COMMUNICATION to the Aarhus Convention Compliance Committee (24 pp)

I. Information on correspondents submitting the Communication

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II. Party concerned

The Belgian State

III. Background to this Communication to the Compliance Committee

- Preliminary observation: *(note on Constitutional Court press releases)*

To facilitate the Committee's understanding of this Communication, the account given below is partly taken from press releases issued in French and Dutch by the Belgian Constitutional Court following Judgment No. 30/2021 of 25 January 2021 and Judgment No. 142/2021 of 14 October 2021. These Constitutional Court judgments were given in Dutch, French and German.

1. By Judgment No. 142/2021 of 14 October 2021, the Belgian Constitutional Court dismissed actions for annulment of the Decree of the Flemish Region of 17 July 2020 validating the sectoral environmental conditions for wind turbines (published in the Belgian Official Gazette, the *Moniteur belge* of 24 July 2020).

   Ten legal actions had been brought against this Decree of 17 July 2020 validating the Flemish sectoral environmental conditions for wind turbines – some were applications for suspension of the Decree and others, actions for its total or partial annulment. A judgment of the Court of Justice of the European Union of 25 June 2020 (in Case C-24/19) compromised consents for and operation of all existing and planned wind farms where the consent related to 'sectoral conditions' for wind turbines. Validation of these sectoral conditions by decree is intended to reduce the negative consequences that the CJEU judgment in C-24/19 could have for Belgium's (the Flemish Region's) renewable energy and energy supply objectives.

   By Judgment No. 30/2021 of 25 February 2021, the Belgian Constitutional Court dismissed the applications for suspension of the Decree of 17 July 2020, on the ground that the pleas put forward against this validation by decree could not reasonably be argued. By Judgment No. 142/2021 of 14 October 2021, the Court again held that these pleas were unfounded. The Court therefore also dismissed the actions for annulment of the validation of the (illegal) wind turbine standards, brought into effect by the Decree of 17 July 2020.

2. Thus, Article 3 of the above-mentioned Decree of the Flemish Region of 17 July 2020 validating sectoral environmental conditions for wind turbines ('the validating Decree') declared valid, with retroactive effect:

   (1) Circular EME/2006/01-RO/2006/02 of the Flemish Region of 12 May 2006;

   (2) Section 5.20.6 of the Order of the Flemish Government of 1 June 1995 on general and sectoral provisions relating to environmental health ('Vlarem II').

   These Flemish sectoral wind turbine standards define conditions for the operation of wind turbines with regard to noise, safety and the shadow cast.

   Article 3 of the validating Decree provides inter alia: *(emphasis added)*

   > "The validation referred to in paragraphs 1 and 2 is limited to infringement of international, European and national provisions relating to the obligation to carry out an environmental impact assessment for certain plans and programmes, inter alia article 7 of the Convention of 25 June ***1988*** 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, because of the absence of an environmental impact assessment."

3. No environmental impact assessment of these sectoral standards – which have in the meantime been validated by the Decree of 17 July 2020 – was carried out before they were adopted, even though this is required under Directive 2001/42/EC and the Aarhus Convention. At the time they were adopted, the Flemish Government and the relevant minister took the view that these standards were not covered by Directive 2001/42/EC and the Aarhus Convention.

   However, in a judgment of 25 June 2020, the Court of Justice of the European Union ('the CJEU') found that these Flemish sectoral wind turbine standards were plans and programmes for which a prior environmental assessment should have been carried out, in accordance with Directive 2001/42/EC. **As this assessment had not been carried out, these sectoral standards were incompatible with European Union law (CJEU judgment of 25 June 2020, C-24/19, *A and Others*).**

4. The judgment in C-24/19 was delivered in proceedings following the referral of questions by interim judgment of a Belgian administrative court, the Raad voor Vergunningsbetwistingen (Flemish Council for Consent Disputes, 'the RvVb'), for a preliminary ruling by the CJEU (Judgment No. RvVb-A-1819-0352 of 4 December 2018 in the matter of Mestdagh and Others).

   The RvVB's interim judgment of 4 December 2018 referred ten questions to the CJEU, essentially relating to the applicability of Directive 2001/42/EC to the Flemish sectoral wind turbine standards. The RvVB also made reference to the history of the Directive and expressly invited the CJEU to reconsider its earlier case-law.

5. By the validating Decree, the Flemish legislature sought to remedy the legal uncertainty which, it believed, resulted from the CJEU judgment of 25 June 2020, taking the view that the validity of many consents granted for existing and future wind turbines had been compromised and therefore renewable energy and electricity supply objectives were undermined.

   The contested Decree provides for two closely linked rules. First, it requires the Flemish Government to establish new sectoral standards for wind turbines within a maximum period of three years. These new standards must be subject to prior environmental impact assessment. Secondly, in anticipation of these new sectoral standards, the Decree validates the existing sectoral standards with retroactive effect, in order to remedy the legal uncertainty concerning existing and planned wind energy projects. The approach used in the validating Decree is to raise the status, with retroactive effect, of

an executive standard to that of a legally binding standard and to exempt it from judicial review as provided for by Article 159 of the Belgian Constitution. This article requires courts to automatically set aside, on the basis of a plea of failure to fulfil obligations, the application of any unlawful rule.

6. Ten legal actions against this validation by the Decree of 17 July 2020 were introduced before the Constitutional Court – some were applications for suspension of the Decree and others, actions for its total or partial annulment. The applicants included a municipality, a business, an action committee and several natural persons who had brought complaints before the RvVB challenging consents granted for wind energy projects in their neighbourhood.

   By Judgment No. 30/2021 of 25 February 2021, the Court dismissed the applications for suspension of the contested Decree, leaving it to consider only the actions for annulment.

   In essence, the applicants claimed that this validating legislation was incompatible with the principle of non-retroactivity, submitting that it interfered with actions pending while not being justified by exceptional circumstances or by overriding reasons in the public interest. The applicants also raised the matter of failure to comply with articles 6, 7, 8 and 9 of the Aarhus Convention and requested that a question be referred to the CJEU for a preliminary ruling.

7. In Judgment No. 142/2021 of 14 October 2021, the Belgian Constitutional Court essentially restated the reasoning applied in Judgment 30/2021, and did so without ordering a question to be sent to the CJEU for a preliminary ruling regarding article 7 of the Aarhus Convention (as requested by the applicants).

   Having previously found, in the earlier Judgment 30/2021, that the pleas put forward could not reasonably be argued (in the context of *prima facie* examination of an application for suspension), the Constitutional Court held, in Judgment 142/2021, that these pleas were also unfounded at this stage.

   In its press release of 14 October 2021 concerning Judgment 142/2021, the Constitutional Court referred back to the press release published after the earlier Judgment 30/2021.

IV. The national court's examination of the complaint of non-compliance with articles 6, 7, 8 and 9 of the Convention

8. The applicants before the Constitutional Court complained that the legislature adopting the Decree (that of the Flemish Region) had inter alia failed to comply with articles 7, 8 and 9 of the Aarhus

Convention, in that it did not discuss the draft decree to validate the wind turbine standards with the public or carry out an environmental impact assessment of the draft, despite the fact that the CJEU had already found, in its judgment in C-24/19, that these wind turbine standards had previously been adopted in breach of the obligation – laid down by EU law and by the Convention – to carry out an environmental impact assessment, discussed with the public beforehand.

9. In Judgment 142/2021, the Belgian Constitutional Court took the view – in the circumstances, erroneously – that "articles 7 and 8 of the Aarhus Convention do not apply to adoption of the contested Decree, since it is not a plan or programme as provided for in article 7 of the Convention, nor is it an executive regulation prepared by a 'public authority' or another 'generally applicable legally binding [rule] that may have a significant effect on the environment' within the meaning of article 8. Article 8 does not cover provisions made by decree, since the concept of 'public authorities' does not include bodies or institutions acting in a legislative capacity. Since the correct application of the Aarhus Convention, which forms part of European Union law, is so obvious as to leave no scope for any reasonable doubt (CJEU judgment of 6 October 1982, C-283/81, *CILFIT*, paragraph 21), the question suggested by the applicants and interveners in Cases 7445, 7446 and 7554, relating to the application of article 7 of the Aarhus Convention, should not be referred for a preliminary ruling".

10. The Constitutional Court set out the applicants' grounds of complaint (that the validating Decree is in breach of the Aarhus Convention) in paragraph A.7.1-3 of Judgment 142/2021, on pages 8 to 9. The Court then went on to reject these arguments in paragraphs B.25-B.26.

In paragraph A.7 of Judgment 142/2021, the Belgian Constitutional Court referred to the applicants' grounds of complaint, stating inter alia:

> "(A.7.1) In the first limb of their plea, the applicants argue that, when adopting a decree validating an order that is unsound because it has not been subject to an environmental impact assessment, the legislature is required to comply with Directive 2001/42/EC and article 7 of the Aarhus Convention. They therefore assert that the contested Decree should have been made subject to an environmental impact assessment and to prior public participation, and, similarly, that the legislature should have based its decision on current scientific data. In neglecting all this, the legislature adopting the Decree has infringed the principle of diligence. According to the applicants, it is not relevant to maintain, as the Flemish Government does, that new Flemish sectoral standards for wind energy will in fact be subject to an environmental impact assessment and to a participation procedure, since their complaints are directed against the sectoral conditions validated by the contested Decree.

A.7.3. In the third limb of the plea, the applicants argue that the contested Decree infringes article 7 of the Aarhus Convention because neither an assessment of its environmental impact nor a public participation procedure has been carried out. Such a participation procedure guarantees that the right to protection of a healthy environment, covered by Article 23, subparagraph 3, section 4, of the Constitution, will be observed. The lack of a participation procedure also infringes Article 14 of the Convention on Biological Diversity, which requires environmental impact assessment with a view to minimizing adverse effects and allows for public participation in such procedures. Even if the approach to validation used by the legislature adopting the contested Decree were legal, an environmental impact assessment of the Decree itself would have to be carried out. Moreover, any legislative initiative that must be regarded as a plan or a programme is subject to an environmental impact assessment under Article 4.2.11 of the Decree of 5 April 1995 laying down general provisions on environmental policy.

According to the applicants, the fact that article 7 of the Aarhus Convention and Article 14 of the Convention on Biological Diversity apply to the contested Decree results from the fact that the standards validated by this Decree fall within the scope of those normative provisions."

11. In paragraph B.25-26 of Judgment 142/2021, the Constitutional Court sets out its grounds for dismissing the applicants' action for annulment.

In Judgment 142/2021, the Constitutional Court held, specifically in paragraphs B.25, B.26.2 and B.26.3, that the Aarhus Convention did not apply. It stated:

"B.25. In the first and fourth pleas in Cases 7440, 7441, 7442 and 7448, in the plea in Cases 7445, 7446 and 7454 (the first and third limbs; the first to fourth parts of the fourth limb) and in the second and third pleas in Cases 7449, 7455 and 7456, the applicants claim that the contested provision is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with article 3, paragraph 9, article 6, paragraphs 2 and 3, article 7, article 8, and article 9, paragraphs 2 and 4, of the Aarhus Convention. In connection with the first and third limbs and the first to fourth parts of the fourth limb of the plea in Cases 7445, 7446 and 7454, the applicants, supported in this respect by Mr Claeys and Mr Anckaert, interveners, request the Court, in the alternative, to refer a question to the Court of Justice for a preliminary ruling on whether article 7 of the Aarhus Convention is to be interpreted as applying to the contested Decree.

In the third plea in Cases 7449, 7455 and 7456, the applicants claim that the contested Decree is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 2,

paragraphs 6 and 7, of the Espoo Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context.

The applicants submit inter alia that the contested provision should itself have been subject to an environmental impact assessment and to public participation.

(…)

B.26.2. Installations for the generation of electricity by means of wind energy are not referred to in annex I to the Aarhus Convention. None the less, the provisions of article 6 also apply, in accordance with national law, to decisions on activities not listed in annex I which may have a significant effect on the environment (article 6, paragraph 1(b)).

There is no need to consider whether or not the contested provision has a significant effect on the environment: it is merely sufficient to determine that the provision does not relate to a 'specific activity' within the meaning of article 6. And in fact, the contested provision does not validate specific consents.

It follows that, as the contested provision is not covered by article 6 of the Aarhus Convention, it also falls outside the scope of article 9, paragraphs 2 and 4, of that Convention. On the same ground, the question of whether the contested provision complies with the requirements of European Union law on 'a specific legislative act', as established by the Court of Justice in its judgment of 18 October 2011 in *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, paragraph 37) and in its judgment of 16 February 2012 in *Solvay and Others* (C-182/10, paragraph 43) and as assessed by the Constitutional Court in Judgment No. 144/2012 (B.12.3) and Judgment No. 11/2013 (B.11), need not be examined.

B.26.3. Likewise, articles 7 and 8 of the Aarhus Convention do not apply to adoption of the contested Decree, since it is not a plan or programme as provided for in article 7 of the Convention, nor is it an executive regulation prepared by a 'public authority' or another 'generally applicable legally binding [rule] that may have a significant effect on the environment' within the meaning of article 8. Article 8 does not cover provisions made by decree, since the concept of 'public authorities' does not include bodies or institutions acting in a legislative capacity. Since the correct application of the Aarhus Convention, which forms part of European Union law, is so obvious as to leave no scope for any reasonable doubt (CJEU judgment of 6 October 1982, C-283/81, *CILFIT*, paragraph 21), the question suggested by the applicants and interveners in Cases 7445, 7446 and 7554, relating to the application of article 7 of the Aarhus Convention, should not be referred for a preliminary ruling."

V. Provisions of the Convention relevant for the Communication

12. Article 6 of the Aarhus Convention (to which article 7 of the Convention refers) provides: "(…)".

Article 7 of the Aarhus Convention requires: *(emphasis added)*

"PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

Article 8 of the Aarhus Convention requires: *(emphasis added)*

"PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

To this end, the following steps should be taken:

a) Time-frames sufficient for effective participation should be fixed;

b) Draft rules should be published or otherwise made publicly available; and

c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible."

Article 9 of the Aarhus Convention provides: "(…)".

13. Article 6 of the Aarhus Convention (to which article 7 of the Convention refers) requires:

"PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.
2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:
(…)
3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.
4. **Each Party shall provide for early public participation, when all options are open and effective public participation can take place.**
(…)." *(emphasis added)*

14. Article 9, paragraph 2, of the Aarhus Convention requires, as regards "access to justice":

"2. 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."

Article 9, paragraph 3, provides for several other ways of exercising the right of access to justice.

VI. Non-compliance with articles 6, 7, 8 and 9, paragraphs 2 and 3, of the Aarhus Convention

Summary

15. In its judgment in C-24/19, the CJEU found that the sectoral conditions for wind turbines – adopted by the Flemish Region without public consultation and without environmental impact assessment – infringed EU law, since these sectoral conditions were "plans and programmes" within the meaning of article 7 of the Aarhus Convention.

16. Article 3 of the Decree validating the sectoral conditions, which was adopted without public consultation and without environmental impact assessment, provides inter alia:

"The validation referred to in paragraphs 1 and 2 is limited to infringement of international, European and national provisions relating to the obligation to carry out an environmental impact assessment for certain plans and programmes, inter alia article 7 of the Convention of 25 June

1988 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, because of the absence of an environmental impact assessment."

By Judgment No. 142/2021 of 14 October 2021, the Belgian Constitutional Court dismissed actions for annulment of the Decree of the Flemish Region of 17 July 2020 validating the sectoral environmental conditions for wind turbines (published in the *Moniteur belge* of 24 July 2020).

The Constitutional Court has infringed the Aarhus Convention by maintaining that the validating Decree is neither a 'plan or programme' (as provided for in article 7 of the Convention) nor an "executive [regulation or] other generally applicable legally binding [rule] that may have a significant effect on the environment" (within the meaning of article 8 of the Convention).

'Validation' – which, in Belgium, is a parliamentary process – cannot declare something that is illegal to be legal, but prevents a court from establishing that illegality. From now on, the fact that the Decree has been validated by Parliament precludes a national court ruling that an illegal wind turbine consent is unlawful, even if this consent is applying the very sectoral standards that the CJEU has already held to be illegal. This is a failure to comply with the requirement to provide access to justice, since the courts are henceforth precluded from ruling on an illegality that is fundamental to the dispute.

Therefore the validating Decree also infringes article 9, paragraphs 2 and 3, of the Convention.

- **End of Summary**

Nature of alleged non-compliance with articles 6, 7, 8 and 9, paragraphs 2 and 3, of the Convention

17. Public participation, as guaranteed by article 7 of the Aarhus Convention, also concerns the environmental impact assessment required before a plan or programme is adopted.

Prior public participation, as guaranteed by article 8 of the Aarhus Convention, also concerns the adoption of "executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment".

18. The Constitutional Court erred in rejecting the applicability of articles 7 and 8 of the Aarhus

Convention to the validating Decree. In Judgment 142/2021 (B.26.3), the Court held:

> "Likewise, articles 7 and 8 of the Aarhus Convention do not apply to adoption of the contested Decree, since it is not a plan or programme as provided for in article 7 of the Convention, nor is it an executive regulation prepared by a 'public authority' or another 'generally applicable legally binding [rule] that may have a significant effect on the environment' within the meaning of article 8. Article 8 does not cover provisions made by decree, since the concept of 'public authorities' does not include bodies or institutions acting in a legislative capacity."

The Constitutional Court's error (and that of the legislature adopting the validating Decree) may be accounted for as follows.

19. Article 3 of the validating Decree expressly provides inter alia: *(emphasis added)*

> "The validation referred to in paragraphs 1 and 2 is limited to infringement of international, European and national provisions relating to the obligation to carry out an environmental impact assessment for certain plans and programmes, inter alia article 7 of the Convention of 25 June ***1988*** 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, because of the absence of an environmental impact assessment."

In other words, the legislature of the Flemish Region, in adopting the validating Decree, clearly confirmed that article 7 of the Aarhus Convention applies to the wind turbine standards – which have also been partially validated in the meantime by the Decree of 17 July 2020. Or – to put this the other way round – these illegal wind turbine standards were, without a shadow of doubt, "plans and programmes" within the meaning of article 7.

Moreover, these wind turbine standards were undeniably also "executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment" within the meaning of article 8 of the Aarhus Convention.

20. And from the point of view of failure to comply with the requirement to carry out an environmental impact assessment, discussed with the public, prior to adoption of these wind turbine standards, the legal process by which they were then 'validated' (by the Decree of 17 July 2020) was equally also:

- a ‘plan or programme’ (as provided for in article 7 of the Aarhus Convention);
- an “executive [regulation or] other generally applicable legally binding [rule] that may have a significant effect on the environment” (within the meaning of article 8 of the Convention).

Yet this validation of the wind turbine standards was not discussed with the public and no environmental impact assessment – which should also have been discussed with the public – was carried out. Therefore validation in this case is affected by the same forms of illegality as the (illegal) wind turbine standards themselves.

21. The legislature adopting the Decree and the Constitutional Court both infringed article 7 of the Aarhus Convention.

It is true that the provisions of the Decree contested before the Constitutional Court do not directly validate specific consents for wind turbines, granted on the basis of the wind turbine standards previously adopted illegally without prior environmental impact assessment and without public consultation. (And we should not forget that this represented a failure on the part of the Belgian State to comply with articles 2 to 9 of Directive 2001/42/EC and article 7 of the Convention, as both the CJEU and the legislature adopting the validating Decree have confirmed.)

But this kind of validation by decree is an equally fundamental element of “the preparation of plans and programmes relating to the environment” within the meaning of article 7.

Therefore it must be the case that the validating Decree is also to be placed in the category of “plans and programmes relating to the environment” within the meaning of article 7.

This validating Decree is simply an integral part of a procedure to extend “plans and programmes” that have previously been prepared by a public authority – a procedure that is clearly flawed, since no prior environmental impact assessment or prior public consultation has been carried out.

22. The requirement that “the public which may participate shall be identified by the relevant public authority” is immaterial.

In other words, the fact that “the public which may participate shall be identified by the relevant public authority” does not restrict the scope of article 7 of the Aarhus Convention only to “plans and programmes” prepared by a “public authority”.

On the contrary, article 7 applies to all "plans and programmes" – subject, of course, to the requirement that "the public which may participate shall be identified by the relevant public authority".

Therefore it is immaterial precisely who – a "public authority" or another national body – is preparing or deciding on the "plans and programmes" (within the meaning of article 7 of the Convention): the public must always be able to participate in good time "within a transparent and fair framework" and after "the necessary information" has been provided to the public.

The only inherent restriction (on article 7) is that "the public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention".

23. The "public participation" referred to in article 7 of the Aarhus Convention concerns "the preparation of plans and programmes relating to the environment". This participation must take place "within a transparent and fair framework", after "having provided the necessary information to the public".

Crucially, public participation (with the participating public "identified by the relevant public authority") involves the right to make legal and factual comments on the plan or programme being prepared.

Therefore the public may also comment on the impact of the plan or programme on the right of access to justice in cases challenging (in accordance with article 9 of the Convention) a consent granted under a given plan or programme.

The essential right to prior public participation during the preparation of "plans and programmes" cannot be restricted by the fact – or, here, the pretext – that these "plans and programmes" are not being or have not been prepared by a "public authority".

The reference in article 7 to the involvement of a "public authority" concerns only identification of "the public which may participate". This condition does not restrict the scope of the expression 'plan or programme' as provided for in of article 7.

24. As we have seen, the approach used in the validating Decree is to raise the status, with retroactive effect, of an executive standard – here, a 'plan or programme' – to that of a legally binding standard

and to exempt it from judicial review as provided for by Article 159 of the Belgian Constitution. This Article requires courts to automatically set aside, on the basis of a plea of failure to fulfil obligations, the application of any unlawful rule.

The validation process is integral to and indissociable from the plan or programme being validated.

The (validated) sectoral standards and their validating Decree form an inseparable whole.

Therefore the validation process, which is integral to the introduction of these illegal wind turbine standards (standards that, furthermore, were declared illegal by the CJEU in its judgment of 25 June 2020) also falls within the scope of article 7 of the Aarhus Convention.

Thus, in Judgment 142/2021, the Constitutional Court erred in finding that the validating Decree was not a 'plan or programme' (as provided for in article 7 of the Convention).

25. The validating Decree and Constitutional Court Judgment 142/2021 both infringed article 8 of the Aarhus Convention (read in conjunction with articles 6 and 9 of the Convention).

It should be recalled that article 8 of the Convention requires:

> "Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment".

It should also be recalled that the approach used in the validating Decree is to raise the status, with retroactive effect, of an executive standard – here a "[regulation or] other generally applicable legally binding [rule]" (within the meaning of article 8) – to that of a legally binding standard and to exempt it from judicial review as provided for by Article 159 of the Belgian Constitution.

Article 159 of the Belgian Constitution requires courts to automatically set aside, on the basis of a plea of failure to fulfil obligations, the application of any unlawful rule. This substantive (national) procedural safeguard is an inherent part of the Belgian rule of law and is also intrinsic to the right of access to justice – a general principle which is confirmed by article 9 of the Convention.

This validation process, put into effect by the Decree, is integral to and indissociable from the plan or programme being validated – in this case, the sectoral standards previously adopted without public consultation and without an environmental impact assessment.

The (validated) sectoral standards and their validating Decree form an inseparable whole and, at a relevant time, these wind turbine standards should have been discussed with the public, which has a right to "effective public participation at an appropriate stage" (within the meaning of article 8 of the Convention).

The process of validating (sectoral standards) is integral to and indissociable from these illegal wind turbine standards, and therefore also falls within the scope of article 8 of the Convention.

26. Consequently, in Judgment 142/2021, the Constitutional Court erred in maintaining that the Decree validating the wind turbine standards could not be defined as an "executive [regulation or] other generally applicable legally binding [rule] that may have a significant effect on the environment" (within the meaning of article 8 of the Aarhus Convention).

This Judgment fails to comply with article 8 (read in conjunction with articles 6 and 9), since:

(1) the wind turbine standards – which, manifestly, were prepared (before being validated) by a public authority (in this instance, the Flemish Government) – had already, from the outset, infringed European law, including articles 6, 7, 8 and 9 of the Convention, by failing to carry out an environmental impact assessment, discussed with the public beforehand;

(2) equally, the parliamentary process of validating, with retroactive effect, these standards – which are illegal because of the lack of prior public consultation – was not discussed with the public beforehand;

(3) validation (by Article 3 of the Decree) prevents a national court from establishing "infringement of international, European and national provisions relating to the obligation to carry out an environmental impact assessment for certain plans and programmes, inter alia article 7 of the Convention of 25 June ***1988*** 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, because of the absence of an environmental impact assessment" (wording from Article 3 of the Decree).

Thus the Belgian State – by pushing through this parliamentary validation process – has infringed the

obligation (in article 8 of the Convention) to "strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment".

In other words, the Belgian State – cumulatively – unlawfully failed to consult the public (1) not only initially, during preparation of the wind turbine standards (previously prepared by a public authority), (2) but also during validation of these illegal wind turbine standards.

The Constitutional Court should have annulled the Decree validating these illegal wind turbine standards – standards which had been invalidated by the CJEU judgment of 25 June 2020.

As it is, this validation of the illegal wind turbine standards perpetuates, supports and entrenches the previous substantive illegality – that there was no prior public participation and that, on each occasion, sectoral standards were adopted without any environmental impact assessment.

It should be recalled that this (initial) illegality consisted, from the outset, of preparing and adopting wind turbine standards without an environmental impact assessment, which itself should also have been discussed with the public beforehand "at an appropriate stage, and while options [were] still open".

Thus, the Belgian State – here, the Flemish Region, which is a federated entity of the Federal State – has persistently failed "to promote effective public participation at an appropriate stage, and while options are still open". In this, it has infringed the obligation laid down by article 8.

27. While it is true that the Belgian State was, in principle, free to decide precisely when "effective public participation" should take place, it remains the case that this crucial public participation should have preceded the preparation and the confirmation/validation of these illegal wind turbine standards.

Article 8 of the Aarhus Convention requires that the Belgian State satisfy the fundamental condition that this participation should take place "at an appropriate stage, and while options are still open".

Moreover, article 8 of the Convention – unlike article 7 – does not allow "the public" to be defined by "public authorities", and so the latter are not empowered to identify the public which may participate under article 8.

Therefore article 8 of the Convention is here infringed by:

(1) total lack of public participation: there was no public consultation during the initial adoption of the sectoral standards or the amendment of these standards over time, nor during the adoption of the Decree validating the sectoral standards;

(2) **persistent refusal of the Belgian State** – here, the Flemish Region, which was the legislature adopting the Decree validating a standard that had, in the meantime, been held by the CJEU to be illegal (judgment of 25 June 2020 in C-24/19) – **to "promote effective public participation at an appropriate stage, and while options are still open**".

28. In these omissions, the Constitutional Court and the legislature adopting the validating Decree also infringed article 9, paragraphs 2 and 3, of the Aarhus Convention (read in conjunction with article 8).

It is true that the provisions of the Decree contested before the Constitutional Court do not directly validate specific consents for wind turbines, granted on the basis of the wind turbine standards previously adopted illegally without prior environmental impact assessment and without public consultation. It should be recalled that the Belgian State failed to comply with articles 2 to 9 of Directive 2001/42/EC and articles 7 and 8 of the Convention – as both the CJEU (in its judgment of 25 June 2020) and the legislature adopting the validating Decree confirmed.

Up to now, any national court (supported by the CJEU judgment in C-24/19, which invalidates the illegal Flemish sectoral standards) has been required, upon application by the public concerned, to declare the illegality of specific wind turbine consents granted unlawfully on the basis of wind turbine standards which were in fact previously adopted illegally (1) without prior environmental impact assessment and (2) without prior public consultation – that is, in breach of articles 7 and 8 of the Convention and of Directive 2001/42/EC.

Yet validation by decree means that a national court is henceforth specifically prohibited and prevented from declaring this fundamental illegality in the context of a case relating to a wind turbine operating consent.

Even though the validating Decree infringes the right of access to justice, the public was not consulted on the draft decree: thus, the Decree also failed to comply with article 9, paragraphs 2 and 3, of the Convention.

The legislature should have refrained from adopting the validating Decree.

In addition, there has also been a failure to comply with article 9, paragraphs 2 and 3, of the Aarhus Convention

29. Article 7 of the Aarhus Convention refers to article 6 – specifically, to its paragraphs 3, 4 and 8.

30. We should recall that, in Judgment 142/2021, the Constitutional Court held that the applicants could not reasonably rely on article 6 of the Aarhus Convention – and even less on article 9.

The Constitutional Court set out its reasoning on this point in paragraphs B.25 and B.26.2 of the Judgment:

> "B.25. In the first and fourth pleas in Cases 7440, 7441, 7442 and 7448, in the plea in Cases 7445, 7446 and 7454 (the first and third limbs; the first to fourth parts of the fourth limb) and in the second and third pleas in Cases 7449, 7455 and 7456, the applicants claim that the contested provision is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with article 3, paragraph 9, article 6, paragraphs 2 and 3, article 7, article 8, and article 9, paragraphs 2 and 4, of the Aarhus Convention. In connection with the first and third limbs and the first to fourth parts of the fourth limb of the plea in Cases 7445, 7446 and 7454, the applicants, supported in this respect by Mr Claeys and Mr Anckaert, interveners, request the Court, in the alternative, to refer a question to the Court of Justice for a preliminary ruling on whether article 7 of the Aarhus Convention is to be interpreted as applying to the contested Decree.
>
> In the third plea in Cases 7449, 7455 and 7456, the applicants claim that the contested Decree is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 2, paragraphs 6 and 7, of the Espoo Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context.
>
> The applicants submit inter alia that the contested provision should itself have been subject to an environmental impact assessment and to public participation.
>
> (…)
>
> B.26.2. Installations for the generation of electricity by means of wind energy are not referred to in annex I to the Aarhus Convention. None the less, the provisions of article 6 also apply, in accordance with national law, to decisions on activities not listed in annex I which may have a significant effect on the environment (article 6, paragraph 1(b)).
>
> There is no need to consider whether or not the contested provision has a significant effect on

the environment: it is merely sufficient to determine that the provision does not relate to a 'specific activity' within the meaning of article 6. And in fact, the contested provision does not validate specific consents.

It follows that, as the contested provision is not covered by article 6 of the Aarhus Convention, it also falls outside the scope of article 9, paragraphs 2 and 4, of that Convention. On the same ground, the question of whether the contested provision complies with the requirements of European Union law on 'a specific legislative act', as established by the Court of Justice in its judgment of 18 October 2011 in *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, paragraph 37) and in its judgment of 16 February 2012 in *Solvay and Others* (C-182/10, paragraph 43) and as assessed by the Constitutional Court in Judgment No. 144/2012 (B.12.3) and Judgment No. 11/2013 (B.11), need not be examined."

31. The Constitutional Court's reasoning is wrong in law.

It should be recalled that the issue in the proceedings before the Constitutional Court was the Decree of the Flemish Region of 17 July 2020 validating the sectoral environmental conditions for wind turbines (published in the *Moniteur belge* of 24 July 2020).

To remind the Committee again – Article 3 of the validating Decree provides inter alia:
(emphasis added)

"The validation referred to in paragraphs 1 and 2 is limited to infringement of international, European and national provisions relating to the obligation to carry out an environmental impact assessment for certain plans and programmes, inter alia article 7 of the Convention of 25 June ***1988*** 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, because of the absence of an environmental impact assessment".

Thus the legislature of the Flemish Region adopting the Decree expressly mentions "inter alia **article 7** of the Convention of 25 June ***1988*** on Access to Information, **Public Participation in Decision-making and Access to Justice in Environmental Matters**" (without including or excluding article 6).

But article 7 of the Convention refers to article 6 – specifically, to its paragraphs 3, 4 and 8.

32. The general guarantee of **"public participation in decision-making and access to justice in environmental matters"** (which Article 3 of the validating Decree mentions explicitly) also clearly

follows from article 7 of the Aarhus Convention (which refers to article 6).

33. It is true – at least formally – that "whether or not the contested provision [in this case, the validating Decree] has a significant effect on the environment[,] it is merely sufficient to determine that the provision does not relate to a 'specific activity' within the meaning of article 6. And in fact, the contested provision does not validate specific consents".

Formally, therefore, the validating Decree should *a priori* be regarded primarily as:

- a 'plan or programme' (as provided for in article 7 of the Aarhus Convention);
- an "executive [regulation or] other generally applicable legally binding [rule]" (within the meaning of article 8 of the Convention).

34. However, in this case, the Decree of 17 July 2020 validating sectoral environmental standards for wind turbines henceforth prohibits a national court from declaring the illegality of specific consents for wind turbines, granted on the basis of the wind turbine standards previously adopted illegally without prior environmental impact assessment and without public consultation.

It should be recalled that the Belgian State (by adopting these illegal standards without any public participation) had, previously and from the outset, infringed articles 2 to 9 of Directive 2001/42/EC and article 7 of the Aarhus Convention – a step whose illegality was confirmed by both the CJEU (in its judgment of 25 June 2020) and the legislature adopting the validating Decree.

Consequently, the legislature adopting the validating Decree undeniably also infringed the right of access to justice – a fundamental right guaranteed by article 9, paragraphs 2 and 3, of the Convention.

Any national court hearing a challenge to the implementation of these (earlier) consents must henceforth refuse to declare these (earlier) consents illegal, even though:

(1) the consents apply illegal sectoral standards that have, in the meantime, already been invalidated by the CJEU (judgment of 25 June 2020, C-24/19)**;**

(2) up to now, the national court could – and even should – declare not only the illegal sectoral standards themselves but also consents granted on the basis of these illegal standards to be unlawful.

35. Thus the legislature adopting the validating Decree also infringed article 7 of the Convention (which also refers to article 6 of the Convention). By doing so, it validates earlier wind turbine consents, even though they were granted on the basis of sectoral standards that had not previously been discussed with the public, either on adoption or on amendment.

Validation by this process prohibits a court from considering a fundamental aspect of any contested wind turbine consent, and in doing so deprives the public of the right to fully challenge the legality of the decision to grant the consent, since the crucial issue of the legality or otherwise of the 'sectoral conditions' is exempt from review by the courts. Therefore this process fails to comply with article 9, paragraphs 2 and 3 of the Convention.

This means that Judgment 142/2021 of the Constitutional Court also infringes article 9, paragraphs 2 and 3.

36. Article 7 of the Convention refers to article 6 – specifically, to its paragraphs 3, 4 and 8.

37. We have established and reiterated above that articles 7 and 8 of the Convention apply here.

The Constitutional Court's argument rejecting the application of article 9, paragraphs 2 and 3, as set out in paragraph B.26.2 of Judgment 142/2021, is incorrect:

> "There is no need to consider whether or not the contested provision has a significant effect on the environment: it is merely sufficient to determine that the provision does not relate to a 'specific activity' within the meaning of article 6. And in fact, the contested provision does not validate specific consents.
>
> It follows that, as the contested provision is not covered by article 6 of the Aarhus Convention, it also falls outside the scope of article 9, paragraphs 2 and 4, of that Convention. On the same ground, the question of whether the contested provision complies with the requirements of European Union law on 'a specific legislative act', as established by the Court of Justice in its judgment of 18 October 2011 in *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, paragraph 37) and in its judgment of 16 February 2012 in *Solvay and Others* (C-182/10, paragraph 43) and as assessed by the Constitutional Court in Judgment No. 144/2012 (B.12.3) and Judgment No. 11/2013 (B.11), need not be examined."

This proposition, which discounts the application of article 9 – in this case, paragraphs 2 and 3 – is without foundation.

It is wrong to presume that, "as the contested provision [i.e., the validating Decree] is not covered by article 6 of the Aarhus Convention, it also falls outside the scope of article 9, paragraphs 2 and 4, of that convention".

38. Let us suppose, for the sake of argument, that the validating Decree is neither a 'plan or programme' (as provided for in article 7 of the Aarhus Convention) nor an "executive [regulation or] other generally applicable legally binding [rule]" (within the meaning of article 8 of the Convention).

Even in that case, the Decree of 17 July 2020 validating sectoral environmental standards for wind turbines henceforth prohibits a national court from declaring the illegality of specific consents for wind turbines, granted on the basis of the wind turbine standards previously adopted illegally without prior environmental impact assessment and without public consultation. This prohibition, imposed on all Belgian courts, results from the 'validation' process.

It should be recalled that the Belgian State had, from the outset, previously infringed articles 2 to 9 of Directive 2001/42/EC and article 7 of the Aarhus Convention by adopting these illegal standards without any public participation – a step whose illegality was confirmed by both the CJEU (in its judgment in C-24/19) and the legislature adopting the validating Decree.

39. Consequently, the legislature adopting the validating Decree undeniably also infringed the right of access to justice, which is a fundamental right guaranteed by article 9, paragraphs 2 and 3, of the Convention.

Where an individual case relating to a particular wind turbine consent actually comes before a court, the validating Decree seriously limits the right of access to justice – and does so in the broadest sense: **henceforth, any national court that hears or will hear a challenge to the implementation of these (earlier) consents – based on the illegal sectoral wind turbine standards – cannot properly raise the question of whether these consents are illegal, or declare that they are.** This is despite the facts that:

(1) these consents apply illegal sectoral standards that have, in the meantime, already been invalidated by the CJEU judgment of 25 June 2020 (C-24/19);

(2) up to now, a national court could – and even should – declare not only the illegal sectoral standards but also any consents granted on the basis of these illegal standards to be unlawful.

It is irrelevant whether or not the validating Decree is covered by articles 7 and 8 of the Convention: the Decree inherently limits access to justice where an individual case relating to a particular wind turbine consent actually comes or will actually come before a court. Article 9, paragraphs 2 and 3, does apply, but here it is improperly disregarded.

40. For the sake of completeness, it should also be recalled how the Constitutional Court summed up the applicants' grounds of complaint in its press releases, stating inter alia: *(emphasis added)*

"In essence, the applicants claimed that this validating legislation was incompatible with the principle of non-retroactivity, in that it interfered with actions pending while not being justified by exceptional circumstances or by overriding reasons in the public interest. The applicants also raised the matter of failure to comply with articles 6, 7, 8 and 9 of the Aarhus Convention and requested that a question be referred to the Court of Justice of the European Union for a preliminary ruling."

This 'interference with actions pending' falls specifically within the scope of article 9, paragraphs 2 and 3, of the Convention. It lies in the fact that the courts are henceforth prohibited from declaring the illegality of these environmental conditions, even though they were invalidated by the CJEU judgment of 25 June 2020 in C-24/19.

VII. Domestic remedies

The communicants applied to the Belgian Constitutional Court for annulment of the Decree of the Flemish Region of 17 July 2020 validating the illegal sectoral environmental conditions, to no avail. The Court dismissed their applications by Judgment No. 30/2021 of ***26*** February 2021 and Judgment No. 142/2021 of 14 October 2021.

VIII. Documentation (copies)

1. Decree of the Flemish Region of 17 July 2020 validating the sectoral environmental conditions for wind turbines (published in the *Moniteur belge* of 24 July 2020)
2. Judgment No. 30/2021 and Judgment No. 142/2021 of the Belgian Constitutional Court
3. Press releases of the Constitutional Court of 25 February 2021 and 14 October 2021 on Judgment 30/2021 of 25 February 2021 and Judgment 142/2021 of 14 October 2021

4. Judgment of the Court of Justice of the European Union of 25 June 2020, C-24/19, *A and Others*
5. CJEU press release of 25 June 2020 on Judgment in C-24/19

IX. Signature

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