

**Oral statement of the Government of the Flemish Region, acting
on behalf of the Kingdom of Belgium, on the Preliminary
Admissibility of Communication PRE/ACCC/2022/192
(Belgium)**

Aarhus Convention Compliance Committee's seventy-sixth
meeting on 13 September 2022

1. The Flemish Government, acting on behalf of the Kingdom of Belgium, wishes to thank the Compliance Committee for the opportunity to deliver comments on the preliminary admissibility of the communication from the public n° PRE/ACCC/C/2022/192 (hereinafter: "*the Communication*").
2. Belgium has carefully considered the arguments set out and the information provided in the Communication and wishes to raise the following points in relation to the question of admissibility.
3. The question put forward by the communicants is in essence whether the Constitutional Court's assessment of the constitutionality of the so-called Flemish Validation Decree of 17 July 2020 is in conformity with the provisions of the Aarhus Convention. By the aforementioned decree, the Flemish Parliament validated the sectoral wind turbine norms issued by the Flemish Government, which apply to the permitting and operation of wind turbines in the Flemish Region. Those norms became invalid following a ruling of the European Court of Justice of 25 June 2020, by which the Grand Chamber of the Court ruled, in essence;
 - (1) that the Flemish wind turbine norms qualify as a plan of programme within the meaning of the European SEA Directive;
 - (2) that as a consequence, the norms should have been subject to an environmental assessment in accordance with the provisions of that Directive; and
 - (3) that a national court may, in exceptional cases, for overriding considerations, maintain the effects of those wind turbine norms for the period of time strictly necessary to remedy that illegality.

As a result of the Flemish Validation Decree of 17 July 2020, which has the force of law, the Flemish wind turbine norms retain their effects for a limited period of three years, until the adoption of new norms that have been subject to an environmental assessment in accordance with the provisions of the European SEA Directive, including consultations of the public and of different advisory bodies.

4. The Communication argues that the validation of the illegal wind turbine norms breaches Articles 7 (read together with Article 6), 8, 9.2 and 9.3 of the Aarhus Convention. According to the communicants, the Belgian Constitutional Court failed to recognise this breach in its judgement of 14 October 2021.
5. First and foremost, it is evident from the wording of the Communication that the communicants' main aim is for the Committee to recognise that the Belgian Constitutional Court has erred in law when assessing the constitutionality of the Validation Decree in light of the provisions of the Aarhus Convention.

However, as stated by the Committee on different occasions, the review mechanism under the Aarhus Convention is not a “*redress mechanism*” that can be used against a specific judicial decision. The State Parties to the Aarhus Convention have not tasked the Compliance Committee to rule on the merits of a specific decision of a national court, let alone a judgement of a constitutional court. This is even more true when the communication in question does not point at “*a wider problem with the legal framework or judicial practice of the Party concerned*”¹.

Therefore, Belgium kindly requests the Committee to declare the Communication inadmissible.

6. Secondly, Belgium believes the Communication is manifestly unreasonable and does not meet the *de minimis* threshold, as set out under paragraph 20 (d) of the Annex to Decision I/7.

To the extent that the communicants allege a breach of the Aarhus Convention on the grounds that the Flemish wind turbine norms have not been subject to an environmental assessment for plans and programmes, it must be recalled that the Aarhus Convention as such does not impose such obligations. Indeed, the provisions invoked by the communicants, i.e. Articles 6, 7, 8 and 9 of the Aarhus Convention do not require State Parties to undertake environmental assessments for plans and programmes.

Moreover, the validation is limited in time, for the period strictly necessary to remedy the illegality by the adoption of new sectoral norms that have been subject to an environmental assessment in accordance with the provisions of the European SEA Directive, including consultations of the public and of different advisory bodies. This means that, as far as the public participation rights under Articles 6-8 of the Aarhus Convention are concerned, the situation is being addressed in the internal legal order.

As to the alleged violation of the right of access to justice, Belgium wants to stress the limited scope of the Validation Decree. Its only effect is that the public cannot raise a violation of national, European and international provisions relating to strategic environmental assessments for a maximum period of three years, until the entry into force of new wind turbine norms. Therefore, the alleged breach of the Aarhus Convention does not amount to a systemic breach of the right of access to justice. This is demonstrated by the proceedings that have led to the judgment of the Constitutional Court of 21 October 2021 and in which the members of the public, including the communicants, were able to put forward their grievances relating to the alleged violation of the Convention.

7. For all these reasons, Belgium, as the Party concerned, respectfully requests the Committee to find Communication PRE/ACCC/C/2022/192 inadmissible or that it defers making any preliminary determination on the admissibility of the Communication.

8. Belgium remains at your disposal, should you want us to provide further clarifications on any point to assist the Committee in its deliberations after internal consultations.

¹ See CC/C/2019/172 Belgium.