

Secretary to the Aarhus Convention Compliance Committee  
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Dear Madam,

**Communication to the Aarhus Convention Compliance Committee concerning compliance by Spain in the context of public participation in the preparation of transitional national plans under the Industrial Emissions Directive**

1. I refer to your letter dated 10 October 2017 requesting ClientEarth and IIDMA provide further information on the use of domestic remedies relevant to our communication.

2. I will respond to each question in your letter in turn:

*“1. You state that IIDMA filed a case before the Supreme Court in January 2017, yet in the same paragraph you state has not yet filed the lawsuit due to dilatory manoeuvres by the Ministry. Please clarify which is correct.”*

3. Under Spanish Law it is required that in addition to the acceptance of the Transitional National Plan (**TNP**) by the European Commission, the plan must be approved by the Spanish Council of Ministers.<sup>1</sup> This approval is essential for the TNP to come into force and to have full legal effect. The TNP was approved by the Council of Ministers on 25 November 2016. Therefore, until that date, no legal action could have been taken.

4. According to the Spanish Administrative Judicial Procedure Law,<sup>2</sup> IIDMA had a period of two months to bring a case before the Supreme Court from when the decision was made public. The administrative judicial procedure is as follows:

- (a) Firstly, the complainant must file a statement containing its intention to file a case against the decision.<sup>3</sup> This announcement of intention was filed by IIDMA before the Supreme Court in January 2017 and it is the one referred to in the sentence *“IIDMA filed a case before the Supreme Court in January 2017”*.

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<sup>1</sup> Art. 46(5) of Royal Decree 815/2013, of 18 October, which approves the Regulation of Industrial Emissions and develops Law 16/2002, of 1 July, of integrated pollution prevention and control (*Real Decreto 815/2013, de 18 de octubre, por el que se aprueba el Reglamento de emisiones industriales y de desarrollo de la Ley 16/2002, de 1 de Julio, de prevención y control integrados de la contaminación*, BOE N. 251 of 19.10.2013).

<sup>2</sup> Law 29/1998, of 13 July, regulating the Administrative Judicial Procedure (*Ley 29/1998, de 13 de Julio, que regula la Jurisdicción Contencioso-administrativa*, BOE N. 167 of 14.07.1998).

<sup>3</sup> Art. 46(1) of Law 29/1998.

- (b) Once the Supreme Court accepts this announcement of intention, it will request that the Spanish administration provide the administrative file of the TNP within a period 20 working days.<sup>4</sup> It will also notify any interested parties which may want to appear as co-defendants.<sup>5</sup> This request took place on 14 March 2017 and interested parties were notified the subsequent day.
- (c) After the Supreme Court receives the file from the Administration, it will provide it to the complainant, who then has a period of 20 working days to file the lawsuit.<sup>6</sup> Therefore, under Spanish Law, receiving the administrative file is a necessary requirement in order for the complainant to be able to file the lawsuit.
5. In the present case, the Spanish Administration circumvented the legal requirement of submitting the administrative file within a period of 20 working days. It took more than 3 months to submit the administrative file to the Supreme Court.
6. Furthermore, although the Supreme Court received the file on 16 June 2017, the Administration had not yet notified the Court if there were any interested parties in the procedure. Thus, the Court could not provide the file to IIDMA. This is a clear indicator of bad faith on behalf of the Administration. Delaying the procedure as much as possible increases the possibility that the TNP has expired when the Supreme Court finally issues a judgment, as the TNP will only be in force until 30 June 2020.
7. Thus, at the time of filing the communication to this Compliance Committee, after almost 5 months since the Supreme Court had requested the Administration to send the file and notify any interested parties, IIDMA had not yet received the file. Therefore, IIDMA was not able to file the lawsuit, as indicated by the sentence *"IIDMA has not yet filed the lawsuit due to dilatory manoeuvres by the Ministry"*.

*'2. What is, broadly speaking, the typical timeframe between the filing of an application before the Supreme Court and the issuance of a final judgment?'*

8. According to data from 2016 provided by the General Council of the Judiciary, the body that governs all the judiciary in Spain, the typical timeframe for the Supreme Court to issue a final judgment is approximately 15 months since the start of the procedure.<sup>7</sup>
9. Nevertheless, in this particular case, the Supreme Court will take longer. Firstly, because of the procedural delay provoked by the Administration explained above. Secondly, due to the large number of co-defendants in the case, which could potentially lead to further delays in the procedure.

*"3. You state that "IIDMA's arguments in the lawsuit will not concentrate on the lack of public participation". Please explain why not?"*

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<sup>4</sup> Art. 48, Ibid.

<sup>5</sup> Art. 49, Ibid.

<sup>6</sup> Art. 52, Ibid.

<sup>7</sup> Consejo General del Poder Judicial, *La Justicia Dato a Dato*, Año 2016, (General Council of the Judiciary, Justice Data, Year 2016). Available online at: <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Juzgados-y-Tribunales/Justicia-Dato-a-Dato/>

10. IIDMA filed the lawsuit before the Supreme Court on 25 October 2017. Although the arguments of the lawsuit did not concentrate exclusively on the lack of public participation, this does not mean that they were not included. What IIDMA meant by this, is that there would be several arguments and the 'lack of public participation' argument is just one argument amongst other, larger arguments.

*“4. Do you agree that the possibility to challenge the TNP before the Supreme Court is an available domestic remedy for the purposes of paragraph 21 of the annex to decision I/7? If not, please explain why not.”*

11. As explained above, at the time of filing this communication, IIDMA had not yet received the administrative file from the Administration, making it impossible to file the lawsuit before the Supreme Court. As the dilatory manoeuvres by the Administration were being unreasonably prolonged, this increased the possibilities that the TNP would expire by the time the Supreme Court had finally issued a judgment. Thus, making this venue an ineffective means of redress.

12. In addition, the lack of public participation in the preparation of TNPs is not only a case applicable to Spain but also to a wide number of EU Member States such as Greece, Romania, Poland and Czech Republic. Thus, in case the Supreme Court issued a judgment acknowledging IIDMA's arguments, this would only be applicable to Spain. Therefore, its scope would be too narrow to address an underlying issue, which applies to several other EU Member States that are also in breach of the Aarhus Convention provisions on public participation. A decision from the Compliance Committee would set a precedent, applicable to all parties of the Convention, which would lead them to carry out public participation procedures in similar cases in the future. It is time for all parties of the Convention to comply with it, instead of avoiding its provisions when they see fit.

13. We hope that we have provided sufficient information to help answer the questions you have asked.

Yours sincerely,

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