COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE

I. INFORMATION ON CORRESPONDENTS SUBMITTING THE COMMUNICATION, WITH CONTACT DETAILS

1. **Mr Henry Maquoi,** residing at 2, rue de l'Eglise, 4500 Ben-Ahin, Belgium,

2. **Ms Claire Dalemans** (Mrs Maquoi), residing at 2, rue de l'Eglise, 4500 Ben-Ahin, Belgium,

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

II. STATE CONCERNED

Belgium.

III. THE COMMUNICATION

A) Facts

a) 6 August 2007: the local authority of the town of Huy granted planning permission to Mrs Browers, a neighbour of the communicants, to extend a building on her property (Annex B1).

b) 2 October 2007: the communicants lodged a single application to the Conseil d'Etat (Council of State), requesting both annulment and suspension of the planning permission granted on 6 August 2007 (Annex B2). The communicants' grounds were that this planned extension affected them adversely through loss of light, given the proximity of the planned neighbouring building, and through damage to the landscape.

c) 8 October 2007: aware that the permit issued was unlawful, the town of Huy withdrew it (as proved by Annexes A1, A2 and A3).

d) 3 November 2008: the communicants took action against the town of Huy in order to obtain compensation for their expenditure (two expert architects consulted as technical advisers, and a lawyer) incurred in bringing proceedings before the Council of State (Annex B3).

e) 18 March 2009: by its judgment No. 191.594, the Council of State noted the withdrawal of the contested measure, decided that the action was now redundant, and ordered the town of Huy to pay SPF Finances (Service public fédéral Finances – the Federal Public Authority for Finance) €350 (i.e. twice the stamp duty of €175, in the light of the fact that the application had been lodged in the names of the two communicants) (Annex Al).

f) 4 June 2009: the Tribunal de première instance de Huy (Huy Court of First Instance) declared the claims of the communicants (Mr Maquoi and Ms Dalemans) unfounded, since there was no causal link between the harm suffered by the communicants (i.e. the expenses of action before the Council of State [a lawyer and technical advisers]) and the wrongful act of the town of Huy (i.e. having adopted an unlawful measure) which the Court considered to have been proved (Annex A2). The communicants were ordered to pay costs (€900).

g) 19 June 2009: since they were not satisfied with the judgment at first instance, the communicants brought an appeal against this decision (Annex B4).

h) 8 June 2010: the Twelfth Chamber of the Cour d'appel de Liège (Court of Appeal of Liège) dismissed the appeal and confirmed the judgment of the Court of First Instance, setting out the same reasoning as the latter (Annex A3). The communicants were again ordered to pay costs (€900).

i) 12 July 2011: the communicants lodged an appeal on a point of law against the Court of Appeal's decision (Annex B5).

j) 11 October 2012: the Cour de cassation (Court of Cassation), by its judgment No. *C.11.0500.F* (Annex A4), dismissed the appeal lodged by the communicants and again ordered them to pay costs (€484.35).

k) As a result of these three actions (points f, h and j*)*, the communicants were to pay – in addition to their own costs, fees for counsel and process server costs (€5,572.89)[1] – their opponent's costs in the sum of €2,284.35[2] even though their main administrative appeal before the Council of State (which itself cost €5,586.49) had been successful.

l) Therefore the total cost to the communicants of all these proceedings (Council of State, Court of First Instance, Appeal Court, Court of Cassation) was **€13,443.73** (i.e. €5,572.89 + €2,284.35 + €5,586.49).

B) Discussion

This complaint to the Aarhus Convention Compliance Committee alleging infringement of article 9, paragraph 3, and article 9, paragraph 4, of the Convention, which provide for access to justice in environmental matters under procedures that are equitable and not prohibitively expensive, relates to two judgments: (a) the judgment of the Twelfth Chamber of the Court of Appeal of Liège of 8 June 2010 and (b) the judgment of the Court of Cassation of 11 October 2012.

[1][Summons (Annex B3)] €208.05 + [appeal application] €186 + [fees for counsel with the status of Advocate at the Court of Cassation] €1,750 + [fees for counsel at first instance and on appeal] €3,428.84 - €5,572.89

[2][Costs at first instance – Annex A2] €900 + [costs of appeal proceedings – Annex A3] €900 + [costs of proceedings for appeal on a point of law – Annex A4] €484.35 = €2,284.35.

1. Infringement of the right to access to justice in environmental matters that is not prohibitively expensive (article 9, paragraph 3, of the Aarhus Convention)

a) General observations

We take the view that, by these judgments, the Twelfth Chamber of the Court of Appeal of Liège and the Court of Cassation rendered the communicants' original action (before the Council of State) prohibitively expensive, and we urge the Committee to share our view.[3] The reasoning here is simple: if it is impossible to recover a lawyer's fees and the cost of consulting technical advisers in the context of litigation before the Council of State, the consequence is that when one makes an application to the Council of State, even if one wins the case, one remains solely responsible for all the expenses incurred, and therefore the action automatically becomes prohibitively expensive.

Moreover, in Belgian law, the principle of recoverability through the courts of expenses incurred in the context of applying to the Council of State for an annulment has been recognized by the Cour constitutionnelle belge (Belgian Constitutional Court), inter alia in its judgment of 16 July 2009 (Annex A5, p. 11, point B.8) – i.e. before the Appeal Court judgment at issue here was delivered.

It should also be pointed out that the Belgian legislature itself has recognized the benefits and legitimacy of recoverability of the expenses of action before the Council of State, since now – from 2014 onwards – the Council of State has the option of making an order for a *case preparation allowance* for proceedings which have taken place before it.[4]

As things previously stood, therefore, failure to allow such recovery of expenses effectively gave the administrative authorities *carte blanche*, since they knew that they had almost nothing to lose when taking unlawful administrative measures, unless they happened to find themselves faced with wealthy opponents.

If a natural person or legal entity discovered that an administrative measure was unlawful, it was still necessary for them to have sufficient means to set proceedings in motion and to take advice, in the knowledge that they would remain responsible for all the expenses incurred.

In short, an authority was encouraged to commit unlawful acts (in relation to the environment). If these were challenged, it withdrew them – therefore it incurred no expenditure (apart from €175 stamp duty), while the party who made the complaint alleging illegality and brought the proceedings incurred substantial expenses (fees for counsel and sometimes for one or more technical advisers). But if the unlawful acts were not challenged because of lack of resources, then they became final and could no longer be challenged!

This is hardly the system that one would wish for in relation to the environment: better, surely, that the cost, rather than being so excessive as to preclude court action, should exert a prohibitive effect on unlawful measures?

Anyone who commits an unlawful act should be liable for the costs of a person who makes a complaint alleging its illegality, and anyone who challenges an act that is not in any way unlawful should be liable for the costs of a person who rightly defends it.

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[3] In this case, the cost of the communicants' action before the Council of State was €5,586.49 (i.e. €2,882.74 in legal counsel's fees and €2,703.75 in architect's fees [set out in Annexes A3 and B3]).

[4] Council of State Reform Act 2014 (Law of 20 January 2014 reforming the powers, procedure and organization of the Council of State) *(Moniteur Belge* [the Official Gazette] 03.02.2014), implemented by Royal Decree of 28 March 2014 concerning the case preparation allowance covered by Article 30/1 of the Coordinated Laws on the Council of State of 12 January 1973 *(Moniteur Belge* [the Official Gazette] 02.04.2014).

b) The disputed Court of Appeal judgment: the first argument for refusing recovery

The reasoning of the Twelfth Chamber of the Court of Appeal (which is the same as the reasoning in the judgment of the Court of First Instance) is as follows: there cannot be any causal link between the authority's wrongful act (permission issued unlawfully) and the harm suffered by the applicant (payment of legal and technical advisers' fees in the context of the proceedings before the Council of State) if a second permit might later be lawfully granted.

However, that reasoning had already been invalidated by a judgment of the Court of Cassation (Annex A6, p. 7), which states:

> "*A judgment that compares the specific situation with which it is concerned to a hypothetical situation, namely one in which the defendant* [the administrative authority] *would issue planning permission consistent with the law, does not preclude as a matter of law the existence of a causal link between the wrongful acts committed by the defendant and the harm suffered by the applicants*."[5]

It is regrettable that the Court of Cassation, when hearing this appeal, did not apply its own case-law (in this connection, see point B.2 of this Communication, relating to infringement of the right to equitable procedures).

Moreover, in the case we are concerned with here, the second permit ultimately granted was not even for the same construction: following consultation, it was for a different building project.

Consequently, this argument was irrelevant to the matter of refusing recovery.

c) The disputed Court of Appeal judgment: the second argument for refusing recovery

The Court of Appeal's second stated reason for refusing to allow the communicants' request was that the Council of State's judgment of 18 March 2009 had already awarded costs to them, by ordering the town of Huy to pay €350.

That is clearly not the case, since the payment of €350 ordered against Huy by the Council of State was to be paid to SPF[6] Finances, not to the communicants. This sum of €350 cannot therefore be viewed as costs awarded to the communicants in compensation for their proceedings. The €350 is straightforward stamp duty for entering the case on the relevant list.

In this connection, the arguments set out in the appeal on a point of law (Annex B5, pages 12 to 15) were relevant and should be reproduced here in full:[7]

[5] Cass., 18 December 2008, Annex A6.
[6] Belgian Federal Public Authority.
[7] They were not, moreover, considered by the Court of Cassation.

"Article 30(5) of the Coordinated Laws on the Conseil d'Etat (Council of State) of 12 January 1973 provides that:

'*The following give rise to payment of stamp duty in the sum of 175 euros:*
1) applications seeking compensation in redress for exceptional harm caused by an administrative authority;
2) applications initiating action for annulment against the acts (both individual and statutory) of various administrative authorities or bringing an appeal on a point of law, as well as applications to suspend implementation of the act of an administrative authority, under the conditions laid down in the second paragraph;
3) applications to have a judgment set aside, applications by a third party to have a judgment set aside, or applications for revision of a judgment.

Where the application is seeking to suspend implementation of the act of an administrative authority (whether individual or statutory), the fee laid down in the first paragraph, under 2), is to be paid immediately only for the application for suspension. In those circumstances, the fee for the application for annulment is due only when a request for continuation of proceedings covered by Article 17(4)b is lodged and is to be paid by the person or persons requesting continuation of proceedings, subject always to Article 30(6).

Where an application for suspension and an application for annulment are brought before the Council of State, and the Council, under the procedure referred to in Article 30(2), considers the request to be redundant, or the request has been concluded under the brief hearing procedure referred to in Article 30(2), the application for annulment does not give rise to payment of a fee.

Where an application for suspension and an application for annulment are brought before the Council of State, and the applicant withdraws during the suspension proceedings, or the contested act is withdrawn so that there is no longer a need to adjudicate, the Council of State may give a single judgment on the application for suspension and the application for annulment without there being any need to seek continuation of proceedings, and so no fee for this is due.

Where a collective application for annulment is made, any applicants who have not requested suspension must make immediate payment of the fee due for the application for annulment, failing which the application will be inadmissible.'.

Article 30(9) stipulates that:

'*The King is to specify, by Decree deliberated upon in the Council of Ministers, the manner in which the fees mentioned in Article 30(5) to (7) and (9) are to be levied.*'

The Decision of the Regent of 23 August 1948 specifying the procedure for claims before the Administrative Litigation Department of the Council of State provides, in Articles 66, 68 and 69, that:

Article 66

‘*Costs include:*

1) the fees covered by Article 30(5) to (7) of the Coordinated Laws;
2) experts’ fees and expenses;
3) witness allowances’.

Article 68

‘[...]
The Council of State settles the fees covered by Article 66, 1), on a restitution basis, awards other costs and determines the contribution to be made to the costs.

Where a request is made to suspend implementation of the individual or statutory act of an administrative authority, the Council of State’s judgment settles not only the costs of the application for suspension but also the costs of the application for annulment and determines the contribution to be made to the costs of the application for annulment at the time when it rules on this application.

In any event, all costs, both those relating to the application for suspension and those relating to the application for annulment, are the responsibility of the party that fails on the merits of the case. However, where the application for suspension is not accompanied or followed by an application for annulment, a judgment lifting the suspension settles the costs by making an order for costs against the applicant.’

Article 69

‘*SPF Finances (the Federal Public Authority for Finance) is to pursue recovery of fees settled on a restitution basis by the Conseil d’Etat (Council of State) and of the other costs advanced by this authority.*

To that end, the Registrar of the Council of State is to send a copy [...] *of the final judgment to the Collector for Land Registration and Estates, accompanied by a detailed statement of the sums to be recovered.*’

The contested decision first states that, '*while it is true that costs such as those settled by the Council of State do not correspond to the actual expenditure incurred by the* [applicants]', that '*the Council of State has held that it was not affected by* [the law of 21 April 2007] *and has not applied the scales laid down by the King under the current Article 1022 of the Civil Procedure Code (Council of State, 4 March 2008, Judgment No. 180.510, cited by the* [defendant],)', that '*the Constitutional Court* [...] *has* [...] *, to show the absence of an infringement of the principle of equality, issued particular grounds for the possibility of claiming, before the ordinary courts, expenses for proceedings conducted before the Council of State (judgment of 16 July 2009 cited by the parties)*', and that '*consequently, if it is to be concluded that the winning party in proceedings before the Council of State has the right to obtain compensation other than only for the costs now granted by the Council of State, this entitlement could, as the case-law of the above-mentioned courts now stands, be obtained only through action before an ordinary court*'. It then goes on to find '*that a request relating exclusively to obtaining expenses incurred by the applicant in proceedings before the Council of State need not be declared upheld, even though the Council has awarded the costs of the proceedings to the applicant*'. In doing so, the contested decision lends the rules relating to costs before the Council of State implications that they do not have, since the costs are not settled by the Council of State in favour of the winning party but are owed to the revenue authorities.

Thus, the costs covered by Article 66, 1), of the Decision of the Regent, i.e. the fees covered, inter alia, by Article 30(5) of the Coordinated Laws, namely the stamp duty of €175 for applications initiating an action for annulment and an action for suspension are, under Article 68 of the Decision of the Regent, settled on a restitution basis by the Council of State and are, as a rule, the responsibility of the losing party. Article 69 explicitly states that SPF Finances is to pursue recovery of fees settled on a restitution basis by the Council of State.

Consequently, in stating '*that a request relating exclusively to obtaining expenses incurred by the applicant in proceedings before the Council of State need not be upheld, even though the Council has awarded the costs of the proceedings to the applicant*', the contested judgment fails to have regard to all the above-mentioned provisions, under which costs are not awarded to the parties before the Council of State, but recovered by SPF Finances (contravention of Article 30 of the Coordinated Laws on the Council of State of 12 January 1973 and of Article 66 of the Decision of the Regent of 23 August 1948 specifying the procedure for claims before the Administrative Litigation Department of the Council of State and, in particular, Articles 68 and 69 of that Decision).

Finally, the decision also fails to have regard to the principle that documents must be construed in accordance with their actual terms, in that it indicates that the judgments of the Council of State and of the Constitutional Court which it cites, i.e. the judgment of 4 March 2008 of the Council of State and the judgment of 16 July 2009 of the Constitutional Court, establish a point of information that in fact does not appear in them, namely that costs settled before the Council of State compensate the winning party (contravention of Articles 1319, 1320 and 1322 of the Civil Code)."

2. Infringement of the right to equitable procedures (article 9, paragraph 4, of the Aarhus Convention)

The communicants take the view that the proceedings before the Court of Appeal and the Court of Cassation in the present case infringed the right to equitable procedures guaranteed by article 9, paragraph 4, of the Aarhus Convention, and urge the Committee to share this view.

Thus, the Court of Cassation departed from its earlier case-law (particularly the judgment of 18 December 2008 – Annex A6)[8] in a way that was not only unforeseeable but without any specific reason or justification, even though the communicants' appeal drew the Court's attention to this earlier decision (Annex B5, page 16, point V.1 of the appeal on a point of law).

The Court of Appeal, firstly, also departed from the case-law of the Court of Cassation – even though it is also binding on the Court of Appeal – and, secondly, on its own initiative, raised the argument that costs had already been granted by the Council of State; it did so without ordering the hearing to be reopened in order to allow the parties, and particularly the communicants, to clarify this question. Moreover, the argument raised by the Court of Appeal on its own initiative is an inexcusable manifest error (see the second argument set out in point III.B.1.c of this Communication).

These two points clearly constitute infringements of the principle of a fair trial.

C) The "environmental" nature of this case

The Aarhus Convention guarantees access to justice in environmental matters that is not prohibitively expensive.

This case as a whole does relate to the environment and therefore clearly falls within the scope of the Convention.

The basis of this case is an action for suspension and annulment, before the Council of State, against the granting of planning permission for a plan that would have led to the communicants' loss of light and to damage to the landscape (Annex B2).

Firstly, an action brought against a planning permit is per se access to justice in environmental matters, since such a permit is nothing other than permission to alter the environment, while, secondly, the kinds of damage invoked by the communicants were themselves linked to the environment (impact on the appearance of the landscape and on light).

According to the recitals to the Convention, "*every person has the right to live in an environment adequate to his or her health and well-being (...)*". A harmonious landscape and the opportunity to enjoy maximum light are, of course, aspects of securing well-being and even health. It follows that where the latter are threatened by a decision made in a planning matter and an action is brought against that decision, access to justice in environmental matters is affected.

[8] See above, point B.1.b of this Communication.

This is indicated by the fact that, in the Belgian domestic legal system, it has already been held that:

> "*The right to a decent environment is enshrined in the Constitution and the concept of 'environment' is to be broadly understood as including the aesthetic aspect*"[9] (emphasis added).

It is, in addition, obvious that the outcome of these proceedings with regard to compensation for expenditure on the action is also covered by the right of access to justice in environmental matters.

IV. NATURE OF ALLEGED NON-COMPLIANCE

The alleged non-compliance consists of two specific, individual cases of infringement of the Aarhus Convention, and in particular of the right to access to justice guaranteed by the Convention, since the procedure for access to justice was rendered prohibitively expensive and unfair.

V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

Article 9, paragraph 3, and article 9, paragraph 4, of the Convention, and in particular the guarantees of an equitable procedure and one which is not prohibitively expensive.

VI. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES

As mentioned above, an appeal was lodged before the Court of Cassation (Annex B5) regarding the judgment of the Court of Appeal of 8 June 2010 (Annex A3), about which this complaint is being made. The Court of Cassation did not quash the contested judgment (see Annex A4), and this Communication is also making a complaint about that Court's judgment.

No international remedy – apart from this Communication – has been sought in this case.

VII. CONFIDENTIALITY

The communicants make no request for confidentiality.

[9] J.P. Marche-en-Famenne, 21 February 1995, reported in *JLMB [Revue de Jurisprudence de Liège, Mons et Bruxelles]* 1995, p. 1301, Annex A7.

VIII. ANNEXES

A. Legal rulings

Annex A1: Judgment No. 191.594 of the Belgian Council of State of 18 March 2009

Annex A2: Judgment of the Huy Court of First Instance of 4 June 2009

Annex A3: Judgment of the Twelfth Chamber of the Court of Appeal of Liège of 8 June 2010

Annex A4: Judgment No. *C.11.0500.F* of the Court of Cassation, Belgium, of 11 October 2012

Annex A5: Judgment No. 118/09 of the Belgian Constitutional Court of 16 July 2009

Annex A6: Judgment No. *C.07.0018.F* of the Court of Cassation, Belgium, of 18 December 2008

Annex A7: Judgment of the Justice of the Peace at Marche-en-Famenne, 21 February 1995, summary.

B. Other

Annex B1: Planning permission issued by the Municipality of Huy on 6 August 2007

Annex B2: Action for annulment and suspension, dated 1 October 2007, and brought before the Council of State on 2 October 2007

Annex B3: Summons of 3 November 2008 in the action brought by the communicants against the town of Huy

Annex B4: Communicants' appeal application, dated 19 June 2009

Annex B5: Communicants' application (for appeal) on a point of law, dated 28 June 2011, and brought before the Court of Cassation on 12 July 2011.

IX. SUMMARY

In the light of the Communication's brevity, no summary seems to be necessary.

X. SIGNATURE

[signed]
For the communicants,
Liège, 16 February 2015
Alain LEBRUN,
Lawyer.