

“Case Study: Fisheries, Transparency and Participation”

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1. Introduction: “Endangered Seas” and transparency

In response to its serious concern about the situation that is being created by overfishing in the seas of our planet, the association WWF launched its worldwide “Endangered Seas” campaign, whose aim is to contribute to the protection and restoration of fishery resources. The campaign invites governments, companies, local communities, fishermen and conservation organizations to:

- safeguard fishery resources and marine biodiversity through the establishment of protected marine areas,
- reduce anti-economic government subsidies that support overfishing, and
- create market incentives that favour sustainable fishing.

Among the campaign’s activities related with reducing the subsidies that support overfishing, the terms “transparency and participation” have become key issues in the campaign. Community and State aid which supports unsustainable commercial fisheries plays a decisive role in the promotion of fishing fleets that surpass the capacity of existing fishery resources. This aid leads to situations of fishery overexploitation and unsustainable fishing practices which eventually lead to the disappearance of numerous species and affect marine biodiversity¹.

And yet, despite the decisive importance of these subsidies, the public does not have easy access to information about their approval and there is a lack of adequate systems for public participation in decision-making in this respect. For this reason, part of the WWF’s worldwide “Endangered Seas” campaign is focused on improving “transparency and participation” in relation with aid and subsidies to the fisheries sector. The campaign aims, on the one hand, to make information accessible and to allow a knowledge of the decisive data and aspects of the issue, while on the other hand providing adequate spaces for public participation in decision-making, thus facilitating debate and the adoption of more suitable measures for reducing the negative effects that some subsidies are having on the state of the seas.

In the European Community, the activities of the “Endangered Seas” campaign in relation with the transparency of fishery subsidies involve, on the one hand, the obtainment of information about subsidies in the twelve countries in which WWF has offices, and on the other hand the holding of an international symposium which will focus on analysing the results obtained and on debating proposals to improve the situation.

WWF/Adena is one of the offices that carries the greatest weight in these activities, in recognition of the importance of the Spanish fishing sector in the European Community. Transparency and participation have also been key issues for WWF/Adena since the beginning of its activities in relation with fisheries. Its work in this respect has been focused, first of all, on access to the information necessary to carry out its activities regarding fishery subsidies, and secondly on requesting participation in decision-making processes related with the use of Structural Funds in

¹ WWF Briefing Report on the European "Right to Know" Laws to Accessing Information on Fisheries Subsidies. 2000. FIELD. (Pending publication)

the fisheries sector. These lines of work are based, in the case of access to information, on the existence in the European Community since 1990 of the Directive on Freedom of Access to Information on the Environment², which aims to facilitate public access to all the information in the hands on the administration concerning the state of the environment and measures that may affect this. And in the field of public participation, its work is based on the regulations applicable to the Structural Funds, which since 1993 include the consideration of environmental variables in the use of these funds and invite the participation of social and economic partners in the planning, execution and evaluation of the use of the funds³.

2. Access to environmental information

The availability of information on the state of the environment is necessary in order to guarantee that environment-related decisions are taken in an appropriate way. Access to environmental information is a key element for advancing towards sustainable development, as has been internationally acknowledged:

- Principle 10 of the Rio Declaration⁴,
- 4th and 5th Environmental Action Programme⁵ ⁶, and
- Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁷.

All persons share responsibility for the state of the environment. Without public access to environmental information it is impossible to set up adequate systems for public participation. And without public participation it is not possible to assure the effectiveness of environmental policies, and hence the attainment of sustainable development.

2.1. Legal regulation of access

In the scope of the European Community, the European Parliament in 1985 took the initiative to regulate access to environmental information, and on 7th June 1990

² Directive 90/313/EEC, of June 7, on the freedom of access to information on the environment. OJ L 158, of 23 June 1990.

³ Council regulation (EEC) no. 2081/93 of 20 July 1993 amending Regulation (EEC) no. 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments. Council Regulation (EEC) no. 2082/93 of 20 July 1993 amending Regulation (EEC) no. 4253/88 laying down provisions for implementing Regulation (EEC) no. 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments. And finally, Council Regulation (EC) no. 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds.

⁴ Principle 10 of the Rio Declaration (1992 Earth Summit) establishes that the attainment of sustainability is dependent on three basic pillars: access to environmental information, public participation and access to justice.

⁵ The 4th Framework Environment Action Programme considers the need to regulate free access to environmental information in the European Community.

⁶ The 5th Framework Environment Action Programme, "Towards Sustainable Development", establishes that all actors must participate in the attainment of sustainable development.

⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Signed in Aarhus, Denmark, on 25th June 1998. See web site: www.unece.org.

approved the Directive on freedom of access to information on the environment⁸, which obliges public administrations to make available to the public any information on the environment that is requested. Transposition of the Directive was to be effective in the Member States by 31st December 1992 at the latest.

In our country the basic regulation on the right of access to environmental information is established by the Law on Freedom of Access to Information on Environmental Matters⁹, which transposes the aforementioned Directive. Provisions on access to environmental information also exist in Murcia Region¹⁰ and in the Basque Country¹¹.

The State law was recently amended in several aspects, including the appeal procedure following refusal of access¹². It should also be mentioned that in the application of legislation regarding access, particular attention must be paid to the provisions of the Law on the Juridical Regime of the Public Administrations and the Common Administrative Procedure¹³, as well as its recent amendment¹⁴, which is applicable for all that is not regulated by legislation on access to environmental information.

In short, the Law on Freedom of Access to Information on Environmental Matters establishes the following regulation:

- a) Environmental information is understood to be¹⁵: information relating to the state of water, air, soil, fauna, flora, land and natural sites, and the interaction between these elements. Information relating to the activities and measures that affect or may affect the aforementioned elements. And also that relating to plans, programmes and measures for the management and protection of the environment and actions or measures for environmental protection. This information may be found in any format: written, visual, oral, electronic, etc.¹⁶.
- b) Access may be requested by natural or legal persons who are nationals or residents in any of the States comprising the European Economic Space¹⁷, and by the nationals of a State that recognizes the same right to Spanish nationals¹⁸.

⁸ Directive 90/313/EEC, of 7th June 1990, on freedom of access to information on the environment. OJ L 158, of 23 June 1990.

⁹ Law 38/1995, of 12 December, “sobre Libertad de Acceso a la Información en Materia de Medio Ambiente”. BOE no. 297 of 13/12/1995.

¹⁰ Law 1/1995, of 8 March, “sobre Protección del Medio Ambiente en la Región de Murcia”. BOE no. 78 of 3/04/1995.

¹¹ Law 3/1998, of 27 February, “General de Protección del Medio ambiente del País Vasco”. BOPV of 27/03/1998.

¹² Law 55/1999, of 29 December, “sobre Medidas Fiscales, Administrativas y del Orden Social”. BOE no. 312 of 30/12/1999.

¹³ Law 30/1992, of 26 November, “de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común”. BOE no. 285, of 27/11/1992. Correction of errata in BOE no. 23 of 27/01/1993.

¹⁴ Law 4/1999, of 13 January, amendment of Law 30/1992, of 26 November, “de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común”. BOE no. 12 of 14/01/1999. Correction of errata in BOE no. 16 of 19/01/1999 and BOE no. 30 of 4/02/1999.

¹⁵ Art. 2 of Law 38/1995.

¹⁶ Art. 2.1 of Law 38/1995 and art. 2 of Directive 90/313/EEC.

¹⁷ The European Economic Space is comprised by the fifteen Member States of the European Union plus Iceland, Liechtenstein, Norway and Switzerland.

- c) Any public administration that has responsibilities and possesses information relating to the environment is obliged to respond to requests for information, with the exclusion of those bodies that act in the exercising of judicial or legislative capacity¹⁹. Thus, the central administration, the administration of the different autonomous regions, and local administrations are obliged to respond to requests for environmental information.
- d) The applicant can choose the format in which he/she wishes to receive the information²⁰. If the requested information is available in different formats, it will be provided in the format specified in the request for information.
- e) The provision of the requested information may be charged for, applying the corresponding legislation on administrative charges²¹. However, the cost applied may not be unreasonable or suppose an obstacle to access.
- f) The time limit established for the notification of resolutions regarding access to environmental information is a maximum of two months, counting from the date upon which the request is received in any of the registers of the administrative body competent to resolve²².
- g) Access to information may be refused in a series of taxative cases, though the general principle is that of free access to environmental information²³. Access may be excepted when the requested information affects:
- actions, in the exercising of competencies not subject to administrative law, of the State government, autonomous regional governments or local corporations;
 - the investigation of crimes, if the divulging of this information may threaten the protection of the rights and liberties of third parties or the investigations that are being carried out;
 - commercial and industrial confidentiality;
 - national defence, public security or international relations;
 - matters that have been or are subject to judicial or administrative sanctioning procedures, including inquiries or actions of a preliminary nature;
 - intellectual property;
 - the confidentiality of personal data and files;
 - data provided by a third party not under the legal obligation to do so;
 - data whose disclosure could increase the risk of damage to the environment to which it refers.

Access may also be refused, as applicable, when the request:

¹⁸ Art. 1 of Law 38/1995.

¹⁹ Art. 2.2 of Law 38/1995.

²⁰ Art. 5.1 of Law 38/1995.

²¹ Art. 5.2 of Law 38/1995, as amended by Law 55/1999.

²² New art. 4.1, according to the recent reform of Law 55/1999.

²³ Art. 3 of Directive 90/313/EEC.

- implies supplying unfinished documents or data;
- refers to internal communications or deliberations of the public administrations;
- is manifestly unreasonable, or
- is formulated in too general a manner, it being impossible to determine what information has been requested.

When any of the taxative causes is applied to except access to information, and it is possible to separate the parts of the requested information that are subject to exception from the parts that are not, the information which is not subject to exception will be supplied, i.e. the requested information will be partially supplied²⁴.

- h) In the event that access to information is refused, this must be reasoned, i.e. with an explanation of the grounds upon which access is totally or partially refused²⁵. Lack of express resolution generates the effects of positive administrative silence, i.e. in the event of no express resolution, access to information is considered to be granted, as is set out in the Law on the Juridical Regime of the Public Administrations and the Common Administrative Procedure, applicable in this case²⁶.
- i) Total or partial refusal of access to the requested information can be appealed against by means of an appeal to the immediately superior authority, if the body that decrees the resolution has a hierarchical superior. Otherwise it is possible either to lodge an optional request for review or to appeal to the administrative court, as established in Title VII of the Law on the Juridical Regime of the Public Administrations and the Common Administrative Procedure²⁷.

Though recent years have seen very important advances in this field, considerable efforts are still necessary in order to guarantee the correct and fluent exercising of the right to access to environmental information. In November 1999 the Commission, on the basis of the reports delivered by the fifteen Member States, the complaints it had received, and the parliamentary requests and questions dealt with, issued a report on experience gained in the application of the Directive²⁸. Among the most problematic aspects of application of the Directive, mention may be made of the following:

- the definitions of information and of public authorities obliged to respond,
- the lack of adoption of practical arrangements that allow information to effectively be made available,
- the broad interpretation of exceptions,
- non-compliance with the obligation to respond,
- the time limit established for responding to requests,

²⁴ Art. 3.2 of Law 38/1995.

²⁵ Art. 4 of Law 38/1995, as amended by Law 55/1999.

²⁶ Art. 43 of Law 30/1992, of 26 November.

²⁷ Art. 4.3 of Law 38/1995, as amended by Law 55/1999.

²⁸ Commission Report to the Council and the European Parliament on Experience Gained in the Application of Council Directive 90/313/EEC, of 7 June 1990, on freedom of access to information on the environment. COM(2000) 400 final. Brussels, 29.06.2000.

- the acceptance of administrative silence, especially if this is understood as negative administrative silence,
- the procedure for appealing against refusals, which is not always sufficiently quick and cheap, and
- the high cost of some administrative charges applied to persons requesting information.

As the Commission's report underlines, numerous obstacles are detected in the Member States when analysing the experience gained in the application of the Directive. In Spain the following are particularly worthy of mention:

- the lack of information to applicants regarding the body that is competent to supply the information,
- non-compliance with the time limit established for resolving requests,
- the numerous cases of administrative silence that have been detected,
- the difficulty in accessing information in supposedly "sensitive" cases, which are liable to obtain a high level of social response,
- the lack of "available information" on matters in which the competent authority is obliged to compile data and information,
- the broad interpretation of some of the exceptions that are established, without internal criteria regarding interpretation or application, leading to different decisions even within the same department,
- the type of appeal established, and finally
- the difficulties, within the responsible bodies themselves, to adequately provide the services requested or to respond to demands for information. At times the delay in responding or the lack of response is more a question of internal organization, or relationships between bodies with different competencies or territorial areas, than the non-existence of information.

More specifically, some of the problems detected by the Commission with regard to the transposition of the Directive in our country gave rise to the opening of two infringement proceedings by the Commission against Spain, one of which has reached the European Court of Justice, and has been the cause of the recent amendment of the Law on Freedom of Access to Environmental Information in December of last year²⁹.

2.2. Future development of the regulation

As a result of the above report prepared by the Commission on experience gained in the application of the Directive, and the ratification process of the Aarhus Convention, the Commission has presented a proposal for the reform of the Directive³⁰. The objective of this proposal is:

- to correct the deficiencies detected in the practical application of the Directive,

²⁹ The aforementioned Law 55/1999, of 29 December, "sobre Medidas Fiscales, Administrativas y del Orden Social".

³⁰ Proposal for a Directive of the European Parliament and of the Council relating to public access to environmental information. COM(2000) 402 final, of 29.06.2000.

- to adapt access to environmental information to the contents of the provisions of the Aarhus Convention,
- to adapt the Directive to technological advances and thus give rise to a “second generation” Directive which takes into account current systems for the creation, collection, storage, transmission and dissemination of information.

The proposal supposes incorporating, among others, the following changes into the current system:

- a) A more exhaustive and explicit definition of the concept of environmental information, which clearly includes³¹: emissions, discharges and other releases into the environment, as well as information relating to genetically modified organisms. Express reference is also made to human health and security insofar as these are or can be affected by the state of the environment. Finally, it also incorporates the definition of cost-profit analyses and other economic analyses used in the framework of activities and measures that affect or can affect the environment.
- b) With regard to the authorities responsible for supplying environmental information, the expression “*with responsibilities for the environment*” disappears, which in the future should avoid restrictive interpretations concerning the authorities that are obliged by these provisions³².
- c) It maintains the non-inclusion of any restriction regarding who can request information, simply providing a definition of applicants as: “*any natural or legal person who requests environmental information*”³³.
- d) The maximum time limit for “*making available*”, which replaces the expression “*responding to the request*” of the applicant is now 1 month, extendible for a maximum of one further month provided that “*the volume and complexity of the information*” requested makes it impossible for the responsible authority to respond within one month³⁴.
- e) Many of the existing exceptions are qualified in order to avoid broad interpretations, and it is added that in each case “*the public interest served by the disclosure shall be weighed against the interest served by the refusal. Access to the requested information shall be granted if the public interest outweighs the latter interest*”³⁵.

As has been seen, the new proposed Directive on access to environmental information incorporates into Community legislation the provisions of the Aarhus Convention on access to environmental information, a Convention which Spain signed on 25 June 1998, whose ratification process is currently nearing completion³⁶,

³¹ Art. 2 (1) of the proposed Directive.

³² Art. 2 (2) of the proposed Directive.

³³ Art. 2 (3) of the proposed Directive.

³⁴ Art. 3 of the proposed Directive.

³⁵ Art. 4 of the proposed Directive.

³⁶ In Spain, the Council of Ministers meeting of November 17 agreed to submit the Aarhus Convention to the Parliament to be ratified.

and which will make it obligatory to set out provisions that permit wider access to environmental information in improved conditions.

2.3. Request for access to information

During the course of its activities in the “Endangered Seas” campaign, and with the aim of obtaining the information necessary for its initiatives in relation with fisheries, in early August 2000 WWF/Adena addressed a request for access to environmental information to the Directorate General of Fisheries Structures and Markets³⁷ of the Spanish Ministry of Agriculture, Fisheries and Food (MAPA), requesting access to the following information:

First of all, it requested information about the interventions of the Financial Instrument for Fisheries Guidance (FIFG), in relation with both the new programming period (2000-2006) and the previous period (1994-1999). The FIFG is one of the Community funds with structural aims which are created in the framework of economic and social cohesion policy³⁸, and whose purpose is³⁹:

- to contribute to achieving a sustainable balance between fishery resources and their exploitation;
- to strengthen the competitiveness of structures and the development of economically viable enterprises in the sector;
- to improve market supply and the value added to fisheries and aquaculture products;
- to contribute to the revitalization of areas that depend on fisheries and aquaculture.

Specifically, WWF/Adena requested access to the following information:

- National Fisheries Development Plan, which will be co-funded by FIFG funds for the period 2000-2006. This document includes data relating to the scheduling of the programme’s economic contributions and a list of the regional, national and Community contributions or other resources aimed at each area of assistance⁴⁰, Pluriregional Operational Programme of Objective 1 Regions.
- Expenses incurred by the different measures financed by the FIFG in the 1994-1999 programming period, with a detailed breakdown of the sums provided by Community, Spanish and privately financed funds, if applicable.
- Also in relation with the previous programming period (1994-1999), detailed information about the allocation of funds under two types of specific measures included in FIFG financing:
 - 1.- Adjustment of capacities
 - 2.- Renewal and modernization of the fishing fleet.

³⁷ Dirección General de Estructuras y Mercados Pesqueros.

³⁸ Title XVII of the European Community Treaty.

³⁹ Council Regulation (EC) no. 1263/1999, of 21 June 1999, relating to the Financial Instrument for Fisheries Guidance. OJ L 161, of 26 June 1999.

⁴⁰ Annex I of Regulation (EC) 2792/1999, of 17 December 1999, which defines the categories and conditions for structural interventions in the fisheries sector. OJ L 337 of 30 December 1999.

- List of all the projects funded by the fishing fleet renewal and modernization measures in the period 1994-1999, including in each case the name and address of the beneficiaries and a description of the project.

Secondly, information was requested in relation with State aid to the fisheries sector, in order to obtain a complete overview of fishery subsidies. More specifically, the following was requested:

- Copy of the national reports submitted in 1998 and 1999 to the Organization for Economic Cooperation and Development (OECD), as contributions to the study on governmental financial transfers in the fisheries sector, and the documentation upon which these reports were based.
- The report relating to State aid to the fisheries sector, submitted to the European Commission and used as a source for the Eighth Survey on State Aid in the European Union.

And finally, as a follow-up to a previous application⁴¹, the request was also included for access to a series of documents referring to the transfer of fisheries capacity from the European Union to Argentina, and in particular the application of the “second generation” Fisheries Agreement between Argentina and the EU⁴². The information requested in this respect was as follows:

- Financial contributions of the European Union to the Argentine Government throughout the period of validity of the Agreement, in the framework of the Technical and Scientific Cooperation projects envisaged in section 4 of article 4 of the Agreement, and the general characteristics of each of the projects financed with the assistance of these Community contributions.
- How control is achieved over the mixed companies benefited by public subsidies, and in what circumstances the Spanish Administration considers that non-compliance with the characteristics of the initial project would justify total or partial recovery of the aid granted.
- What Community legislation is considered to be applicable to this type of situation.

The present request, as well as other previous applications, was always accompanied by telephone conversations and interviews with the persons responsible for supplying the requested information. These persons have always shown their willingness to process the applications. Though the final results have been variable, the time limits established for notifying their resolution have always failed to be observed.

⁴¹ Request for information prior to that considered in this case study, presented by WWF/Adena in December 1999 to the Directorate General of Fishery Structures and Markets of the Spanish Ministry of Agriculture, Fisheries and Food.

⁴² Agreement between the European Economic Community and the Argentine Republic on Relations in Sea Fisheries. Signed on 30 November 1992 but in force since 1994. The EEC approved the agreement and incorporated it into the *acquis communautaire* by means of Regulation 3447/93, of 28 September 1993. In force since May 1994. OJ L 318 of 20/12/1993.

With regard to the specific request in question, it should be noted that at the end of the maximum time limit legally established for notification of the resolution, i.e. two months from its presentation before the competent body⁴³, no express notification has been received. This, in strict application of the provisions relating to administrative silence, would indicate a case of administrative silence of a positive nature, i.e. the lack of express resolution is the equivalent of a positive response, which grants access. Therefore WWF/Adena's request has been accepted, but it has not however yet been provided with the requested information.

2.4. Legal analysis of the request

This heading analyses, on the one hand, the application's conformity with the legal provisions in force regarding access to environmental information, and on the other hand, the situation that has arisen due to the lack of response by the competent authority:

Can WWF/Adena request access to environmental information?

WWF/Adena is a non-governmental organization and is registered as a public charity, i.e. it has legal personality and as such is recognized the right to request environmental information without having to prove an interest⁴⁴.

Is the information requested by WWF/Adena environmental information?

The information requested in the application considered in this case study refers to funding granted to the fisheries sector. More specifically, it alludes to aid and subsidies granted either through Structural Funds or other types of State aid, for the financing of projects and actions in the framework of different plans and operational programmes in the sea fisheries sector. These are measures that have a clear effect on fishery resources, i.e. on the state of marine fauna and biodiversity. This therefore clearly falls within the definition given by the Law on Freedom of Access, as this request refers to information relating to "*activities and measures that affect or may affect the state of these elements of the environment*", with fauna being one of the elements mentioned⁴⁵.

The European Court of Justice stated its opinion in the case of Wilhelm Mecklenburg versus Kreig Pinnerber regarding the need to make a broad interpretation of the definition, and to include any "*act (of the administration) which may affect or protect the state of any of the sectors of the environment to which the Directive makes reference*"⁴⁶.

Has the request been addressed to the competent authority?

⁴³ Art. 4 of Law 38/1995, as amended by Law 55/1999.

⁴⁴ Art. 1 of Law 38/1995.

⁴⁵ Art. 2 (1) a) of Law 38/1995.

⁴⁶ Case C-321/96, sentence of 17 June 1998.

The request for information was addressed to the Directorate General of Fisheries Structures and Markets, which depends on the General Secretariat of Sea Fisheries⁴⁷, of the Spanish Ministry of Agriculture, Fisheries and Food. Among others, the functions of this directorate general are⁴⁸:

- general economic planning of the fisheries sector,
- basic management of the fisheries sector,
- administration of the Structural Funds of the Financial Instrument for Fisheries Guidance, and
- planning of the fishing fleet.

This is therefore the competent body of the administration, and that which has access to the information referred to in the request for access considered in this case study.

What situation has been created by the lack of express resolution within the time limit?

In the absence of an express resolution, the provisions regarding administrative silence established by the Law of the Juridical Regime of the Public Administrations and the Common Administrative Procedure⁴⁹ are applicable. In this case the administrative silence is assumed to be positive⁵⁰. The obligation to issue an express resolution still persists, but in any case the subsequent resolution may only be issued in the sense of confirming the content of the assumed act, i.e. the granting of access to all the information requested⁵¹. Furthermore, resolution by administrative silence has, for all effects and purposes, the consideration of being the administrative act that finalizes the procedure⁵².

Thus, WWF/Adena has received a positive response to its application, but has not obtained real access to the requested information, since such access has not been provided by the Directorate General of Fisheries Structures and Markets.

In this situation WWF/Adena has requested a “*certificate of acknowledgement of administrative silence*”⁵³ from the Directorate General of Fisheries Structures and Markets, with which it will subsequently demand from this body the supply of all the information granted by virtue of administrative silence.

As an obvious result, the lack of response to applications for access to environmental information and the consequent activation of the mechanism of “positive silence”, which has incidentally recently been amended due to the appeal lodged against Spain before the European Court of Justice, is highly cumbersome, since it supposes the formal granting of the information, by a presumed act, though this information does not really reach the hands of the applicant. This is a complicated and unpractical situation which almost certainly deters many persons from continuing to try to obtain access.

⁴⁷ Secretaría General de Pesca Marítima.

⁴⁸ Information taken from the web site: www.mapya.es/org/pags/pesca.htm

⁴⁹ Law 30/1992 of 26 November.

⁵⁰ Art. 42 (2) of Law 30/1992.

⁵¹ Art. 43 (4) of Law 30/1992.

⁵² Art. 43 (3) of Law 30/1992.

⁵³ Art. 43 (5) of Law 30/1992.

If the information is not supplied after the issuing of certification of the presumed act, a contentious-administrative appeal may be lodged. At the same time it is also possible to demand disciplinary responsibilities against the persons responsible for resolving the application and who failed to comply with the time limit set out to that end⁵⁴, as well as the use of the “complaints and suggestions book”, and thus the intervention of the General Inspection of Departmental Services and Sectorial Inspections⁵⁵.

3. Public participation

The principle of “co-responsibility” is of key importance for public participation. In fact, it is the reason why the establishment of systems and procedures that guarantee public participation in environment-related decision-making is recognized to be necessary for the attainment of sustainable development. Principle 10 of the Rio Declaration is a reflection of the consensus achieved in this respect⁵⁶. In the same way the European Community, in its 5th Environmental Action Programme, establishes the need for all the actors involved to participate in the achievement of the programme, which incidentally is entitled “Towards Sustainable Development”. Without the active participation of all the actors and the putting into practice of the principle of co-responsibility it is impossible to talk of the effectiveness of environmental policy and legislation. Such has been the international recognition and agreement in this respect that in 1998, during the 4th Pan-European Environment for Europe Conference, the Aarhus Convention, relating to Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁵⁷, was opened for signing. This Convention has the aim of “*contributing to the protection of the right of every person, of present and future generations, to live in an environment adequate to his or her health and well-being*”⁵⁸, through recognition and protection of the rights of access to information, public participation in decision-making and access to justice in environmental matters.

3.1. Legal situation and future development

In our legal system, besides the constitutional recognition⁵⁹ of the right of all persons to participate in public matters, there is no specific regulation governing public participation in environmental matters. Nevertheless, there are numerous provisions

⁵⁴ Art. 42 (7) of Law 30/1992.

⁵⁵ Royal Decree 208/1996, of 9 February, which regulates administrative information services and citizen services. BOE no. 55 of 4 March 1996.

⁵⁶ Principle 10 of the Rio Declaration recognizes that to achieve sustainability it is necessary to ensure access to environmental information, public participation and access to justice.

⁵⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Open to signatories in Aarhus, Denmark, June 25, 1998. Web page: www.unece.org.

⁵⁸ Art. 1 of the Aarhus Convention.

⁵⁹ Art. 23 (1) of the Spanish Constitution 1978.

that establish procedures for public participation in decision-making in matters that affect the environment⁶⁰.

In the case in hand, relating to public participation in the use of the Structural Funds, participation is regulated at Community level in the Regulation which sets out general provisions on the Structural Funds⁶¹.

In 1993, with the reform of the Structural Funds regulation, the environmental variable is incorporated in the programming, execution and evaluation of the use of the funds. For the first time, the new regulations demand the performance of an environmental impact assessment of the programmed development actions, and the participation of environmental authorities in the different stages of use of the funds.

The regulation approved in 1999 maintains the need to integrate the environment in economic and social cohesion policy. Thus, the new Regulation establishes that the actions financed by the funds will contribute, among other things, to protecting and improving the environment. It commits Member States and the Commission to guaranteeing that environmental protection is integrated in the definition and application of the funds, requiring fulfilment of the principle of compatibility, i.e. that the operations of the funds have to adapt, among other things, to the protection and improvement of the environment⁶².

Together with this, it reiterates the need to incorporate social and economic actors as partners in the use of the funds, in application of the partnership principle⁶³. Community actions are conceived as a complement to national actions and must be approved in close coordination between the Commission itself and the Member State in question. The State will, “*within the framework of its national rules and current practices*”, designate the different public authorities, as well as the social and economic partners, with whom the Commission will put into practice the partnership principle⁶⁴.

Moreover, “*in designating the most representative partnership at national, regional, local or other level, the Member State shall create a wide and effective association of all the relevant bodies, according to national rules and practice and taking account of the need to promote equality between men and women and sustainable development through the integration of environmental protection and improvement requirements*”⁶⁵.

And “*partnership shall cover the preparation, financing, monitoring and evaluation of assistance. Member States shall ensure the association of the relevant partners at the different stages of programming, taking account of the time limit for each stage*”⁶⁶.

⁶⁰ Sanchis, F., Díaz, J.L., Fernández, M. 1998. Spain in: “Doors to Democracy. Current Trends and Practices in Public Participation in Environmental Decisionmaking in Western Europe. The Regional Environmental Centre. Hungary: pp 143-163.

⁶¹ Council Regulation (EC) no. 1260/1999.

⁶² Arts. 1, 2 (5) and 12 of Council Regulation (EC) no. 1260/1999.

⁶³ Art. 8 of Council Regulation (EC) no. 1260/1999.

⁶⁴ Art. 8 (1) of Council Regulation (EC) no. 1260/1999.

⁶⁵ Art. 8 (1) of Council Regulation (EC) no. 1260/1999.

⁶⁶ Art. 8 (2) of Council Regulation (EC) no. 1260/1999.

Further on, the Regulation considers in some detail certain aspects relating to the participation of social and economic partners:

- before the presentation of the plans to the Commission it must make consultations with them⁶⁷,
- furthermore the plans will have to include how they are to be consulted⁶⁸,
- provisions on the application of the Community support framework will also include provisions relating to the participation of the partners in the monitoring committees⁶⁹,
- and, the partners will also be consulted when the monitoring committees are being set up⁷⁰.

In short, it is necessary to consult the social and economic partners in the preparation of the plans, and also in the creation of the monitoring committees whose mission is to control and evaluate the execution of the plans and programmes. However, the Regulation alludes in these aspects to “national rules and current practices”, which leaves a broad margin for arbitrary interpretation by each Member State as to what form this participation will actually take.

At this point it is important to note the signing of the Aarhus Convention by all the EU Member States. And though the Convention has not yet come into force, it is nevertheless a fact that all the signatory States are engaged in their respective ratification processes⁷¹, as is the Commission itself, given that the European Community is also a signatory to the Convention. Ratification work implies the adaptation of existing legislation to the provisions of the Convention, which, as has previously been pointed out, aims to guarantee the rights of access to information, public participation and access to justice. And specifically, under the heading of public participation, it also regulates participation in the elaboration of plans, programmes and policies relating to the environment⁷². For this participation the Convention demands that the following aspects be guaranteed:

- that reasonable time limits be provided, allowing the public sufficient time to be informed and to participate effectively in the work throughout the decision-making process⁷³,

⁶⁷ Art. 15 (2) of Council Regulation (EC) no. 1260/1999 sets out that “plans shall be submitted by the Member State to the Commission after consultation with the partners, who shall express their views within a period of time consistent with the deadline set in the second subparagraph”.

⁶⁸ Art. 16 (1) (d) of Council Regulation (EC) no. 1260/1999 says that plans submitted under Objectives 1, 2 and 3 shall include among other issues: “an account of arrangements made to consult partners”.

⁶⁹ 17 (2) (d) in fine of Council Regulation (EC) no. 1260/1999: “Each Community support framework shall include: (...) (d) the provisions for implementing a Community support framework including: (...) - arrangements for involving the partners in the Monitoring Committees described in Article 35; (...)”.

⁷⁰ Art. 35 of Council Regulation (EC) no. 1260/1999.

⁷¹ In Spain, following the decision of the Council of Ministers’ meeting of November 17 to submit the Aarhus Convention to the Parliament, it is envisaged that this will occur in the first semester of 2001.

⁷² Art. 7 of the Aarhus Convention.

⁷³ Art. 6 (3) of the Aarhus Convention.

- that participation should begin early in the procedure, when all the possibilities and solutions are still open and the public can exert a real influence⁷⁴,
- finally, that the ultimate decision should take into account the results of the public participation procedure and that these be incorporated in it⁷⁵.

As has been mentioned above, the Commission has also set about the task of adapting the aspects of Community legislation covered by the Convention to its provisions, and thus, in addition to the aforementioned reform of the Directive on Freedom of Access to Information on the Environment, it is also revising the Directives relating to environmental impact assessment, integrated pollution management and control, and all the Directives that affect decision-making related with the environment. Together with this, it is envisaged that specific regulations will be prepared to provide for all matters regarding participation which are not contemplated in sectorial regulations.

Pending its ratification, which is currently under way, the Convention should inspire a broader interpretation of all the provisions adopted in order to allow public participation in decision-making related with the environment.

3.2. Request for participation and responses

In parallel with the activities carried out in connection with access to environmental information within the worldwide “Endangered Seas” campaign, WWF/Adena has requested participation in the use of the Structural Funds dedicated to support to the fisheries sector, i.e. development actions financed by the FIFG. Thus it first asked to be consulted during the phase of elaboration of plans, and subsequently to be admitted as a partner and to participate in the monitoring committees.

The first request was addressed in writing in June 2000 to the Subdirector General of Structural Fund Management⁷⁶, of the Spanish Ministry of Agriculture, Fisheries and Food. This request proposed that WWF/Adena be considered a partner in the phase of elaboration of plans and operational programmes, with the aim of participating in the process and thus being able to transmit a series of considerations concerning the existing proposals.

The response to this request was made in an interview that was held in September with the Subdirector General of Structural Funds for Fisheries. In summary, this official informed WWF/Adena, firstly, that the plans were already in the process of negotiation in the Commission, and thus it was too late to respond to its request, and secondly, that responsibility regarding the procedures for consultation and participation in the monitoring committees lay exclusively with the Treasury Ministry⁷⁷, which for its part had issued clear instructions in this respect to the rest of

⁷⁴ Art. 6 (4) of the Aarhus Convention.

⁷⁵ Art. 6 (8) of the Aarhus Convention.

⁷⁶ Subdirección General de Gestión de los Fondos Estructurales.

⁷⁷ Ministerio de Hacienda.

the competent authorities. Thus, in his opinion, WWF/Adena should address its request to that ministry.

In September a second written request with a similar content to the first was addressed to the Directorate General of Community Funds and Territorial Funding⁷⁸, of the Treasury Ministry.

An interview was also held in October with the Programmes Coordinator of the Subdirectorate General of Regulations and Institutional Cooperation⁷⁹ of the Ministry of the Environment⁸⁰, with the aim of reiterating WWF/Adena's request to participate in the Structural Funds process. The result of this interview was to identify the Treasury Ministry as being absolutely responsible for consultation and participation processes.

In October the second request was once again submitted to the Directorate General of Community Funds and Territorial Funding of the State Secretariat for Budgets and Expenditure⁸¹ of the Treasury Ministry. This second request had not obtained a response. This time the request was also included to participate in the monitoring committees and to access the instructions regarding the composition of these committees which are elaborated and distributed by the Treasury Ministry.

Finally, also in the month of October, an interview was requested with the Director General of Community Funds and Territorial Funding, in order to discuss the aforementioned requests for participation in the process.

In November responses were received to the two requests sent in October; the first concerning participation in the monitoring committees and access to the instructions regarding their composition, and the second requesting an interview to discuss the matter. The response received from the Treasury Ministry may be summarized as follows:

- environmental integration in the execution of the programmes is “*sufficiently assured*” through the participation of the environmental authorities, which in the new period will be permanent members of the monitoring committees,
- the “*mass presence of environmental associations*” is scarcely operative, especially considering the “*markedly technical character*” of the meetings of the monitoring committee and the fact that each environmental association “*could accentuate different aspects of environmental policy*” which it would be difficult to deal with in these meetings.

3.3. Analysis of the situation

In conclusion, participation in Spain in the process of the planning, execution and evaluation of the Structural Funds is as follows:

⁷⁸ Dirección General de Fondos Comunitarios y Financiación Territorial.

⁷⁹ Subdirección General de Normativa y Cooperación Institucional.

⁸⁰ Ministerio de Medio Ambiente.

⁸¹ Secretaría de Estado de Presupuesto y Gastos.

- the participation of social and economic partners is achieved at central level through the Economic and Social Council (CES)⁸², and at regional level through the different economic and social councils and committees. These regional councils and committees are comprised by representatives from trades unions and business associations, and include no organization representing environmental interests;

- the interests of environmental protection in the use of the Structural Funds, guaranteed by the regulations that rule the funds, is assured through the participation of the Network of Environmental Authorities⁸³. The representatives in this network include the environment officials appointed by the autonomous regional governments and by the Ministry of the Environment, as well as the authorities responsible for the Structural Funds of the Ministry of Economy and Treasury⁸⁴, the Ministry of Agriculture, Fisheries and Food, and the Ministry of Employment and Social Affairs⁸⁵. Their meetings also include the participation of representatives of the European Commission. No organization representing environmental interests is included in the Network of Environmental Authorities.

The aforementioned Regulation establishes, with regard to the partnership principle, that Member States will follow their “*national rules and current practices*”, both in the designation of partners and in the establishment of the specific formulae for participation. However, these rules and practices have not satisfactorily fulfilled many of the Regulation’s provisions.

First of all, the need to integrate the environmental variable in the use of the funds has been clearly established since 1993. In this respect the regulations establish some strictly defined provisions, leaving others open to arbitrary interpretation by the Member States. In our country this led to the establishment in 1997 of the Network of Environmental Authorities. The door, even then, was closed to public participation through the participation of environmental organizations who are not represented in this network, and which do not participate in its meetings or in its thematic workshops⁸⁶. It should also be noted that only for this new programming period the Network of Environmental Authorities will participate as a permanent member of the monitoring committees, which will supposedly lead to greater integration of environmental viewpoints in the use of the funds. Thus, only the CES, at central level, and the different economic and social committees and councils in the different autonomous regions, can be considered instruments for public participation. These councils and committees represent certain social interests, though not all, and do not include representatives of environmental interests.

Secondly, it is interesting to mention at this point the analysis that the CES itself makes of its participation, in the two opinions approved in relation with the Regional

⁸² Regulated by Law 21/1991, of 17 June, on the creation of the Social and Economic Council. BOE no. 145 of 18 June 1991.

⁸³ Red de Autoridades Ambientales. Formally established on 4 September 1997 at the meeting of the Monitoring Committee of the Community Support Framework 1994 -1999.

⁸⁴ Ministerio de Economía y Hacienda.

⁸⁵ Ministerio de Trabajo y Asuntos Sociales.

⁸⁶ 1996-1999 Report of the Network of Environmental Authorities. Web site: www.mma.es.

Development Plan 2000-2006, concerning Objective 1 and 2 regions respectively⁸⁷. This analysis suggests that “*the rules and current practices*” in our country cannot be considered sufficient to satisfy demands relating to the principle of coordination as it is set out in the Regulation. The CES mentions the following aspects:

- The request for an opinion from the CES on the Structural Development Plan 2000-2006 for Objective 1 regions was made with such short notice that it was impossible to make an analysis of the breadth and depth that this issue merits. Thus the CES considers that this practice in particular cannot be considered a sufficient complement to the partnership principle.

- Both opinions mention that participation must take place from the preparatory work on the plan, and not be limited exclusively to remitting the plan to the CES once it has been elaborated. They consider that this practice also fails to respect the established criteria on the partnership principle, which in the new regulation goes beyond that of simple information and consultation⁸⁸.

- Both opinions also draw attention to the fact that the drafting of the plan does not clearly establish what will be the procedures for consultation or the way in which the partners will participate in these, thus going against what is demanded in the Regulation⁸⁹.

- And finally, both opinions dedicate a special heading to the partnership principle, referring to a previous report, from 1995, in which specific proposals were made for improving what they consider to be the deficient practical application of the partnership principle⁹⁰.

Conclusions

Access to the information requested in this case under study is guaranteed in the framework of the legislation currently in force. From a legal analysis of the request it is seen that it complies with all the requirements concerning the applicant, the body competent to provide a response and the type of information requested. All the aspects of the request are in accordance with the provisions of the Law on Freedom of Access to Information on Environmental Matters.

The lack of response by the administration competent to resolve is one of the possibilities regulated by the aforementioned law. However, both the Directive, the Law on Freedom of Access, and the Law on the Juridical Regime of the Public Administrations and the Common Administrative Procedure stress the need for persons requesting access to environmental information to receive the corresponding response. This takes on an even greater importance when analysing the reasons for

⁸⁷ CES Opinion on the Regional Development Plan 2000-2006 regarding Spanish Objective 1 regions under the European Structural Funds, of 13 October 1999. CES Opinion on the Plan 2000-2006 regarding Spanish zones under Objective 2 of the European Structural Funds, of 21 June 2000.

⁸⁸ Art. 8 (2) and 15(2) of Council Regulation (EC) no. 1260/1999.

⁸⁹ Art. 16 (1) (d) of Council Regulation (EC) no. 1260/1999.

⁹⁰ Report 4/1995, of 20 September 1995, regarding application of the partnership principle to economic and social partners in Community structural policy.

the existence of legislation relating to access to environmental information. The reasons are to facilitate the first step towards strategies for the attainment of sustainable development, which will only be possible with the participation of the different actors that share responsibility for the state of the environment. And this participation cannot take place in our society without an informed public, with much greater levels of communication about the state of the environment and the consequences of current consumption and production patterns.

The lack of response to this request for information shows that the systems for access to information are not working correctly, and there continues to be a need to work harder in order to adequately fulfil the obligations and responsibilities set out in the legislation on free access to environmental information.

With regard to participation, in the case study it has been clearly established that despite the clear intention of the reform of the regulations that rule the Structural Funds to incorporate the environment in the use of the funds, and to guarantee a broader interpretation of the partnership principle, this is not yet occurring in our country. On the one hand, because not all the partners have spaces to participate –this is obvious in the case in hand with regard to social organizations that represent environmental interests. And, on the other hand, because the way in which the parties recognized as social partners are participating is greatly removed from the provisions of the Regulation, and their participation is thus converted into a simple formality and not a true participation process.

As the 5th Environmental Action Programme underlined, the current state of the environment is simply a symptom of a real problem, that of our current production and consumption models. It is necessary to achieve drastic behaviour changes on the part of the different actors involved, who are all responsible in a shared way for the environmental situation. We need effective environmental policies, which will only be achieved with the participation of all.

Environmental information must thus be accessible, and furthermore accessible within a prudent time frame which guarantees its utility, because one of its aims is to provide a basis for public participation in environmental decision-making. It is true that the application of the legislation that has been presented here implies a change in behaviour and the perception of information and its flows, both on the part of the authorities responsible for supplying information and of the public, but it is also true that these changes are possible and that their effects are also highly positive for all involved and for the environment itself.

Compliance with the obligations arising from this legislation means paying special attention to dissemination and training by the administrations responsible for supplying information, and the incorporation of criteria of transparency and attention to the public requesting access to this information. Furthermore a range of measures must be adopted to permit the establishment of adequate mechanisms and which allow the effective resolution of these requests.

In order to collaborate in this task, WWF/Adena is preparing a proposal, addressed to the Spanish Ministry of Agriculture, Fisheries and Food, on “better conditions for

access to environmental information”, which will contribute to the process for making the right of freedom of access to environmental information a reality.

And finally, it must be assured that all the actors involved in the use of the funds participate actively, in the way set out in the provisions of the Regulation and taking as the guiding principle the provisions of the Aarhus Convention. This participation does not necessarily mean an “avalanche of organizations” who come to interrupt the “technical” work being carried out by the responsible authorities. We must avoid this type of mistrust which is transmitted by the responses to the requests for participation made by WWF/Adena, drawing attention to all the positive aspects of public participation in decision-making processes affecting the environment. And take into account that the important thing is the willingness to collaborate, and from that starting point it is not complicated to include adequate formula to satisfy the legitimate desire to participate.

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