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At the Task Force on Access to Justice, Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters

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The Cercle Català de Negocis (CNN) is an association of entrepreneurs and also a think-tank advising economic actors, civil society and, sometimes, political institutions. It endeavors to contribute to the internationalization of the Catalan economy and to identify best practices. But today I shall be speaking about bad practices. I would like to refer to the so-called "Castor Case" to exemplify some of the main obstacles for the implementation of the Aarhus Convention, particularly in connection with the third pillar, access to justice.

The "Castor Project" is a submarine gas storage facility that was decided upon, developed and implemented after the Kingdom of Spain had signed and ratified the Aarhus Convention. The Castor platform is located about 10 miles offshore on the maritime divide between Catalonia and the Autonomous Region of Valencia. Different central Spanish administrations were involved (first the previous social democratic – PSOE - and then the present PP – conservative - government). The project was awarded to a Spanish-Canadian consortium controlled by the president of the Real Madrid football club and it was financed in part with the help of the so-called Eurobonds (Castor was one of the first European infrastructure projects financed with the help of European Investment Bank).

The project ended in a total fiasco. The Environmental Impact Assessment (EIA) studies were inadequate and did not take into account neither the warnings of seismological risk (as requested by the Catalan authorities) nor earlier geological studies made in connection with oil prospection operations in the zone. The project promoters and the central Spanish authorities also ignored the resolutions adopted by the Catalan Parliament. As a consequence, the Catalan government denied permission to build the project on Catalan territorial waters. The response was to go ahead with the project and to build the platform immediately next to Catalan waters off the shore to Vinarós (in the Valencian Autonomous

Community). The result was a series of earthquakes (more than a thousand during September and November 2013) some of reaching a magnitude of 4 on the Richter scale that affected buildings and terrorized residents in the area of South Catalonia (Amposta and Les Cases d'Alcanar) and finally led to the "hibernation" of the project. It could have been worse considering that the Vandellos nuclear power plant is in close vicinity. The PP government had appealed the original Castor contract as "contrary to the interest of the State" "too favorable" to the promoter all the way to the Supreme Court. But instead of pursuing the issue of possible negligence by the promoter as suggested by the Court it decided to pay the whole amount of compensation foreseen by the contract: 1.3 billion Euros. Just to give you an idea of the order of magnitude: this amount roughly equals the total of investments by the Spanish State in infrastructure in Catalonia over a whole year. The Spanish government approved the payment by way of a Royal Legislative Decree 13/2014 in October 2014 and disbursed the money within weeks. The payment will now be passed on to consumers as part of the gas bill over the next 30 years (the total financial cost for the consumers will be around 3.5 billion Euros).

While the non-compliance with the Aarhus Convention in terms of information and participation is unquestionable, as it has been extensively covered by Spanish and international media over the last two years, with regard to access to justice, although the matter is still "sub judice", I believe that the following relevant issues are worth being brought to the attention of the Task Force:

1) The Effect of the "Saucissonement" or "Dépeçage" of the Aarhus Convention by the EU Directives. Although the Spanish State had already signed and ratified the Aarhus Convention, which entered into force for Spain on 31 March 2005, the "transposition" to the Spanish system was done by way of Law 26/2006 of 18 July together with the EU directives 2003/4/CE and 2003/35/CE which, as it is known, do not incorporate any effective "access to justice" elements as required by the Aarhus Convention. Thus, the Spanish Law established that judicial appeals for the infringement of the Aarhus Convention must take place before the contentious-administrative courts. However, the government decisions first to award the project concession to the promoter and then to pay the full amount of

compensation foreseen in the contract (without any attempt to invoke the responsibility for damages or the negligent behavior by the promoter) were taken by Royal Legislative Decrees. These cannot be appealed before the administrative jurisdiction. The Catalan Government has therefore started legal action before the Spanish Constitutional Court on grounds of defenselessness. It must be pointed out that while Catalonia is not allowed to negotiate international treaties, it has, according to its Autonomous Statute, full powers for the implementation of environmental agreements.

2) The Aarhus Convention as an "Unknown Entity". In none of the legal proceedings that have taken place so far in connection with the Castor Affaire has the Aarhus Convention been mentioned, invoked or alluded to. Neither the Supreme Court, nor the Public Prosecution, nor the General Advocate, nor the Ministries Concerned or the Constitutional Court seemed to be aware of the existence of the Convention. None has pleaded a violation of the Convention as a ground for annulment of the Castor contract. This shows not only the lack of public awareness about the Convention even among high ranking officials but also the inadequate application of the "*iura novit curia*" principle in the Spanish judicial system. Even more surprising is the fact that the EU authorities, such as the European Ombudsman approached by complainants (the Catalan Ombudsman, the associations of residents affected, etc.) have chosen to treat the issue as one related to a violation of the prohibition of illegal state aids (to corporations) without identifying the problem areas as falling within the realm of implementation of the Aarhus Convention. This is, to say the least, very disturbing. In view of this, a possible solution for the present "inadequate awareness" by Spanish courts and judicial and legal authorities which could maybe be recommended by the Task Force through the Aarhus implementation Committee could be a general and systematic utilization of the "prejudicial requirement" (as it is being done in consumer protection cases) to have the benefit of the European Court of Justice case law. Moreover, both CCN and the Catalan government clearly subscribe the principle of continuity of treaties by newly independent States, thus the Aarhus Convention jurisprudence will be in any case very relevant for present and future Catalan authorities.

3) The "Denial of Justice Syndrome". Even more disturbing and preoccupying is the prospect that in a near future, because of the effect of "agreements" (such as bilateral or multilateral free trade and investment treaties) purporting to provide immunity from local or even regional European courts to international promoters of "projects", such as the Castor one, the whole third pillar of the Convention could be obliterated. I believe that the Task Force should seriously think about the dangers that such a development, as already exemplified in the "Castor Affair", would entail for the implementation of the Aarhus Convention as well as for the very existence of a democratic rule of law in Europe. Of course, this must be seen in connection with other extremely preoccupying developments, such as the retroactive derogation of incentives for the use of renewable sources of energy, the sending of navy ships to prevent boycott actions against oil prospection (off shore the Canary Islands), the appeals submitted to the Constitutional Court to block the legislation from Autonomous Communities prohibiting "fracking" or the attempts to legislate to prevent the exercise of freedom of expression and demonstration. In any event, the attempt to grant de iure and the facto immunity to international promoters or investors must be seen as contrary to the third pillar of the Aarhus Convention and even as "contra bonos mores" (as indicated by the Independent Expert of the United Nations for a Democratic Legal Order in his latest report to the GA).

The CCN will be submitting a non-compliance communication to the Aarhus Convention implementation Committee and would be very interested in receiving your comments in this respect.