ClientEarth

30 November 2021

Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

Dear Ms Marshall

ACCC/C/2017/148 – Factual update

1. We would like to express our appreciation for the Committee's continuous work on this communication. Ahead of the upcoming hearing at the 73rd meeting of the Committee, we would like to submit:

   (a) a succinct update of the factual basis of the original Communication from the Public ACCC/C/2017/148 Greece (dated 3.8.2017, hereinafter, "**the Communication**");

   (b) a succinct review and update of the factual claims of the Response to the Communication from the Party concerned (dated 16.2.2018, hereinafter, "**the Response**").

2. This submission does not reply to any of the legal claims made by the Party concerned but is solely meant to provide the Committee with a factual update to facilitate the hearing at the upcoming 73rd meeting.

1 UPDATE OF THE FACTUAL BASIS OF COMMUNICATION ACCC/C/2017/148 GREECE

3. According to the communication ACCC/C/2017/148, the granting of an administrative permit (Special Provisional Operational Permit, acronymized there as SPOP) to a specific operator by special, tailor-made legislation, in conjunction with the limitations of judicial review in Greece, violates article 9(2) and (4) of the Aarhus Convention (hereinafter, the Convention). Please note that the SPOP is mentioned interchangeably as Provisional License of

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Operation or Provisional Unified Operating License in the official translation attached to the Communication, and as Temporary Integrated Operation Permit or Integrated Operation Permit in the Response.

1.1 Further extension of the SPOP in 2016 and 2020

4. In our original Communication, we have included a table, which shows the successive SPOP extensions. For the convenience of the Compliance Committee, we have updated the table in Annex A. The extensions that have superseded the original Communication are highlighted in red. We have also included the dates on which Aarhus Convention, and other relevant provisions of EC law, entered into force according to Greek and EU law (in blue). An unofficial translation of the new extensions is provided in Annex B (points 1 and 2).

5. The table demonstrates that the extensions are punctual and consistent. Renewals take place roughly every two years, shortly before the expiration of the previous extension, in order to provide a continual coverage for the operation of an unspecified number of installations, singled out only by their operator. As a whole, this "temporary" regime already lasts for almost 22 years, with no end in sight.

1.2 Further legislative extensions for the environmental permits

6. In our original Communication, we described the current non-transparent practice of extending the duration of environmental permits of PPC's lignite-fired power plants (paras 29 to 35; the environmental permits are acronymized as AEPO in the Response). There, we drew your attention to the extension, by legislative fiat and without public participation, to 10 years of all environmental permits in force invariably. Recent Greek legislation has further extended the duration of all environmental permits in force to 15 years: an unofficial translation of the relevant provision is included in Annex B (point 3). Therefore, the lifetime of all permits has been further extended for 5 more years.

7. As the ACCC has recently noted, "*the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions*". Moreover, the ACCC has made clear that "*except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of duration to be subject to the provisions of article 6… an extension of an activity's duration by five years is by no means minimal*". Accordingly, the extension of environmental permits by legislation is an "*update [of] the operating conditions*" in the sense of Art. 6(10) of the Convention, and a "decision" or "act" in the sense of Art. 9(2) of the same Convention.

8. In our original Communication, we highlighted the relevance of IED Directive's permit regime (points 10, 12). IED's "permit", irrespective of the modalities of its transposition into Greek law, is a "decision" or "act" in the sense of Art. 9(2) of the Convention. In this respect, it is of note that recent Greek legislation grants an extension of "up to two years" to all IED operators, who have merely submitted a report on BAT compliance to the authorities, the obligation to file the report is enshrined in Art. 62 IED as transposed into Greek law in Art. 53 of 36060/2013 JMD. However, according to applicable law (Art. 21(3) of the IED

directive), authorities are required to reconsider all the permit conditions, if necessary, update them. Here, the extension is “automatic” : no explicit administrative act, reasoned statement, “reconsideration” (in the sense of Art. 21 of the IED Directive, or 6(10) of the Convention] or ‘update” (in the sense of Art. 6(10) of the Convention) is required. The relevant provision is included in Annex B (point 4). This amendment replaces the permitting procedure with a reporting requirement, even though these two obligations serve distinct and serving different purposes, thus sidestepping once again the relevant legal requirements.

9. The Communicants emphasize the concerted impact of these developments. The environmental permit (AEPO) extension (para. 4, above) circumvents the requirement of public participation and access to justice during the “update of operating conditions”, in the sense of Art. 6(10) of the Convention. The tacit extension of the IED permit (para. 6, above) bypasses the requirement of public participation and access to justice of the IED Directive – itself protected by Arts 3(1) and 6(1)(a) (in conjunction with Annex I, point 20) of the Convention. Finally, SPOP’s granting and habitual extension (paras. 2 to 4, above) by statutory law ensures that the operation of covered installations is not subject to early and effective public participation and access to justice, in contravention of Arts 6 and 9 of the Convention. The hollowing out of public participation and associated access to justice is complete.

2 REVIEW AND UPDATE OF THE FACTUAL CLAIMS OF RESPONSE FROM THE PARTY CONCERNED

10. For the convenience of the Compliance Committee, we will discuss the factual claims of the Response sequentially (chapter by chapter).

2.1.1 Main points of national environmental permitting system (environmental impact assessment process, pp. 2-6)

11. As far as it goes, the description of the Greek EIA law (i.e. law 4014/2011) is correct. However, it contains glaring omissions. A basic omission is the extension, by legislative fiat and without public participation, of all environmental permits in force to 15 years (Annex B, point 3). Another basic omission is the extension, by legislative fiat and without public participation, of IED permits, irrespective of the precise legal form they have assumed in Greek environmental law (para. 7, above; Annex B, point 4).

12. Taken together, these omissions compromise the assertion of the Response that the “legislative environmental system” is “comprehensive and integrated” and that “both Law 4014/2011 and Joint Ministerial Decision 36060/2013 contain explicit provisions to ensure public participation in the environmental licencing process as well as access to justice for environmental issues resulting from the operation of installations/plants covered by the IED” (p. 5). Indeed, an accurate and comprehensive description of any legislative framework should include all relevant provisions.

13. The main point, to which we will return, is that SPOP regime makes the application of above EIA law irrelevant, supererogatory or optional.

14. The subchapter concludes with a special note, stating that the environmental permit (AEPO) "like any such act, can be directly challenged in the national courts for breach of the requirements of its adoption, on the basis of the procedural framework…" (p. 6). This is also correct, but beside the point: the Communication does not claim that an environmental permit, issued in accordance with the applicable administrative environmental assessment process described in the Response, cannot be challenged. The Communication instead claim that the SPOP is unlike "any such" act, i.e., unlike the typical administrative permit, it is a provision of statutory law, and as such it is constitutionally excluded from direct judicial review.

2.2 The permitting regime of production and operation of power plants

15. The Response makes an incorrect factual claim when it states that "PPC plants have been provided from the very first moment with environmental permitting (AEPO) of Law 4014/2011 specialized for each plant" must be rejected.

16. In fact, recently (6 February 2019), the highest administrative court in Greece (Council of State) has ruled that the 2006 environmental permit of the Megalopolis A power plant has expired on September 2016 at the latest. As a result, the Party illegally continued to issue other permits based on the assumption that it remained in force (Council of State 1606/2019).

17. The judicial review was initiated by ClientEarth and WWF Greece. The Claimants sought the annulment of the 2017 "update and modification" of the 2006 environmental permit. The party concerned claimed that, in accordance with the aforementioned provisions, the 2006 permit was "tacitly extended" when the operator (PPC) submitted its update request and supporting documentation. The Court accepted the claim, arguing that no environmental permit can be tacitly extended more than years – i.e., the "standard" duration of environmental permits issued in accordance with ordinary administrative procedure. Accordingly, no "update and modification" was possible in 2017.

18. Unfortunately, as Annex A shows, at least two more SPOP extensions have been approved by Parliament since that date (September 2016).

2.3 The complainants' allegations in particular- national authorities' refutations

19. The Party goes into great lengths to argue that certain highly polluting lignite-fired power plants are equipped with an IED permit (pp. 9-10), and that the Communicants have repeatedly sought the judicial review of similar permits. However, as it was stated in para. 14, above (as well as paras 37-48 of the Communication), the Communication does not claim that an environmental permit, issued in accordance with the applicable administrative environmental assessment process described both in the Response and the Communication, cannot be challenged. It argues that SPOP cannot be challenged, despite the fact that it falls under 9(2) and 9(4) of the Convention, and should be accordingly subject to review of its procedural and substantive legality.

20. Finally, the Response wrongly claims, in reference to Acheloos river case, that "WWF Hellas, one of the complainants…appealed to the Council of State against the law" (meaning, the "formal" statutory law) "approving the environmental terms of the diversion of the upper Acheloos river and its appeal was actually accepted…".

21. The Response refers to Council of State (Plenary Session) 26/2014, which was decided after a preliminary reference to the Court of Justice of the European Union (CJEU) (see C-43/2010, and esp. paras. 30-40, for a description of the dispute of the main proceedings). One of the objects of this challenge was the ratification by an act of national legislation of the "environmental specifications applicable to the construction and operation of the works associated with that project", after their previous judicial annulment (see, esp., para. 38). The Council Of State referred, inter alia, the following question to the CJEU: "for the purpose of … Directive 85/337/EEC [(the old EIA Directive)] …, does an [EIA] which relates to the construction of dams and the transfer of water and which was placed for approval before the national parliament after the annulment by a judicial decision of the measure by which it had previously been approved and in respect of which the publicity procedure had previously been observed, without that procedure being observed anew, meet the requirements of Articles 1, 2, 5, 6, 8 and 9 of that directive regarding informing the public and public participation?" (sixth question).
22. In accordance with the CJEU's judgement (paras 76-91), the Council of State confirmed that Art. 1(5) of Directive 85/337 (today, Art. 2(5) of Directive 2011/92) was not complied with. However, and despite the fact that petitioners asked the Court to do so, it did not annul the relevant act of national legislation. It annulled all administrative orders, explicit or not, that were issued in compliance with that legislation. Therefore, the Party's claim that it is possible to annul a provision of national legislation is incorrect.
23. In addition, the Party concerned has never claimed that the issuance and the extension of SPOP's by an act of national legislation is an application of Art. 2(5) of Directive 2011/92. If this were the case, it is incumbent upon it to demonstrate also that "the objectives of" the Directive "are met" (Art. 2(5)(a) of Directive 2011/92).

Yours sincerely,

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ANNEX A

Date of entry into force	Law that granted/extended the SPP and SPOP and other relevant legislation on access to justice	Details
22/12/1999	Law 2773/1999, Article 42(1)	PPC is granted a **SPP** to "maintain the operation" of all the power plants that were either operating or being constructed at the time the law was published (i.e. for 22 plants in 8 lignite power stations; now 16 plants in 7 lignite power stations).
12/09/2001	Law 2941/2001, Article 8(5)	Amendment of Law 2773/1999 Article 42(1). The plants that held the SPP were also granted a **SPOP** until 31/07/2005
19/08/2005	Law 3377/2005, Article 24(1-4) (Annex 11 of Communication)	**Extension** of the SPOP granted by Law 2941/2001, until 31/12/2008. Any **new power plants** that were given production permits after 24/01/2002 are also given a SPOP until 31/12/2008.
28/01/2009	Law 3734/2009, Article 33(2) (Annex 12 of Communication)	**Extension** of PPC's SPOP to 31/12/2013
31/12/2013	Law 4223/2013, Article 55 (5) (Annex 13 of Communication)	**Extension** of PPC's SPOP to 31/12/2015
24/12/2015	Act of Legislative Nature 24/24-12-2015 National Gazette A 182/24-12-2015, Article 9 (Annex 14 of Communication)	**Extension** of PPC's SPOP to 31/12/2017
15/02/2016	Law 4366/2016, Article First (Annex 15 of Communication)	**Validation** of the Act of Legislative Nature (Emergency Act) 24/24-12-2015 National Gazette A' 182/24-12-2015, Article 9; extension to 31/12/2017 confirmed by ordinary, non-emergency legislation
22/12/2017	Law 4508/2017, Article 31(1-2) (Annex B)	**Extension** of PPC's SPOP to 31/12/2019
3/12/2019	Law 4643/2019, Article 32(1-2) (Annex B)	**Extension** of PPC's SPOP to 31/12/2021

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ANNEX B – Unofficial translation of recent legislative permits

1. Article 31(1) to 31(2) of Law 4508/2017 (Official Gazette A 200) is phrased as follows:

“Article 31

Extension of the Single Provisional Operating Permit for PPC S.A. and PPC Renewables S.A. power plants

1. The terms of validity of article 24 of law 3377/2005 (Official Gazette A 202), as replaced by article 33, par. 2 of law 3734/2009 (A 8), article 55, par. 5 of law 4223/2013 (A 287) and article 9 of article first of law 4366/2016 (A 18) are extended as follows:

(a) The term of validity of the Single Provisional Operating Permit of paragraph 1 is extended to 31.12.2019 for all installations of PPC S.A. which, at the time this law enters into force, are subject to its Single Production Permit.

(b) The term of validity of the Single Provisional Operating Permit of paragraph 2 for installations of which the individual production permit has been issued between 24.1.2002 and the entry into force of the present law, and are still in operation, is extended until 31.12.2019.

(c) The term of validity of paragraph 3 is extended until 31.12.2019.

2. The provisions of paragraph 1 are applicable to all wind parks have been transferred from PPC S.A. to PPC Renewables S.A., and for which the application of article 24, paragraph 4 of law 3377/2005 has not been submitted.”

Note: the mention of “paragraph 1”, “paragraph 2” and “paragraph 3” in points (a) to (c) refers to the original distinctions of article 24 of law 3377/2005. “Paragraph 1” installations are the PPC S.A. power plants which were subject to SPOP as of 31.12.2015. “Paragraph 2” installations are the PPC S.A. and the PPC Renewables S.A. installations, for which the individual production permits have been issued between 24.1.2002 and the “entry into force” of the present law (apparently, these plants have an individual production permit, but they lack other necessary permits). “Paragraph 3” installations are power plants which are parts of “small isolated systems” and “micro-isolated systems” in the sense of art. 2 (points 26 and 27) of Directive 2009/72 concerning common rules for the internal market in electricity (no longer in force). The object of the “application of article 24, paragraph 4” is the submission of all the necessary permits and documents, which would allow the full regularization of all the power plants covered by the provision.

2. The phrasing of article 32(1) to 32(2) of Law 4643/2019 (Official Gazette A 193) is identical. The only difference is the extension of the terms of validity of paragraph 1 [(a) to (c)] to 31.12.2021.

3. Article 1(1) and 1(2) of Law 4685/2020 (Official Gazette A 92) replaces article 2(8)(c) of Law 4014/2011, the official translation of which is included in Annex of the Communication. For

the convenience of the reader, the official translation of the original art. 2(8)(c) included in the Communication is as follows:

“c. The term of the EIA’s issued at the time of publication of this law is extended until the completion of ten years from issuance thereof provided the data on the basis of which they were issued have not materially changed.”

The provision is replaced by article 1 of Law 4685/2020 as follows:

“Article 1

Term of validity of environmental permit (AEPO)

1. Cases (a) and (b) of article 2, paragraph 8 of law 4014/2011 (Official Gazette A 209) are replaced as follows:

“8.a. The term of validity of the environmental permit (AEPO) is 15 years, provided the data on which is based have not changed…”

2. The present article applies also to environmental permits in force at the time of publication of the present law.”

Note: the “time of publication of the present law” (i.e., law 4685/2020) is 7.5.2020.

4. Article 109(1) of Law 4821/2021 (Official Gazette A 134) is phrased as follows:

“Article 109

Treatment of delays in the environmental permitting of large industrial installations

1. Installations of Annex I of Joint Ministerial Decree 36060/1155/E.103/2013 (Official Gazette B 1450), of which the environmental permit (AEPO) has not been modified in accordance with the relevant BAT conclusions and article 12(3) of the aforementioned Decree, and the operator of which has submitted a request for the modification or the update of environmental permit (AEPO) or the relevant compliance reports in accordance with article 3(10) of the Decree, continue to operate for up to two years from the date of publication of the present law in accordance with their compliance reports, so as their operation remains compliant with the Decree.

Note: Joint Ministerial Decree 36060/1155/E.103/2013 has transposed into Greek law Directive 2010/75. Article 12(3) of the Decree is equivalent to article 15(3) of the Directive: this article instructs the competent authority to set emission limit values ensuring that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques laid down in the decisions on BAT conclusions. Article 10(3) includes the definition of best available techniques. The provision, essentially, allows the Annex I installations to “continue to operate” without an environmental permit update, if they have merely submitted the required documentation (a “request” or a “compliance report” demonstrating that the operation of the installation is in accordance with the Directive).