

## FRENCH REPUBLIC

### MINISTRY FOR INCLUSIVE ECOLOGICAL TRANSITION

**Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by France with the provisions of the Convention on access to justice in relation to standing (France ACCC/C/2015/135) – Further comments from Mr Patrick Janin in response to the observations of the French authorities – Further observations by the French authorities**

Following the observations of the French authorities on Mr Patrick Janin's Communication, which were sent to the Compliance Committee on 9 August 2016, the applicant submitted further comments on his Communication, which were dated 19 September 2016.

The French authorities now respectfully submit the following additional observations to the Compliance Committee.

**1. Mr Janin states that his Communication is based exclusively on the provisions of article 9, paragraph 2, of the Convention and that therefore the French authorities' observations on articles 6 and 8 of the Convention are irrelevant.**

For the following reasons, the French authorities submit that it was essential to draw attention to the link between article 9, paragraph 2, of the Convention and article 6 of the Convention, as well as 'other relevant provisions' of the Convention (notably article 8):

Article 9, paragraph 2, of the Convention provides that 'each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- a) Having a sufficient interest or, alternatively,
- b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention' (emphasis added).

The review procedure provided for by article 9, paragraph 2, applies without reservation to decisions, acts or omissions covered by article 6 of the Convention, namely particular administrative decisions relating to specific activities that may have a significant impact on the environment.

In contrast, for decisions governed by 'other relevant provisions' of the Convention, *inter alia* articles 5, 7 and 8, implementation of article 9, paragraph 2, is conditional on the existence of national legal provisions expressly setting this out. In circumstances such as those of this case, that condition is not satisfied.

In the present case, the administrative decision challenged by Mr Janin, which is intended to frame a regulatory mechanism to control non-domestic animal species, clearly cannot be viewed as permitting a specific activity within the meaning of article 6 of the Convention.

Therefore the action brought by Mr Janin does not fall within the scope of article 6, but within that of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

The present situation, as the French authorities made clear in their observations of 9 August 2016, is that the review procedure provided for by article 9, paragraph 2, of the Convention has not been specifically extended into national law on decision-making under article 8.

Therefore the French authorities consider that there has been no failure to comply with the provisions of article 9, paragraph 2, of the Convention.

**2. The French authorities also submit, as a secondary point, that it is appropriate to inform the Compliance Committee of the rules of national law which are applicable in these circumstances, notably those relating to an interest giving standing to bring proceedings**

Members of the public have access to a review procedure before a court of law to challenge decisions of the type at issue in the present case – as provided for by article 9, paragraph 3, of the Convention – irrespective of whether they have participated in the procedure for preparing the contested decision.

In this context, while Mr Janin does not challenge the relevance of the concept of sufficiently definite, direct personal interest, he submits that the dismissal of his petition on grounds of lack of standing demonstrates that this concept is construed by the Conseil d'Etat in a manner that does not comply with the guarantees provided for by the Aarhus Convention, and that this has the effect of restricting access to justice to legal entities alone.

**2.1 Contrary to this contention, the legal standing of persons other than officially recognized environmental protection associations is broadly acknowledged, giving them wide access to the courts**

**a) Where an action is brought by an association that has not been officially recognized, by any other legal entity or by any natural person, the interest invoked by the applicant must meet certain conditions.**

- This interest must be lawful: it cannot be intended to preserve an unlawful situation; it may be material or non-material, individual or collective.

- It must be relevant and appropriate: the applicant's status must be connected with the decision at issue. For example, it is not admissible for a person to invoke his status as a trader in order to challenge permission to build commercial premises in the neighbourhood of his shop; it is, however, admissible for him to challenge consent to operate these premises as shops.

- In accordance with the principle that one cannot sue or be sued by proxy, a legal interest in bringing proceedings must be sufficiently personal: it must be one's own interest.

- The direct (or not unduly indirect) nature of the interest invoked by the applicant should establish a link between the applicant's personal interest and the contested measure. Thus, an action brought on the basis of the applicant's status as 'citizen' or 'consumer' does not prove a sufficiently direct relationship between the impact of the measure and the applicant's own situation. In that context, it should be pointed out that associations which are not officially recognized and therefore do not benefit from the presumption of standing afforded to officially recognized associations can bring proceedings before the same courts as the latter if, like any other applicant, they prove a sufficiently direct interest to give them standing (CE, 25 July 2013, *Association de défense du patrimoine naturel à Plourin*, No. 355745, unpublished).

- Finally, a legal interest in bringing proceedings must be definite.

**b) In respect of actions brought against individual decisions**, the Conseil d'Etat has held that in order to be able to challenge a decision enforcing measures on installations classified for environmental protection purposes, which may present hazards or drawbacks for the amenity of the neighbourhood, for the personal health and the security of members of the public, for public health and safety, for agriculture or for nature and the environment, natural persons who are third parties in this context must prove a sufficiently direct interest to give them standing to seek annulment of the decision, having regard to the drawbacks and hazards to which the installation at issue exposes them, taking into account *inter alia* the situation of the persons concerned and the layout of the site (CE, 13 July 2012, *Société Moulins Soufflet*, Nos 339592, 340356, B).

The same structured approach to assessing legal standing has been applied to the various permits required for construction of a nuclear power plant, where third parties have had to prove a sufficiently definite, direct interest to give them standing to seek annulment of the decision, having regard to the hazards to which the installation at issue exposes them, taking into account *inter alia* the situation of the persons concerned and the layout of the site (CE, 24 March 2014, *République et canton de Genève et Ville de Genève*, No. 358882, T.).

It also provided the basis for acknowledgement of the standing of a legal entity (the Champagne Committee) to challenge planning permission for a radioactive waste storage centre, since the applicant was a joint trade association whose objects are 'to promote sustainable winegrowing practices, environmental protection and a rational approach to vineyard development' and the Champagne vineyards were located close to the installation (CE, 27 July 2009, *Comité interprofessionnel du vin de champagne*, No. 301385, unpublished).

**c) Where the acts concerned have regulatory force**, the administrative courts' approach to the direct nature of legal standing is fully consistent with the concept of 'having a sufficient interest' provided for by the Aarhus Convention.

Contrary to what Mr Janin maintains, the administrative courts acknowledge that legal standing may be individual or collective, just as it may be material or non-material. However, it must be to a certain degree **specific** in nature.

In respect of **natural persons**, there are numerous examples demonstrating that the administrative courts seek to achieve balance, guaranteeing the right to a review procedure while refusing to introduce an *actio popularis* that would give everyone the right to bring proceedings against any regulatory act.

Thus, applicants who present themselves as consumers, citizens or taxpayers in the broad sense fail to prove that they have a definite, direct or personal interest: simply acting in defence of lawfulness is not sufficient to constitute such an interest.

This means that a private individual who merely put forward the interests of consumers in a general way was not proving any definite, direct or personal interest giving him standing to seek annulment of a Ministerial Order prohibiting the compounding and supply of pharmaceutical or other preparations based on *Teucrium chamaedrys* L. and a Ministerial Order for their classification on List I of poisonous substances (CE, 29 December 1995, *Beucher*, No. 139530, Rec.).

Similarly, the status of French taxpayer is not in itself accepted as conferring legal standing, since it is too broad: its acceptance would lead to every taxpayer being in a position to challenge almost all decisions made at national level (CE, 13 February 1930, *Dufour*, A). A local taxpayer, on the other hand, has sufficient interest to challenge certain local measures that affect the local authority's budget (CE, 29 March 1901, *Casanova*, or CE, 16 March 2001, *Commune de Rennes-les-Bains*, No. 157128).

The applicant must prove a **personal interest that would be affected by the decision concerned and do so with a degree of probability that establishes a link between the interest invoked and the decision**.

Moreover, in assessing the sufficiently direct nature of the interest concerned, the administrative courts may apply a **geographical test**.

Thus, where an applicant relied on his status as a walker and a resident of the *département* in which a national park had been established but resided more than 200 km away, the court considered that he had not proved a sufficient interest to challenge the decree establishing this park (CE, 3 June 2009, *Canavy*, No. 305131, B).

On the other hand, it is admissible for a citizen residing in a given region to challenge the lawfulness of a decree approving the Spatial Planning and Development Scheme for that region (in the case concerned, this was Corsica: CE, 14 January 1994, *Collectivité territoriale de Corse et Casalonga*, Nos 135936, 136193).

Similarly, residents of an area through which a motorway was likely to be built proved a sufficient interest to challenge the lawfulness of approval of the National Highways Master Plan (CE, 21 October 1994, *Gutin et autres, Guilly et autres*, Nos 138077 and 138101).

The same was true of a private individual residing in a municipality adjacent to the area affected by an order establishing a wind turbine development zone, who proved a sufficient interest to bring proceedings (CE, 16 April 2010, *Brocard et Association Rabodeau Environnement*, No. 318067, B).

Moreover, as to the admissibility of an action brought by an association, the association concerned must prove a definite, direct personal interest in securing annulment of the contested regulatory act. This means that putting the measure into effect would undermine the interests defended by the association in question, assessed in the light of the objects defined in its memorandum and articles.

Thus, a joint association with objects that involve ‘studying and defending the rights and the material and non-material interests, both collective and individual, of the owners of forests in the *département* of Loire-Atlantique’ and ‘everything relating to the role of the forest in the environment, to sustainable forest management and to nature protection’ proved a legal interest in bringing proceedings in a case relating to an order of the Minister of Ecology, Sustainable Development and Energy establishing a list of species of animals classified as pests (CE, 28 November 2014, *Fédération départementale des chasseurs de Loire-Atlantique et autres*, No. 372879, unpublished).

Similarly, it was admissible for an association whose object is ‘improving the quality of life for people affected by airport noise pollution’ to challenge a Noise Exposure Plan (CE, 6 June 2007, *Commune de Groslay et autres*, No. 292942).

Assessment of the direct nature of an association’s legal interest in bringing proceedings also takes into account the **geographical relationship** between the operation of the contested measure and the geographical scope of the association’s involvement. Therefore a local association must show that a particular decree would affect the interests it is defending at the local level (CE, 6 November 2013, *Association défense de la santé et de l’environnement*, No. 354440; CE, 4 November 2015, *Association ‘Ligue des droits de l’Homme’*, No. 375178, Rec.).

Finally, it should be noted that, in another decision concerning the Order challenged by Mr Janin, the Conseil d’Etat held that actions for annulment brought by three associations active in environmental matters were admissible – indeed, it annulled parts of the measure at issue (CE, 14 June 2017, *ASPAS et autres*, Nos 393045 et al., unpublished).

Thus, the French authorities submit that these criteria, which allow wide access to justice before the administrative courts in environmental protection matters, are fully consistent with the requirements of article 9 of the Convention.

2.2 Mr Janin further maintains that the French authorities ‘distort the wording and meaning’ of his Communication. He writes: ‘the French authorities argue on an abstract level, through generalities, without considering the facts that characterize my personal situation’. Mr Janin submits that, in the present case, his personal commitment to various nature protection associations gives him a sufficient interest within the meaning of article 9, paragraph 2, of the Convention.

Contrary to this contention, the Conseil d’Etat, in its decision of 23 October 2015, specifically examined the applicant’s arguments on this point.

It held that, in invoking his interest in wildlife and its preservation, which is reflected in his publication of numerous articles in specialized journals, his involvement, over a period of several

years, as a founding member or administrator of environmental protection associations, and the fact that he was involved in the public participation procedure on the draft of the contested Order, which took place under Article L. 120-1 of the Environmental Code, Mr Janin had failed prove a definite, direct personal interest in the annulment of the Order of 30 June 2015 by the Minister of Ecology, Sustainable Development and Energy establishing the list of species of animals classified as pests, the periods stipulated for their destruction and the methods of destruction to be used. In doing so, the Conseil d'Etat applied only the criteria noted in Section 2.1. above.

In particular, the fact that Mr Janin participated in a personal capacity in the consultation procedure on the draft of the Order which he went on to contest was not sufficient to give him a right of access to a review procedure to challenge the Order finally adopted. In accordance with the above criteria, it was necessary for him to prove a definite, direct personal interest in securing annulment of Order, not just that he had participated in the procedure for preparing the measure concerned. In this regard, it should be pointed out that the Conseil d'Etat has held that Article 2 of the Environmental Charter, which transposes the provisions of the Aarhus Convention into national law and ensures that 'everyone is under a duty to participate in preserving and enhancing the environment', cannot in itself give all those who invoke this provision standing to bring an action on grounds of ultra vires against any administrative decision that they seek to contest (CE, 3 August 2011, *Mme Buguet et autres*, Nos 330566, 330050, B).

Thus, Mr Janin's personal situation was in fact taken into consideration by the Conseil d'Etat.

The French authorities remain at the Compliance Committee's disposal and will be happy to provide any further details required.