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Environment Division
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RE: Comments of the Kingdom of Belgium on the Preliminary Admissibility of Communication PRE/ACCC/C/2022/192 (Belgium)

Dear Committee Members,

We are writing you as legal counsels of the Government of the Flemish Region, who acts on behalf of the Kingdom of Belgium with regard to the communication from the public n° PRE/ACCC/C/2022/192, submitted to the Secretariat to the Aarhus Convention on 8 August 2022 (hereinafter: "*the Communication*").

First and foremost, the Kingdom of Belgium wishes to thank the Committee for the opportunity to deliver preliminary comments on the admissibility of the Communication. Furthermore, we are honoured for the opportunity to participate in the Compliance Committee's seventy-sixth meeting on 13 September 2022.

In what follows, we will provide the Committee with the necessary background information for it to be able to assess the admissibility of the Communication. Thereafter, we will set out the reasons as to why the Kingdom of Belgium believes the Communication is inadmissible.

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1 REGARDING THE LEGAL FRAMEWORK FOR PERMITTING WIND TURBINES IN THE FLEMISH REGION

(a) *Introduction*

1. Belgium is a federal state, where the regions, i.e. the Flemish Region, the Walloon Region and the Brussels-Capital Region, are competent for the urban planning and environmental legal framework that applies to the permitting of wind turbines.

2. The Communication relates to the situation in the Flemish Region.

The question put forward by the communicants is in essence whether the Constitutional Court's assessment of the constitutionality of the Flemish Decree of 17 July 2020 validating the sectoral environmental norms for wind turbines (hereinafter: "*the Validation Decree*") is in conformity with the provisions of the Aarhus Convention. By the aforementioned decree, the Flemish Parliament validated an irregular act of the Executive (i.e. the Flemish Government) as a result of which this legal act retains its effects for a limited period of three years.

A legislative validation raises several complex questions of a constitutional nature, such as the separation of powers, the application of international and European law in the national legal order and the right of access to justice. Under Belgian law, it is for the Belgian Constitutional Court to oversee the constitutionality of a legislative validation, in light of the general principles established throughout its case law, which ensure the conformity of the legislative validation with the provisions of international and European law. The use of the technique of legislative validation is subject to stringent conditions, due to its retroactive effects. As such, a legislative validation is only allowed where there are "*exceptional circumstances or imperative reasons of public interest*" and subject to the condition that it serves as an *ultimum remedium.*

(b) *Legal framework for permitting wind turbines in the Flemish Region*

3. In the Flemish Region, the Order of the Flemish Government on the general and sectoral norms with regard to environmental health of 1 June 1995 (in Dutch: "*Besluit van de Vlaamse Regering van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne*", hereinafter: "*Vlarem II*" or "*the Order*") lays down general and sectoral environmental norms concerning, first, the nuisances and risks to which certain installations and activities can give rise and, second, the technical measures that should be taken to avoid or mitigate adverse impacts on the environment.

Prior to 2011, *Vlarem II* did not encompass any specific legally binding standards for wind turbines. A first coordinated approach to the permitting of wind turbines was introduced by the Circular EME/2000.01 laying down the "*Assessment framework and conditions for the installation of wind*

turbines", which was adopted by the Flemish Government on 17 July 2000 (hereinafter: "*the Circular of 2000*").

The Circular of 2000 aimed to provide a coordinated approach to urban planning and environmental aspects of wind turbines in order to reconcile the need for wind turbine projects in view of sustainable energy production with the demands of a good spatial planning.

Due to the technical evolutions in wind turbine projects (bigger and more powerful), the Circular of 2000 was replaced by Circular EME/2006/01-R0/2006/02 laying down the "*Assessment framework and conditions for the installation of wind turbines*" of 12 May 2006 (hereinafter: "*the Circular of 2006*"). The main objective of the Circular of 2006 was to further encourage the production of wind energy in light of the renewable energy targets, while assuring that any impact on people or the environment remained within acceptable limits. As such, the Circular of 2006 set out conditions on noise and shadow flicker as well as spatial planning principles.

4. On 23 December 2011 the Flemish Government introduced a new section 5.20.6 into Vlarem II. This section, applicable until this very day, lays down the standards for wind farms and sets out the conditions relating to noise, shadow flicker and safety.

On 25 April 2014 a new Circular R0/2014/02 laying down the "*Assessment framework and conditions for the installation of wind turbines*" (hereinafter: "*the Circular of 2014*") replaced the Circular of 2006, albeit in a limited form, since the technical norms on noise and shadow flicker are included in section 5.20.6 of Vlarem II.

2 REGARDING THE JUDICIAL REVIEW PROCEDURES AGAINST SECTION 5.20.6 OF VLAREM II AND THE CIRCULAR OF 2006

2.1 Regarding the procedure before the Council for consent disputes and the preliminary ruling of the European Court of Justice of 25 June 2020, which ultimately led to the adoption of the Validation Decree

5. On 27 October 2016, the European Court of Justice ruled in its *D'Oultremont and Others* judgement that a regulatory order containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations, falls under the notion of "*plans and programmes*", within the meaning

of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (hereinafter: "*SEA Directive*").[1]

Following the aforementioned judgment of the Court, several actions were brought before the Council for consent disputes (in Dutch: "*Raad voor Vergunningsbetwistingen*" or "*RvVb*")[2], seeking the annulment of consents for wind turbine projects in the Flemish Region. In support of their action, the applicants before the Council for consent disputes[3] submitted that the Order and the Circular of 2006, on the basis of which the consent was granted, infringe the SEA Directive on the grounds that those national instruments were not subject to an environmental assessment, contrary to the provisions of that directive, as interpreted by the Court (inter alia in its judgment of 27 October 2016, *D'Oultremont and Others*).

6. By way of an interlocutory judgment of 4 December 2018 No. RvVb/A/1819/0352, in one of the appeals, the Council for consent disputes raised two preliminary questions to the European Court of Justice.

By its first (and most important in regard to the Communication) preliminary question, the Council for consent disputes asked, in essence, whether Article 2(a) of the SEA Directive must be interpreted as meaning that the concept of "*plans and programmes*" covers an order and circular, adopted by the government of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines.

By its second preliminary question the Council for consent disputes asked, in essence, whether and under what conditions, if it is found that an environmental assessment within the meaning of the SEA Directive should have been carried out prior to the adoption of the Order and Circular of 2006 on the basis of which a consent was granted for the installation and operation of wind turbines, with the result that those instruments and that consent do not comply with EU law, a court may maintain the effects of those instruments and that consent.

In its judgement of 25 June 2020 with No. C-24/19 (annex I), the Court (Grand Chamber) ruled as follows:

- Article 2(a) of the SEA Directive must be interpreted as meaning that the concept of "*plans and programmes*" covers an order and circular, adopted by the government

[1] ECJ 27 October 2016, nr. C-290/15, *D'Oultermont a.o.*

[2] The Council for consent disputes is an independent Flemish administrative tribunal, competent for, *inter alia,* the appeals against environmental, urban planning or integrated permits that have been awarded or refused in Flanders.

[3] Including, *inter alia*, the communicants of the present Communication.

of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines;

- Article 3(2)(a) of the SEA Directive must be interpreted as meaning that an order and a circular, both of which contain various provisions concerning the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision[4];

- where it appears that an environmental assessment within the meaning of the SEA Directive should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, was granted for the installation and operation of wind turbines with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that illegality. It is for the referring court, if necessary, to carry out that assessment in the case in the main proceedings.

7. Following the ruling of the Court of Justice of 25 June 2020 legal uncertainty compromised both existing as well as future wind turbine projects, since the legal bases for permits that were awarded in the past (i.e. section 5.20.6 of Vlarem II and the Circular of 2006) as well as the legal basis for future permits (i.e. section 5.20.6 of Vlarem II) became precarious.

The potential annulment of existing consents and the impossibility to grant new consents for wind turbine projects were likely to have significant implications for the electricity supply in Belgium and would have jeopardised the attainment of the binding renewable energy targets under EU law.

In order to remedy this situation and given the imperative reasons of overriding public interest, the Flemish Parliament intervened and adopted the Decree of 17 July 2020, validating the sectoral environmental norms for wind turbines (hereinafter: "*the Validation Decree*") (Annex II).

2.2 Validation Decree and the new sectoral norms

8. In essence, the Validation Decree covers the point of illegality by which section 5.20.6 of Vlarem II and the Circular of 2006 were affected as a consequence of the ruling of the Court of Justice

[4] According to Article 2(b) of the SEA Directive "*environmental assessment*" shall mean "*the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9*".

of 25 June 2020 in light of European and national provisions on environmental assessments for a limited amount of time. The Validation Decree ties the validation of the unlawful sectoral environmental norms for wind turbines for a maximum period of three years to an injunction to the Flemish Government to adopt new sectoral norms following an environmental assessment, within a period of maximum three years following the publication of the Validation Decree in the Belgian Official Gazette on 24 July 2020 (i.e. 23 July 2023).

Furthermore, the validation of the sectoral environmental norms for wind turbines was limited to the point of law on which the Court of Justice had ruled, i.e. the violation of international, European and national rules on environmental assessments for plans and programmes.

9. The Validation Decree consists of five provisions (freely translated):

> "*Article 1. This decree regulates a regional matter.*
>
> *Art. 2. A section 6 is added to Title V, Chapter 4, of the Decree of Flemish Parliament of 5 April 1995 laying down general provisions on environmental policy*[5]*, inserted by the Decree of 25 April 2014 and amended by the Decree of 27 October 2017, which reads as follows:*
>
> *"Section 6. Peculiar validation".*
>
> *Art. 3. In Title V, Chapter 4, of the same Decree, an Article 5.4.15 is added to Section 6, added by Article 2, which reads as follows:*
>
> *"Art. 5.4.15. Section 5.20.6 of chapter 5. 20 of Part 5 of the Order of the Flemish Government on the general and sectoral norms with regard to environmental health of 1 June 1995, inserted by the Order of the Flemish Government amending the Order of the Flemish Government of 6 February 1991 on the adoption of regulations concerning environmental consents and amending the Order of the Flemish Government on the general and sectoral norms with regard to environmental health of 1 June 1995, as regards updating the aforementioned orders in relation to technical developments of 23 December 2011 and last amended by the Decree of the Flemish Council of 3 May 2019 amending various decrees relating to the environment and agriculture, shall be declared valid with effect from the date of its entry into force. The declaration of validity shall apply until the date of entry into force of the new sectoral norms for installations for the generation of electricity by means of wind energy which the Flemish Government approves after carrying out an environmental impact*

[5] In Dutch: "*Het Decreet houdende Algemene Bepalingen inzake Milieubeleid*". Title V of this Decree transposes the European directives on environmental impact assessments for both plans and programmes as well as projects (i.e.: the SEA-Directive and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment) in the Flemish legal order.

> *assessment, and shall in any case cease to apply after a period of a maximum of three years from the entry into force of this Article.*
>
> *Circular EME/2006/01-RO/2006/02 of 12 May 2006 laying down the assessment framework and conditions for the implantation of wind turbines shall be declared valid with effect from the date of its entry into force. The declaration of validity is valid until the date of entry into force of Circular RO/2014/02 of 25 April 2014 laying down the assessment framework and conditions for the implantation of wind turbines.*
>
> *The declaration of validity, mentioned in the first and second paragraphs, is limited to the violation of the international, European and national provisions on the obligation to carry out an environmental impact assessment for certain plans and programs, in particular Article 7 of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Articles 2 to 9 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, and Chapter II of Title IV of this Decree, for failure to carry out an environmental impact assessment.".*
>
> *Art. 4. In title V, chapter 4, of the same decree, an article 5.4.16 is added to Section 6, added by Article 2, which reads as follows:*
>
> *"Art. 5.4.16. The Flemish Government shall lay down new sectoral environmental norms for installations for the generation of electricity by means of wind energy, which shall enter into force within a maximum period of three years from the entry into force of this Article. Such sectoral standards shall be subject to a prior environmental impact assessment in accordance with Title IV, Chapter II."*
>
> *Art. 5. This Decree shall enter into force on the day of its publication in the Belgian Official Gazette*." (emphasis added)

10. In execution of the injunction by the Flemish Parliament, the Flemish Government is currently in the process of adopting new sectoral environmental norms for wind turbines. This process is subject to an environmental assessment, including consultations of the public and of the competent authorities.

In accordance with the national provisions on environmental assessments, end 2021 a notification was submitted to the public that included, *inter alia*, the following information:

- a description and clarification of the intentions of the proposed plan or program;

- a proposal on the scope and level of detail of the environmental assessment;

- a proposal on the substantive approach of the environmental assessment (including methodology).

A public inquiry was held between 15 December 2021 and 12 February 2022 to allow the members of the public to submit observations on the information to be included in the environmental report. Following the public inquiry and consultations of the different advisory bodies, Team Mer (the Flemish authority competent for impact assessments) drew up guidelines on the information to be supplied in the environmental assessment on 9 May 2022. The draft sectoral environmental norms as well as the environmental report will be submitted to a public inquiry and consultations of the different advisory bodies. Members of the public will therefore be able to submit their observations on, inter alia, the draft sectoral norms to the competent authorities, in accordance with Article 5.4.4. of the Decree of 5 April 1995 concerning general provisions relating to environmental policy (in Dutch: "*Decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid*" or "*DABM*").

According to the envisioned time-line, the environmental assessment procedure should be finalised at the beginning of 2023. Subsequently, the Flemish Government will adopt the new sectoral environmental norms.

2.3 Regarding the action before the Constitutional Court against the Validation Decree

11. Following the adoption of the Validation Decree, several individuals, including the communicants of the Communication at hand, as well as non-governmental organisations and a local municipality brought several actions for annulment and applications for suspension of the Validation Decree before the Belgian Constitutional Court. In support of their action, the applicants submitted several arguments relating to the constitutionally of the following aspects of the Validation Decree:

- the legal nature of the decree;
- the right of access to justice;
- the law of the European Union;
- the international treaties on environmental assessments and public participation in decision-making (including the Aarhus Convention);
- the *standstill*-obligation as to the protection of the environment;
- other grievances.

12. In its ruling of 25 February 2021 with No. 30/2021 and its subsequent ruling of 14 October 2021 with No. 142/2021 (annex III), the Constitutional Court rejected the applications for suspension and the actions for annulment respectively.

Regarding the applicability of the Aarhus Convention, the Court ruled that, since the Validation Decree does not validate one or more specific permits and does not qualify as a plan or programme within the meaning of Article 7 nor as an "*executive regulation or a generally applicable legally binding rule that may have a significant effect on the environment"* within the meaning of Article 8 of the Aarhus Convention, those provisions do not apply (Section B.26.2 and B.26.3 of the Ruling of 14 October 2021):

French official text of the Ruling:

> *« Les installations pour la production d'énergie éolienne ne sont pas reprises dans l'annexe I de la Convention d'Aarhus. Cependant, il y a également lieu d'appliquer les dispositions de l'article 6, conformément au droit interne, lorsqu'il s'agit de prendre une décision au sujet d'activités non énumérées à l'annexe I qui peuvent avoir un effet important sur l'environnement (article 6, paragraphe 1, b).*
>
> *Sans qu'il soit nécessaire de vérifier si la disposition attaquée a un effet important sur l'environnement, il suffit de constater qu'elle ne concerne pas une « activité particulière » au sens de l'article 6. En effet, la disposition attaquée ne valide pas des permis concrets.*
>
> *Dès lors que la disposition attaquée ne relève pas du champ d'application de l'article 6 de la Convention d'Aarhus, elle ne relève pas non plus du champ d'application de l'article 9, paragraphes 2 et 4, de cette Convention. (...)*
>
> *Les articles 7 et 8 de la Convention d'Aarhus ne s'appliquent pas non plus en ce qui concerne l'adoption de la disposition décrétale attaquée, puisqu'il ne s'agit ni d'un plan, ni d'un programme au sens de l'article 7 de cette Convention, ni d'une disposition réglementaire élaborée par une « autorité publique » ou d'une autre « [règle] juridiquement contraignante d'application générale qui [peut] avoir un effet important sur l'environnement », au sens de l'article 8. Cette dernière disposition ne vise en effet pas les dispositions décrétales, puisque, par la notion d'«autorités publiques», il ne faut pas entendre des organes ou des institutions agissant en qualité de pouvoir législatif. (...)»*

English translation of the official text of the Ruling (freely translated):

> *"Installations for the production of wind energy are not included in Annex I of the Aarhus Convention. However, the provisions of Article 6 should also be applied, in accordance with domestic law, when deciding on activities not listed in Annex I, which may have a significant effect on the environment (Article 6, paragraph 1, b).*
>
> *Without it being necessary to verify whether the contested provision has a significant effect on the environment, it suffices to note that it does not concern a "particular activity" within the meaning of Article 6. Indeed, the contested provision does not validate specific individual permits.*

Since the contested provision does not fall within the scope of Article 6 of the Aarhus Convention, it equally does not fall within the scope of Article 9, paragraphs 2 and 4, of that Convention. (...)

Articles 7 and 8 of the Aarhus Convention do not apply either to the adoption of the contested decretal provision, since it is neither a plan nor a program within the meaning of Article 7 of this Convention, nor an executive regulation or another "generally applicable legally binding rule that may have a significant effect on the environment" prepared by a "public authority", within the meaning of Article 8. This last provision does not apply to legislative provisions, since the notion "public authorities" does not pertain to bodies or institutions acting as a legislative power. (...)"

3 REGARDING THE ADMISSIBILITY OF COMMUNICATION PRE/ACCC/C/2022/192

3.1 Preliminary remark as to the aim of Communication PRE/ACCC/C/2022/192

13. Communication PRE/ACC/C/2022/192 consists of two main arguments.

14. The first argument raises an alleged breach of Articles 7 (read together with Article 6) and 8 of the Aarhus Convention. In particular, the communicants argue that the Constitutional Court has breached the Aarhus Convention where it stated that the Validation Decree does not qualify as a "*plan or programme*" within the meaning of article 7 of the Convention, nor as an "*executive regulation and/or generally applicable legally binding normative instrument*" within the meaning of Article 8 of the Convention.

According to the communicants, the Validation Decree and the sectoral environmental norms for wind turbines form one indivisible whole. Therefore, since section 5.20.6 of Vlarem II qualifies as a "*plan or programme*" in the sense of Article 7 of the Aarhus Convention, the Validation Decree should obtain the same qualification.

The communicants argue that the Validation Decree and section 5.20.6 of Vlarem II should at least be regarded as one inseparable instrument for which there should be "*effective public participation at an appropriate stage*" during the preparatory stage as required by Article 8 of the Aarhus Convention.

15. The second argument asserts that the Constitutional Court incorrectly ruled that the Validation Decree does not breach Articles 9.2 and 9.3 (read together with Article 8) of the Aarhus Convention. More in particular, the communicants argue that the Validation Decree makes it impossible for administrative or civil courts to declare an individual permit unlawful on the grounds

that it was adopted on the basis of sectoral environmental norms for wind turbines, where those sectoral environmental norms themselves have been found illegal due to the absence of a prior environmental assessment, including public participation.

3.2 Remarks on the admissibility of Communication PRE/ACCC/C/2022/192

(a) *Conditions for the admissibility of communications by the public*

16. As explained under paragraph 97 of the "*Guide to the Aarhus Convention Compliance Committee*", the Committee shall consider any communication from the public, unless it determines that the communication does not meet the requirements set out in paragraph 20 of the Annex to Decision I/7 adopted by the first meeting of the Parties to the Aarhus Convention.[6] A communication shall therefore be found inadmissible if the Committee determines that it is:

a) anonymous; or

b) an abuse of the right to make such communications; or

c) manifestly unreasonable; or

d) incompatible with the provisions of this decision or with the Convention.

According to paragraph 21 of the annex to decision I/7, the Committee should also at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

Furthermore, paragraph 100 of the aforementioned Guide adds that the Committee may determine that a communication, while broadly appearing to fulfil the admissibility requirements of paragraph 20 of the Annex to Decision I/7, after careful consideration does not pass a threshold of *de minimis.* In such cases, the Committee may find the communication inadmissible on the grounds that by not passing the *de minimis* threshold with respect to the communication's relevance and importance in the light of the purpose and functions of the Committee, the communication is incompatible with the provisions of decision I/7. In the previous guidance document on the Aarhus Convention Compliance Mechanism, it is further explained that the *de minimis* threshold is aimed to focus on the Committee's resources on communications that raise important aspects of non-compliance.[7]

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[6] United Nations Economic Commission for Europe, *Guide to the Aarhus Convention Compliance Committee*, available at: https://unece.org/Guide_to_the_Aarhus_Convention_Compliance_Committee_2019.pdf, p. 27.

[7] United Nations Economic Commission for Europe, *Guidance Document on the Aarhus Convention Compliance Mechanism*, available at: https://unece.org/CC_GuidanceDocument.pdf, p. 17.

17. The Committee has already expressed its concern that the review mechanism of the Aarhus Convention should not be used to review cases of unsuccessful environmental litigation, which is clearly not the purpose of the Committee.[8]

Furthermore, the Committee has found that a communication was manifestly unreasonable pursuant to paragraph 20 (c) of the Annex to Decision I/7 where the factual circumstances of the case proved that legal redress was ultimately granted.[9]

A communication does not meet admissibility requirement d) as mentioned above, where the communicant fails to demonstrate that the allegations made in the communication fall within the scope of the provisions of the Convention.[10]

(b) ***Application of the criteria for admissibility to Communication PRE/ACCC/2022/192***

(i) *Communication PRE/ACCC/C/2022/192 is inadmissible in so far as it intends to use the review procedure as an appeal procedure*

18. As the Committee has already stated in previous findings, its aim is not to serve as an instance of appeal against a judicial outcome with which a member of the public is dissatisfied.[11]

Indeed, in accordance with article 15 of the Aarhus Convention, the compliance mechanism under the Aarhus Convention is a non-judicial review procedure. As paragraphs 13 and 18 of the Annex to Decision I/7 further explain, the Committee's function is to consider communications from the public concerning a Party's compliance with the Convention. The compliance mechanism thus rather aims at finding general issues of non-compliance with the Aarhus Convention within a member state, followed by a recommendation of the Committee to address the issue. The main objective of the review procedure is to facilitate the implementation of and compliance with the provisions of the Convention.

19. However, it is clear from the wording of the Communication that the communicants' main aim is for the Committee to recognise that the Belgian Constitutional Court, in its judgment of 14 October 2021, has erred in law when assessing the constitutionality of the Validation Decree in light of the provisions of the Aarhus Convention.

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[8] E.g.: communication ACCC/C/2004/07/Poland and ACCC/C/2019/172/Belgium.

[9] E.g.: communication ACCC/C/2009/40/United Kingdom.

[10] E.g.: communication ACCC/C/2019/170/Kazakhstan; communication PRE/AAC/C/2019/167/Kazakhstan.

[11] E.g.: communication ACCC/C/2004/07/Poland and ACCC/C/2019/172/Belgium.

Indeed, the communicants reiterate their dissatisfaction with the outcome of the aforementioned judgement throughout the Communication, thereby using the following expressions:

- "*la Cour constitutionnelle (belge) a – en l'espèce certes erronément – considéré (dans l'arrêt n° 142/2021 du 14 Octobre 2021 que « les articles 7 et 8 de la Convention d'Aarhus ne s'appliquent pas (…)».*"[12]

- "*la Cour constitutionnelle viole la Convention d'Aarhus en soutenant que le décret du 17 juillet 2020 de validation n'est ni « un plan ou programme » (au sens de l'article 7 de la Convention) ni « une disposition réglementaire et autre règle juridiquement contraignante d'application générale qui peuvent avoir un effet important sur l'environnement » (au sens de l'article 8 de la Convention).*"[13]

- "*la cour constitutionnelle a erronément rejeté l'applicabilité des articles 7 et 8 de la Convention d'Aarhus au décret de validation du 17 juillet 2020.*"[14]

- "*l'erreur de la Cour constitutionnelle (et du législateur du 17 juillet 2020) s'explique comme suit.*"[15]

- "*le législateur décrétal et la Cour constitutionnelle ont ainsi méconnu l'article 7 de la Convention.*"[16]

- "*dans l'arrêt n° 142/2021, la Cour constitutionnelle déclare donc erronément que le décret du 17 juillet n'est pas « un plan ou programme » (au sens de l'article 7 de la Convention d'Aarhus).*"[17]

- "*le décret du 17 juillet 2020 et l'arrêt de la Cour constitutionnelle n° 142/2021 méconnaissent tout autant l'article 8 de la Convention d'Aarhus (juncto les articles 6 et 9 de la Convention d'Aarhus).*"[18]

- "*dans l'arrêt n° 142/2021, la Cour constitutionnelle soutient donc ici erronément que le décret du 17 juillet d2020 de validation des normes éoliennes n'est pas à qualifier comme*

[12] Page 5 of the Communication.

[13] Page 10 of the Communication.

[14] Page 11 of the Communication.

[15] Page 11 of the Communication.

[16] Page 12 of the Communication.

[17] Page 14 of the Communication.

[18] Page 14 of the Communication.

« une disposition réglementaire et autre règle juridiquement contraignante d'application générale qui peuvent avoir un effet important sur l'environnement » (au sens de l'article 8 de la Convention)."[19]

- "*ce faisant, la Cour constitutionnelle et le législateur décrétal du 17 juillet 2020 méconaissent donc également les articles 9.2 et 9.3 de la Convention d'Aarhus (juncto l'article 8 de la Convention).*"[20]
- "*le raisonnement de la Cour constitutionnelle est toutefois erroné en droit.*"[21]
- "*inexact est l'argument de la Cour constitutionnelle pour rejeter l'application des articles 9.2 et 9.3.*"[22] (emphasis added)

20. The review mechanism before the Committee is, however, not meant to be used as a forum to overturn a judicial decision or to hear that a judgement erred in law. The compliance procedure is designed to improve compliance with the Convention and is not a redress procedure for alleged violations of individual rights The Committee is not an instance of appeal that can rule on the merits of a given case; that is a matter of national law.

In a recent determination of 18 November 2019 concerning a communication by a NGO alleging that Belgium had failed to comply with Articles 9 (3) and (4) of the Convention with respect to a judgment of the Council of State, the Committee rightly dismissed the communication on the grounds that "*the Committee (...) is not a redress mechanism and that the communication expressly states that it concerns a single specific case of alleged non-compliance and does not allege that there is a wider problem with the legal framework or judicial practice of the Party concerned with respect to the implementation of article 9(3) and (4) of the Convention*"[23].

Moreover, it is important to note that the judgement criticised by the communicants in their communication was rendered by the Belgian Constitutional Court, which has a particular expertise and responsibility in safeguarding the protection of fundamental rights, including the international and European obligations relating to public participation rights and the right of access to a court. The

[19] Page 15 of the Communication.

[20] Page 17 of the Communication.

[21] Page 19 of the Communication.

[22] Page 21 of the Communication.

[23] ACCC/C/2019/172 Belgium.

State Parties did not task the Committee to rule on the merits of a specific judgment of a national court, let aside of a constitutional court.

21. Since the essence of the Communication relates to the communicants' dissatisfaction with the procedural outcome of the action they have brought before the Belgian Constitutional Court, it must therefore be declared inadmissible. To determine otherwise, would set a precedent for the Convention's compliance mechanism being used to revise cases of unsuccessful environmental litigation, which was clearly not its purpose[24].

22. In light of the above, the Kingdom of Belgium kindly requests the Committee to declare the Communication inadmissible.

(ii) *Communication PRE/ACCC/C/2022/192 is inadmissible on the grounds that it is manifestly unreasonable and does not meet the de minimis threshold*

23. In what follows, the Kingdom of Belgium will demonstrate that the Communication is manifestly unreasonable and therefore inadmissible as well.

24. First of all, it must be pointed out that, to the extent that the communicants' grievances relate to the alleged misapplication by the Constitutional Court of the European and international obligations on environmental assessments for plans and programmes, those grievances are inadmissible, since the Aarhus Convention itself does not impose such obligations in the context of plans and programmes. Indeed, the provisions invoked by the communications (i.e. Articles 6, 7, 8 and 9 of the Aarhus Convention) do not entail any obligation for State Parties to undertake an environmental assessment for plans and programmes.

In addition, in so far as the communicants put forward that the sectoral environmental norms contained in section 5.20.6 of Vlarem II should have been subject to an environmental assessment, including a public participation procedure, this discussion has been settled by the European Court of Justice in its ruling of 25 June 2020[25]. The illegality of these sectoral environmental norms is the reason why the Flemish Parliament intervened by adopting the Validation Decree. The discussion on this matter is therefore without object, making it manifestly unreasonable to raise the issue again before the Committee.

25. Secondly, it must be clear from the outset that the subject-matter of the Communication relates to a remediation by the Flemish Region of a breach of EU law (i.e. the SEA Directive)

[24] E.g. communication CCC/2004/7 Poland.

[25] For the sake of clarity, it should be noted that, contrary to what the communicants put forward in their Communication, the Court of Justice, in its judgment of 25 June 2020, did not assess the Flemish sectoral norms in light of the Aarhus Convention, but limited its review to the SEA Directive.

following the judgment of the European Court of Justice of 25 June 2020 in Case C-24/19. The means for reparation for breaches of international law is a matter of domestic law, in this case EU law and Belgian constitutional law. The case law of the European Court of Justice and the Belgian Constitutional Court allow for the maintenance of the effects of an illegality as a means for reparation under strict conditions, including conformity with principles of international law, and only for the period of time strictly necessary to remedy that illegality. The Constitutional Court in its judgment of 21 October 2021 made that assessment under national and international law and validated the reparation conceived by the Flemish Region in the form of the Validation Decree, taking into account the imperative reasons of overriding public interest at stake.

As explained, the reparation consists of a legislative validation of the illegal wind turbines norms for a maximum period of three years (i.e. 23 July 2023) until the adoption of new wind turbines norms that have been submitted to an environmental assessment with public participation. As set out under point 2.2 above, new sectoral wind turbine norms are in the course of being drafted. This procedure includes an environmental assessment, including a public participation procedure that will allow members of the public to put forward their observations on the new draft wind turbine norms and the environmental report . As a consequence, as far as the public participation rights under Articles 6-8 of the Aarhus Convention are concerned, the situation is being addressed. Thus, the Kingdom of Belgium does not see what interest the communicants have in raising the alleged violation of Articles 6-8 of the Aarhus Convention at this point in time. The Communication is therefore manifestly unreasonable.

In addition, as to the alleged violation of the right of access to justice, the Kingdom of Belgium wants to stress the fact that the Validation Decree does not impair the right of the public (including the communicants) to act before a court of law against any wind turbine project in the Flemish Region. The only effect of the Validation Decree is that the public cannot raise a violation of the national and international obligations relating to environmental assessments for a maximum period of three years, until the entry into force of new wind turbine norms. The Validation Decree is therefore very limited in scope. The situation at hand does not amount to a systematic violation of the right of access to justice under Aarhus Convention, as demonstrated by the proceedings that have led to the judgment of the Constitutional Court of 21 October 2021 and in which the communications were able to put forward their grievances relating to the alleged violation of the Convention. The Communication does not relate to a denial of access to judicial procedures, but rather reflects dissatisfaction with their outcome. It is therefore clear that the grievances of the communicants (if any) do not meet the *de minimis* threshold either.

26. In light of the above, the Kingdom of Belgium kindly requests the Committee to declare the Communication inadmissible.

4 CONCLUDING REMARKS

Belgium respectfully requests the Committee to declare Communication PRE/ACCC/C/2022/192 inadmissible on one or more of the following grounds:

- the Communication is inadmissible in so far as it intends to use the review mechanism under the Aarhus Convention as a second appeal against the judgment of the Belgian Constitutional Court of 14 October 2021, since the Committee should not be used to review cases of unsuccessful environmental litigation;

- the Communication is manifestly unreasonable and therefore inadmissible, given (1) the legal redress that is being provided by the Flemish Region, which guarantees the communicants a right of public participation concerning the new sectoral norms, and (2) the fact that the communicants were able to fully exercise their right of access to justice before the Constitutional Court and to put forward their grievances relating to the alleged violation of the Aarhus Convention.

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In light of the above, the Kingdom of 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.

The Kingdom of Belgium reserves the right to make a subsequent statement as to the inadmissibility of the communication. The Kingdom remains nevertheless committed to fully cooperate with the Committee in the event that the Committee declares the Communication PRE/ACCC/C/2022/192 admissible. Furthermore, we remain at your disposal should you want us to provide further clarifications on any point to assist the Committee in its deliberations after internal consultations.

Yours sincerely,

The Government of the Flemish Region, acting on behalf of the Kingdom of Belgium.

Annexes to Belgium's comments on the Preliminary Admissibility of Communication PRE/ACCC/C/2022/192

1. Annex I – Ruling of the Court of Justice of 25 June 2020 with No. C-24/19;
2. Annex II – Official publication of the Decree of the Flemish Parliament of 17 July 2020, validating the sectoral environmental norms for wind turbines, as published in the Belgian Official Gazette in Dutch and in French;
3. Annex III – Ruling of the Belgian Constitutional Court of 14 October 2021 with No. 142/2021 (official French version).