



## STATEMENT FOR THE AARHUS CONVENTION COMPLIANCE COMMITTEE ON Communication 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 3rd 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 10th 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 lawsuit 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 3rd 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 7th 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 11th March 2019, the 63rd meeting of the Compliance Committee of the Aarhus Convention took place. 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’ (constitutional protection) and they confirmed they indeed applied for it on 8th 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 offer enough legal basis 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 denounced 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 other than the fact that they did not have previous knowledge, of the amparo procedure initiated by the communicant. The Compliance Committee closed the session informing both parts that on Friday, 15th March, a decision would be taken on the admissibility or non-admissibility of the communication presented by IIDMA against the kingdom of Spain.

6. On 22nd 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.

7. On 1st February 2024 the Compliance Committee sent a letter to the communicants with the aim to inform that, at its eighty-second meeting (Geneva, 20th–23rd February 2024), the Committee would consider how to proceed with the concerned communication, as well as to invite to provide, where appropriate, an update regarding their allegations.

8. On 15th February 2024 the Communicants responded to the requests made by the Compliance Committee without providing any additional allegations.



9. On 20th February 2024 Spain attended the 82nd meeting of the Compliance Committee.

## STATEMENTS

10. From this National Focal Point, after consulting with the Industrial Environment Area of the Ministry for the Ecological Transition and the Demographic Challenge, we would like to stimulate reflection on the following issues that we consider important when taking a decision on this case:

(a) The communication filed by Climate Earth and IIDMA is mainly based in the incorrect classification of the TNP 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 considers 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. The TNP must be approved by the European Commission in the form of a Decision and its content is practically limited to the list of Spanish installations that use this mechanism of flexibility provided by the Industrial Emissions Directive (IED); it does not develop any action framework for the categories of activities to which it applies to, it does not contain strategies nor environmental guidelines or proposals directly enforceable, but it is rather a mere instrument to inform the Commission of the Spanish installations that are included in 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 as a whole. The government of Spain did not have any margin for 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 prescriptions 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 conclusion, **the TNP can not be considered as a plan in the sense of the Aarhus Convention.**

(b) 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. 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 after 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 a different flexibility



mechanism, not foreseen in the IED. For this reason, 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. Logically, it was this third and last version the one that was submitted to public participation, because it was **the most updated one**. The exclusion of the three installations left the second draft obsolete right after its approval by the Commission and therefore, it was more appropriate to publish the final version including the last 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 (2nd draft) or not yet approved by the Commission (1st draft); we consider that submitting an obsolete TNP to public participation would have been confusing with regard to the quality of the information provided to the public and questionably compatible with the provisions of both the IED and the Aarhus Convention.

(c) The public participation process took place from the 4<sup>th</sup> to the 21<sup>st</sup> of December 2015 making the TNP available to the public in the Spanish Ministry website. We consider that period reasonable, taking into account the above-mentioned nature and content of the TNP and considering that article 6.3 of the Convention does not set any specific timeline, leaving it to the choice of the member states (“... *reasonable time-frames for the different phases, allowing sufficient time for informing the public...*”).

(d) During the public information period on the website no comments from any of the communicants were received. However, during the process of elaboration of the TNP, comments and remarks were received, and were taking in due account, from the following sectors and stakeholders:

- 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).
- Ministry of Industry, Energy and Tourism.
- Ministry of Health, Social Services and Equality.
- Audience to the Autonomous Communities: comments from Castilla y León, Islas Baleares, Cataluña and Galicia.
- Audience to the industrial sectors: comments from Acogen, CEOE, Gas Natural Fenosa Generación, UNESA, Viesgo and Endesa.
- Report from the Technical General Secretary of the Ministry of Agriculture, Food and Environment.
- Finally, because it was a Project implying the establishment of technical requirements it had to be sent to the European Commission in application of 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.



## CONCLUSION

11. In view of all that has been argued, we can conclude then that this procedure of public participation and information of the Transitional National Plan has been done in accordance with 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. The public participation process was carried out once the PNT was approved by the European Commission and in line with the provisions established in article 32, paragraphs 5 and 6, of the Industrial Emissions Directive.

12. Even when public participation wasn't mandatory (on account of the TNP's not being a plan *strictu sensu*), Spain did carry out a public participation process for the sake of public transparency and awareness, in order to publicly inform of the installations using this flexibility mechanism. The process was carried out at a time when the public could still influence the final decision and using the latest and most updated version of the TNP.

13. The communicant had a chance to participate in the process and had access to Justice at all stages of the process, as stated by them. Therefore, there was no breach of the rights granted by the Aarhus Convention.

14. It is opinion of this National Focal Point that **the Compliance Committee should close the communication ACCC/C/2017/159**, filed by IIDMA.