

**COMPLIANCE COMMITTEE REGARDING THE FAILURE OF SPAIN TO COMPLY WITH ARTICLE 6  
AND 7 OF THE AARHUS CONVENTION IN THE DEVELOPMENT OF THE NATIONAL  
TRANSITIONAL PLAN FOR LARGE COMBUSTION PLANTS UNDER THE INDUSTRIAL EMISSIONS  
DIRECTIVE**

Next Monday, the 5th of November, Spain must appear before the Compliance Committee of the Aarhus Convention to expose his arguments regarding the possible preadmissibility of a failure of its articles 6 and 7 during the preparation of the National Transitional Plan (NTP) for large combustion plants under the Industrial Emissions Directive (IED).

Such arguments, according what has been argued by the defendant IIDMA (Instituto Internacional de Derecho y Medio Ambiente) in its communication of August 2017, are mainly based in the erroneous description of the NTP as a plan *stricto sensu*. The Aarhus Convention does not include an official definition of the concept of plan but the Implementation Guide on the Convention informally does characterize it as an “instrument of legal nature initiated by a public authority which sets, often in a binding way, the framework for certain categories of specific activities”, with a broad and general scope of action and implementation.

In this sense, it is necessary to clarify that the NTP is one of the three flexibility mechanisms that the Directive 2010/75, on industrial emissions, grants to the large combustion plants under its scope in order to progressively comply with the emission limit values (ELV) included in its article 30 and its Annex V, compelling the Member States to decide and communicate to the Commission which flexibility mechanism they want to embrace. This communication, in the case of the NPT, must be approved by the Commission in the form of a Decisión, and its content is practically limited to the list of Spanish installations that use this mechanism, as well as the relevant calculation of the emission ceilings with respect to the period 2016-2020, bearing in mind that in 2020 all the installations included in the transitional plan must comply with the ELV of the mentioned Annex V. Therefore, this communication, subsequently Decision after the approval of the European Commission, does not develop any action framework for the categories of activities to which it applies to, does not contain strategies nor environmental guidelines or proposals directly enforceable, but it is a European instrument to inform the Commission of the 29 Spanish installations that embrace the gradual individual compliance of the emission limit values legally established in the directive, always respecting the total calculation of the emissions of all the installations together. The government of Spain did not have the margin of discretion when complying with article 30 of the IED; all the precriptions needed to achieve this goal of reducing the pollution observing in a gradual manner with the values of the Annex are described in its wording and in the Executive Decision of the Commission of 10 of February of 2012, and there was no place for ulterior regulatory development of any kind.

In relation to the public participation procedures that the defendant consider mandatory, we would like to explain that until the NTP draft was not approved by the Commission, turning to be in that moment a decision, we did not consider appropriate to submit it to public participation, as the previous texts were not definitive and therefore had no legal value. Latter modifications consisted on excluding installations that decided to comply with other flexibility mechanisms. We also want to stress that, although was not legally mandatory cause, as we

already explained, the NTP's nature is not the same as a plan strictly speaking, we carried out a public participation process for the sake of the public transparency and awareness in order to publicly inform of the installations using this flexibility mechanism; the NTP in fact is still published in the web of the Spanish Ministry of Ecological Transition.

Finally, for information, we would like to point out that the defendant already sued in Spain in relation to this same issue before the Supreme Court, being the case dismissed.

#### Conclusion

As a result of the foregoing we believe that the communication should not be admitted by the Compliance Committee because, in our opinion, it falls in the cause of non admissibility contemplated in the annex of Decision 1/7 "Review of Compliance" Paragraph 20(d) "Incompatible with the provisions of this decision or with the Convention" since the Aarhus Convention does not provide for public participation in this type of procedure.