



REPORT FOR THE AARHUS CONVENTION COMPLIANCE COMMITTEE.

Communication to the Aarhus Convention Compliance Committee concerning compliance by Spain with regard to public participation in the preparation of its transitional national plan under the Industrial Emissions Directive (ACCC/C/2017/159).

BACKGROUND

1. On 3 August 2017 Client Earth and the “Instituto Internacional de Derecho y Medio Ambiente” (IIDMA) filed a communication before the Aarhus Convention Compliance Committee of the United Nations, alleging non-compliance of articles 6 and 7 of the Aarhus Convention by the kingdom of Spain during the approval procedure of the Transitional National Plan (TNP) for Large Combustion Plants (LCP), foreseen in article 32 of the Industrial Emission’s Directive 2010/75/EU (IED).
2. On 10 October 2017 the Aarhus Convention Compliance Committee asked the communicants Client Earth and IIDMA to clarify some issues in relation to the use of domestic remedies during the approval of the TNP. More specifically, explanations were asked about the suit that IIDMA filed before Spanish justice in January alleging, among other things, the absence of a public participation process during its approval. The answer of the communicants was sent in November and included information on the functioning of the Spanish justice, as well as on the deadline and duration of the procedures.
3. On 3 October 2018 the communicants contacted again with the Compliance Committee to inform on the dismissal of the suit by the Supreme Court in Spain, and the intention of filing another one before the Constitutional Court based on the violation of a fundamental right during the procedure that took place before the Supreme Court.
4. On 7 March 2019 the Compliance Committee contacted all the stakeholders again, both the focal point of the Aarhus Convention of the former Ministry of Agriculture, Food and Environment and the communicants, in order to inform them about the celebration of a meeting relative to the admissibility of the communication **PRE/ACCC/C/2017/159**. On 11 March 2019 took place the 63rd meeting of the Compliance Committee of the Aarhus Convention. The communicants, and Spain as a respondent party, were invited to participate by means of audio conference, to give answers to some issues concerning the use of domestic remedies, mainly addressed to the communicants, namely:
 - (a) The Committee asked for confirmation about the communicants applying for amparo and they confirmed they indeed applied for it on 8 November 2018.
 - (b) In case the appeal is granted, the Committee wanted to know if the sentence will put remedy to the non-compliance alleged in the communication. IIDMA informed that the appeal for amparo was filed because they considered that article 14 of the Spanish



Constitution was violated as the Supreme Court did not offered enough legal foundation to support the dismissal of the previous administrative appeal, as well as to dismiss the nullity of the sentence subsequently required by IIDMA. Hence, the amparo appeal what has denounced is a violation of a fundamental right, not the legality of the TNP, and in consequence a granting of the amparo would lead to an obligation by the Supreme Court of issuing another sentence but without reconsidering the substance of the appeal, that is, without any possibility of remedying the presumed non-compliance of the TNP, possibility that was exhausted with the Supreme Court's sentence.

(c) The Committee asked which is normally the deadline for the Constitutional Court to issue its sentence and the communicant informed that an amparo procedure can last up to 5 years.

5. Once the questions were answered by the communicant, the Compliance Committee asked Spain if there was any declaration to be made on the commented issues; Spain answered that they had nothing to declare apart from the fact that they ignore up to this date about the amparo procedure initiated by the communicant. The Compliance Committee closed the session informing both parts that the next Friday, 15 March at 17.15, a decision will be taken on the admissibility or non-admissibility of the communication presented by IIDMA against the kingdom of Spain.

6. On 22 March 2019 the Compliance Committee informed Spain on the admissibility of the preliminary determination of the communication filed in 2017, according to paragraph 20 of the annex to the Decision I/7, at the expense of the ulterior decision in relation to the Spanish non-compliances of articles 6 and 7 of the Aarhus Convention. In order to deeply study the matter of substance of the mentioned non-compliances Spain is invited to send the relevant arguments within 5 months, i.e on 22nd of August.

LEGAL FOUNDATIONS

7. The Transitional National Plan, provided in Article 32 of the IED, and optional for member states, has as main objective to comply with the commitments established in the European Union on the reduction of SO₂, NO_x and particulate emissions from large combustion plants. The content of the TNP consists in a list of installations, in particular large combustion installations with a thermal power greater than 50 MW, which are given the possibility of being exempted from compliance with the emission limit values for NO_x, SO₂ and particles set out in Annex V of the IED during the period from 1 January 2016 to 30 June 2020.

8. The TNP contains six chapters and one Annex: the chapters include data of the installations covered by the plan, how the emission ceilings are calculated during the relevant period, as well as the control and monitoring measures of the TNP. The annex contains 5 tables with specific information on each of the facilities covered by the TNP, as well as the calculated ceilings for each of the years covered by the Plan.



9. As provided for in paragraph 5 of the aforementioned article, once the TNP is drawn up, it should be submitted to the European Commission for further approval, understanding this is approved if within twelve months the Commission has not raised any objection; once approved, any amendment must also be communicated to the Commission within six months.

10. Spain made use of this flexibility mechanism developed by European legislation and opted to draw up a TNP, a decision that is expressly included in the technical legislation transposing the IED, by means of Royal Decree 815/2013, of 18 October, approving the Regulation on industrial emissions and the development of Law 16/2002. In addition to the approval by the executive body of the EU, the Royal Decree established that in the case of Spain, the TNP had to be approved by the Council of Ministers.

11. The communication filed by IIDMA considers the, during the approval procedure of the TNP, Spain has infringed articles 6 (paragraphs 3, 4 y 8) and 7 of the Aarhus Convention, namely:

“Article 7. PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT. Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.*

**3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.*

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation”.

12. To this respect, we would like to point out that the communication filed by Climate Earth and IIDMA is mainly based in the incorrect classification of the National Transition Plan as a plan *stricto sensu*. The Aarhus Convention does not include an official definition of the concept of a plan, but its Implementation Guide informally asserts that a plan “has the legal nature of (a) a general act (often adopted finally by a legislative branch), (b) initiated by a public authority, (c) which sets, often in a binding way, the framework for certain categories of specific activities....”, with a very broad scope and implementation framework.

13. In this sense, it is necessary to clarify that the TNP is one of the three mechanisms of flexibility that the Directive 2010/75, of industrial emissions, provides to the large combustion



plants under its scope, offering this possibility in order to comply with the emission limit values set in article 30 and Annex V in a progressive manner. Member states are compelled to decide and communicate to the Commission which mechanism of flexibility are they going to apply. This communication, in the case of the NPT, must be approved by the Commission in the form of a Decision, 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 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, nor had the choice of several options or measures, as a plan *stricto sensu* would offer. 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.

14. At the moment of the presentation of the communication before the Compliance Committee of the Aarhus Convention, the calendar of approval of the TNP had been the following:

- (a) 21 December 2012: the initial proposal of the National Transition Plan was sent to the Commission,
- (b) 17 December 2013: the European Commission, through the Decision 2013/799/UE, rejected the Spanish proposal for not complying with the requirements of the IED,
- (c) October 2014: a second version of the TNP was sent to the European Commission,
- (d) 29 May 2015: the European Commission accepts the second version of the TNP by means of Decision C(2015)3525,
- (e) 20 November 2015: a modification on the list of installations is communicated to the Commission, basically consisting in the removal of three installations that decided to use another flexibility mechanism, forcing us in consequence to send a third version of the plan that was approved by the Commission on March 3rd 2016,
- (f) 4 to 21 December 2015: a consultation and public participation procedure for the third version of the TNP is done, together with an announcement in the web site of the Ministry of Agriculture, Food and Environment,



(g) 25 November 2016: the Council of Ministers of Spain approves the TNP,

(h) 16 December 2016: Spain informs the Commission about another modification of the plan though which two large combustion plants are removed from the list, being this approved on April 27th 2017.

15. As we can see, the first draft on the TNP was rejected by the Commission within the deadline of one year that the IED gives for the raising of objections. The reason was that the plan did not comply with the requirements set in the directive for the elaboration and implementations of the Transitional National Plan.

16. Spain proceeded to rectify the non-compliances and sent the second version of the TNP in October 2014, which was accepted by the Commission seven months later. Almost immediately to this approval, the Industrial Environment Area of the Spanish Ministry of Agriculture, Food and Environment was informed about the intention of three installations included in the list of the second version of using other flexibility mechanism of the ones foreseen in the IED, so that, within the 6 months that article 32.5 provides for the modification of the plans, the Ministry sent a new list of installations with the mentioned modifications. Is this last version the one that is submitted to public participation, because is the one that was considered more updated. The exclusion of the three installations left the second draft obsolete right after its approval by the Commission and therefore, although in principle it was the one to be submitted to public participation. It was decided that it was more appropriate to publish the version including the modifications so the public would receive the updated and definitive information. The Aarhus Convention sets that the public participation must be done when the public can exert a real influence and this would have been difficult if the draft was obsolete and not approved by the Commission.

17. We consider that submitting an obsolete TNP to public participation would have been confusing with regard to information to public and questionably compatible with the provisions of both the IED and the Aarhus Convention.

18. Furthermore, we also want to stress that, although was not legally mandatory cause, as we already explained, the TNP'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 TNP in fact is still published in the web of the Spanish Ministry of Ecological Transition.

19. The public participation process took place from the 4th to the 21st of December, time that has been described as non sufficient by IIDMA. We consider that period reasonable, taking into account that article 6.3 of the Convention does not concrete any timeline, leaving it to the choice of the member states ("...reasonable time-frames for the different phases, allowing sufficient time for informing the public..."), and the nature and content of the TNP. We can conclude then that the public participation process was carried out according to the Aarhus Convention and the Law 27/2006, of 18 July, regulating the rights to access to information, public participation and



access to justice on environmental matters, which is the transposition to our legal system of the Convention.

20. During the public information on the Spanish Ministry website no comments were received.

21. In addition to the publication in the website, during the process of elaboration of the TNP, comments and remarks were received from the following sectors and stakeholders:

(a) The Environmental Advisory Council: comments from Comisiones Obreras (CCOO) and Greenpeace, whose comments were made in conjunction with the Instituto Internacional de Derecho y Medio Ambiente (IIDMA).

(b) Ministry of Industry, Energy and Tourism.

(c) Ministry of Health, Social Services and Equality.

(d) Audience to the Autonomous Communities: comments from Castilla y León, Islas Baleares, Cataluña and Galicia.

(e) Audience to the industrial sectors: comments from Acogen, CEOE, Gas Natural Fenosa Generación, UNESA, Viesgo and Endesa.

(a) Report from the Technical General Secretary of the Ministry of Agriculture, Food and Environment.

(a) Finally, for being a Project that implies the establishment of technical requirements it has to be sent to the European Commission in application to the procedure of information on legal and technical matters and on regulations relative to the services to the information society, foreseen in the Directive 98/34/CE of the European Parliament and the Council, of 22 June.

CONCLUSIONS

22. From the Industrial Environment Area of the Ministry for the Ecological Transition we would like to stimulate reflection on the following issues that we consider important when taking a decision on this case:

(a) Taking into account that, according to the Implementation Guide for the Aarhus Convention, the aim of this kind of procedure is the remediation, and assuming that this (a public participation process) already took place, it does not have much sense to ask for a remediation that has been already done.



(b) The suit filed by the communicant to this respect in the single administrative instance of the Supreme Court has been dismissed, as well as the nullity process subsequently requested. Such an access to justice reaffirms the importance of the joint implementation of the three pillars of the Aarhus Convention, in a way that is accomplished the requirement of this third pillar of providing adequate, real and effective instruments so that the intervention before the administrative bodies and the courts is effective and can serve to the fundamental objective of protecting the collective legal interest of the environment. This objective in our country is framed in article 45 of the Constitution, together with the right to an effective judicial protection (article 24.1) that demands that the defence of the legitimate rights and interests can be enforceable in an effective manner before independent judges and tribunals.

23. In view of all that has been exposed, it is opinión of this Area that the Compliance Committee should reject the communication filed by IIDMA, taking into account that the procedure of public participation and information of the Transitional National Plan has been done in accordance with the Aarhus Convention, once it was approved by the European Commission, and in line with the provisions established in the already mentioned article 32, paragraphs 5 and 6, of the Industrial Emissions Directive.

Madrid, August 2, 2019



LIST OF ANNEXES ATTACHED

ANNEX I: TRANSITIONAL NATIONAL PLAN FOR LARGE COMBUSTION PLANTS OF THE KINGDOM OF SPAIN. ANNEX. (refers to paragraphs 7 to 13).

ANNEX II: DECISIONS OF THE COMMISSION ON THE TRANSITIONAL NATIONAL PLAN. (refers to paragraphs 14 to 16).

- **ANNEX II.1: DECISION ON THE APPROVAL OF THE TNP OF 29 MAY 2015**
- **ANNEX II.2: DECISION OF MODIFICATION OF THE TNP OF 3 MARCH 2016**
- **ANNEX II.3: DECISION OF MODIFICATION OF TNP 27 APRIL 2017**

ANNEX III: CERTIFICATION OF PUBLIC PARTICIPATION PROCESS. (refers to paragraph 19 and 20).

ANNEX IV: CERTIFICATE OF HEARING TO THE ENVIRONMENTAL ADVISORY BOARD (CAMA). COMMENTS RECEIVED FROM GREENPEACE E IIDMA (refers to paragraph 19 and 21).

- **ANNEX IV.1: CERTIFICATE OF HEARING TO THE ENVIRONMENTAL ADVISORY BOARD (CAMA).**
- **ANNEX IV.2: COMMENTS RECEIVED FROM GREENPEACE E IIDMA**

ANNEX V: DOCUMENTS REGARDING THE LEGAL SUIT FILED BY IIDMA IN SPAIN (refers to paragraph 22).

- **ANNEX V.1: DEMAND OF THE INSTITUTO INTERNACIONAL DE DERECHO Y MEDIO AMBIENTE (IIDMA) BEFORE THE SUPREME COURT**
- **ANNEX V.2: SENTENCE DISMISSED BY SUPREME COURT**