

Communication to the
Aarhus Convention Compliance Committee Regarding the Failure of the Hellenic Republic to
Comply with Article 9 of the Aarhus Convention

I. Information on correspondent submitting the communication

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II. Party concerned

The Party concerned is the Hellenic Republic (*Greece*).

III. Facts of the communication

Relevant Law

European Union law

1. Directive 2010/75/EU of the European Parliament and the Council on industrial emissions (the *Industrial Emissions Directive* or *IED*) is the main EU instrument regulating pollutant emissions from industrial installations. The IED replaced Directive 2001/80/EC of the European Parliament on Integrated Pollution and Prevention Control (the *IPPC Directive*).
2. The IED regulates different industrial activities; however, this communication only concerns the manner in which Greece has respected its Aarhus Convention obligations in implementing the IED with respect to certain large combustion plants (*LCPs*).
3. The objective of the IED is to lay down “rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole.”¹

¹ IED, Article 1.

4. The clear objective of the IED is to implement an ‘integrated permit’ regime.² Most Member States grant a single integrated permit that authorises the operation of a LCP (*Integrated Permit*).
5. Integrated Permits must comply with the principles and provisions of the IED to ensure the prevention and control of pollution and to achieve a high level of environmental protection.³ For example, Integrated Permits must include emission limit values (ELVs) for the following polluting substances: nitrogen oxides (NO_x), sulphur dioxide (SO₂), and dust.
6. Article 24 of the IED concerns access to information and public participation in the permit procedure. It ensures that the public are given early and effective opportunities to participate when a permit is (1) granted for a new installation; (2) granted in relation to any substantial change (i.e. may have significant negative effects on human health or the environment); (3) when the operator applies to derogate from certain ELVs set by the IED (in accordance with Article 15(4)); and (4) when the permit is reconsidered or updated as a result of significant pollution, safety flaws or non-compliance with an environmental quality standard.
7. Article 25 of the IED ensures that members of the public have the right to challenge the substantive or procedural legality of decisions, acts or omissions in the permitting process, laid down by Article 24.
8. Article 25 of the IED is intended to transpose the requirement of Article 9(2) of the Aarhus Convention (*the Convention*).

Domestic law

9. The Aarhus Convention on Access to Information, Public Participation and Access to Justice (*the Convention*) was ratified by Greece on 12 December 2005 and entered into force on 13 December 2005. The ratification and adoption of the Convention was made through law 3422/2005 that transposed the whole body of the Convention into Greek Law.⁴
10. The Joint Ministerial Decision 36060/1155/E.103/13-6-2013 (*the JMD*) is intended to transpose into Greek law the requirement of the IED (Annex 2).⁵ In particular, it requires an ‘environmental permit’ to be issued for operation of LCPs.
11. The construction and operation of LCPs is possible only on issuance of various other permits and following implementation of the JMD. Grant of an environmental permit is a pre-condition for the grant of these other permits. The key permits that must be held by a LCP, in addition to the environmental permit, are as follows:⁶
 - a. a production permit issued by the Regulatory Authority for Energy;⁷
 - b. an installation permit issued by the Minister for Environment and Energy.⁸ The permit provides health and safety and environmental protection measures;
 - c. a construction permit issued by the respective planning department of the Municipality, within the region of which the plant is constructed;⁹ and
 - d. an operation permit issued by the Minister for Environment and Energy.¹⁰

² IED, Article 1,4 and 5.

³ IED, Articles 5.

⁴ National Gazette A’ 303/13-12-2005.

⁵ National Gazette B 1450/24-6-2013 as amended by article 58 paragraph 1, law 4342 /2015, National Gazette A 143/19-11-2015.

⁶ Law 4014/2011, Article 2(10).

⁷ Law 4001/2011, National Gazette A 179/22-8-201, Articles 13, 132, 135.

⁸ Law 2244/1994, Article 3(4).

⁹ Law 4030/2011, National Gazette A 249/25-11-2011, Articles 2, 3 and 6.

¹⁰ Law 2244/1994, Article 3(5), (6).

12. No single one of these permits constitutes the Integrated Permit envisaged by the IED, however, collectively they are intended to satisfy the IED's requirements (as well as other technical requirements found in other EU and national law).
13. Each authority that issues the above-mentioned permits is a public authority, whose actions may be subject to internal administrative review according to the Code of Administrative Procedure.¹¹ An act/decision of the authorities granting one of the above permits may be subject to judicial review according to the Greek Constitution,¹² the Presidential Decree 18/1989¹³ and the Code of Administrative Procedural Law.¹⁴ The internal administrative review precedes the judicial review.
14. If any interested party sought to challenge the permit procedures pursuant to environmental law requirements, they can proceed further before the competent authority and/or before the Greek Administrative Courts.¹⁵ The same goes for acts or omissions of the authorities to inform and consult the public concerned before granting the permits.¹⁶
15. However, a permit is non-reviewable if it is granted legislatively, for example, through a 'special law' or through an 'act of legislative nature'.
16. **Special Laws:** A special law is an act of the Greek Parliament exercising its legislative authority.¹⁷ Special laws are more specific than 'general laws'. Special laws further specify an action that is regulated by a 'general law'. Special laws cannot be *per se* administratively and/or judicially reviewed because the Greek judicial system lacks a "Constitutional Court". The subject of an administrative/ judicial review can only be an action or an omission of the public authority (see paragraph 14) and not a law. Special laws regulate most LCP activities.
17. In the context of permitting, if a permit is granted directly (legislatively) by a special law, and not by a decision of a local authority, the permit cannot be challenged. The only way a special law can be challenged is if a public authority adopts a permit decision on the basis of the special law, and subsequently this decision becomes the object of an administrative and/or judicial review procedure. In this administrative and/or judicial review procedure, the court can incidentally examine the legality of the special law.
18. **Acts of a Legislative Nature (*Emergency Acts*):** Article 44 (1) of the Greek Constitution establishes Emergency Acts. These acts are adopted by the President of Greece "*in case of emergency and imperative, and unforeseeable need*" following a proposal of the Ministerial Council. These acts are not valid unless the Parliament approves them within a relatively short time. Like special laws, these acts cannot be administratively or judicially reviewed. According to the settled jurisprudence, the Council of State has rejected any attempt to challenge these emergency acts.¹⁸

¹¹ Law 2690/1999, National Gazette A 45/9-3-1999, Article 24 (1). This is a provisional procedure. In some cases, explicitly provided by law, the internal administrative review of a disputed act of the public authorities is a pre-condition for the judicial review (Annex 5)

¹² Article 95 (Annex 6).

¹³ National Gazette A 8/9-1-1989, Article 45(1) (Annex 7).

¹⁴ Law 2717/1999, National Gazette A 97/17-5-1999, Article 63 (Annex 8).

¹⁵ The Administrative Court of First Instance, the Administrative Court of Appeal, the Council of State.

¹⁶ Article 22 JMD.

¹⁷ Article 45(1), (5) of Presidential Decree 18/1989.

¹⁸ Council of State Decisions 136/2013, 56/2013, 737/2012, 1250/2003, 3636/1989.

Relevant facts

19. The Public Power Corporation (**'PPC'**) is Greece's national incumbent power company and operates the majority of Greece's highly polluting lignite mines and power plants. Since its foundation, in 1952, PPC has enjoyed preferential treatment by the Greek State in many areas. One such area, and the subject of this communication, is the granting and extension of PPC's LCP permits through special laws and Emergency Acts. Through this practice, PPC has been allowed to circumvent the requirements to operate its installations in compliance with important national and EU environmental legislation since 1999.
20. It is very important to highlight that the legislative permits described below have been tailored to PPC's plants. **No other power production company in Greece enjoys similar legislative permits.**

PPC's Single Production Permit and Single Provisional Operation Permit

21. **PPC's Single Production Permit (SPP):** As explained in paragraph 11(a) above, Greek law requires power plants to hold a production permit in order to operate. Normally, an individual production permit would set the requirements for the authorisation of the power station and its installations, the production capacity and the type of fuel.
22. The Greek parliament granted PPC a SPP by virtue of a special law that entered into force in 1999.¹⁹ The SPP is a single production permit that applies only to PPC's lignite plants that were in operation or under construction at the date that the special law implementing the SPP entered into force (1999). The SPP initially applied to 22 of PPC's LCPs, now it applies to 16 of PPC's LCPs.²⁰ As the SPP was adopted pursuant to a legislative and not administrative provision, it cannot be judicially reviewed.
23. The SPP substitutes the individual production permits that each of PPC's LCPs should have been granted and that could have been judicially reviewed. The SPP does not specify any of the requirements described in paragraph 21 above, as normally found in a production permit. As the SPP was adopted pursuant to a legislative and not administrative procedure, it cannot be judicially reviewed.
24. **PPC's Single Provisional Operation Permit (SPOP):** As explained in paragraph 11(d) above, Greek law also requires power plants to hold an operational permit in order to operate. Normally, an individual operational permit would specify conditions regarding the safe operation of the installation and the efficient protection of employees and the environment.
25. The Greek parliament granted PPC a SPOP by virtue of a special law that amended the special law that previously implemented the SPP, and which entered into force in 2001.²¹ The SPOP is a single permit that was only applied to the plants that were granted the SPP.
26. Like the SPP, the SPOP substitutes the individual operational permits that each of PPC's LCPs should have been granted and that could have been judicially reviewed. The SPOP also does not specify any of the requirements described in paragraph 24 above, as normally found in an operational permit. As the SPOP was adopted pursuant to a legislative and not administrative procedure, it cannot be judicially reviewed.

¹⁹ Law 2773/1999, National Gazette A 286/22-12-1999, Article 42, (Annex 9).

²⁰ Decision 186/17, Greek Regulatory Authority for Energy, National Gazette B 1092/2017.

²¹ Law 2941/2001, National Gazette A 201/12-09-2001, Article 8 (5) (Annex 10).

27. The renewals that followed the initial SPOP extended the SPOP to additional lignite plants that were not covered under the SPP, and also extended its temporal scope – as the initial SPOP expired in 2005 (and subsequent SPOPs were also time-limited). The following table summarizes each SPOP extension and the means by which it was extended:

Date	Law that granted/extended the SPP and SPOP	Details
22/12/1999	Law 2773/1999, Article 42(1)	PPC is granted a SPP to “maintain the operation” of all the power plants that were either operating or being constructed at the time the law was published (i.e. for 22 plants in 8 lignite power stations; now 16 plants in 7 lignite power stations).
12/09/2001	Law 2941/2001, Article 8(5)	Amendment of Law 2773/1999 Article 42(1). The plants that held the SPP were also granted a SPOP until 31/07/2005
19/08/2005	Law 3377/2005, Article 24(1-4) (Annex 11)	Extension of the SPOP granted by Law 2941/2001, until 31/12/2008. Any new power plants that were given production permits after 24/01/2002 are also given a SPOP until 31/12/2008.
28/01/2009	Law 3734/2009, Article 33(2) (Annex 12)	Extension of PPC’s SPOP to 31/12/2013
31/12/2013	Law 4223/2013, Article 55 (5) (Annex 13)	Extension of PPC’s SPOP to 31/12/2015
24/12/2015	Act of Legislative Nature 24/24-12-2015 National Gazette A 182/24-12-2015, Article 9 (Annex 14)	Extension of PPC’s SPOP to 31/12/2017
15/02/2016	Law 4366/2016, Article First (Annex 15)	Validation of the Act of Legislative Nature (Emergency Act) 24/24-12-2015 National Gazette A’ 182/24-12-2015, Article 9

28. The latest extension of PPC’s SPOP took place in December 2015. The extension is valid until the 31st of December 2017. The legal instrument chosen for this extension was not a special law but an Emergency Act adopted by the Greek Parliament.²² The explanatory note of the Emergency Act identifies the “*emergency, imperative and unforeseeable need*” with “*PPC’s operation*”. This act could not be administratively or judicially reviewed as explained above in paragraph 18.

²² Law 4366/2016, National Gazette A 18/15-2-2015.

PPC's Environmental Permits

29. In 2011, a special law (law 4014/2011) extended or kept in force the outdated environmental permits of each of PPC's plants. Articles 5(4) and 6(3) of this special law provide that the expiring environmental permits remain valid from the timely submission of a renewal/amendment request until the renewal procedure is completed.
30. PPC usually submits a renewal/amendment request for each plant before the expiration of each environmental permit. As this special law only grants an extension of the existing environmental permits, PPC's environmental permits have not yet been updated to reflect the IED requirements that came into force for existing LCPs on 1 January 2016.²³
31. If the established administrative procedure was followed in granting the environmental permits, the permits would never have been extended and PPC would have had to apply for a new environmental permit.
32. As explained above in paragraph 11 the environmental permit is a pre-condition for the grant of the operational permit. Therefore, the SPOP could not have been granted and extended without an environmental permit. The Greek parliament found a way around this issue through granting PPC a legislative and non-reviewable extension of their outdated environmental permits.
33. The outcome of the legislative environmental permit extension is that, like the SPOP, the outdated environmental permits were granted by a special law that could not be challenged through the Courts, even if the extension of the environmental permits did not comply with the IED.
34. Moreover, the legislative grant/extensions of PPC's environmental permits has never been preceded by public participation (nor have the grant of the SPOP or SPP) as required by Article 6 of the Convention. Even if public participation requirements had been fulfilled, this would not provide a sufficient remedy to the inability of the public to apply for a review of the permits before the competent authorities or the Courts.
35. Through the special laws and through the Emergency Act, the Greek Parliament has substituted the respective administrative (public) authorities and granted permits to PPC's plants circumventing legal, environmental and other requirements.

IV. Alleged non-compliance with provisions of the Convention

36. Greece has failed to comply with **Article 9(2) and (4)** of the Convention in relation to the grant/extension of PPC's SPOP and extension of PPC's environmental permits. The full wording of Article 9(2) and (4) of the Convention is attached below as Annex 1, for ease of reference.

VI. Nature of alleged non-compliance

37. The public concerned does not have access to a review procedure, administrative or judicial, challenging the substantive and procedural legality of the special laws or the Emergency Act that granted and extended the SPOP or extended the validity of the environmental permits of PPC's plants as required by Article 9 (2) of the Convention.
38. Deprived of their right for administrative or judicial review, the public lacks adequate and effective remedies against the legislative renewal of PPC's SPOP and environmental permits,

²³ Law 4014/2011, Article 4.

although they contravene the national and EU environmental requirements. The details of this non-compliance are set out below.

Article 9 (2)

39. Article 9 (2) requires Greece to ensure that
- a. members of the public concerned having a sufficient interest or maintaining impairment of a right,
 - b. have access to a review procedure before a court of law and/or another independent and impartial body established by law,
 - c. to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 or of other relevant provisions of the Convention.

These components are addressed separately below.

Public Concerned having a sufficient interest or maintaining impairment of a right

40. Greece is required to ensure that members of the public concerned having a sufficient interest or maintaining impairment of a right are able to challenge any decision. No one in Greece has the right to challenge the special laws or Emergency Act that grants the permit, therefore, the Greek state is clearly in violation of this condition. Although Article 9(2) allows Greece a certain margin of discretion, this cannot be exercised in a way that excludes all members of the public concerned from accessing a review procedure.
41. In any event, Article 9(2) in conjunction with Article 2(5) of the Convention, identifies NGOs promoting environmental protection, such as WWF Greece, as the public concerned that can be the requesting party of the judicial review. WWF Greece has 'sufficient interest' for the purposes of Article 9(2) of the Convention as it meets the requirements of Article 2(5) of the Convention.

Access to a review procedure before a court of law and/or another independent and impartial body established by law

42. All special laws and Emergency Acts adopted by the Parliament are non-reviewable as described above.
43. By choosing to legislatively grant/extend PPC's SPOP and environmental permits, instead of following the established administrative procedure, Greece has failed to provide the public concerned with access to a review procedure.
44. The special laws and Emergency Act that granted/renewed PPC's environmental permits and SPOP substituted the decisions that the public authorities should have issued, which could have been the object of a challenge before the competent administrative Courts.

Challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 or other relevant provision of the Convention as provided for by national law

45. Article 6(1) of the Convention concerns public participation in decisions on permitting activities listed in Annex 1. The operation of LCPs is included in these activities.
46. Furthermore Article 6(10) provides that the procedures laid down in Article 6(2) to (9) apply when a public authority reconsiders or updates the operating conditions of the activities listed in Annex I. Therefore, Article 6 applies to the present facts.
47. The public concerned have not been able to challenge the substance or procedural legality of any decision, act or omission in relation to the following crucial permits that regulate PPC's LCPs:

- a. PPC's SPP;
- b. PPC's SPOP or any of its renewals since 2001; and
- c. the renewal of PPC's environmental permits since 2011.

48. The public concerned cannot challenge these permits because they are issued by special laws and an Emergency Act that are non-reviewable. Therefore, Greece has failed to comply with Article 9(2) of the Convention.

Article 9(4)

49. Article 9(4) requires that Article 9(2) provides adequate and effective remedies to challenge the permits such as injunctive reliefs. Since there is no access to judicial/administrative review of PPC's legislative grant/renewal of the SPOP and environmental permits, there is no possibility of adequate and effective remedies, such as injunctive relief, being granted. Therefore, Greece has failed to comply with Article 9(4) of the Convention.

VII. Use of domestic remedies

50. As specified above in paragraphs 16-18 the special laws and the Emergency Act that granted/extended the SPOP and environmental permits of PPC's power plants are non-reviewable. Neither are they subject to internal administrative review according to the Code of Administrative Procedure nor to judicial review according to the Greek Constitution, the Presidential Decree 18/1989 and the Code of Administrative Procedural Law. Therefore, the parties concerned have no domestic remedies available.

VII. Use of other international procedures

51. In March 2016, WWF submitted a complaint to the European Commission, regarding but not limited to the above access to justice failings. WWF argued that the choice of a special law as a means to extend/keep into force the expired environmental permits, along with an emergency act to grant a SPOP, deprived third parties of their access to justice rights, since laws cannot be challenged in national courts.

52. WWF's letter also addressed other concerns relating to IED compliance, such as:

- a. Greece's failure to issue individually considered environmental permits for each of PPC's plants; and
- b. the fact that 6 LCPs were breaching ELVs set by Greece's Transitional National Plan (in accordance with Article 32 of the IED).

53. On 23 November 2016 the Commission responded that it did not intend to commence an infringement procedure at the moment (Annex 16). Regarding the proper implementation of Directive 2010/75/EC, the Commission replied that it has opened a file and is looking into whether Greece implemented fully and correctly the IED and whether the provisions of Greek special law 4014/2011 are compatible with it.

54. In response to WWF's argument about the violation of access to justice rights, the Commission only mentioned the automatic renewal of environmental permits through the means of special law 4014/2011. The Commission suggested that WWF challenge the compatibility of the environmental permits that are still into force on the basis that they breach the provisions of the IED (for example the fact that there was no public participation procedure of the environmental permits before their automatic renewal). In this context, the national Courts could refer a question to the Court of Justice of the EU for a preliminary ruling. The Commission did not reply regarding the extension of the SPOP with an emergency act by the Greek Government.

55. The Commissions suggestion, that WWF challenge the compatibility of the environmental permits at a national level, cannot be actualized because the permits cannot be challenged in national courts.

VIII. Confidentiality

56. This communication may be published and made publicly available.

IX. Supporting documentation (copies, not originals)

57. The following documents are attached in support of this communication:

- a. Annex 1: Article 9(2) and (4) of the Aarhus Convention;
- b. Annex 2: Joint Ministerial Decision 36060/1155 /E.103/2013 National Gazette B 1450/14-06-2013, Article 3;
- c. Annex 3: Law 2244/1994, National Gazette A 168/1994, Article 3(4), (5), (6);
- d. Annex 4: Law 4014/2011, National Gazette A 209/21-09-2011, Article 2(8),(10), Article 5(1)-(4), Article 6(1)-(5);
- e. Annex 5: Law 2690/1999, National Gazette A 45/9-3-1999, Article 24(1);
- f. Annex 6: Greek Constitution, Article 95(1),(2);
- g. Annex 7: Presidential Decree 18/1989, National Gazette A 8/9-1-1989, Article 45(1), (5);
- h. Annex 8: Law 2717/1999, National Gazette A 97/17-5-1999, Article 63(1);
- i. Annex 9: Law 2773/1999, National Gazette A 286/22-12-99, Article 42(1);
- j. Annex 10: Law 2941/2001, National Gazette A 201/12-9-2001, Article 8(5);
- k. Annex 11: Law 3377/2005, National Gazzete A 202/19-8-2005, Article 24(1)-(4);
- l. Annex 12: Law 3734/2009, National Gazette A 8/28-1-2009, Article 33(2);
- m. Annex 13: Law 4223/2013, National Gazette A 287/31-12-2013, Article 55(5);
- n. Annex 14: Emergency Act 24/24-12-2015, National Gazette A 182/24-12-2015, Article 9;
- o. Annex 15: Law 4366/2016, National Gazette A 18/15-2-2016, Article First;
- p. Annex 16: European Commission's response to WWF's complaint, dated 23-11-2016.

X. Signature

I confirm that I am authorised to sign this communication on behalf of ClientEarth.



Dominique Doyle
Lawyer (Australian Qualified)

Dated: 2 August 2017

I confirm that I am authorised to sign this communication on behalf of WWF



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Dated: 2 August 2017

XII. Sending the communication

Send the communication by **e-mail** and by **registered post** to the following address:

Secretary to the Aarhus Convention Compliance Committee
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Environment Division
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Clearly indicate:
"Communication to the Aarhus Convention Compliance Committee"