire Lévai Project was ongoing at the time would have been a breach of article 4 (1) in conjunction with 4 (3) (c) of the Convention.

108. However, the domestic courts subsequently ordered that the requested information be disclosed. The Committee accordingly considers that the issue was remedied through domestic procedures prior to the submission of the communication.

109. Given the foregoing, the Committee finds that, based on the evidence before it, the Party concerned is not in noncompliance with article 4 (1) in conjunction with article 4 (3) (c) of the Convention.

Commercial confidentiality – article 4 (4)d

110. While article 4 (4) (d) provides for the protection of the confidentiality of commercial and industrial information, that exemption from disclosure must be applied restrictively taking into account the public interest in disclosure. Moreover, information on emissions which is relevant for the protection of the environment must be disclosed.

111. In the light of the above, the Committee considers that MVM’s refusal of Energiaklub’s request in its entirety on the ground that the requested information was “trade secrets” would have been a breach of article 4 (1) in conjunction with article 4 (4) (d) of the Convention.

112. However, since the decisions of the domestic courts subsequently held that, subject to some limited redactions, the requested information should be disclosed, the Committee considers that the issue was remedied through domestic procedures prior to the submission of the communication.

113. Given the foregoing, the Committee thus finds that, based on the evidence before it, the Party concerned is not in non-compliance with article 4 (1) in conjunction with article 4 (4) (d) of the Convention.

Articles 4 (2) and (7) and 9 (4)

114. While Paks Ltd. and MVM did not provide the requested information regarding the Teller and Lévai Projects, they both replied to the information requests, albeit by way of reasoned refusals, within the timeframe envisaged in article 4 (2) and (7) of the Convention, that is, within one month or no more than two months in the case of voluminous or complex requests. Accordingly, the Committee does not find the Party concerned to be in non-compliance with article 4 (2) or 4 (7) of the Convention.

115. Regarding the time that it took after the courts ordered Paks Ltd. and MVM to disclose the requested information, the Committee notes that this is a matter of adequate and

¹²⁶ See findings on ACCC/C/2010/51 (Romania), (ECE/MP.PP/C.1/2014/6/Add.3), para 29.

effective remedies under article 9 (4) of the Convention rather than the timeframe for responding to information requests under article 4 (2).

116. On this point, the communicant in its letter of 10 April 2012 to MVM regarding the Levai project refers to the communicant's entitlement to seek enforcement of the court's judgment of 2 March 2012. On the same date, however, it requested additional information that was not part of its original information request.

117. Similarly, in its letter of 20 July 2011, Energiaklub not only requested Paks Ltd. to provide the outstanding information that it considered to be covered by the court's judgment but also various additional information that was not part of its original request.

118. Given the overlapping of the old and new information requests, on the basis of the information before it the Committee is not in a position to determine the timeframes in which the full set of the information stemming from the original requests were actually provided. Moreover, since the communicant did not seek to enforce the courts' judgments in either case, the Committee is also not in a position to determine whether the legal framework of the Party concerned would have provided for adequate and effective remedy to enforce the courts' judgments ordering the disclosure of the requested information.

119. In the light of the foregoing, the Committee does not find the Party concerned to be in noncompliance with articles 4 (2), (7) or 9 (4) of the Convention.

Article 5 (7) (a)

120. It is vital that a Party give the public all facts and analyses of facts it considers relevant and important in framing major environmental policy proposals, as well as when plans and programmes relating to the environment are being prepared and discussed. There is in this respect a key interrelationship between the requirements of article 5 (7) (a) and article 7 of the Convention, as the publication of facts and analyses of facts under the former helps ensure the public has the relevant information it needs to make its participation in the related decision-making under article 7 effective.

121. The communicant claims that the Party concerned did not comply with article 5 (7) (a) with respect to Resolutions 40/2008 and 25/2009 by failing to publish, and denying access, to the "studies, analysis and materials resulting from Teller and Levai projects".¹²⁷

122. Article 5 (7) (a) requires each Party to proactively disclose the facts and analyses of facts which it considers relevant and important in "framing" the proposal. In determining whether particular information "frames" a policy proposal, the Committee points out that "framing" refers to information that supports or underpins the decision-making on the policy proposal *prior* to that decision being taken. It does not refer to analyses and other environmental information generated *as a result* of that environmental policy proposal. In the present case, the Levai project was implemented as a result of Resolution 25/2009. Studies, analyses and materials preparing during the Levai project can thus not have "framed" either Resolution 40/2008 or Resolution 25/2009.

123. With respect to the Teller project, it is the Committee's understanding that the purpose of that project was to examine the feasibility of a new NPP and that the studies and analyses prepared during the Teller project indeed fed into the decision-making on Resolution 25/2009.¹²⁸ That does not mean however that article 5 (7) (a) required the proactive disclosure of all studies, analyses and materials generated by that project, but only the information that, because of its relevance and importance, frames the proposal. This would depend on the central relevance of that information to the decision-making. For example, such information

¹²⁷ Communicant's reply to Committee's questions, 9 March 2016, p. 19.

¹²⁸ See Paks website, para. 2, <https://www.paks2.hu/web/paks-2-en/background-of-the-project>.

will usually be mentioned in the explanatory memorandum or other official justification for the proposal, even if not in the text of the proposal itself. On this point, the communicant refers only very generally to the “studies, analysis and material” resulting from the Teller project, without pointing the Committee to any particular analysis that it claims, from the text of the Resolution, or any accompanying materials, framed the Resolution and thus, in its view, should have been proactively disclosed under article 5 (7) (a) of the Convention.

124. The Committee thus finds that while, as pointed out in paragraphs 103, 107 and 111 above, the studies, analyses and materials resulting from the Teller and Levai projects should have been disclosed upon request under article 4 (1), the allegation regarding article 5 (7) (a) is unsubstantiated.

Article 7 – Resolutions 40/2008 and 25/2009

125. The Committee considers that when adopting Resolutions 40/2008 and 25/2009, the Parliament of the Party concerned did not act in a legislative capacity as under article 2 (2) of the Convention. The Committee notes that the Party concerned also accepts that, in adopting these Resolutions, the Parliament was not “acting in a legislative capacity” (see para. 71 above). The Committee examines whether the Resolutions are within the scope of article 7 of the Convention below.

126. Article 7 of the Convention does not define a “plan”, “programme” or “policy” relating to the environment. When determining how to categorize a document under the Convention, the document’s substance, legal functions and effects must be evaluated, rather than its label in domestic law.¹²⁹

127. A typical plan or programme (a) is often regulated by legislative, regulatory or administrative provisions, (b) has the legal nature of a general act (often adopted finally by a legislative branch), (c) is initiated by a public authority, which (d) provides an organised and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which (e) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.¹³⁰

128. The Committee points out that the scope of plans and programmes under article 7 of the Convention is not limited to those “which are likely to have a significant impact on the environment” but instead includes any plan or programme “relating to the environment”.

129. The term “policies” applies to other kinds of strategic documents, subject to preparation and/or adoption by an authority.¹³¹

130. The Committee makes clear that the characteristics of a plan or programme listed in paragraph 127 are those which are “typical”. They are neither exhaustive nor elements which must each be satisfied in order to come within the scope of article 7.

Resolution 40/2008

Plan, programme or policy relating to the environment

131. The communicants submit that Resolution 40/2008 is a policy decision within the scope of article 7. The Party concerned accepts that Resolution 40/2008 could constitute a policy under article 7, while noting that the lack of a definition of the Convention means the

¹²⁹ See the Committee’s findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 29.

¹³⁰ See findings on ACCC/C/2013/88 (Kazakhstan) (ECE/MP.PP/C.1/2017/12), para. 125, and the Maastricht Recommendations, para. 154.

¹³¹ See the Maastricht Recommendations, paras. 154–156.

issue is not clear (see para. 74 above). The Committee examines below whether Resolution 40/2008 is a plan, programme or policy under article 7 of the Convention or otherwise outside the scope of that provision.

132. In determining whether Resolution 40/2008 is a plan or programme, with respect to the characteristics listed in paragraph 127 above the Committee notes that: (a) the preparation of the Resolution was regulated by legislative provisions (namely articles 43 (1) and 44 (2) of the Environmental Code); (b) it has the legal nature of a general act; and (c) it was initiated by a public authority (the Ministry of Economy and Technology).

133. Resolution 40/2008 repealed Resolution 21/1993 of 9 April 1993 on the Hungarian energy policy. In turn, Resolution 40/2008 was repealed in 2011 by Resolution 77/2011 on the National Energy Strategy. Resolution 40/2008 thus appears to have been one in a series of strategic energy documents.

134. However, while the content of Resolution 40/2008 supports the view that it is a document of a strategic nature, in contrast to point (d) in paragraph 127 above its content does not appear to provide an organised and coordinated system that sets the framework for certain categories of specific activities (development projects), but rather sets out more general goals, priorities and tasks for the government. With respect to the Resolution's legal effects, the Committee understands that, under the legal framework of the Party concerned, a resolution adopted by the Parliament is not binding on the Government since it is not subordinate to the Parliament according to the Fundamental Law.¹³² Given the foregoing, the Committee considers that Resolution 40/2008 is a policy, and not a plan or programme.

135. On this point, a policy under article 7 of the Convention need not be adopted in the form of a parliamentary resolution. Rather, the fact that the policy was prepared by the Ministry and subject to article 43 (1) and 44 (2) of the Environmental Code indicates to the Committee that this document was of the nature to constitute a "policy" within the meaning of article 7 of the Convention. Accordingly, even if the 2008-2020 energy policy prepared by the Ministry of Economy and Technology had not been adopted in the form of a parliamentary resolution, the Committee would still have considered it to be a policy within the meaning of article 7.

136. In examining whether Resolution 40/2008 is "relating to the environment", the Committee notes that phrases such as "environmental sustainability", "environmentally-friendly" and other express references to "the environment" appear multiple times throughout the document. The Resolution also addresses environmental matters such as nuclear waste, greenhouse gases and pollution emissions. The Committee thus considers that it is clear that the Resolution is "relating to the environment" within the meaning of article 7.

137. In the light of the foregoing, the Committee considers that Resolution 40/2008 is a policy relating to the environment within the scope of article 7 of the Convention.

Opportunities for public participation

138. Pursuant to the final sentence of article 7, to the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

139. It is evident from the wording of article 7, final sentence, that the obligation to provide for public participation in policies is somewhat "softer" than that regarding plans and programmes. The Convention does however impose certain minimum obligations with respect to the opportunities for the public to participate in the preparation of policies. Of these, the following are of particular relevance to the present case.

140. First, article 7, final sentence, refers to "the public" in general. Thus, it would not suffice if the opportunities to participate in the preparation of a policy were only provided to

¹³² Party's reply to Committee's questions, 9 March 2016, paras. 32-34.

selected stakeholders. On this point, the Committee recalls its findings on communication ACCC/C/2010/51 (Romania) in which it stressed that:

“the inclusion of representatives of NGOs and “stakeholders” in a closed advisory group cannot be considered as public participation under the Convention. Furthermore, whatever the definition of the “public concerned” in the law of a Party to the Convention, it must meet the following criteria under the Convention: it must include both NGOs and individual members of the public; and it must be based on objective criteria and not on discretionary power to pick individual representatives of certain groups. In this context, participation in closed advisory groups cannot be considered as public participation meeting the requirements of the Convention.”

141. While those findings concerned a plan or programme under article 7, the Committee considers the above statement to be equally applicable to all public participation under 6, 7 or 8 of the Convention, including public participation on policies relating to the environment.

142. Second, as noted in paragraph 122 above, article 5 (7) (a) requires each Party to proactively disclose the facts and analyses of facts which it considers relevant and important in “framing” major environmental policy proposals.

143. In the present case, it is clear that Resolution 40/2008, which sets out the Party concerned’s national energy policy for the period 2008-2020, constitutes a major environmental policy proposal.

144. The Party concerned submits that the draft energy policy 2007-2020 (as it was known prior to the Resolution’s 2008 adoption) with the “assessment analysis” required under article 43 (1) of the Environmental Code was sent to the National Environmental Council (NEC) for its comments in accordance with article 44 (2) (a) of the Environmental Code. It contends that the NGOs that participated in the NEC therefore had an opportunity to comment on the document.¹³³ On this point, the Committee repeats that, in line with the findings on communication ACCC/C/2010/51 (Romania) cited above, the involvement of a selection of NGOs in the NEC cannot itself be considered as public participation meeting the requirements of the Convention.

145. It is common ground between the parties, however, that the concept of the 2007-2020 energy policy was then published on the website for the Ministry for Economy and Transport for the public’s comments from 15 June to 15 July 2007. Thereafter, three section meetings were held with the participation of interested experts and organizations.

146. Subsequently, on 4 February 2008, the draft energy policy 2007-2020, by then in the form of a draft resolution, and a background document (though not the “assessment analysis”) were made available on the Parliament’s website. The draft resolution was discussed in a number of parliamentary committees and any member of the public could take part in those committee sessions and make comments. The Party concerned points for example to the minutes of the Committee on Economy and IT which record the comments received from various NGOs during the Committee session at which the draft resolution was discussed. It also provides the text of the draft Resolution identifying the revisions made to its text in the light of the NGOs’ comments.

147. Based on the above, the Committee considers that the public in general, and not just selected stakeholders, had the opportunity to comment on the draft 2007-2020 energy policy during the periods that it was posted on the websites of the Ministry, and later of the Parliament, and also to participate in the relevant parliamentary committees. The marked-up version of Resolution 40/2008 put before the Committee demonstrates that a number of

¹³³ Party’s reply to Committee’s questions, 9 March 2016, para. 50, and Party’s reply to Committee’s questions, 29 November 2016, para. 19.

revisions were made to the draft Resolution to take into account the comments received from the public.¹³⁴ This has not been disputed by the communicants.

148. The Committee next turns to consider the information that was made available to the public during the preparation of the 2008-2020 energy policy, recalling that article 5 (7) (a) requires Parties to publish the facts and analysis of facts which it considered relevant and important in framing that policy.

149. Besides the texts of the various versions of the draft 2007-2020 energy policy (which following the Resolution's 2008 adoption, became the 2008-2020 energy policy), the Committee considers that at least two further documents have been put before it that must be considered relevant and important in framing the 2008-2020 energy policy. First, the "Background document on the draft Parliamentary Resolution no H/4858 on the energy policy concept for the period 2007-2020"¹³⁵ that was put before the Parliament and, second, the "assessment analysis" dated 5 June 2007¹³⁶ that was required to be prepared under article 43 (1) of the Environmental Code.

150. The "Background document"¹³⁷ put before the Parliament was, and still is, available to the public on the Parliament's website.

151. In contrast, the Committee understands that the "assessment analysis" required under article 43 (1) of the Environmental Code was not made available to the public during the preparation of the draft 2007-2020 energy policy (which became Resolution 40/2008 on the 2008-2020 Energy Policy).

152. The Committee welcomes that, even where there is no requirement for an SEA to be carried out, article 43 (1) of the Environmental Code requires draft legislation and "concepts" related to the environment are subject to a mandatory "assessment analysis".

153. However, since the "assessment analysis" was a legal requirement for the preparation of the draft 2007-2020 energy policy, the Committee considers that this analysis constitutes an "analysis of facts" that the Party concerned "considered to be relevant and important in framing" the 2007-2020 energy policy. Pursuant to article 5 (7) (a) of the Convention, the "assessment analysis" should thus have been made available to the public during the preparation of the draft 2007-2020 energy policy, not least so that the public could effectively exercise their opportunities to participate under article 7, final sentence, of the Convention.

154. Based on the foregoing, the Committee finds that, by not publishing the "assessment analysis" of the draft 2007-2020 energy policy prepared under articles 43 (1) and 44 (2) of the Environmental Code, the Party concerned failed to comply with article 7, final sentence, in conjunction with article 5 (7) (a) of the Convention.

Resolution 25/2009

155. In contrast, to Resolution 40/2008, Resolution 25/2009 does not have the character of a plan, programme or policy under article 7 of the Convention. The Committee agrees with the Party concerned that it appears to have an entirely different character than either Resolution 40/2008 or Resolution 77/2011.

156. Resolution 25/2009 concerns a specific project and does not provide a general framework. Whilst Resolution 25/2009 is therefore not a plan, programme or policy under article 7, it is related to Resolution 40/2008 and the decision-making on possible new units at the Paks nuclear power plant in critical respects.

¹³⁴ Party's reply to Committee's questions, 7 May 2021, annex 8.

¹³⁵ Ibid., annex 3b.

¹³⁶ Ibid., annexes 1 and 2.

¹³⁷ Ibid., annex 3b.

157. Firstly, it is one of the actions that the Government had been invited to take by the Parliament, in section 12 (f) of Resolution 40/2008, namely to make a proposal on the necessity of the investment in new nuclear capacities to the Parliament. The interrelatedness of these two acts is further borne out by the express reference in Resolution 25/2009 to Resolution 40/2008, with which Resolution 25/2009 states itself to be “in harmony”.

158. Secondly, as the parties agree, Resolution 25/2009 was a necessary condition for commencing the preparatory works under article 7 (2) of the Atomic Act, conferring the right to commence further decisions to issue permits of various kinds (e.g. siting, environmental, and later construction and operating permits).¹³⁸ This means that Resolution 25/2009 was not merely instrumental for, but crucially linked to these subsequent decision-making processes for the possible new units at Paks NPP.

159. While noting that the specific siting decision would be subject to a downstream procedure, the Committee considers that Resolution 25/2009 established the general location, at least, as being at the site of the Paks NPP. Should the government or authorities have wished to commence preparatory activities at another location, they would have required a new resolution under article 7 (2) of the Atomic Act.

160. In the light of the foregoing, the Committee considers that in some respects Resolution 25/2009 appears to have the nature of a decision in a multi-stage decision-making procedure subject to article 6 of the Convention. However, the communicants did not raise article 6 in their communication and the Committee accordingly has not received submissions from either party on the possible application of article 6 to Resolution 25/2009. The Committee is thus not in a position to make a finding on this point.

161. Based on the foregoing, without excluding that article 6 of the Convention could be applicable to Resolution 25/2009, since Resolution 25/2009 is clearly not a plan, programme or policy under article 7 of the Convention, the Committee finds that the Party concerned has not failed to meet the requirements of article 7 with respect to that Resolution.

Article 3 (1)

162. The communicants allege that their access to information cases reveal structural problems in the Party concerned in contravention of article 3 (1). Having found in paragraphs 105, 109, 113 and 119 above that the Party concerned is not in non-compliance with article 4 (1), 4 (2) or 4 (7) of the Convention, it considers the allegation that the Party concerned has failed to comply with the requirements of article 3 (1) of the Convention in the circumstances of this case to be unsubstantiated.

IV. Conclusions and recommendations

163. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

164. The Committee finds that, by not publishing the “assessment analysis” of the draft 2007-2020 energy policy prepared under articles 43 (1) and 44 (2) of the Environmental Code, the Party concerned failed to comply with article 7, final sentence, in conjunction with article 5 (7) (a) of the Convention.

¹³⁸ Reply to the Committee’s questions, 9 March 2016, annex II.

B. Recommendations

165. The Committee pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 36 (b) of the annex to decision I/7, recommends that the Party concerned takes the necessary legislative, regulatory, administrative and practical measures to ensure that “assessments analyses” of policies relating to the environment prepared under articles 43 (1) and 44 (2) of the Environmental Code, or any legislation that supersedes them, are made available to the public so that they can effectively exercise their opportunities to participate under article 7, final sentence, of the Convention.
