

**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)**

At its meeting of 18 December 2015, the Aarhus Convention Compliance Committee considered, on a preliminary basis, the admissibility of the Communication submitted to the Committee by Mr Patrick Janin on 4 November 2015, concerning compliance by France with the provisions of article 9, paragraph 2, of the Convention.

In this connection, by letter dated 11 March 2016, the Secretariat to the Compliance Committee invited the French authorities to submit their observations on this Communication within five months of the date of notification.

The French authorities have the honour to transmit the following observations to the Compliance Committee.

1. Mr Patrick Janin's Communication to the Compliance Committee follows Decision No. 392550 of 23 October 2015 of the Conseil d'Etat dismissing his action for annulment of the Ministerial Order of 30 June 2015 establishing the list of native animal species classified as pests across the whole of mainland France, the periods stipulated for their destruction and the methods of destruction to be used, pursuant to Article R. 427-6 of the Environmental Code.

His petition was based on the alleged infringement of the right recognised by Article 7 of the Charter for the Environment for everyone to participate in public decision-making likely to affect the environment, in the conditions and to the extent provided for by law. He maintained that the public consultation procedure, arranged under Article L. 120-1 of the Environmental Code, for preparation of the contested Order did not allow effective exercise of this right.

The Conseil d'Etat's finding that the petition is inadmissible was based on the petitioner's failure to demonstrate a definite, direct personal interest in annulment of the contested Order.

In his Communication, Mr Janin maintains that, through a restrictive assessment of his standing, the substance of his petition was not considered and that this denied him his right to judicial remedy, in contravention of article 9, paragraph 2, of the Aarhus Convention.

2. The French authorities are of the opinion that there are no grounds for this Communication, since Mr Janin is not justified in maintaining that article 9 of the Convention gives everyone a right to judicial remedy against any decision likely to affect the environment.

2.1. Article 9, paragraphs 2 and 3, of the Convention do not provide that taking part in the public participation procedure implemented for a draft decision likely to affect the environment has the effect of giving everyone who has taken part legal standing to challenge the decision concerned.

- 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”.*

Thus, the right to review is intended for members of the public concerned having a sufficient interest or maintaining impairment of a right, given however that “*what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention*”.

The Parties are also empowered to extend the review procedure to other relevant provisions of the Convention, such as those of articles 5, 7 and 8 of the Convention.

- The same is true in respect of the opportunity, provided for in article 9, paragraph 3, of the Convention, for members of the public, where they meet the criteria, if any, laid down in national law, to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Consequently, in the absence of provisions of national law to that effect, taking part in a public participation procedure does not in itself create a right to challenge the decision taken on the basis of the procedure.

2.2. There has been no failure to comply with article 9, paragraphs 2 and 3, of the Convention in the present case.

The objective of the decision contested by Mr Janin is to frame a regulatory mechanism to control non-domestic (native) animal species classified as pests and found in mainland France, such as polecat, fox, rook or carrion crow, by establishing the list of species, the periods stipulated for their destruction and the methods of destruction to be used.

The Order contested by Mr Janin is not covered by the requirements of article 6 of the Convention, which applies to particular administrative decisions on whether to permit specific categories of activities, listed in annex I to the Convention, which may have a significant impact on the environment (mineral oil and gas refineries, installations for gasification and liquefaction, nuclear power stations, installations relating to the production and processing of metals, the chemical industry and waste-water treatment plants) or, where so provided for under national law, to decisions on activities not listed in annex I which may have a significant effect on the environment.

Nor should the Order be seen in the context of the requirements of paragraph 20 of annex I, which provides on a supplementary basis that any activity not covered by paragraphs 1 to 19 of the annex shall be included among activities referred to in article 6, paragraph 1 (a), in cases “*where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation*”.

In practice, the decision contested by Mr Janin is covered by the requirements of article 8 of the Convention, which concerns public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

In this connection, the provisions of national law arranging public participation in public decision-making likely to affect the environment and covered by article 8 of the Convention do not provide for a specific procedure for judicial remedy, and the admissibility of any action is unconnected with participation in the procedure for preparing the contested decision.

However, decisions of the type at issue in this case may be subject to judicial remedy: the rules of ordinary law which are to be applied in this instance are *inter alia* those, identified by the case-law of the administrative courts, concerning interest giving standing to bring proceedings.

Pursuant to this case-law, standing is defined as a definite, direct personal interest sufficient to seek annulment of an administrative decision. The petitioner must show that the act he is seeking to have annulled places him in a special position.

Assessment of whether the petitioner has a sufficiently definite, direct personal interest is to be made by the administrative courts and is not open to appeal; in an action for annulment, the administrative court will find this interest sufficient provided that the harm to the petitioner has not been unduly indefinite or indirect.

An interest giving standing to bring proceedings may be either individual or collective: individuals and associations can readily bring an action against an administrative decision, irrespective of their participation in the early enquiry stages or the later preparation of the decision concerned.

In general, associations have standing if the contested decision concerns their objects, which they are free to define in their articles of association.

In particular, environmental protection associations enjoy easy access to justice: they can bring proceedings before the administrative courts for any complaint relating to the objects of the association; they have the right, in certain conditions, to exercise the same rights as those granted to a party claiming damages in a criminal matter, and, where they are officially recognized, they benefit from presumed legal interest in bringing proceedings against any administrative decision likely to harm the environment (Article L. 142 of the Environmental Code).

The administrative courts' approach to assessing whether or not the objective conditions for standing have been met is flexible, in accordance with the Convention's objective of granting the public concerned wide access to justice; but the courts are also concerned not to encourage people to bring proceedings where the effect on their legitimate interests has not been sufficiently established.

In the present case, the Conseil d'Etat's application of the conditions relating to an interest giving standing to bring proceedings is consistent with well-established, relevant administrative case-law. Both Mr Janin's interest in wild life and wildlife conservation and the fact that he took part in the public participation procedure are, of course, related to the subject matter of the contested decision; however, the Conseil d'Etat did not find that they amounted to circumstances demonstrating that the act he is seeking to have annulled placed him in a special position. Therefore the interest defended by Mr Janin did not appear to be sufficiently established.

It should also be pointed out that, in its decision of 23 October 2015 (Point 2) the Conseil d'Etat specifically examined the petitioner's argument concerning the requirements of article 9 of the Aarhus Convention: *"whereas Mr Janin states, in the second place, that Article 7 of the Charter for the Environment provides that everyone has the right to participate in the process of making decisions likely to affect the environment; whereas, however, contrary to what is maintained, these provisions have neither the aim nor the effect of altering the conditions for an administrative court's assessment of an interest giving standing to bring proceedings against decisions likely to affect the environment; whereas, similarly, the requirements of article 9 of the Aarhus Convention do not on any view have either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment"*.

In dismissing Mr Janin's application, on the first ground that he could not demonstrate an interest giving him standing to bring proceedings and on the second ground that Article 7 of the Charter for the Environment and article 9 of the Aarhus Convention do not have either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment, the Conseil d'Etat did not fail to comply with article 9 of the Convention.

Accordingly, the French authorities are of the opinion that there are no grounds for this Communication.

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