Report concerning the communication submitted by the applicant 'Fons de Defensa Ambiental' to the Aarhus Convention Compliance Committee in reference to matter ACCC/C/2014/99

1. Background

1. On 20 January 2014, the Secretariat of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention) received a communication sent by the non-governmental environmental organisation Fons de Defensa Ambiental (hereinafter, the FDA) to the Convention Compliance Committee (hereinafter, the Committee). This communication alleged a possible breach by Spain of certain provisions of the Convention concerning public participation in decision-making and access to justice. In particular, the complaint alleges:

- Firstly, deficiencies in the public consultation phase for the award of an environmental authorisation to Uniland Cementera, SA, insofar as the notice published in the *Official Journal of the Government of Catalonia* (number 5590 of 18 March 2010, hereinafter DOGC) referred to the authorisation of an activity (cement manufacture and rock extraction) that was different from the one actually authorised (substantial modification to permit use of waste derivatives from municipal waste and dried sewage sludge).
- Secondly, a breach of access to justice insofar as it refused to grant a preliminary administrative review to the non-governmental environmental organisation Col·lectiu Bosc Verd due to a lack of standing and insufficient grounds.

2. On 26 June 2014, the applicant, FDA, responded to the issues raised by the Committee before the latter was to decide on the preliminary admissibility of the communication.

3. On 2 July 2014, once the communication had been examined and the additional information had been requested, the Committee concluded that it was admissible since it did not contain any of the criteria for inadmissibility stipulated in paragraph 20 of Decision I/7.

4. On 8 September 2014, the Committee sent separately to the FDA and to the Spanish ministerial bodies two letters in which it listed the steps taken so far in the proceedings to enforce compliance with the Aarhus Convention, while at the same time it called on the FDA to send, no later than 24 September, its response to a new list of questions aimed at further clarifying the matter. Similarly, it also called on the Spanish authorities to state, no later than 8 February 2015, their opinion on the communication in which they were challenged.

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5. On 25 September 2014, this unit was informed of the document of preliminary clarifications requested from the environmental organisation, after which it opened a case file in order to collect all the necessary documentation for the preparation of this report.

6. Before proceeding to analyse the matter under discussion, it will be necessary to highlight a number of background facts:

One.- On 24 November 2009, the company Uniland Cementera, SA, engaged in the manufacture of cement in rotary kilns and located in the municipality of Santa Margarida i els Monjos (Barcelona), requested the inclusion of a substantial modification to the environmental authorisation granted on 19 January 2007. The modification involved widening the scope of the types of waste used in the energy recovery activities listed in the original environmental authorisation granted on 19 January 2007. This energy recovery waste consisted of waste derivatives from the residual fraction of municipal solid waste (EWC191210) and dry sewage sludge (EWC190805). The project involved the partial replacement of the petroleum coke fuel used in the cement plant's clinker furnaces (4E and 5E) with the abovementioned alternative fuels.

Two.- In accordance with current legislation in Catalonia, public participation in environmental authorisation proceedings is guaranteed by means of public and local consultation processes. Under the latter of these formats, the City Council directly notifies the immediate local residents of any proceedings relating to the award or modification of environmental permits. On 18 March 2010, during the proceedings for the inclusion of a substantial modification, a notice was published in the DOGC (number 5590) regarding the launch of the public consultation phase for a request for the environmental authorisation of a project involving cement manufacture and rock extraction in the municipality of Santa Margarida i els Monjos (BA20090192). No pleadings were received during the allotted 30-day period for the presentation of pleadings. Nor was any objection received after the said request was published on the Department's telematic networks; nor once the term allotted for the public consultation phase had concluded. There is only one record of an enquiry made by a sole person on 8 April 2010.

Three.- On 25 March 2010, the City Council of Santa Margarida i els Monjos began a local consultation regarding the request for an environmental authorisation filed by Uniland Cementera, SA (File OGAU: BA20090192 and File Ajuntament: 29/2009) pursuant to Article 31.1 of Decree 136/1999, of 18 May, approving the general Regulations implementing Law 3/1998, of 27 February, on the comprehensive intervention of the environmental authorities. On 7 April 2010, a final communication was made to local residents regarding the term of 10 business days granted for individual communication and hearings. Finally, on 28 April 2010, the local consultation certificate was added to the file confirming that no pleadings had been submitted during the proceedings.

Four.- On 3 June 2010, the Minister for the Environment and Housing of the Government of Catalonia, after completing all the relevant formalities, issued a

Decision on the inclusion of a substantial modification to widen the scope of the waste used in its energy recovery activities (File BA20090192).

Five.- On 20 June 2011, Mr Jordi Asensi i Gabriel, representing the environmental group Bosc Verd, visited the offices of the Ministry of Territory and Sustainability of the Government of Catalonia, at Territorial Services in Barcelona, requesting to examine file BA20090192 and making photocopies of the documents contained therein (specifically, 294 photocopies of documents in the file).

Six.- On 17 May 2012, the registry of the central services of the Ministry of Territory and Sustainability of the Government of Catalonia received a request for an *ex officio* review under Article 102 of Law 30/1992, submitted on behalf of the environmental association Col·lectiu Bosc Verd against the Decision granting a substantial modification to the 2007 environmental authorisation, based on the following sole pleading:

- Invalidity as a matter of law due to the clear, manifest and obvious omission of an essential procedural step in the proceedings for an environmental authorisation and in the proceedings for the environmental impact assessment, consisting in the public consultation phase of the project and the environmental impact study. In particular, violation of Article 16 of Law 16/2002, of 1 July, on integrated pollution prevention and control; of 13.2 c) and 16 of Law 3/1998, of 27 February, on the comprehensive intervention of the environmental authorities; and of 31 of Decree 136/1999, of 18 May; and of 5.1 d) and 9 of Legislative Royal Decree 1/2008, of 11 January, approving the revised text of the Environmental Impact Assessments Act. Doubts were raised regarding the notice of the public consultation phase published in the DOGC (number 5590 of 18 March 2010), insofar as it referred to the authorisation of an activity (cement manufacture and rock extraction) that was different to the one actually authorised (substantial modification allowing the use of waste derivatives from the residual fraction of municipal solid waste and dried sewage sludge as fuel).

Seven.- On 19 June 2012, the head of the Legal Department for Environmental Affairs informed the aforementioned environmental organisation of the maximum regulatory term established for the completion of the proceedings, as well as the effects of administrative silence, indicating the date on which the competent body received the application.

Eight.- On 6 July 2012, having complied with the above mandatory procedural steps, Mr Salvador Iguaz Campos, on behalf of the cement company in question, submitted a written statement of opposition to the application for an *ex officio* review, together with attached documentation, namely:

- Rejection of the application for an *ex officio* review on the basis of the fact that the environmental association Col·lectiu Bosc Verd lacks all standing.

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- Non-existence of the alleged defect of invalidity as a matter of law, a claim manifestly lacking legal grounds.
- And on a subsidiary basis, that the content of the publication in the DOGC regarding the public consultation phase would, in any case, constitute a mere formal defect that would not make it invalid as a matter of law.
- Inadmissibility of exercising, at that time, the right to an *ex officio* review, insofar as the exercise of that right would be contrary to the equity, good faith and rights acquired by the company.

Nine.- On 17 September 2012, the Minister for Territory and Sustainability issued a Decision whereby it rejected, due to a lack of standing and legal grounds, the request for an *ex officio* review made by the environmental association Col·lectiu Bosc Verd in connection with the decision of the Minister for the Environment and Housing, dated 3 June 2010, to approve the inclusion of a substantial modification to widen the scope of the types of waste used in the energy recovery activities listed in the environmental authorisation of 16 January 2007 and awarded to Uniland Cementera, SA.

Ten.- On 12 November 2012, the registry of the central services of the Ministry of Territory and Sustainability received the appeal for reconsideration lodged against the Decision of 17 September 2012, submitted by the organisation Col·lectiu Bosc Verd, based on the following arguments:

- Inadmissibility of the rejection given that the said request for *ex officio* review should have been processed by also requesting a preliminary opinion of the Legal Advisory Committee (advisory body in Catalonia) and issuing a ruling on the merits, dismissing the claim, in any case, due to a lack of standing.
- The effective standing of the environmental association to seek a declaration of invalidity given its status as an interested party.
- Inadmissibility of the rejection due to a lack of legal grounds since this is possible only when the request is 'manifestly' lacking legal grounds, while the appealed Decision interprets this cause in an excessively broad way.
- The defects in the public consultation phase did indeed constitute invalidity as a matter of law and there was no violation whatsoever of the equity, good faith, and rights of the individuals as a result of the long period of time between the date on which the association became aware of the authorisation and the date of its request for the *ex officio* review.

Eleven.- On 22 November 2012, a hearing was granted to the company concerned in relation to the appeal and on 18 December 2012, the latter submitted the following succinct arguments:

- Accreditation of the lack of standing of the environmental organisation Col·lectiu Bosc Verd insofar as the appellant is not an interested party and cannot institute public proceedings. Furthermore, that the claim of a lack of standing does not make it necessary to seek the opinion of the Legal Advisory Committee, since as the organisation is not considered an 'interested party, it is rejected *in limine*.
- Admissibility of the rejection of the request for an *ex officio* review due to a manifest lack of legal grounds as it cannot be deemed that the public consultation

phase published in the DOGC was invalid or non-existent given that the notice referred to the specific project subject to authorisation (BA 20090192) in favour of the applicant (Uniland Cementera, SA), as well as the activity conducted by the latter which was already authorised and known in 2007, and into whose authorisation only one modification was introduced regarding its manufacturing process.

Twelve.- On 25 January 2013, the Minister for Territory and Sustainability issued a Decision whereby it rejected the appeal for reconsideration lodged by Col·lectiu Bosc Verd against the Decision of 17 September 2012 rejecting the application for an *ex officio* review of the Decision of 3 June 2010 that had incorporated a substantial modification to the environmental authorisation of 16 January 2007 in favour of Uniland Cementera, SA, and thus confirmed the administrative act in its entirety. Similarly, notice was given that, in the event of disagreement, it could lodge an appeal with the contentious-administrative courts within the period of two months.

Thirteen.- There is no evidence that the organisation Col·lectiu Bosc Verd has approached the courts in relation to the stated administrative acts, as permitted by national legislation (Law 29/1998, of 13 July, regulating contentious-administrative jurisdiction).

2. Legal considerations

Having described the background to the case, it will now be appropriate to consider whether, as the FDA alleges, a breach of the Convention has taken place.

As indicated in the background section, two breaches of the provisions of the Convention are basically claimed:

- Firstly, a breach of the right to public participation in decisions relating to specific activities, stipulated in Article 6, considering that in the public consultation notice published in the *Official Journal of the Government of Catalonia* (hereinafter, DOGC), it explicitly referred to the activity of cement manufacture and rock extraction, and not to the inclusion of a substantial modification widening the scope of the types of waste used in the energy recovery activities listed in the 2007 environmental authorisation (waste from the residual fraction of MSW and dry sewage sludge). In its pleadings document, it specifically denounces a breach of Article 6, paragraphs 2, 3, 4, 8 and 9.

- Secondly, a breach of Article 9 of the Convention regarding access to justice, insofar as it denied the preliminary administrative review to the non-governmental environmental organisation Col·lectiu Bosc Verd due to a lack of standing and insufficient legal grounds. In its pleadings document, it specifically denounces a breach of paragraph 2 of the said Article.

We shall now examine the said breaches.

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2.a) Analysis of the possible breach of the right to public participation, as provided under the Aarhus Convention

1. The structure of the right to public participation under the Aarhus Convention is described in Article 6.

Firstly, point a) of the first paragraph states that the provisions contained in said clause shall apply with respect to decisions on whether to permit the activities listed in annex I.

Annex I to the Convention lists, among other activities, those corresponding to the so-called 'mineral industry' (paragraph 3):

'3. Mineral Industry:

Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day.'

Within the same Annex, paragraph 5 refers to 'Waste Management' activities, as follows:

'5. Waste management:

installations for the incineration, recovery, chemical treatment or landfill of hazardous waste; installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;

installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;

landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.'

In the file subject to analysis herein (with reference number BA20090192), it is noted, furthermore, that the activity of Uniland Cementera, SA, located in the municipality of Santa Margarida i els Monjos, is the manufacture of cement or clinker in rotary kilns. As stated in the basic 'File details' table of the authorisation granted, the activity of the company is the 'Manufacture of cement or clinker in rotary kilns, when the sum of the cement or clinker production capacities exceeds 200 t/d'.

As specified in the descriptive part of the Decision itself, the substantial modification concerned energy recovery, proceeding to partially replace the petroleum coke that it had been using in its furnaces (a maximum of 33%) with alternative non-hazardous fuels[1]. As stated in the operative part of the Decision, this implies that the substantial

[1] As is noted in the environmental authorisation in point a) 'Characteristics of the Project', these fuels are combustible waste (refuse-derived fuel) from the residual fraction of municipal solid waste that are subjected to treatment involving classification, drying and shredding (EWC 191210) dry sewage sludge (EWC 190805)

modification basically involved the inclusion of the energy recovery of certain wastes, namely, *'To include in the environmental authorisation of 16 January 2007 [...] a substantial modification widening the scope of the types of waste used in energy recovery to include waste derivatives from the residual fraction of municipal solid waste (EWC 191210) (90,000 t/year) and dry sewage sludge (EWC 190805) (50,000 t/year), with a waste pending treatment storage capacity of 500 tons per year for RDF and 280 tons for dried sewage sludge.'*

Since the modification involved the energy recovery of waste, considering that paragraph 5 of Annex I to the Convention expressly refers to activities of 'incineration' or 'disposal' of waste, and not to energy recovery, one might deem this to be covered by paragraph 3, *Mineral industry*, which regulates the company's main activity, i.e. the manufacture of cement, and not by the paragraph on *Waste Management,* which does not specifically refer to the activity of energy recovery.

2. In order to further examine the alleged breach of the right to public participation, we must refer to the original environmental authorisation and its subsequent modifications, in order to properly examine the type of activity that the company has been undertaking since 2007. Similarly, we must start from the premise that all the authorisations have been published on the website of the Government of Catalonia since 2006; furthermore, since the entry into force of Law 20/2009, of 4 December, on prevention and environmental control of activities, these have also been published in the *Official Journal of the Government of Catalonia*.

The 'Background' section of the challenged Decision, refers to the modifications introduced into the environmental authorisation since the date of its initial award (19 January 2007), making it necessary to analyse the original environmental authorisation and the modifications introduced until the date of the Decision of 3 June 2010.

Indeed, Uniland Cementera received the environmental authorisation by means of a Decision of 19 January 2007 approving '...the environmental authorisation to upgrade the cement manufacturing activity and to upgrade and extend the mining activity for the extraction of limestone and marl known as "Ampliación Uniland-04"' (file number BA20050045).

As described in the 2007 environmental authorisation, said company was engaged in mining activities and the manufacture of cement or clinker, with the requirements and other environmental conditions for the performance of both activities being established under the same authorisation document. Since its inception, this activity used certain wastes as substitutes for raw materials (see page 23 of the 2007 environmental authorisation).

Uniland's original environmental authorisation was subjected to a number of modifications which were all approved by the competent bodies:

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- On 18 June 2008, authorisation was granted to the company to include a non-substantive modification involving the addition of a maximum of 330 tons of fly ash generated at the plant during the cement manufacturing process (file BA20080022) in order to use it in energy recovery.

In fact, the operative part, besides establishing the incorporation of the aforementioned energy recovery activity, imposed two obligations: on the one hand, to take out a civil liability insurance policy that includes cover against accidental damage to the environment, for a minimum amount of EUR 175,000, to be submitted annually to the Waste Agency of Catalonia (see item 4 of the operative part of Decision BA20080022); on the other, an obligation was included to post a deposit in the amount of EUR 189,000 in favour of the Waste Agency of Catalonia; this obligation also includes the requirement to regularly update the deposit in line with increases in the consumer price index (CPI) (see item 5 of the operative part of the Decision).

- On 3 March 2009 another non-substantive modification was granted to the company, involving the replacement of a maximum of 25% of the current fuel, petroleum coke, with plant pruning residues in order to use them in energy recovery (BA20090001).

The operative part of that Decision provided that the said non-substantive modification involved 'the use of a maximum of 115,000 tons of plant pruning as fuel and the construction of a facility for the dosing of biomass in a precalciner kiln consisting of: storage warehouse, feeding hopper, roller, belt conveyors, feeder and loading hopper into the furnace...'

- On 14 April 2009, authorisation was granted for the inclusion of the non-substantive modification involving the management of aspirated particles of casting cores and moulds which have not undergone pouring, which entailed, as described in the document itself, the addition to the raw materials table of the 'aspirated particles' (waste considered a by-product) generated by another company, also for use in energy recovery.

- On 3 November 2009, authorisation was granted to the company Uniland Cementera, SA to include a non-substantive modification involving the inclusion of the management of sludge from fluoride neutralisation (EWC code 060503) and sludge from water clarification (EWC code 190902) as by-products, classified as non-hazardous. (File number BA20090135)

In accordance with the background facts presented, we must take into account the fact that the company had been performing energy recovery from waste long before the inclusion of the modification at issue here (dating from 3 June 2010), since the non-substantive modification had already been granted on 18 June 2008 for energy recovery from other wastes (in this case, fly ash) by means of their incineration. Thus, at all times, its main activity has and continues to be the manufacture of cement, with the only variation being the fuels used in the process.

All of the non-substantive modifications described were authorised in compliance with the relevant legal requirements. As noted, these authorisations were published on the website of the Government of Catalonia. From the entry into force of Law 20/2009, of 4 December, on prevention and environmental control of activities (which took place on 11 August 2010), they began to be published in the DOGC.

3. Having clearly described the type of activity undertaken by Uniland Cementera, SA, we shall now enter into aspects of the participatory process in the granting of environmental authorisations.

Article 6 of the Aarhus Convention, on 'Public participation in decisions on specific activities,' states in paragraph 2 that '...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.' Subsequently, it lays down the aspects to which, in particular, such information must refer, such as, among others, the proposed activity, the nature of possible decisions or the draft decision, the envisaged procedure (such as the opportunities for the public to participate, the time and venue of any envisaged public hearing), etc.

Paragraph 3 of the said article states that the different phases of the participatory process should include reasonable timeframes, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making.

Paragraph 4, on the other hand, states that: *Each Party shall provide for early public participation, when all options are open and effective public participation can take place.*

Furthermore, paragraphs 8 and 9 establish, on the one hand, that each Party shall ensure that in the decision due account is taken of the outcome of the public participation and, on the other, that, when the decision has been taken, the public is promptly informed of the decision in accordance with the appropriate procedures.

Moving now to address the challenged procedure, we highlight that the company applied for the substantial modification to the environmental authorisation on 24 November 2009, using the procedure laid down in Law 3/1998, of 27 February, on the comprehensive intervention of the environmental authorities, and in Decree 136/1999, of 18 May, approving the general Regulation implementing said Law (hereinafter, Law 3/1998 and Decree 136/1999).

Firstly, Article 31 of Decree 136/1999, on public and local consultation procedures, provides that 'After the period of 15 days mentioned in the preceding article has passed or, if appropriate, once any shortcomings have been resolved, the OGAU must submit the application to public consultation for a period of 20 days, by means of its publication in the *Official Journal of the Government of Catalonia* and its dissemination on the telematic information networks, and the city council must submit

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the application to a local consultation phase open to the residents of the area surrounding the site of the activity for a period of 10 days, and notify the result to the OGAU.'

As the claimant organisation itself acknowledges, on 18 March 2010, the *Official Journal of the Government of Catalonia* No. 5590 published the 'Public consultation notice regarding the application for environmental authorisation of a Project involving cement manufacture and rock extraction in the municipality of Santa Margarida i els Monjos (BA20090192)' and classifying the change to the said activity as substantive in nature. It is true that it did not specify the precise content of the modification, but it did report that it was a significant modification.

The said notice provided as follows: *In compliance with the provisions of Article 31 of Decree 136/1999, of 18 May, approving the general Regulations implementing Law 3/1998, of 27 February, on the comprehensive intervention of the environmental authorities and the adaptation of its annexes, we submit to public consultation the application for the environmental authorisation of the Project involving the exercise of an activity of cement manufacture and rock extraction by the company Uniland Cementera, SA, in the municipality of Santa Margarida i els Monjos.*

The project will be available for viewing by the public for a period of thirty days, during office hours at the premises of the Unified Environmental Management Office of the Territorial Services and the Department of the Environment and Housing in Barcelona, Travessera de Gràcia, 26, 6th floor. During this period, any pleadings submitted in writing will be accepted.

This announcement complies with the requirements of Article 6 of the Convention, as it states that the authorisation affects a plant for the manufacture of cement; it explains the applicable procedure and identifies the regulations governing it; it indicates the time and venue where it may be consulted, the authorities to which any comments or questions should be addressed and the location of the activity (see attached Document No. 1).

There is no evidence, as the complainant has claimed, of an omission in the procedure, since it was filed as a substantial modification to the activity of cement manufacture and the notice required by Article 6 of the Convention was published.

According to the notice published, any persons who saw it fit were granted the opportunity to consult the project documentation, to present pleadings during the process and/or to assert their status as an interested party. In fact, the file was consulted on 8 April 2010 by a sole person, specifically the environmental officer of another cement production plant managed by the company Lafarge (a commercial competitor of Uniland) in the town of Sagunto (see attached Document No. 2). Neither the person who consulted the file nor any other person submitted any pleadings.

In addition to the public consultation phase described, an additional procedure was performed which, as already indicated above, is provided under Catalonian regulations and states that the City Council of the area where the activity is

conducted must individually notify the immediate local residents of that area of the authorisation that is being requested so that they may consult the file and submit their pleadings.

In compliance with the local consultation procedure, the complete file of the application was forwarded to the City Council of Santa Margarida i els Monjos on 4 March 2010, in order for it to be communicated to the immediate local residents. The said City Council issued a certificate on 28 April 2010, in which it expressly noted that:

…on 25 March 2010, it was submitted to local consultation (FILE OGAU: BA20090192 /FILE AJUNTAMENT: 29/2009), which was processed at the request of Uniland Cementera, SA, for the award of an ENVIRONMENTAL AUTHORISATION (SUBSTANTIAL MODIFICATION), for the use of dried WWTP sludge and Refuse-Derived Fuel (RDF), as a fuel at the Cement factory, in the building located at Av. PLA DE L'ESTACIÓ, S/N, of this town. (See attached Document No. 3)

This certificate states that individual communication was made to the immediate local residents, granting a period of 10 days, during which no pleadings were submitted to the file.

In the case of the local consultation, it is evident that the information given to the immediate local residents (those most directly affected by it) was totally clear.

Summarising these actions, we must therefore state that:

1. The activity undertaken by Uniland in Santa Margarida i els Monjos is the manufacture of cement or clinker in rotary kilns of the type contained in paragraph 3 of Annex 1 to the Aarhus Convention, although as part of this process, since 2009, energy has been recovered from certain non-hazardous waste, subject to the proper environmental controls and safeguards.

2. The site of Uniland in Santa Margarida i els Monjos cannot be classified as a facility for the disposal of the type of waste described in paragraph 5 of Annex 1 to the Aarhus Convention, since the activity undertaken is energy recovery to substitute a conventional fuel.

3. During the proceedings for the authorisation of the modification of 3 June 2010, it was clearly indicated that the permit that was being processed was for a plant engaged in the manufacture of cement, and public participation was enabled by means of the public consultation notice published in the *Official Journal of the Government of Catalonia*. While the published notice did not fully state the scope of the permit requested, it did clearly indicate that it related to an activity with an environmental impact and granted all citizens access to the file and participation in the process. Therefore, it cannot be deemed that the participatory process has been omitted. In addition, the public consultation phase was further complemented by an

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additional phase of local consultation for the immediate local residents in the area surrounding the facility, which described in a more complete way the scope of the authorised activity. At no time have the Catalan authorities sought to breach the public participation obligation provided for in the Convention, since it published an official notice and, in fact, the citizens concerned were granted access to all the information, a right which was in fact exercised by a commercial competitor of Uniland.

4. In order to ensure greater clarity and accuracy in the content of the public notices, all the departments concerned have already been given the appropriate instructions. (Attached document No. 4).

In light of the foregoing, we believe that no violation of Article 6 of the Convention has occurred, since the relevant public was permitted to participate in the authorisation process, whether by means of the public consultation phase announced in the official bulletin or by means of the local consultation phase applicable to the individuals living in the immediate vicinity of the site, instructed by the City Council of Santa Margarida i els Monjos.

2.b) Analysis of the alleged breach of the right of access to justice provided in the Aarhus Convention

Having completed the appropriate public and local consultation phases, and once a decision had been issued on the file, pursuant to the provisions of paragraph 9 of Article 6 of the Convention, the Decision of 3 June 2010 was published on the website of the Department, regarding the incorporation of a non-substantive modification to widen the scope of the waste used for energy recovery (file BA20090192).

As noted in the section 'Background' of this report, on 20 June 2011 Mr Jordi Asensi i Gabriel, representing the environmental group Bosc Verd, visited the offices of the Ministry of Territory and Sustainability of the Government of Catalonia, at the Territorial Services in Barcelona, requesting consultation of the file BA20090192 and making photocopies of documents contained therein (specifically, 294 photocopies of documents in the file) (see attached Document No. 5).

It should be noted that, prior to such consultation, the organisation Col·lectiu Bosc Verd was already aware of the authorisation granted, since on 18 May 2011 the environmental groups were informed of the authorisation awarded and on 26 May 2011 the movement against incineration by Uniland was created, with the participation of various organisations, among them Col·lectiu Bosc Verd (see press releases attached as Document No. 6).

Despite having access since 20 June 2011 to all the documentation relating to the environmental authorisation, Bosc Verd allowed the statutory deadlines for filing an administrative appeal against this authorisation to pass by, waiting one year before it officially requested the *ex officio* review on 17 May 2012.

Having described the relevant facts, we shall now analyse the provisions of the Convention in relation to access to justice in environmental matters.

Article 9.2 of the Aarhus Convention states that each Party shall, within the framework of its national legislation, ensure that members of the public concerned that have a sufficient interest or maintain an impairment of a right, may appeal to 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.

In this regard, it cannot be deemed that there has been a breach of this provision of the Convention as a result of this agency's administrative acts, since the Convention mentions ensuring access to a 'court of law and/or another independent and impartial body established by law' and the alleged breach stems from the rejection of an appeal to an administrative body that is neither a court of law nor independent. Although the Government Agency, pursuant to national legislation, objectively serves the general interest and is fully subject to the Constitution, its Acts and the law, in no event can it be considered to be the independent and impartial body established by the Convention.

In fact, in the documentation of the file, specifically, in the document *Questions to the Fons Defensa Ambiental concerning communication to the Aarhus Convention Compliance Committee concerning Spain,* clarification is requested from the institution regarding the reasons why the environmental organisation feels that the Minister for the Environment and Sustainability is the independent and impartial body established by law referred to in Article 9.2 of the Aarhus Convention. To which the latter answered, literally, that: *Counselor of Land and Sustainability Department of the Generalitat of Catalonia is not an independent and impartial body establishes by law. The reason is that he is part of the executive, a member of the Catalan Government and in any case an independent body. He can be equated to a minister of this Department in the Catalan Government…*

Therefore, under no circumstances can it be considered that the actions of the Ministry of Territory and Sustainability involve a breach of Article 9.2 of the Convention, since it is not a court of law or an independent authority.

The appeal by the organisation FDA was examined with full respect for Spanish legislation regarding administrative procedure, which provides in general two types of appeals:

a) Administrative appeals, which can be ordinary or extraordinary. These appeals may be lodged against acts that constitute, for any reason, an infringement of the law. For the present purposes, we should draw your attention to the existence of appeals for reconsideration, which must be lodged within one

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month from the date that the person concerned becomes aware of the administrative act that he claims is infringing the law.

b) An *ex officio* review is an extraordinary remedy that is limited solely to cases in which the law could be seriously affected once the act becomes enforceable. This review may be carried out, among other cases, where the act has completely and absolutely ignored the established procedure and has not been subject to administrative appeal within the time limits described above.

Similarly, after exhausting these legal remedies, as we shall describe below, the possibility exists to appeal to the Contentious-Administrative Courts.

Consequently, our national legislation establishes two types of proceedings for the review of acts in the administrative jurisdiction. However, both of these formats are of a different legal nature, which in turn are subject to a different procedural regulation, with different timeframes and treatments in order to ensure the strict observance of the principle of legal certainty. We are not, therefore, dealing with appeals that are alternatives, but rather with completely independent options.

Firstly, the limitation period for filing an appeal for reconsideration means that an *ex officio* review cannot subsequently be requested if the one month period for lodging an appeal for reconsideration was made available and was allowed to expire. As stated in the preceding paragraphs, the organisation Bosc Verd, despite having direct and perfect knowledge of the environmental authorisation since 20 June 2011, did not lodge any ordinary administrative appeal of the type provided in legislation and it was not until almost a year later, on 17 June 2012, when it requested an *ex officio* review.

Under the Spanish legal system, an *ex officio* review is interpreted restrictively, since it is conducted, as in the case of Bosc Verd's petition, once the person that has submitted it has allowed the deadlines for lodging an ordinary administrative appeal to expire.

Supreme Court Rulings such as that of 30 September and 3 December 2008 support this interpretation. Specifically, the Ruling of 3 December 2008 emphatically states that the *ex officio* review remedy does not mean that the possibility of lodging an appeal remains open indefinitely, or that this extraordinary remedy leads to the reopening of deadlines that have already expired. Otherwise, a conflict would arise between the *ex officio* review process and the ordinary appeals process against administrative acts. As stated in this Ruling: *The opposite solution, which is raised in the claim, would quite simply entail the reopening of closed deadlines, thereby leading to an encroachment of the ex officio review into the sphere of the ordinary appeals process against administrative acts, which is contrary to the most basic requirements of legal certainty, permitting the challenging of an administrative act issued in 1960 four decades later, while citing the same reasons that should have been invoked at that time in an appeal lodged pursuant to the legally established timeframes for the submission of challenges. Note also that the appellant, as we indicated in the second point of the legal grounds, already requested in 1987 and*

1993 a remapping of boundaries due to a change in the configuration of the area, which were rejected.

These Rulings were recently revisited by the High Court; for example, in the Ruling of 20 March 2012. In this sense, the Ruling of the Supreme Court of 14 April 2010 is clear and conclusive when it establishes that (emphasis added): *The request by a person concerned that the Administration declare ex officio the invalidity of an administrative act presupposes, in principle, a previous inaction on the part of the person concerned, who did not, at the time, file the relevant contentious-administrative appeal in which he could have invoked whatever arguments may have been in his interest. This explains why the ex officio review is limited to proceedings classified as invalid as a matter of law and must be interpreted restrictively.*

Similarly, in an *ex officio* review it is not possible merely to argue minor irregularities, but rather these must be very serious defects or constitute a complete lack of procedure.

This is also stated in the Supreme Court Ruling of 19 December 2001, which explains the purpose of an *ex officio* review (emphasis added):

...Article 102 of Law 30/1992 aims to facilitate the elimination of defects in administrative acts that are radically or absolutely invalid, with the clear purpose of avoiding a situation in which, due to the short timeframes permitted to challenge them, they could become definitively consolidated. Therefore, this procedural remedy aims to increase the opportunities available to challenge decisions, thereby preventing a situation in which a matter that is invalid as a matter of law is prolonged over time and gives rise to legal effects despite containing such a significant defect. However, acts that are invalid as a matter of law cannot be conflated with defects that are merely voidable.

In short, the motion for annulment was not created to address any breach of law that may be attributable to an administrative act, but rather only those that constitute an invalidity as a matter of law under Article 62.1 of Law 30/1992. Furthermore, the opposite solution would lead to a conflict between the timeframes for appeals and any annulment proceedings that may be brought, conflating different procedural channels that serve different purposes and have different functions.

It is for this reason, furthermore, that the competent body to hear the *ex officio* review may, on reasoned grounds, refuse to grant leave to proceed for a request made by an interested party if the prerequisites are not met. This may occur either when the request is not based on any of the grounds for invalidity stated in Article 62 of Law 30/1992, when it is manifestly unfounded and it is evident, clear, obvious and certain that there is a lack of grounds (as established in the State Opinion 5356/1997), or when other substantially similar requests had already been rejected on the merits. Similarly, a request may not be given leave to proceed when it is brought by a person

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that does not have standing to challenge, i.e. by any person that does not have the status of an interested party.

Moreover, in the event of a rejection of an *ex officio* review it is always possible to resort to jurisdictional dispute settlement, through the filing of a contentious-administrative appeal, in accordance with Article 25.1 of Law 29/1998, of 19 July, regulating contentious-administrative jurisdiction. As stated in the appeal footer of the Decision on the request for *ex officio* review (we reprint the text of this notice below):

Against this Decision, which ends the administrative phase, you may lodge a contentious-administrative appeal before the Contentious-Administrative section of the High Court of Justice of Catalonia, within two months from the day following receipt of the notification, in accordance with the provisions of Article 119 of Law 30/1992, of 26 November, on the legal regime of public administrations and the common administrative procedure, and Articles 8, 14 and 25 of Law 29/1998, of 13 July, regulating contentious-administrative jurisdiction, without prejudice to the filing of any other appeals deemed appropriate.

As we shall show at a later stage, at no time did the environmental group Bosc Verd resort to jurisdictional dispute settlement, citing the high cost of this remedy and the excessive delay by the Courts in resolving cases. In fact, one of the issues highlighted by the environmental organisation, in relation to which the Committee has sought clarification, is the matter of the excessive costs of accessing justice, the lack of clarity of the law regarding access to justice by environmental NGOs or judges' discretion when determining whether to impose costs on the losing party.

Once again, regarding these alleged barriers to access to the courts, it should be noted that they are, in any case, systemic or general problems that do not depend in any way on the actions of this Government Agency. Therefore, these issues should be notified to the Justice Department.

However, the issue of excessive legal costs is questionable. By way of example, we can refer to the case of the Cassation Appeal filed by the Fundación Oceana against the Government of Catalonia and Ercros Industrial (Appeal 3792/2013). In these proceedings, on 9 May 2014 the Court issued a Decree in which it stated that, on the issue of fees, domestic legislation was not in contradiction with the Aarhus Convention:

As regards Law 27/2006, of 18 July, regulating the right of access to information, public participation and access to justice in environmental matters, and Law 10/2012, regulating court fees, since these are domestic laws, they are not in contradiction with the Aarhus Convention, since the latter does not prohibit the existence of fees in the area of environmental matters, but rather only those that are 'unduly burdensome'. Furthermore, Articles 22 and 23 of Law 27/2006, of 18 July, provide for actio popularis *by certain non-profit organisations dedicated to environmental protection, provided they meet certain requirements. And finally, Law 10/2012, in its Art. 4.2.a), provides a subjective exemption from court fees for persons who have been recognised as eligible for legal aid.*

Furthermore, recent judicial appeals in the area of environmental matters, cast doubt on the excessiveness of the costs alleged by the claimant organisation. By way of example, we cite the case of Cassation Appeal no. 1703/2011, brought against the ruling of the High Court of Catalonia in relation to the environmental authorisation of the company Ercros Industrial, which imposed costs of EUR 2,941.95.

Having established the main points in relation to the appeals regulated in general in the Spanish legal system, we shall now provide details regarding the *ex officio* review requested by the applicant, which was resolved with the Decision issued on 4 September 2012. Specifically, the said Decision made the following remarks:

- The procedure for *ex officio* review of administrative acts is regulated under Article 102 et seq. of Law 30/1992, of 26 November, on the legal regime of public administrations and the common administrative procedure (hereinafter, Law 30/1992). As indicated in Article 102.1, this remedy—which may be initiated at any time, whether *ex officio* by the administration or at the request of an interested party—must declare *ex officio* the invalidity of any administrative acts bringing to an end the administrative phase that are affected by any of the cases provided under Article 62.1 of Law 30/1992.

According to this rule, before commencing an *ex officio* review, there is a preliminary phase where two requirements are examined: the first, whether the applicant has the status of an interested party and, if so, whether the administrative act subject to the claim can be subsumed under the cases of invalidity as a matter of law set out in Article 62.1 of Law 30/1992.

- Regarding the requirement on standing, our domestic law explicitly establishes the requirements to be met by an organisation in order to be permitted to appeal acts or omissions attributable to the public authorities that contravene regulations relating to the environment. Specifically, Law 27/2006, of 18 July, regulating the rights of access to information, public participation and access to justice in environmental matters, establishes these requirements in Article 23, which are: a) that their by-laws include an undertaking that involves environmental protection in general or any of its elements in particular; b) that they were legally incorporated at least two years before bringing proceedings and have been actively conducting the activities necessary to achieve the aims specified in their by-laws; c) that according to their by-laws they conduct their activity in a territory which is affected by the administrative act, or where appropriate, omission.

According to these requirements, it was found, based on the association's by-laws, that the aims of this association were not the protection of the environment in general, but rather only of a very specific and particular element thereof, the defence and protection of woodland and the wildlife that inhabits it. In accordance with domestic law and, in particular, Article 3, point o) of Law 16/2002, of 1 July, on integrated pollution prevention and control, which requires that the stated aims be affected by any decisions taken regarding the awarding or updating of an integrated

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environmental authorisation or its conditions, the organisation did not state or prove that the aims of this association, i.e. protection of woodland and its wildlife, could be affected by the challenged Decision.

This Decision also rejected the claim that the organisation had standing on the basis of Article 106.1 of the Consolidated Text of the Waste Act, approved by Legislative Decree 1/2009, of 21 July, establishing an *actio popularis* in this matter, since the Bosc Verd organisation did not at any time invoke, even circumstantially, the violation of any provision of the Waste Act.

Therefore, the request was dismissed as it did not meet the requirement on standing.

Importantly, although standing was not recognised, a detailed explanation was provided on the reasons why its request was not granted, that is, although domestic legislation does not require it, it addressed the merits of the matter by offering a reasoned answer to the merits of the case, indicating why it was decided that the proceedings had followed the correct legal procedures and why it was decided that there was not a complete and utter disregard for procedure (as claimed by the organisation), in order to give as reasoned and detailed a response as possible. This excessive thoroughness, however, was criticised as peculiar in the complaint filed with the Committee on 20 January 2014: *… And the clear groundless is at least peculiar since the resolution had to spend 15 pages to sustain it.*

- As regards the second requirement, i.e. the grounds for the *ex officio* review, the law states that one of the grounds for invalidity as a matter of law set out in Article 62.1 of Law 30/1992 must be present.

The requirement on grounds is not met either, since as grounds for the invalidity the organisation alleged the situation established in point e) of Article 62.1, which refers to those acts rendered with complete and utter disregard for the established legal procedure, based on the fact that the public consultation notice allegedly rendered this participatory process completely ineffective.

As mentioned, although the public consultation phase did suffer from certain shortcomings and there was room for improvement, it was in no case contrary to law and did not constitute grounds for invalidity as a matter of law.

Accordingly, although the title of the notice did not exactly match the title of the Decision approving the substantial modification in 2010, this does not imply a breach of the rules governing public consultation. As noted above, the title of the public consultation notice must announce the particular procedure to which this information is submitted, and in this sense it was not wrong to indicate that it was a request for an ‘environmental authorisation for a Project involving cement manufacture and rock extraction’ given that, for their award, substantial modifications follow the application procedure for an environmental authorisation.

Similarly, the public consultation notice identified a number of elements, specifically: the applicable legislation, the subjection to public consultation of the application for the environmental authorisation for an activity of cement manufacture and rock

extraction, who the promoter of the activity was, the location of the activity, the availability of the project to the public, the venue and time for consultation (period of 30 days) and finally, the receipt of any pleadings that were submitted in writing during that term.

Moreover, after this public consultation phase, a local consultation phase was launched aimed at the immediate local residents in the area surrounding the site of the activity, which clearly informed them that a substantial modification had been requested for the use of dried sewage sludge from WWTPs and Refuse-Derived Fuel (RDF), as fuel at the cement factory.

Therefore, although, as already indicated in the *ex officio* review proceedings, it was acknowledged that the notice could suffer, in a sense, from a lack of sufficient clarity, as has been noted, this cannot be deemed a complete and utter disregard for procedure that would constitute an invalidity as a matter of law in the sense of point e) of Article 62.1 of Law 30/1992.

C) Controls of the activity

Beyond demonstrating compliance with the requirements of the Aarhus Convention as regards the right to participation and access to justice in environmental matters, this agency must highlight that the activity has passed each of the controls stipulated in its authorisation.

Regarding the environmental authorisation in force, according to the information provided by the Environmental Monitoring and Information Service (hereinafter, the SSIA) on 13 October 2014 (see attached document no. 7), we must inform the Commission that the cement activity has passed all its controls, thereby complying with the requirements and conditions stated in its administrative title.

The said report specifically highlights the following points:

- The system of integrated environmental controls set up on the basis of the Decision on substantial modification BA20090192, establishes an inspection on the start-up date of the facilities linked to the new activities of energy recovery from waste; and biennial integrated environmental inspections to verify compliance with all the specifications set out in the environmental authorisation. Furthermore, an environmental monitoring programme is set up (self-monitoring measures) to oversee the emission sources channelled into the atmosphere.

- In accordance with Law 20/2009, of 4 December, on prevention and environmental control of activities (current regulation that replaces Law 3/1998, mentioned above), non-substantive modifications are implemented through periodic inspections, unless an initial inspection is specifically established in the authorisation of the non-substantive modification.

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Below, we reprint the report indicating the sequence of the events deriving from the integrated environmental inspections (initial or periodic) executed since 2009:

Inspection code	*Scope*	*Execution*	*Remarks*
CDIABA090891	*Periodic integrated inspection (not including the extraction activity)*	*Between June 2009 and January 2010*	*Favourable inspection without incidents (Resolution of 06/07/2010).* *Request to submit the next periodic inspection (except for the extraction activity) before 17/06/2011.*
CDIABA100574	*Periodic integrated inspection (extraction activity)*	*Between July and October 2010*	*Favourable inspection without incidents (Resolution of 30/11/2010).* *Request to submit the next periodic inspection (extraction activity) before 02/09/2011.*
CDIABA110019	*Initial inspection of the non-substantive modification BA20090192*	*March 2011*	*EAC reports that the furnace feeding installations using alternative fuels have been built but no energy recovery has yet been performed.* *Favourable inspection without incidents (Resolution of 04/05/2011).*
CDIABA110178	*Regular integrated inspection*	*Between July 2011 and March 2012*	*Favourable inspection without incidents (Resolution of 15/05/2012).* *The next periodic inspection of the activity must be submitted before 08/03/2014.*
B1CI120117	*Initial inspection for the non-substantive modification BA20090001*	*May 2012*	*Favourable inspection without incidents.* *EAC reports that the dosing installation in pre-heater of furnace V has not yet been implemented.*
B1CP140128	*Regular integrated inspection*	*Between July 2013 and January 2014*	*Favourable inspection without incidents.*

It also highlights that on 24 January 2014, the Secretary for the Environment and Sustainability issued a Decision whereby the environmental authorisations for all facilities included under Annex I.1 of Law 20/2009, of 4 December, were updated in order to comply with the first transitional provision of Law 5/2013, of 11 June, amending Law 16/2002, of 1 July, on integrated prevention and control of environmental pollution (except for 39 authorisations of facilities included in code 10.6 and all those of code 11.1).

The Uniland authorisation is included in this update.

As indicated by the SSIA: *This resolution amends the system of environmental control of the listed facilities, which is hereby substituted for the environmental inspections set forth in the Environmental Inspection Plan and Programme, once the latter have been approved, without prejudice to the sector controls that the environmental authorisation may establish.*

On 20 February 2014, the Director-General for Environmental Quality issued a decision approving the Integrated Environmental Inspection Plan of Catalonia for the

period 2014-2016. The UNILAND facility is covered by this Plan, with identification IDQA 0552.

On 21 February 2014, the Director-General for Environmental Quality issued a decision approving the Integrated Environmental Inspection Programme of Catalonia for the period 2014-2016.

In application of the methodology and the criteria for selecting the facilities included in the environmental inspection programme, the Uniland site has not been included in the 2014 Inspection Programme, since it is registered in the EMAS register. It is expected that this inspection will be requested in the 2015 programme.

Moreover, monitoring of sector controls is carried out by the relevant sector units. For example, monitoring of the environmental supervision programme for atmospheric emissions is performed by the Air Monitoring and Surveillance Service.

Therefore, to date, the activity with current authorisation number BA20090192, in accordance with the Decision of 14 May 2010, strictly complies with the conditions stipulated in the environmental authorisation.

Barcelona, 18 January 2015

Approval

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