8 September 2014

Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Environment, Housing and Land Management Division
Office S-332
Palais des Nations
1211 GENEVA 10

SWITZERLAND

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By registered mail with acknowledgement of receipt

Madam/Mr Chair,

Our Ref.: **CARRIERE BODARWE 00000639 RC/LR/75**
Your Ref.: **Communication to the Aarhus Convention Compliance Committee**

Please find enclosed a Communication for the attention of the Aarhus Convention Compliance Committee.

Yours faithfully,

Alain LEBRUN
Lawyer
[signed]

RESPONSE TO THE COMMITTEE'S QUESTIONS

1. *Please provide the Committee with a more comprehensive (but not lengthy) description of the original case the communication relates to (for example, what kind of permits the communicant challenged at the national courts, for what reasons, what were the main arguments of the courts for dismissing the appeals). Also, please explain in more detail in what ways the court decisions referred to and/or the Belgian legislation do not comply with the Convention.* ***In particular, please clarify whether the communicants consider that the alleged non-compliance to be of a systemic nature (for example, due to inadequate legislation) or rather to be an individual case of a court incorrectly applying the law.***

The answers to Question 1 are to be found in the amended communication of 5 September 2014, in particular under subheadings 3 and 4.

2. *Please explain why the sums of €1,200 and €2,500 which the communicants were ordered to pay as costs of the court proceedings were "prohibitive in themselves", both for Belgian environmental NGOs generally and specifically for the communicants. Please clarify if the communicants each had to pay €3,700 or the sums were to be divided between them.*

- The sum of €3,700 is to be paid by both communicants together. Therefore they are free to decide between them who will pay how much; but the total for both is €3,700.

- The extracts from accounts (provided as Annexes 4, 5 and 12) demonstrate that this sum is prohibitive for these communicants. Ardennes liégeoises ASBL was and is incapable of paying even half this case preparation allowance. Terre wallonne ASBL could not make more than one such high payment without going bankrupt. This would mean the end of their role as environmental watchdogs.

- These associations [Ardennes liégeoises ASBL and Terre wallonne ASBL] and their accounts may be viewed as representative of the financial health of the majority of Belgian non-profit associations, a fact which demonstrates that this sum would be prohibitive for any Belgian environmental protection NGO. What is prohibitive for one is, in general, prohibitive for the others.

3. *The communication alleges that the communicants were "misled by erroneous calculation of the administrative time limits " and therefore they did not ask for the appeal case preparation allowance, which would have made the appeal procedure less costly. Please clarify by whom were the communicants misled and who calculated the administrative time limits erroneously.*

In an e-mail of 19 December 2012, Marc Peerts, Inspector-General of the Operational General Directorate for Agriculture, Natural Resources and the Environment of the Service public de Wallonie [Government Administration of the Walloon Region], mentioned that consent had been notified on 29 January 2008, that this was after the mandatory time-limit and that therefore this had resulted in tacit rejection (see Annex 6).

The conclusion that the permit had been tacitly refused also appeared in the Summary Report on the Administrative Appeal (Annex 7, p. 48) and in the proposal for a Ministerial Decree drafted by civil servants of the Walloon Government, dated 9 June 2008 (Annex 8, p. 13).

4. *Please provide more specific information to support the statement in the communication that the communicants "have no significant financial resources".*

See extracts from the accounts of Terre wallonne ASBL (Annex 5) and of Ardennes liégeoises ASBL (Annex 4). See also paragraph *6* of the Communication of 8 September 2014.

5. *Please provide more specific information about the costs for an appeal to the Cour de Cassation and why the communicants consider that the regulation and/or jurisprudence concerning these costs is in non-compliance with the Convention.*

As the complaint against the Belgian system of appeal on a point of law is no longer being submitted, an answer to this question is no longer relevant.

6. *Please provide the Committee with English translations of any relevant provisions of Belgian legislation and extracts of jurisprudence that would support the communicants' allegations of non-compliance.*

At the end of *Guidance on the Aarhus Convention Compliance Mechanism*, on page 35, it is stated that communications should be submitted in one of the official languages of the Convention, i.e. English, French or Russian. Therefore this Communication is entirely in French.

Alain LEBRUN
[signed]

COMMUNICATION TO THE COMPLIANCE COMMITTEE

I. INFORMATION ON CORRESPONDENTS SUBMITTING THE COMMUNICATION

1. Ardennes liégeoises ASBL, a non-profit association with its registered office established at 1, Chemin de Longchamps, 4190 Ferrières (Belgium), and Business Registration No 0442.181.824,

with counsel Alain Lebrun, lawyer, in chambers at 6, Place de la Liberté, 4030 Grivegnée (Liège, Belgium), which is his address for service for the purpose of this procedure;

2. Terre wallonne ASBL, a non-profit association with its registered office established at 8, rue de la Passerelle, 4031 Angleur (Belgium), and Business Registration No 0863.332.167,

with counsel Alain Lebrun, lawyer, in chambers at 6, Place de la Liberté, 4030 Grivegnée (Liège, Belgium), which is his address for service for the purpose of this procedure.

II. STATE CONCERNED

Belgium.

III. FACTS OF THE COMMUNICATION

1. The first Communication to the Compliance Committee (see Annex 1) contained two complaints:

a) The first complaint concerned the judgment of the Twelfth Chamber of the Cour d'appel (Court of Appeal) of 29 October 2013, No 2011/RG/1927. This is an individual instance of non-compliance with the Convention.

b) The second complaint was more general and related to the Belgian system of appeal on a point of law. This complaint is no longer being pursued. Therefore the Committee is requested to take no further account of it.

2. <u>Facts in respect of the first and only complaint:</u>

a) On 20 June 2007, Carrières et entreprises Bodarwé & Fils SA [a public limited company operating a quarry] applied for an environmental permit to extend its quarry by 17.5 ha.

b) On 25 January 2008, a valid environmental permit was granted to the company.

c) The decision to grant the permit was notified to the applicants on 29 January 2008.

d) The communicants had various documents, emanating ad hoc from the regional administrative authorities, showing that this notification had been made after the expiry of the time-limit and that therefore consent had been tacitly refused (Annex 7, p. 48 and Annex 8, p. 13). These documents were among the documents that the communicants placed before the courts, and therefore the Tribunal de première instance de Verviers (Verviers Court of First Instance) and the Cour d'appel de Liège (Court of Appeal of Liège) were aware of them.

e) On the strength of these different documents, the communicants brought proceedings, on the basis of Article 2 of the Law of 19 January 1993, before the Verviers Court of First Instance hearing an application for interim relief. The aim of this action was to ask the Court to rule that Carrières et entreprises Bodarwé & Fils SA did not have the valid environmental permit required for the operation concerned and that this company should be ordered, subject to a penalty payment, to apply to have the situation regularized.

f) On 17 November 2011, the Court held, in blatant disregard of the Aarhus Convention, that the application by the two non-profit associations was inadmissible (Annex 9).

Indeed, in response to the applicants' submission that the action was admissible pursuant to the Aarhus Convention, the judgment stated:

> "Also, the Aarhus Convention, specifically article 9, paragraph 3, thereof, refers to the criteria, if any, laid down in national law, in determining the admissibility of legal action."

This was the sole point at which the Court considered the Aarhus Convention.

In declaring the application inadmissible and not, therefore, ruling on the merits at first instance, this judgment led to loss of the applicants' access to one level of jurisdiction, and contributed significantly to increasing the cost of these proceedings.

It became apparent from the judgment in the subsequent appeal that the legality of the permit was indisputable. If this had been established at first instance, no appeal would have been brought, and the costs arising from that appeal would have been avoided.

g) The two non-profit associations appealed against the decision. The judgment in that appeal (Annex 2) is the subject of this complaint that article 9, paragraphs 3 and 4, of the Aarhus Convention have been infringed.

h) It should be clearly stated here that it is not the decision in the judgment on the merits of the case that is being criticized. The decision on the merits – i.e. the legality of the permit – is acknowledged and accepted here. The calculation which led to the conclusion that the notification had been made after expiry of the time-limit (even though it was also confirmed by the Regional Administration in a 2012 e-mail and produced before the Court of Appeal (see Annex 6)) was found to contain an error.

3. This complaint concerns the aspect of the judgment to be found in the final section on page 6:

4. The Court orders the two environmental protection associations to pay the costs of the proceedings at both instances, in an amount of €1,200 + an amount of €2,500. These sums are prohibitive in themselves, and they infringe article 9, paragraph 4, of the Convention.

Indeed, pages 41 and 42 of the associations' Submissions state:

> "If, however, the Court were to dismiss the appellants' action, it should be taken into account that these are non-profit associations pursuing a legal remedy specifically available to them and which is provided for the collective environmental good, that they should not be penalized for their efforts to achieve this objective and that they should have to pay only the minimum case preparation allowance, i.e. €75**.**
>
> Under the third paragraph of Article 1022 of the Civil Procedure Code, the Court is to take account of the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance (an ancillary step might be to compare it to the respondent's substantial financial capacity) and of the manifestly unreasonable nature of the situation that would result from imposing the standard case preparation allowance.
>
> The Court will consider, as necessary, the position of the Aarhus Convention Compliance Committee, which has taken the view that, in environmental litigation, ordering the applicant to pay the costs at first instance and on appeal contravenes the terms of this Convention, since it does not comply with article 9, paragraph 4, of the Convention; especially, see page 74 of José Juste-Ruiz and Eduardo Salazar-Ortuno, 'Non-respect par l'Espagne des obligations de la Convention d'Aarhus: Communication ACCC/C/2008/24 dans le cas "Senda de Grenade" à Murcie [Non-compliance by Spain with its obligations under the Aarhus Convention: Communication ACCC/C/2008/24 in the "Senda de Granada" case in Murcia]', *Revue juridique de l'environnement* 2011/1, (supporting document No. 25).
>
> The Court should also take account of the fact that the defendant has never had a co-operative attitude towards the proceedings, either during preliminary negotiations or at first instance, and merely sent five lines of explanation (see supporting documents) as to why it claimed that the calculation of the time-limits in the Summary Report on the Administrative Appeal was wrong. If there was a mistake at that level, the reason for it was simple and did not require lengthy submissions to be forced – perhaps unnecessarily – on the applicants."

5. The Twelfth Chamber of the Court of Appeal of Liège has not given reasons for its judgment as regards the last quoted paragraph of the Appeal Submissions on the question of costs.

Put simply, the main complaint against Carrières et entreprises Bodarwé & Fils SA was that it did not have a valid environmental permit, since the required notification of consent was made too late, resulting in tacit rejection.

This submission was supported by three administrative documents (see Annex 6, Annex 7, p. 48, and Annex 8, p. 13).

Instead of relying from the outset on the factors in its favour, the defendant (later the respondent) provided sparse information, compelling the environmental protection associations to undertake time-consuming work drafting submissions, which ultimately proved unnecessary.

In the light of the contents of three administrative documents that were not disproved by the other party until the end of the appeal proceedings, it is impossible to understand the reasoning used in the judgment, which stated that the action had been introduced by the communicants "without reasonable basis".

The basis of the application was reasonable, and the length of the proceedings was due solely to the respondent (Carrières et Entreprises Bodarwé & Fils SA), who waited until the end of the trial to explain its theory on the calculation of time-limits, and – since the administrative authorities had misled the applicants – without ever giving the applicants' counsel the opportunity to correct this calculation error.

6. <u>The Court is of the opinion that the</u> environmental protection associations <u>have not</u> adequately <u>established reasons relating to their exact financial position</u> that would allow the Court to reduce the case preparation allowances normally calculated according to the statutory scales for such proceedings.

However, it is necessary to counter that argument with the fact that the accounts of non-profit associations are public, since they are lodged at the Registry of the Tribunal de commerce (Commercial Court). Article 26 *novies*, §1, of the Law of 27 June 1921 states:

> "A file is to be kept at the Registry of the [Commercial Court] for each Belgian non-profit association (referred to in this chapter as 'association') that has its registered address in the district.
>
> This file is to contain:
>
> [...]
>
> 5) the association's annual accounts, drawn up in accordance with Article 17;
>
> [...]

> The King is to specify how the file is to be compiled and establish the fee to be charged to the association for that purpose, which may not exceed the actual cost. The King may provide that the documents referred to in the second paragraph can be lodged and reproduced in a specified form**.** Under conditions specified by the King, copies are to be regarded as authentic original documents and may be substituted for them. The King may also permit automatic processing of specified information in the file. The King may authorize linking of data files. If necessary, detailed rules are to be laid down for doing this."

These accounts indicate that the two associations have no significant financial resources. Terre wallonne ASBL received a gift that is dwindling from year to year (its assets are currently less than €1,000; see Annex 12) and receives only small contributions and donations.

On the other hand, although the respondent had not, in its own submissions, requested production of the non-profit associations' accounts, if the Court of Appeal was of the opinion that it should seek broader clarification, an order for the hearing to be re-opened and the applicants' accounts to be produced would have displayed the procedural fairness required by article 9, paragraph 4, of the Convention.[1]

However, it is self-evident – and therefore common knowledge – that Belgian non-profit associations generally do not have large resources. Indeed, this is a well-known fact.

The accounts of the two non-profit associations, *[audited]* and approved by the general meeting of the association concerned, are annexed, to give the Committee an understanding of the financial situation of both associations (Annexes 4, 5 and 12).

7. The crux of the alleged infringement of article 9, paragraphs 3 and 4, therefore, is that the communicants have been ordered to pay a case preparation allowance of €3,700 rather than a minimum one of €75.

Ordering a non-profit environmental protection association to pay a case preparation allowance of €3,700 renders the possibility of effective remedy (including therefore any possibility of appeal) to all intents and purposes illusory for most non-profit associations, since the latter generally do not have sufficient funds to pay this kind of cost several times a year.

Yet an essential function of an environmental protection association is to act as guardian of the environment, able when necessary to threaten court action against those (private individuals, public entities and/or businesses) who jeopardize or destroy the environment.

Ordering an environmental protection association to pay such a large case preparation allowance makes this merely a phantom threat, since, as a result, these associations will not seek a remedy unless they are certain of winning their action; furthermore, it means that they will not be able to contribute to the creation of case-law on issues that give rise to doubt.

[1] This was particularly necessary because, two days after the appellants lodged their Appeal Submissions on 9 April 2013, the Court of Justice of the European Union gave its judgment of 11 April 2013 in Case C-260/11 clarifying the meaning of 'not prohibitively expensive' proceedings, whereas European Union law was in issue before the Court of Appeal and this judgment required consideration of the factors thus defined by that new case-law.

Even the judgment that forms the subject of this complaint states:

> "It may seem desirable overall that non-profit associations acting in defence of the environment should not be ordered to pay the costs of their actions."

The reasoning used in the judgment to depart from this rule has already been criticized in paragraphs 5 and 6 of this account of the facts.

8. Moreover, this is not an isolated judgment of the Twelfth Chamber of the Court of Appeal of Liège. Several other judgments involve orders for relatively high costs, effectively gagging those who seek to protect the environment (whether natural persons or legal entities).[2]

9. It should also be pointed out that the meaning of 'not prohibitively expensive' access to justice in environmental matters has been clarified by a judgment of the Court of Justice of the European Union of 11 April 2013:

> "[T]he cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable."[3]

IV. NATURE OF ALLEGED NON-COMPLIANCE

This is a specific infringement, by the courts of the State concerned, in the context of a particular case, of the right of access to justice guaranteed by article 9, paragraphs 3 and 4, of the Aarhus Convention and of the requirement that the costs of a relevant court action should not be prohibitively expensive (see Section III).

V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

Article 9, paragraph 3, and article 9, paragraph 4, of the Aarhus Convention.

[2] See the judgment of 29 October 2013 in Case 2012/RG/1067 (Annex 10) and the judgment of 14 June 2013 in Case 2012/RG/1021 (Annex 11).

[3] CJEU Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraph 40.

VI. USE OF DOMESTIC REMEDIES

No appeal on a point of law has been envisaged. The applicants have formally acquiesced.

VII. CONFIDENTIALITY

The applicants do not require any guarantee of confidentiality.

VIII. ANNEXES

Annex 1: First Communication to the Compliance Committee, 12 May 2014

Annex 2: Judgment of the Court of Appeal of Liège of 29 October 2013

Annex 3: Reply from the Secretariat of the Aarhus Convention Compliance Committee

Annex 4: Extract from the accounts of the non-profit association Ardennes liégeoises for 2012

Annex 5: Extract from the accounts of the non-profit association Terre wallonne for 2011 and 2013

Annex 6: e-mail of 19 December 2012

Annex 7: Summary Report on the Administrative Appeal (p. 48)

Annex 8: Proposal for a Ministerial Decree drafted by civil servants of the Walloon Government (p. 13)

Annex 9: Judgment of the Verviers Court of First Instance of 17 November 2011

Annex 10: Judgment of the Court of Appeal of Liège of 29 October 2013 in Case 2012/RG/1067 *Carrières de Préalle SPRL* v *Albert Dubois and Sonia Jacot*

Annex 11: Judgment of the Court of Appeal of Liège of 14 June 2013 in Case 2012/RG/1021 *Association du Val d'Amblève, Lienne et Affluents*, *Ardennes liégeoises ASBL and Grappe ASBL* v *Walloon Region*

Annex 12: e-mail from Accounts Officer of the non-profit association Terre wallonne, indicating the account balance on 28 July 2014.

IX. SUMMARY

Because of the brevity of this Communication, a summary is believed to be unnecessary.

X. SIGNATURE

Liège, 8 September 2014

Axelle CHARLIER, lawyer
in loco Alain LEBRUN, lawyer
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[signed]