

**COMMUNICATION
TO THE AARHUS COMPLIANCE COMMITTEE
Clean Air Action Group
Hungary**

Cover Sheet

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Submitted by: Clean Air Action Group
1075 Budapest, Károly körút 3/a.
Mailing address: Budapest, Pf. 1676, HU-1465, Hungary
Phone: +36 1 411-0509; 411-0510; 266-0854
E-mail: lukacs@levego.hu
levego@levego.hu
Internet: www.levego.hu
Contact Person: András Lukács

State concerned: Hungary

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6; 9.2; 9.3; 9.4

Number of supporting documents: 1

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On behalf of Clean Air Action Group I submit the following communication to the Aarhus Convention Compliance Committee (hereafter: Committee).

I request the Committee to assess the non-compliance of *Act CXXVIII/2003. on Public Interest and Development of the Expressway Network in the Republic of Hungary* (hereafter: Expressway Act) with the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (hereafter: Aarhus Convention).

In addition I request the Committee to call on the Hungarian Government to establish compliance with the Aarhus Convention in regard to the undermentioned sections of the Expressway Act.

My submission is based on Article 15 of the Aarhus Convention and Meeting of the Parties Decision I/7. on Review of Compliance.

1.) Section (1) of Para 1 in the Expressway Act declares that:

“The development of the expressway network is an important public interest activity.”

In our opinion public interest means that members of the public should be permanently well-informed about all aspects of the matter. Information must be comprehensive, accurate, in-depth, covering the opinion of the full range of competent actors of the society in order to duly reflect timely and actual public interest. It is also questionable that one specific activity can be declared by law as of important public interest, whereas no other activity (e.g. education, health care, environmental protection) is declared by law as an important public interest activity. This declaration of the Expressway Act was criticized even by the State Audit Office.

The Aarhus Convention establishes the above as a general objective. Article 1 reads:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

According to Article 2.3 (b) of the Convention information concerning construction and development of motorways is to be considered as “environmental information”.

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Moreover, in accordance with the Aarhus Convention Article 6.1. (a) and Annex I. 8 (b) and (c) activities in connection with expressway networks regulated by the Expressway Act, Hungary must apply the provisions of Article 6 with respect to the procedure of decision-making on whether to permit these activities.

This means that during the permission procedure of any expressway construction activity, the following obligations have to be fulfilled:

Article 6.2

“The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
 - (i) The commencement of the procedure;
 - (ii) The opportunities for the public to participate;
 - (iii) The time and venue of any envisaged public hearing;
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.”

2.) According to Para 4 of the Expressway Act, an *incorporated company shall be responsible for the construction of expressways*. This company carries out the entire permission procedure. Therefore relevant contracts, engineering and feasibility studies, as well as other

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documents could be concealed from the public concerned with reference to trade secrets. But information contained in such documents is necessary for the public in order to decide whether the eventual change of their environment is intolerable or not.

The right of access to information means not only that relevant data shall not be concealed but also that the information provided for the public mustn't be partial, one-sided or biased. This can be a frequent occurrence if a company is responsible for informing the public without adequate supervision, and especially if that company is financially interested (and even its mere existence depends on) motorway constructions.

Therefore Para 4 of the Act is non-compliant with Article 6.6 of the Aarhus Convention which rules:

“Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure... ..without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and
- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.”

3.) According to Para 5 of the Expressway Act:

Section (2): “The Minister (of Economy and Transport)... ..compiles the documentation of a preliminary environmental study and of a study for the land management plan.”

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Section (3): “The Designer shall maintain communication with the Environmental Authority, other authorities concerned and the municipalities during the period of preparation of the studies and documentation.”

Section (4): “The Contractor conducts citizen forums during the period of drafting the preliminary environmental study in order to inform the public concerned and to learn the opinion of the municipalities.”

In recent past the public had no opportunity to learn about studies and research commissioned by the Hungarian Academy of Sciences, the European Union, the World Bank in connection with the construction of expressways. These studies and research results expressed doubts about the feasibility and economic reasonability of the motorway-construction projects in Hungary. The Contractors often withhold arguments and study results of those experts who draw attention to the environmental dangers of the projects.

The Expressway Act legitimized the above practices. It allows the Government to plan motorway construction based on unreasonably speedy procedure serving the narrow interest of the contractor. In our opinion the public concerned have a right of access to relevant, multi-faceted environmental information during the preparation period as well. Moreover, experts and environmental organizations must be entitled to participate in the initial phases of the decision making process, as well.

Therefore, the Expressway Act does not comply with Article 6.2; 6.3; 6.4; 6.5; 6.6; 6.7 of the Aarhus Convention, especially with the following obligations:

Article 6.3

“The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public...”

Article 6.4

“Each Party shall provide for early public participation, when all options are open and effective public participation can take place.”

Article 6.7

“Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”

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4.) In accordance with Para 9, Section (4) of the Expressway Act in cases of upgrading existing roads to become expressways there is no need for preliminary environmental impact assessment (EIA): *“the environmental permission procedure starts with the presentation of a detailed environmental impact study”*.

The Ministry of Economy and Transport argues that the preliminary EIA phase is unnecessary because the track of the would-be expressway is the same as that of the already existing lower grade road.

In our opinion the aim of the preliminary EIA is not only to examine the acceptability of the track to be mapped out but also to determine the standpoints for the subsequent detailed environmental study. Also, the upgrading of a smaller road to an expressway might have considerable effect on the environment. In addition, the preliminary EIA phase should provide the opportunity for public participation in decision-making. According to Government Decree 20/2001 during the period of preliminary EIA, the environmental impact study has to be sent to the municipalities, displayed by them for public scrutiny and comments of all those concerned. Should there be no preliminary EIA phase, the above opportunity is lost. Therefore, Para 9 Section (4) is contradictory with Article 6.2; 6.4; 6.6; 6.7 of the Aarhus Convention.

5.) Para 14 of the Expressway Act declares:

“...The lead authority shall not prolong the deadline for administration of environmental and building permission procedures.”

This rule deprives the head of the National Environmental Inspectorate which carries a burden of overcharged caseload to extend deadlines in case of need. Consequently, decisions in connection with expressway permission procedures often lack due consideration of the outcome of the preliminary EIA phase, leaving no time to collect different opinions from the public. As far as the technique of prolonging deadlines is concerned, it is allowed in the course of other environmental permission procedures, allowing lead authorities to cope with workloads. In our case Para 14, therefore, is also contradictory with Article 6 of the Aarhus Convention.

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6.) Para 6 of the Expressway Act declares:

“The track... of an expressway is determined by the Minister in a decree based on the decision made as a result of the preliminary environmental procedure by the environmental authority.”

According to Para 18, Section 7:

“The Minister is authorized to determine the track of an expressway... ..by a decree.”

It is unprecedented that a decision which evidently falls within the competence of public administration is regulated by a ministerial decree. The procedure of creating a ministerial decree excludes reconciliation possibilities with the interests of different public segments, such as environmental interests. Consequently, the public concerned have no voice in the most important decision based on the permission procedure.

Normally, the public concerned have several appeal and remedy opportunities against the decision of any authority. As far as an adopted ministerial decree is concerned, there is no effective legal redress possibility. This violates the right of access to justice in environmental matters.

Therefore, the above mentioned rules of the Expressway Act are contradictory with the following obligations of the Aarhus Convention:

Article 9.2

“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6...

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...To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above.

Article 9.3

“...each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”

7.) According to Para 9 Section 1 of the Expressway Act:

“.. in the course of the environmental permission procedure (preliminary permission phase, detailed permission phase) the National Environmental Inspectorate has jurisdiction on first instance.”

According to the Hungarian Environmental Law (Act LIII/1995) during the environmental permission procedure the authority has the obligation to continuously communicate with the public concerned. In other environmental permission procedures it is the regional environmental inspectorates who are entitled by law to make public all the relevant information during preliminary permission phases and conduct hearings in order to collect the opinion of the residents during detailed permission phases. In other words, the first instance authority jurisdiction is administered at the regional level.

The Expressway Act refers the first instance jurisdiction to the National Environmental Inspectorate located in Budapest, far from the location of motorways under construction. Therefore the authority is not as well placed as regional inspectorates for the task of adequately collecting and evaluating the opinion of the residents concerned.

Moreover, Para 10, Section 2 of the Expressway Act declares:

“Appeals against the decision of the environmental authority shall be addressed... ..to the head of the authority.”

This rule is very perilous because the head of the same authority should not be allowed to proceed following an appeal against the first instance decision of the body she/he chairs. Such an appeal procedure gives ground to suspicion of partiality and prejudice. The regulation

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does not comply with the right of access to justice and with the following rule of the Aarhus Convention:

Article 9.4

"...the procedures... ...shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."

8.) According to Para 12 Section 3 of the Expressway Act:

"The second instance decision made during the building permission procedure – with regard to public interest – is immediately executory."

This means that the construction of an expressway may start immediately after the decision is made. If someone appeals to the court, by the time the court passes its judgment, the expressway will in most cases have been already constructed and its harmful effects on the environment will have become irreversible. (This aspect is taken into consideration by the laws relating to all other kind of investments: the environmental permission or the construction permission for all investments is waived automatically if anyone appeals to court. The Expressway Act made the only exception from this rule.) This rule is also contradictory with Article 9.4 of the Aarhus Convention:

"...the procedures... ...shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."

9.) According to Para 15 a):

"The court may suspend the execution of the decision made by an executive authority only with regard to public interest or client's considerable interest."

Motorway construction is, arguably, public interest in its own right. Since the law does not spell out what other public interest shall be considered superior, in the case of appeal to the court it is next to impossible to achieve suspension of the execution of the executive decision and to stop construction work. The interpretation of this concept is very problematic because normally the court is entitled to suspend execution of administrative decisions on the basis of a much broader range of consideration. The Expressway Act narrows down the scope

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of judiciary reference. Therefore this revision opportunity is not as effective as is necessary and does not comply with Article 9.4 of the Aarhus Convention.

10.) At the end of the text, the Expressway Act declares:

“The public shall be informed about the implementation of the expressway network.”

Information in itself doesn't mean that the public concerned can participate in decision making and in practice the flow of such information is one-way and prejudiced. This concluding statement is in clear discord with the spirit of the Aarhus Convention as a whole.

Confirming the admissibility of the communication

The Clean Air Action Group is a Hungarian non-governmental organization which operates in the field of environmental protection. It is a national federation of 126 Hungarian environmental NGOs (see www.levego.hu).

The Aarhus Convention is in force in Hungary since the ratification of it by Act of Parliament No. LXXXI/2001.

To our best knowledge the government of Hungary has not notified the Secretary-General of the United Nations concerning inadmissibility of communications from the public.

Use of domestic remedies

The Clean Air Action Group took a stand against the Expressway Act in the course of the whole enactment procedure. It sent its comments to the Ministry of Economy and Transport, Ministry of Justice, Ministry of Environment and to all members of the Parliament. It took the issue to the National Environment Protection Council (an governmental advisory body consisting of representatives of industry, the Hungarian Academy of Sciences and environmental NGOs) which expressed its serious concern about the bill. The Ministry of Economy and Transport who introduced the bill has not taken into consideration the revision proposals and the arguments submitted by our organization and by the National Environmental Protection Council. Our critical remarks concerning non-compliance with international environmental law were not answered or were intentionally misinterpreted by the ministry.

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We asked the Environment Committee of the Hungarian Parliament to examine whether the text of the Expressway bill as proposed by the government complies with the Hungarian Constitution. The Committee expressed its serious concern about the bill and turned to the Constitutional and Legal Committee of the Hungarian Parliament, asking it to examine the issue. This Committee gave only five minutes to the representative of the Clean Air Action Group to tell his opinion, and then the representative of the Ministry of Economy and Transport told his version. There was no possibility to refute the arguments of the Ministry. Finally the Committee decided by a very small majority (11:10) that the bill conforms to the Constitution.

Since in our opinion several provisions of the Expressway Act are unconstitutional, we are applying to the Constitutional Court of the Hungarian Republic with the aim of achieving its revision. It has to be noted, however, that the Constitutional Court is overloaded with work: it has more than 1000 cases pending, quite a number of them for over 5 years. Therefore we doubt that it will make any decision about the constitutionality of the Expressway Act within the coming 5 years.

We also called upon the President of the Hungarian Republic to consider turning to the Constitutional Court in connection with the non-compliance of the Act with the Constitution and with European Union Directive 2001/42/EC. We did not receive any response.

Budapest, 30 April 2004

András Lukács
President
Clean Air Action Group
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