

# **Statement by the Hellenic Ministry of Environment and Energy concerning the communication**

**PRE/ACCC/2017/149**

(Aarhus Convention Compliance Committee regarding the failure of Greece to comply with Art. 6 and 7 of the Aarhus Convention)

## **I. THE MAIN OBJECTIONS RAISED BY THE COMMUNICANT WWF HELLAS**

The main issue raised by the communicants is the alleged breach of the right of the public to participate in the drafting of the Transitional National Emission Reduction Plan (hereinafter referred to as "TNP"), provided by Directive 2010/75/EU, which has been transposed into Greek national law by Ministerial Decision 36060/1155/2013 (OJG B 1450/2013).

More specifically, main arguments/allegations of the communicants are as follows:

- a) The TNP is a plan relating to the environment, thus, falls within the provisions of Article 7 of the Aarhus Convention.
- b) Regarding the preparation of the TNP, the technical inter ministerial working group (provided for in Article 28 of the Joint Ministerial Decision 36060/1155/2013) was established with neither participation of the representatives of local community nor of the public concerned. According to the communicants, this constitutes a restriction on their right to participate in the pre-legislative procedure of a plan relating to the environment.
- c) There were neither public consultation procedures held during the preparation of the TNP nor uploading of the adopted TNP in the national official websites.

## **II. MAIN ARGUMENTS OF THE GREEK AUTHORITIES**

The following arguments are raised against the objections of WWF Hellas:

### **A. The TNP is not considered as a "plan" and thus does not fall under the provisions of Directive 2001/42/EC and Articles 6 and 7 of the Aarhus Convention:**

According to Article 2 (a) of the Directive 2001/42/EC (on the environmental impact assessment of certain plans and programmes) a) "**plans**" shall mean "*plans, including those co-financed by the European Community ....: aa) which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption through a legislative procedure by*

*Parliament or Government and bb) which are required by legislative, regulatory or administrative provisions”.*

Additionally, according to Article 3 (2) (a) of the aforementioned Directive, an environmental assessment shall be carried out for all plans and programmes “*a) which are prepared for .... Industry ... and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC*” for which an environmental assessment (environmental permit) is required, in accordance with national law.

Finally, in cases falling within the scope of this Directive, consultation with relevant authorities and the public is required [Article 3 (6)].

The abovementioned provisions of Directive 2001/42/EC have been transposed into national law by the Joint Ministerial Decision 107017/2006 (OJG B 1225/2006).

**Greek authorities maintain that the TNP does not meet the requirements for its inclusion in the scope of Directive 2001/42/EC and hence in the abovementioned definition of "plan" for the implementation of Articles 6 and 7 of the Aarhus Convention, for the following reasons:**

**1.** According to Article 32 of Directive 2010/75/EE - IED (Article 28 of the JMD 36060/1155/2013), the TNP is a transitional national plan covering existing combustion installations/plants that meet the conditions and requirements set out in the above Article. It should be mentioned that according to paragraph 1 of the same Article “... the Member States may draw up and implement a transitional national plan ...”. Thus, it is expressly stated that it is at the **discretion** of the Member States to prepare and implement a transitional plan.

In particular, according to Article 32 of IED and the Implementing Decision 2012/115/EU: **a)** the TNP covers existing combustion plants, which continue to operate during the period from 1/1/2016 to 30/6/2020 **b)** these plants are required to comply with the emission limit values for certain pollutants applicable on 31/12/2015, set by the relevant European legislation (these limit values are included in the environmental permit of the above plants according to Law 4014/2011), **c)** the maximum total annual emissions for all the plants included in the TNP were calculated on the basis of the relevant emission limit values set out in Directive 2001/80/EC for 2016 and in IED for 2019, **d)** the TNP contains the measures (anti-pollution technology) foreseen for each of the installations/plants, in order to ensure compliance of the plant with the IED limit values that will apply from 1/1/2020 (these measures are included as environmental conditions in the environmental permit of Law 4014/ 2011).

The same Article further specifies the monitoring of the TNP in order to ensure compliance with the requirements of Article 32.

The strict EU legislative framework set by Article 32 of IED states that the Member States' discretion for drawing up the TNP is **fully defined and predetermined**. Consequently, there is practically no margin for alternate regulatory options in the

preparation and drafting of the TNP, as emission limit values are already defined by European legislation. Thus, given the **inflexible provisions** of Directive 2010/75/EU and Implementing Decision 2012/115/EU, regarding the requirements foreseen for the inclusion of the plants in the TNP and for its preparation, European legislation does not leave room for Member States' choice or alternative proposals. As a result, Member States' discretion is limited to the **choice to apply or not** Article 32 without any further regulation.

2. The TNP is a transitional national 4-year plan (2016-2020), which allows for a limited life time derogation from the application of Directive 2010/75/EU (IED) for the installations/plants included in it. In addition, TNP is a specific applicable act, in the sense that it does not cover all plants of a particular category.

3. Since the TNP includes only existing installations, which are required to comply with the emission limit values set out in European legislation (which are already included in the environmental permit granted to them in accordance with Law 4014/2011), the conditions for the inclusion of TNP within the scope of the **mandatory application of Directive 2001/42/EC** are not met. In particular, pursuant to Article 3 (paragraph 1 and 2) of the Directive, an environmental impact assessment shall be carried out for plans: **a)** *"... likely to have significant effects on the environment"* and **b)** *"... which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC..."*.

On the basis of the above, the reasons which substantially differentiate the TNP from the concept of "plan" and hence from the scope of the provisions of Directive 2001/42/EC and, consequently, Articles 6 and 7 of the Aarhus Convention, are summarized as follows: **a)** the narrowly descript content of TNP by the EU Directive, in which each Member State **only has the ability to accede** to (Article 32 of the IED), **b)** its **transitional/temporary** character in the sense of the limited life time derogation from the application of the IED for the plants included, **c)** the fact that the TNP does not provide a framework for future project authorizations as it **includes only existing plants**; and **d)** the compliance of the plants with the provided emission limit values, **leaving no room for possible significant impact on the environment**.

This is the main reason why the Directive 2010/75/EU **does not impose directly or indirectly any obligation for public consultation or participation** during the preparation of the TNP. Additionally, there is no reference in the Directive's recital about the application of Articles 6 and 7 of the Aarhus Convention.

### **B) Institutional/regulatory specificity of the TNP:**

The Greek TNP was drafted by the national administration and submitted to the European Commission (the first TNP in 2012 and the modified one in 2014) in accordance with the provisions of paragraphs 4, 5 and 6 of Article 32 of the IED and the Implementing Decision 2012/115/EU. The provisions of the above-mentioned

European legislation have been strictly observed. The Greek TNP was approved by the European Commission, after a full thorough examination and submission of additional clarifications by the Greek authorities, by **Decisions C (2013) 8133 final/26-11-2013** (the first one) and **C (2014) 4533 final/7-2014**.

It should be highlighted that TNP approval falls under the **exclusive competence of the European Commission**, which first examines whether the conditions and requirements laid down in the EU provisions are met. When examining and approving the TNP, in the context of the application of Article 32 of the Directive, the European Commission did not require, suggest or set as a prerequisite, to the Greek administration, the public consultation and participation procedure under Article 6 and 7 of the Aarhus Convention.

The adoption of the TNP approval decision by the European Commission, as it is widely known, is binding for national authorities, like all EU Decisions for Member States. However, in order to increase legal certainty, this was followed by a **supplementary** Joint Ministerial Decision (JMD 34062/957/2015). This Decision also incorporated the official data on the documentation and application of Article 32 of the Directive, which were provided by the national authorities to the European Commission for the adoption of the aforementioned Decision. In this way, the above data become binding for the Greek legal order and thus the TNP regulatory content is enforced in terms of national law.

This institutional/regulatory specificity of the TNP, which is linked to the strictly defined discretion of the Member States, without any further regulatory flexibility, as already mentioned above, is also the ratio based on which Article 32 of the EU Directive **does not provide for compliance with the consultation and public participation procedure** in the context of Article 6 and 7 of the Convention.

### **C) Preparation of the TNP by a technical inter-ministerial working group:**

The main goal of the Greek Government's initiative to establish a **technical inter-ministerial working group**, in accordance with Article 28 (paragraphs 7, 7.1 and 7.2) of Joint Ministerial Decision 36060/1155/2013 (transposing Directive 2010/75/EU), was, through the technocratic approach, the expertise and the specialized scientific knowledge of its members, to effectively contribute to the proper preparation and documentation of the TNP, as well as to the effective monitoring of its implementation in accordance with the strictly defined requirements of EU legislation.

It is evident from the purely technical content of the regulation that it is in no way linked to a derogation or weak implementation of the participation/consultation procedure, with authorities and public, of Article 7 of the Convention, as this procedure, as already mentioned, is not required by the EU Directive.

#### **D) References in the Directive 2010/75/EU to the right to public participation and consultation:**

In the recital of the Directive, particularly in paragraph 27, there is a reference to the Aarhus Convention and its provisions for effective public participation in decision making and access to justice. This reference is linked with Article 24 of the operational part of the Directive which, however, includes provisions regarding the access to information and public participation in the environmental permit procedure for plants, in accordance with Law 4014/2011. In fact, the aforementioned Article restricts the exercise of this right in the following cases:

- i. the granting of a permit for new installations,
- ii. the granting of a permit for any substantial change,
- iii. the granting or updating of a permit for an installation where the application of Article 15 is proposed,
- iv. the updating of a permit or permit conditions for an installation in accordance with Article 21 (5).

The TNP does not come under any of the aforementioned categories of permits for which there is an obligation for the Member States to comply with the conditions and to secure the rights provided by the Aarhus Convention. Thus, according to the Directive's provision, the preparation of the TNP is excluded from any public consultation/participation obligation.

#### **E) Publicity of the TNP:**

The TNP data were published by the Hellenic Ministry of Environment and Energy twice **prior its approval** by the European Commission, following a request from an interested party. Firstly, it was in response to a request from an interested party that was submitted to the European Commission, and secondly, in response to a relevant request from the WWF Hellas, when both data of TNP and the relevant correspondence with PPC SA were published.

Additionally, the data included in the TNP were also published, **after its approval** by the European Commission, through the **adoption of the Joint Ministerial Decision 34062/957/E103/2015**, which was published in the Official Government Gazette, where all Greek legislation is published (free access to the Official Government Gazette is provided through the National Printing House of Greece <http://www.et.gr>), and was additionally uploaded in the official website of the Hellenic Ministry of Environment and Energy (<http://www.ypeka.gr>).

Therefore, any interested party could request the national authorities to provide data regarding the TNP. This data were already available to the public at the stage of the TNP preparation, given the fact that after the adoption of the JMD

36060/1155/2013 (transposing Directive 2010/75/EU), which has been uploaded since 2/5/2013 in the official website of the Ministry of Environment and Energy: a) the TNP was already published, as according to Article 28 (5) of the JMD, the national authorities should communicate the TNP to the EU within the year 2013, and b) the decisions for the establishment of the technical inter-ministerial working groups for the preparation of the TNP were also available since 2013 through the "DIAVGEIA" website (transparency portal where governmental and administrative acts are uploaded).

#### **F) Special note:**

The fact that the TNP is not a plan or programme as defined in Article 7 of the Aarhus Convention, arises the question as to whether it is an environmental policy, namely if it falls under the provisions of the last paragraph of Article 7 of the Convention: *"To the extent appropriate, each Party shall endeavor to provide opportunities for public participation in the preparation of policies relating to the environment"*.

Under this provision, it is clear that three evaluative concepts are formulated "... **to the extent appropriate**..." and "...**endeavor**...", "...**provide opportunities**...". Consequently, for the application of this provision, each party is asked to assess whether and how to follow the relevant public participation process.

In the light of the above, it is clear that the national authorities, during the preparation of the TNP, have acted within the regulatory limits laid down in the last paragraph of Article 7 of the Aarhus Convention.

#### **G) The issue of the inclusion or not of the TNP in the scope of Article 8 of the Aarhus Convention:**

As stated by the aforementioned arguments, the TNP is not a plan and does not fall under the provisions of Articles 6 and 7 of the Aarhus Convention. However, the TNP approval decision is an **administrative regulatory act and concerns an indeterminate number of persons**. Nevertheless, this Decision was adopted later and in addition to the corresponding EU Decision, which is also a binding act. This particular regulatory nature of the TNP, as set out in paragraph (B) above, stemmed from the assessment of the national authorities to incorporate and give regulatory substance to the evidence already examined and approved by the EU in order to adopt its Decision.

In addition, as European legislation does not leave to Member States room for option or alternative proposals, as mentioned above, the TNP was prepared and approved in compliance with the strict and rigid provisions of Directive 2010/75/EU and Implementing Decision 2012/115/EU.

Thus, the inclusion of the TNP in the scope of the provisions of Article 8 of the Aarhus Convention has no substantive content. This means that the participation of the public in its preparation process has little final significance in terms of safeguarding or not of the rights of participation provided by the Convention.

#### **H) The right to appeal:**

The fact that the national authorities consider that the TNP does not fall under the provisions of Articles 6 and 7 of the Aarhus Convention does not mean that the TNP cannot be appealed at any time in the national courts with an application for its annulment. This application may be made in the context of an action challenging an individual administrative act (environmental permit) based on the TNP.

It is particularly important to focus on the fact that the provisions of JMD 36060/2013 (transposing Directive 2010/75/EU) are structured on the basis of the provisions of Law 4014/2011 and its implementing acts.

This means that the environmental permit mechanism (in this case the installations/plants that fall under the provisions of IED and are included in the TNP) is, inter alia, the institutionalised way of public participation in the decision-making process on environmental issues and their judicial protection when this right is infringed. The relevant provisions of Law 4014/2011 and JMD 36060/2013 fully enshrine this participation and its judicial protection in the context of the implementation of relevant provisions of European law and the Aarhus Convention (Articles 6 and 9). Thus, the public is able to participate in the process of approving an environmental permit, as well as to challenge it in court, when it proves to be affected by it, on the basis of the procedural framework, mainly on the basis of the provisions of Presidential Decree 18/1989.

Accordingly, on the basis of this national procedural framework, in the case of challenging in court of an environmental permit which has been issued based on, inter alia, the legal basis of the TNP, the applicant can also raise reasons concerning the legitimacy of TNP and even succeed in its annulment.

There is no doubt that the communicants themselves are aware of that, since they have often sought legal protection for (alleged) irregularities in decisions concerning environmental permits<sup>1</sup>. In the relevant application for annulment before the Greek Council of State, the communicants raised all the environmental issues which, in their opinion, are not or are poorly covered by those permits, including breaches of the provisions of Directive 2010/75. In particular, they have raised issues of

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<sup>1</sup> We indicatively mention the applications 6533/2006 and 1866/2007 for annulment of environmental permits approved, inter alia, for the steam-electric power station of Mesochora (which was even brought to the CJEU), as well as recently the applications 3093/2017, 3094/2017 and 3896/2016 against decisions approving the environmental terms of the steam-electric power station of Megalopolis A and B, as well as that of Agios Dimitrios, all falling within the scope of Directive 2010/75/EC.

infringement of Article 11 of the Directive (Article 9 of Joint Ministerial Decision 36060/2013) on permitted emission limit values for certain pollutants as well as Article 32 (Article 28 of Ministerial Decision 36060/2013) for plants included in the NTP.

According to the abovementioned, indeed, it is very strange that the communicant WWF Hellas: a) has not exercised the right to challenge directly the JMD in Greek Council of State by submitting an application for annulment from 2015 (the date of the adoption of the JMC approval of the TNP) until today, and b) the communicant has not challenged the legitimacy of the JMD approving the TNP, even through its three pending applications before the Council of State for annulment of environmental permits for three lignite power plants included in the TNP.

In this context, the communicants' allegations for costly and time-consuming procedures are unfortunate. It should be noted, however, that a) the cost for the discussion of application for annulment is about 1,000 €, while b) the determination of the application discussion day, indeed needs more time, however, the parties can ask for the acceleration of the discussion date with the submission of a preference application. Indicatively, application for invalidation by the communicants seeking the cancellation of the decision approving the environmental conditions of Megalopolis plants A and B, were submitted to the Greek Council of State in November 2017 and are determined to be discussed on 23 May 2018.

In view of the above, it is demonstrated that the protection provided by courts is effective as it could lead to the annulment of the TNP approval decision. The obvious question then arises as to why the complainants did not follow the legal proceedings.

### **III) FINAL CONCLUSION**

The analysis described above demonstrates the following main points:

a) Since the TNP does not meet the requirements for being considered as a "plan" and therefore does not fall within the scope of Directive 2001/42/EC, the provisions of Articles 6 and 7 of the Aarhus Convention are not applicable to it. The IED allows Member States to make use of the provisions of Article 32 by preparing, approving and implementing the TNP. However, this possibility is only limited to the state's accession to the restrictive regulations of the Directive, which is finally controlled by the European Commission for the approval of the TNP.

b) Greek national authorities consider that the disclosure requirements are adequately met by the procedures for the preparation and approval of the TNP, even in the case that the TNP fell within the scope of the last paragraph (policies relating to the environment) of Article 7 of the Aarhus Convention.



c) Due to the institutional/regulatory specificity of the TNP, its inclusion in the scope of the provisions of Article 8 of the Aarhus Convention is not of substantial importance, since during the preparation of the TNP the national authorities are not involved in regulatory issues.

d) The right to appeal against the decision approving the TNP may be exercised by any interested party on the basis of the procedural framework, mainly on the basis of the provisions of Presidential Decree 18/1989.

On the basis of the arguments of the Greek authorities, the contractual obligations of Greece are met in full, without breaching the provisions of Articles 6 and 7 of the Aarhus Convention.

**In view of the above, the complaint in question should be rejected.**

**For the Hellenic Republic**