

**COMMUNICATION ON THE FAILURE OF SPAIN TO COMPLY WITH  
ARTICLE 6 (10) OF THE AARHUS CONVENTION REGARDING THE  
UPDATE OF INTEGRATED ENVIRONMENTAL PERMITS AS ESTABLISHED  
IN 1<sup>ST</sup> TRANSITIONAL PROVISION OF LAW 16/2002, OF 1<sup>ST</sup> OF JULY ON  
INTEGRATED PREVENTION AND POLLUTION CONTROL**

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**II. Party concerned**

Name of the State Party concerned by the communication: Spain ( Kingdom of Spain)

**III. Facts of the communication**

Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) repealed and replaced a series of Directives including Directive 2008/1/EC on integrated pollution, prevention and control (IPPC). This Directive was transposed into Spanish national Law by an amendment to the existing Law 16/2002 of 1<sup>st</sup> of

July, on Integrated Prevention and Pollution Control introduced through Law 5/2013 of 11<sup>th</sup> of June<sup>1</sup>. In addition, Royal Decree 815/2013, of 18 October (RD 815/2013) also transposed into Spanish Law the IED developing and implementing Law 16/2002 (IPPC Law).

The objective of these instruments, 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*” (Article 1 of IPPC Law) setting out the so-called “integrated approach” to prevent negative impacts on all environmental media due to a certain industrial activity through the conditions established in the permits granted by public authorities. These permits, which in Spain are known as “integrated environmental permits” are regulated in Title III of IPPC Law and Chapter II of RD 815/2013, and apply to activities listed in Annex I of both legal instruments. Most of the industrial activities listed in those Annexes are coincident with those listed in Annex I of the Aarhus Convention.

The IPPC Law not only covers the procedure to follow for obtaining a permit and the substantive elements that a permit needs to contain, and the operator of an existing or new installation needs to comply with but also provides for specific permit procedures such as changes to the installation and the reconsideration and update of permit conditions by the competent authorities all provided by Title III on the “legal regime of the integrated environmental permits”<sup>2</sup>

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<sup>1</sup> It must be noted that the IED provided a deadline for Member States to transpose this Directive into their legal system until 7 January 2013. However, Spain transposed the IED on 11 June 2013 through Law 5/2013 which was published in the Spanish Official Journal (BOE) on 12 June and it entered into force the day after its publication 13 June 2013.

<sup>2</sup> This Title contains the following provisions:

**CHAPTER I.- Purpose and implementation**

Article 9. Plants subject to integrated environmental permits

Article 10. Changes in the plant

Article 11. Purpose of the integrated environmental permit

**CHAPTER II.- Application and granting of the integrated environmental permit**

Article 12. Content of the application

Article 13. Submittance of the application

Article 14. Procedure

Article 15. Planning Report of the City Council

Article 16. Public information

Article 17. Reports

Article 18. City council report

Article 19. River Basin Authority report

Article 20. Motion for resolution and hearing

Article 21. Resolution

Article 22. Content of the integrated environmental permit

Article 22 bis. Plant closure

Article 23. Notification and publishing procedure

Article 24. Appeal

Article 25. Integrated environmental permit review

Article 26. Activities with cross-EU or transboundary effects

**CHAPTER III.-Coordination with other environmental intervention mechanisms**

Article 27. Coordination with the environmental impact assessment procedure

Law 5/2013 of 11<sup>th</sup> of June amending the IPPC Law introduced a specific provision on the updating of existing permits for those facilities which were functioning and authorized before 13 June 2013 or those facilities that had applied for the necessary authorizations and that started its operation before 13 June 2014<sup>3</sup>. That provision is contained in the 1<sup>st</sup> Transitional Provision of IPPC Law which regulates the updating of existing permits. In fact, that transitional provision transposed Article 82 (1) of the IED which provides for the following transitional schedule:

*1. In relation to installations carrying out activities referred to in Annex I, point 1.1 for activities with a total rated thermal input exceeding 50 MW, points 1.2 and 1.3, point 1.4(a), points 2.1 to 2.6, points 3.1 to 3.5, points 4.1 to 4.6 for activities concerning production by chemical processing, points 5.1 and 5.2 for activities covered by Directive 2008/1/EC, point 5.3 (a)(i) and (ii), point 5.4, point 6.1(a) and (b), points 6.2 and 6.3, point 6.4(a), point 6.4(b) for activities covered by Directive 2008/1/EC, point 6.4(c) and points 6.5 to 6.9 which are in operation and hold a permit before 7 January 2013 or the operators of which have submitted a complete application for a permit before that date, provided that those installations are put into operation no later than 7 January 2014, Member States shall apply the laws, regulations and administrative provisions adopted in accordance with Article 80(1) from 7 January 2014 with the exception of Chapter III and Annex V.*

The First Transitional Provision of the Spanish IPPC Law provides:

1. *“The competent authority to grant integrated environmental permits shall perform the necessary actions to ensure that **permits are updated** according to the requirements provided by Directive 2010/75/EU of the European Parliament and of the Council, of 24 November 2010 on Industrial Emissions, **before January 7<sup>th</sup> 2014**”<sup>4</sup>.*

*Thereafter, reviews shall be carried out as established in articles 25.2 and 25.3 of this Law. Combustion plants under the already mentioned flexibility mechanisms shall incorporate the requirements those mechanisms stipulate.*

2. *According to paragraph 1, permits shall be considered updated when they contain specific prescriptions on:*
  - a. *Incidents and accidents, especially regarding the obligations operators have of communicating them to the competent authority and of implementing measures, even complementary ones, to limit*

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Article 28. Coordination with the regime applied to classified activities

<sup>3</sup> Article 3 (4) of the Spanish Law 16/1992 establishes the definition on “existing facilities” as explained.

<sup>4</sup> To understand why this date it is necessary to recall that

*environmental consequences and avoid other possible incidents and accidents,*

- b. The failure to comply with permit conditions,*
- c. In case of waste generation, the implementation of the waste hierarchy as established in article 4.1.b),*
- d. When necessary, the report mentioned in article 12.1.f), which must be taken into consideration in the event of plant closure,*
- e. The measures which will be applied in the event of anomalous functioning conditions,*
- f. When necessary, the monitoring requirements for soil and groundwater,*
- g. In the case of an incineration or co-incineration plant:*
  - i. Waste treated by the plant, when listed in the European Waste List*
  - ii. The emission limit values regulated for these types of plants.*

*These permits shall be published in the Official Gazette of the concerning Autonomous Community, mentioning its adaptation to Directive 2010/75/EU*

*The public has the right to access the updated permit, according to Law 27/2006, of July 18<sup>th</sup>.*

- 3. *The permits that, after the entry into force of this Law do not include the requirements listed above, must be updated before January 7<sup>th</sup> 2014. The competent authority shall require the operator to prove compliance with the above mentioned requirements, in order to update the permit. After this, the updated permit shall be published in the Official Gazette of the concerning Autonomous Community.***
- 4. *Every plant that has updated its permit according to the above mentioned requirements, must have an inspection plan, as provided by Regulation” (the emphasis is ours).***

The preamble of Law 5/2013 states in regards to this transitional provision the following:

*“To guarantee the adequate transposition of Directive 2010/75/EU, of 24 November, on Industrial Emissions, an update procedure for permits already granted is established as a transitional provision; through this procedure the competent authority shall check ex officio through a brief procedure the adequacy of the permits with the new Directive. The deadline to update the permits is 7 January 2014. After the update of the existing permits, these shall be reviewed following the new conditions for its review as incorporated by this Law”*

This transitional provision denied any possibility for the concerned public as defined by Article 2 (5) of the Aarhus Convention, in particular non-governmental organizations, to participate in the update of the existing permits carried out when they did not contain prescriptions on:

- a) **Incidents and accidents**, especially regarding the obligations operators have of communicating them to the competent authority and of implementing measures, even complementary ones, to limit environmental consequences and avoid other possible incidents and accidents. In fact, this prescription or condition that must be included in the permit derives from obligation contained in Article 7 on incidents and accidents of the IED which provides:

*Without prejudice to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage <sup>(30)</sup>, in the event of any incident or accident significantly affecting the environment, Member States shall take the necessary measures to ensure that:*

- (a) the operator informs the competent authority immediately;*
- (b) the operator immediately takes the measures to limit the environmental consequences and to prevent further possible incidents or accidents;*
- (c) the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to limit the environmental consequences and to prevent further possible incidents or accidents.*

- b) **The failure to comply with permit conditions**,
- c) In case of waste generation, the **implementation of the waste hierarchy** as established in article 4.1.b). This article provides that hierarchy: prevention, preparation for reuse, recycling and any other type of valorization, including energy valorization.
- d) When necessary, the report mentioned in article 12.1.f), which must be taken into consideration in the event of plant closure. This article 12.1.f) requires a **baseline report** before starting an activity and before the update of a permit when an activity implies the use, production and emission of hazardous substances, taking into consideration the possibility of **groundwater and soil pollution** in the site of the facility<sup>5</sup>. In fact, this report must contain the necessary information to

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<sup>5</sup> This obligation in article 12.1.f) of the IPPC Law transposes the requirements in article 22 (2) of the IED. **Article 22 of the IED** provides the following for **site closure**:

*1. Without prejudice to Directive 2000/60/EC, Directive 2004/35/EC, Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater*

determine the state of groundwater and soil to make a quantified comparison with the state upon definitive cessation of activities. Article 14 of the IED provides the conditions a permit must include. Among those conditions, its paragraph (1) (b) requires that a permit includes “appropriate requirements ensuring protection of the soil and groundwater and measures concerning the monitoring and management of waste generated by the installation”.

- e) The **measures which will be applied in the event of anomalous functioning conditions**. This condition derives from Article 14(1) (f) which requires permits to include “measures relating to conditions other than normal operating conditions such as start-up and shut-down operations, leaks, malfunctions, momentary stoppages and definitive cessation of operations”.

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*against pollution and deterioration<sup>(31)</sup> and to relevant Union law on soil protection, the competent authority shall set permit conditions to ensure compliance with paragraphs 3 and 4 of this Article upon definitive cessation of activities.*

*2. Where the activity involves the use, production or release of relevant hazardous substances and having regard to the possibility of soil and groundwater contamination at the site of the installation, the operator shall prepare and submit to the competent authority a baseline report before starting operation of an installation or before a permit for an installation is updated for the first time after 7 January 2013.*

*The baseline report shall contain the information necessary to determine the state of soil and groundwater contamination so as to make a quantified comparison with the state upon definitive cessation of activities provided for under paragraph 3.*

*The baseline report shall contain at least the following information:*

- (a) information on the present use and, where available, on past uses of the site;*
- (b) where available, existing information on soil and groundwater measurements that reflect the state at the time the report is drawn up or, alternatively, new soil and groundwater measurements having regard to the possibility of soil and groundwater contamination by those hazardous substances to be used, produced or released by the installation concerned.*

*Where information produced pursuant to other national or Union law fulfils the requirements of this paragraph that information may be included in, or attached to, the submitted baseline report.*

*The Commission shall establish guidance on the content of the baseline report.*

*3. Upon definitive cessation of the activities, the operator shall assess the state of soil and groundwater contamination by relevant hazardous substances used, produced or released by the installation. Where the installation has caused significant pollution of soil or groundwater by relevant hazardous substances compared to the state established in the baseline report referred to in paragraph 2, the operator shall take the necessary measures to address that pollution so as to return the site to that state. For that purpose, the technical feasibility of such measures may be taken into account.*

*Without prejudice to the first subparagraph, upon definitive cessation of the activities, and where the contamination of soil and groundwater at the site poses a significant risk to human health or the environment as a result of the permitted activities carried out by the operator before the permit for the installation is updated for the first time after 7 January 2013 and taking into account the conditions of the site of the installation established in accordance with Article 12(1)(d), the operator shall take the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances, so that the site, taking into account its current or approved future use, ceases to pose such a risk.*

*4. Where the operator is not required to prepare a baseline report referred to in paragraph 2, the operator shall, upon definitive cessation of the activities, take the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances, so that the site, taking into account its current or approved future use, ceases to pose any significant risk to human health or the environment due to the contamination of soil and groundwater as a result of the permitted activities and taking into account the conditions of the site of the installation established in accordance with Article 12(1)(d).*

- f) When necessary, the **monitoring requirements for soil and groundwater**. This condition derives from Article 14(1)(e) which requires permits to include “appropriate requirements for the regular maintenance and surveillance of measures taken to prevent emissions to soil and groundwater pursuant to point (b) and appropriate requirements concerning the periodic monitoring of soil and groundwater in relation to relevant hazardous substances likely to be found on site and having regard to the possibility of soil and groundwater contamination at the site of the installation”.
- g) In the case of an incineration or co-incineration plant:
  - a. Waste treated by the plant, when listed in the European Waste List
  - b. The emission limit values regulated for these types of plants.

It is clear that the implications and dimensions of those conditions to be included in a permit by this expeditious update [such as those referring to incidents and accidents, or the consequences of the failure to comply with permits conditions or the baseline report on groundwater and soil pollution, or the measures to apply in case of anomalous functioning, or the monitoring requirements for soil and groundwater] are conditions which require the participation of the public concerned in the sense of the Aarhus Convention and not only the operator of the facility. However, the Spanish Law automatically excluded public participation for all these updates.

**The subject matter of this communication relates to how the provisions of the Aarhus Convention regarding public participation have been reflected for the update of the existing permit regulated in the 1<sup>st</sup> Transitional Provision of the Spanish IPPC Law, for those activities listed in Annex I of both IPPC Law and RD 815/2013, in relation to Annex I of the Aarhus Convention.**

While the reviewing of permits, as regulated in articles 16 and 25 of IPPC Law and article 16.4 of RD 815/2013 do include a public participation procedure reflecting the obligation of submitting the information to the public, prior to its approval by the competent authority; it is clear that the updating of these permits as regulated in 1<sup>st</sup> Transitional Provision of IPPC Law, does not require public participation whatsoever. In fact, according to its paragraph 2, the public will have access to the permit, once is it already updated and available on the Official Gazette of the concerning Autonomous Community.

This lack of public participation is contrary to the CJEU ruling regarding the need for public participation in EU Law, and therefore, for the national transposing law, to be aligned to rules on public participation of the Aarhus Convention. In its judgment of 15 January 2013 in case C- 416/10 known as Križan, the Court stated:

*“77. Those rules on public participation must be interpreted in the light of, and having regard to, the provisions of the Aarhus Convention, with which, as follows from recital 5 in the preamble to Directive 2003/35, which amended in part Directive 96/61, European Union Law should be “properly aligned” (Case C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen [2011] ECR I- 3673, paragraph 41). However, Article 6(6) of that convention states that the public concerned must be able to have access to all the information relevant to the decision-making relating to the authorization of activities referred to in Annex I to that convention, including in particular landfill sites receiving more than 10 tonnes of waste per day or with a total capacity exceeding 25 000 tonnes of waste”*

In spite of this, it is clear that 1<sup>st</sup> Transitional Provision of IPPC Law is not properly aligned with the provisions on public participation of the Aarhus Convention, specifically with article 6(10), due to the lack of public participation in the case of updating existing permits.

The consequence of that lack of public participation in the update of existing permits in Spain has been that there have been massive permit update procedures, in order to comply with the due-date of the 1<sup>st</sup> TP but without public participation. For example, in Galicia, in December 2013, the competent authority concluded that it was necessary to update 229 permits and they were “*addressed globally, in order to comply with the due-date provided by the 1<sup>st</sup> Transitional Provision*”<sup>6</sup>.

As a result of this, **permits have been updated without public participation in spite of the nature, implications and significance of the operating conditions to be updated and included in the existing permits.** In order to be updated accordingly, each plant would have to endure a specific and detailed procedure which would have to include the obligation of public participation. However, the procedures were expeditious without any opportunity for public to express its concerns.

#### **IV. Nature of alleged non – compliance**

As explained, this communication relates to a wrong reflection of the provisions of the Aarhus Convention related to public participation in the 1<sup>st</sup> Transitional Provision of Law 16/2002, of 1<sup>st</sup> of July, on Integrated Prevention and Pollution Control. As explained, this Provision has allowed the updating of the operating conditions of existing facilities blocking public participation in all cases.

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<sup>6</sup> <http://www.europapress.es/galicia/noticia-actualizadas-autorizaciones-ambientales-229-industrias-galicia-ellas-ence-elrosa-20131231132042.html>



## V. Provisions of the Convention relevant for the communication

Article 6(1) point (a) of the Aarhus Convention provides that “*Each Party shall apply **the provisions of this article with respect to decisions** on whether to permit proposed activities listed in annex I;*” (the emphasis is ours).

Secondly Article 6 (10) of the Aarhus Convention provides:

*Each Party shall ensure that, when a public authority **reconsiders or updates the operating conditions for an activity** (the emphasis is ours) referred to in paragraph 1, the provisions of paragraph 2 to 9 of this article are applied mutatis mutandis, and where appropriate.*

Paragraph 1 refers to activities listed in Annex I of the Aarhus Convention, which are -in almost identical form- covered by the Annex I of the IPPC Law and of RD 815/2013.

The provisions on public participation of the Aarhus Convention therefore:

- a) Set the **obligation** for public participation to take place in the case of reviewing or updating the operating conditions of an activity. The Kingdom of Spain has breached this obligation, as it has discretionally denied any possibility for public participation when updating of a permit (as provided in 1<sup>st</sup> Transitional Provision of the IPPC Law)
- b) Provide that public participation is to be ensured prior to the taking of a decision by the competent authority. Public access to the updated permit, has only been regulated and allowed once it has been approved by the competent authority and published in the Official Gazette of the concerning Autonomous Community. Therefore, the Kingdom of Spain has also breached article 6(2) of the Aarhus Convention which provides that “*the public concerned shall be informed, [...] early in an environmental decision-making procedure, and in an adequate, timely and effective manner*”.

To ensure the correct interpretation of Article 6 of the Aarhus Convention, the definition of “public concerned” provided in article 2(5) must be taken into account:

*“the public concerned means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, **non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest**”*

Regarding Spain, information and participation prior and during the expeditious update procedure have been exclusively provided to the operator.

Furthermore, the Aarhus Convention Compliance Committee has already interpreted the provisions of Article 6(10) in two cases: Armenia ACC/C/2009/43,

ECE/MP.PP/2011/11/Add. 1, April 2011 para.58 and Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/Add.3, 12 May 2011 paras. 53, 55, 56 and 57. In particular, the Slovakia case provides information which is of great relevance for the present communication:

*“55.(...) Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied “mutatis mutandis, and where appropriate”. In this context, the Committee wishes to stress that, although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.*

*56. The Committee considers that the clause “where appropriate” introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that “access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns” and aiming to “further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment”. Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the present case”.*

**However, the 1st Transitional Provision of the Spanish IPPC Law granted a complete discretion denying any possibility for public participation in the expeditious update of operating conditions.**

The Aarhus Convention Compliance Committee has already stated that although each Party is given some discretion to determine where public participation is appropriate, it does not imply a complete discretion for all cases as the IED provides. In addition, although the clause “where appropriate” is an objective criterion, this has to be seen in the context of the goals of the Convention. However, the lack of public participation in the update of permits under the cases provided in the 1st Transitional Provision of the Spanish IPPC shows that the goals of the Convention are not achieved when they are triggered.

These findings have also been reported in the second edition of the Aarhus Implementation Guide<sup>7</sup> highlighting that Article 6 “can apply, for example, to spatial planning decisions, [...] operating permits, including secondary decisions such as those relating to safety and emissions. Other examples include permits for water or other natural resource use, as well as permits for discharges of pollutants into the water, air or soil.” Further the findings highlight that “the requirements of

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<sup>7</sup> The Aarhus Convention Implementation Guide, second edition 2013

article 6 apply to all decisions to permit activities within the scope of article 6, whether or not a formal licensing or permitting procedure has been established. (the emphasis is ours)<sup>8</sup>. **The implementing guide also makes clear that the public participation is to be guaranteed in all cases when the public authority reconsiders or updates operating conditions for article 6 activities** (i.e. Spanish IPPC Law Annex 1 activities)<sup>9</sup>.

The Aarhus Compliance Committee has made clear that Article 6(10) is to be applied for all administrative procedures relating to the reconsideration of operation conditions for IED activities: **“The administrative procedures relating to the reconsideration of operating conditions for a covered activity require the application of full public participation procedures under article 6.”**<sup>10</sup>

## **VI. Use of domestic remedies or other international procedures**

No domestic procedures have been invoked given that the 1<sup>st</sup> Transitional Provision to the Spanish IPPC Law was introduced by the amending Law 5/2013 of 11<sup>th</sup> of June. The Spanish Law on the Administrative Judicial Review Procedure only allows challenging before an Administrative Court administrative acts and omissions and regulations and normative acts not having the rank of Law (Article 25 of Law 29/1998, of 13<sup>th</sup> of July, regulating the Administrative Judicial Review Procedure). Laws as the one introducing the 1<sup>st</sup> Transitional Provision can only be challenged before the Spanish Constitutional Court when they contravene the Spanish Constitution and can be only challenged by the Spanish President, the Spanish Ombudsman, 50 Members of the Spanish Parliament, 50 Members of the Spanish Senate, the college of the Executive Power of Autonomous Communities and the Parliaments of the Autonomous Communities (Articles 161 and 162 of the 1978 Spanish Constitution). Therefore, there are no domestic remedies available.

No international remedy has been used with the exception of this communication.

## **VII. Confidentiality**

No confidentiality is requested for this communication

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<sup>8</sup> See page 122

<sup>9</sup> See page 124

<sup>10</sup> See page 163 and following of the second edition of the Implementation Guide to the Aarhus Convention

## **VIII. Supporting documentation (copies, not originals)**

- Text of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions.
- Text of the Law 16/2002, of 1<sup>st</sup> July on Integrated Pollution Prevention and Control
- Text of the Law 5/2013, of 11<sup>th</sup> of June, amending the IPPC Law
- Consolidated version of the Law 16/2002, of 1<sup>st</sup> July, including Law 5/2013 amendments
- Royal Decree 815/2013, of 18<sup>th</sup> of October, which approves the Industrial Emissions Regulation and develops Law 16/2002
- CJEU Judgement on case C-416/10, Križan case
- Aarhus Convention Compliance Committee Slovakia case ACCC/C/2009/431
- Text of the above-mentioned press release, regarding the massive update permit process of 229 industries in Galicia.

## **IX. Signature**



Ana Barreira

## **X. Address**

Please send the communication by email AND by registered post to the following address:

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Clearly indicate: "Communication to the Aarhus Convention's Compliance Committee"