Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10,
Switzerland

Communication from the public
to the Aarhus Convention Compliance Committee

I. ON BEHALF OF

FRANCE NATURE ENVIRONNEMENT, an association with its registered office established at [redacted] Paris

Represented by
Mr Jérôme Graefe (Documents 3 and 4)
Lawyer
Tel [redacted]
email [redacted]

FRANCE NATURE ENVIRONNEMENT ('FNE'), an association whose objective is to protect the environment, is recognized as a public-interest organization and approved under Article L. 141-1 of the Environmental Code (Documents 1 and 2)

'The Sphinx', an association with its registered office established care of Mr Schwencke, [redacted] Gif-sur-Yvette

Represented by
Mr Thomas Vezin (Document 7)
General Secretary of the Association

The objective of 'The Sphinx' is 'the protection, conservation and restoration of spaces, resources, environments and natural habitats on and around the campus of the École polytechnique'. (Documents 5 and 6) This association applied for a question to be brought before the Conseil constitutionnel ('the Constitutional Council') about Article L. 600-1-1, which impairs the right of access to justice.

GREENPEACE FRANCE, an association with its registered office established at 13 rue d'Enghien, 75010, PARIS

Represented by
Ms Clara Gonzales (Document 10)
Lawyer

Greenpeace France is an association whose objective is to protect the environment. It is approved for this purpose under Article L.141-1 of the Environmental Code. (Documents 8 and 9)

The Committee is requested to send all correspondence concerning this communication to: [redacted]

II. PARTY CONCERNED France

III. FACTS OF THE COMMUNICATION

A. Summary of the facts

1 In town and country planning matters, the French State is gradually restricting access to justice for associations, inter alia those promoting environmental protection as provided for in articles 2 and 3 of the Aarhus Convention.

2 Among recent restrictions, Article L. 600-1-1 of the Planning Code – amended by the ELAN Law on the pretext of combating unreasonable legal actions – limits the admissibility of actions against planning consents solely to those brought by associations whose articles of association have been filed **at least a year** before the planning application is displayed.

3 This restriction has no direct link with the objectives of legal certainty and combating unreasonable legal actions. There is no causal link between the length of time an association has existed, the unlawfulness of a planning consent and the quality of argument in any legal action seeking review. In light of the facts that almost no planning consents are contested, that an extremely small proportion of legal actions are found to be unreasonable and that there has been no significant increase in the number of cases before the courts, this unnecessary restriction on the right of access to justice seems disproportionate.

4 When legal action was brought against this new restriction on the right of access to justice in environmental matters guaranteed by the Aarhus Convention, the Constitutional Council failed to observe the right of associations for their action to be reviewed by an impartial, independent body established by law: two former ministers who, when in government, had carried through and publicly supported the new restriction imposed by Article L. 600-1-1 of the Planning Code sat on the Constitutional Council which ruled on whether these provisions are compatible with the Constitution.

5 Thus, in environmental matters in France, there is a systemic infringement of the right of access to an impartial, independent body in cases before the Constitutional Council, because of the way constitutional justice is administered, in that the Council's Internal Rules of Procedure fail to recognize objective bias as a ground for recusal – thereby contravening the requirement for impartiality – and unjustifiably place a time limit on the admissibility of an application for recusal.

B. Full details of the facts

6 By order of 2 April 2021, the Mayor of Palaiseau, on behalf of the State, granted the company Total Paris-Saclay a building permit for a research and innovation centre on the campus of the École polytechnique, with a floor area of 12,420 m^2.

7 'The Sphinx' was opposed to the project on the basis of its environmental impacts and also because it runs counter to the remit of the École polytechnique, which does not include collaboration with an oil company. This led the association to bring an action for annulment and a summary application for suspension[1] before Versailles Administrative Court[2] on 7 and 20 July 2021, requesting suspension of the project consent as a matter of urgency. (Document 11)

[1] A summary application for suspension is an urgent procedure requesting a court to prevent the immediate enforcement of an unlawful administrative decision.

[2] An administrative court rules on disputes between individuals and administrative authorities. It is a court of first instance – that is, the first court to hear a given case.

8 Its action was dismissed at first instance on the basis of Article L. 600-1-1 of the Planning Code, as amended by Law No. 2018-1021 of 23 November 2018 on Housing Development, Planning and the Digital Economy ('the ELAN Law'), which limits the conditions for admissibility of actions brought by associations – including environmental protection associations – against planning consents. This Article provides: 'It is admissible for an association to take legal action against a decision relating to land occupation or use only if its articles of association have been filed at the prefecture at least a year before the planning application is displayed at the mayor's office'.

9 Although 'The Sphinx', established in 2017, already had a direct interest as an association of students on the campus concerned, it had not filed its new articles of association, incorporating environmental protection, at least a year before the application was displayed.

10 During the case at first instance, 'The Sphinx' requested that a question be referred for a priority preliminary ruling on the issue of constitutionality,[3] on the basis that this provision of the Planning Code, requiring it to have filed its articles of association at least a year before the planning application was displayed, infringed its rights and freedoms as guaranteed by the French Constitution. (Document 12) However, the Court dismissed this request by order of 27 July 2021. (Document 13)

11 The association brought an appeal[4] before the Conseil d'Etat against the Order of 27 July 2021 dismissing its request for a priority preliminary ruling on the constitutionality of Article L. 600-1-1, which was put forward against it. The Conseil d'Etat eventually sent this question to the Constitutional Council, which received the referral for a priority preliminary ruling on the issue of constitutionality on 1 February 2022. (Document 14)

12 By Decision No. 2022-986 QPC of 1 April 2022, the Constitutional Council found that the provisions of the Article – that legal actions brought by associations are admissible only if they have filed their articles of association at least a year before the planning application is displayed at the mayor's office – do not disproportionately impair the right to an effective judicial remedy and are compatible with the Constitution. (Document 15) At the sitting of 31 March 2022, the Constitutional Council was composed inter alia of Ms Jacqueline Gourault and Mr Jacques Mézard.

13 Mr Jacques Mézard was appointed as Minister for Regional Cohesion by a decree of 21 June 2017 and served until 16 October 2018; he was appointed as a member of the Constitutional Council by a decision of 22 February 2019 and came into office on 12 March 2019. (Documents 16, 17, 18 and 19) As Minister for Regional Cohesion, in a statement to the French National Assembly on 3 October 2018, Mr Mézard mentioned the amendment to Article L. 600-1-1 of the Planning Code favourably, as a measure to combat unreasonable legal actions. (Document 20) He had also highlighted this earlier in the year, in an article for *L'agence*: 'L'ambition du projet de loi ÉLAN? Libérer et protéger [The draft ELAN law aims to free up and protect the planning process]', Jacques Mézard, Minister for Regional Cohesion. (Document 21)

[3] Referral for a priority preliminary ruling on the issue of constitutionality is the recognized right of anyone who is a party to proceedings, submitting that a legislative provision infringes the rights and freedoms guaranteed by the Constitution.

[4] Some decisions made at first instance by an administrative court may not be appealed. The only way of challenging them is to appeal to the Conseil d'État on a point of law.

14 Ms Jacqueline Gourault was appointed Minister for Regional Cohesion and Local Government Relations on 16 October 2018, succeeding Jacques Mézard; she was appointed as a member of the Constitutional Council by a decision of 1 March 2022, coming into office on 14 March. (Documents 22, 23 and 24) In a press release of 27 November 2018, Ms Gourault, then Minister for Regional Cohesion and Local Government Relations, listed specific outcomes of the ELAN Law, including explicitly the contested measure restricting access to justice. (Document 25) In addition, as Minister, Ms Gourault issued a circular on 21 December 2018 presenting the immediately applicable provisions of the ELAN Law, inter alia Article L. 600-1-1 of the Planning Code, which now forms the subject matter of this dispute. (Document 26)

15 Thus Ms Gourault and Mr Mézard, as ministers, carried through and publicly supported the new provisions of the ELAN Law, including the amendment to Article L. 600-1-1 of the Planning Code, before sitting on the Constitutional Council called upon to rule on the constitutionality of these provisions. Therefore Mr Mézard and Ms Gourault could not act as members of the Constitutional Council without jeopardizing the appearance of impartiality of that court.

16 However, the rules governing the operation of the Constitutional Council (its Internal Rules of Procedure) (Document 27) provide that 'the fact that a member of the Constitutional Council took part in drawing up the legislative provision, the constitutionality of which is at issue, shall not be a ground for recusal'. The association was not able to apply for the recusal of Ms Gourault and Mr Mézard. Therefore the impartiality of the court was not guaranteed. Furthermore, the fact that the Internal Rules of Procedure refuse to recognize any situation of objective bias creates a systemic infringement of the requirement for impartiality before this constitutional court.

17 Moreover, the Internal Rules of Procedure, by setting time limits on the admissibility of an application for recusal, do not offer any protection in situations where bias becomes apparent between the date set for receipt of initial observations and the date of the hearing on constitutionality. In the case of Decision No. 2022-986 QPC, Ms Gourault was actually appointed to the Constitutional Council after the date for receipt of initial observations.

IV. PROVISIONS OF THE CONVENTION WITH WHICH NON-COMPLIANCE IS ALLEGED

18 The provisions with which France has failed to comply are those of articles 2 and 9 of the Aarhus Convention ('the Convention') on access to impartial justice, oriented and underpinned by the right to a fair trial protected by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights').

A. Access to justice

19 The Aarhus Convention requires that members of the 'public concerned' either having a sufficient interest or maintaining impairment of a right have access to a review procedure to challenge the substantive and procedural legality of any decision taken in environmental matters.

20 Article 9 of the Convention 'encourages a broad interpretation of who may bring a review under national law. A broad interpretation, allowing, in general, any interested individual or organization to bring a challenge, would substantially reduce a fundamental barrier to access to justice, and practice in some countries suggests that it would not be overly burdensome on the work of the courts or other tribunals'.

21 The 'public concerned' is defined in article 2, paragraph 5, as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.

22 With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2, paragraph 5, are deemed to have a 'sufficient interest' or a right capable of being impaired.

23 The reference to 'meeting any requirements under national law' should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide 'appropriate recognition of and support to' NGOs.

24 Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure that these requirements are not overly burdensome or politically motivated [...].

25 Moreover, any requirements should be consistent with the Convention's principles, such as the avoidance of technical and financial barriers. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary.

26 The second main obligation in article 9, paragraph 5, requires Parties to consider the establishment of 'appropriate assistance mechanisms' to remove or reduce barriers to access to justice. Possible barriers under article 9, paragraph 5, might include, inter alia, limitations on standing.

27 Therefore the right of access to the courts is not absolute: there may be limitations intended inter alia to establish the conditions of admissibility of an appeal; however, these must not restrict 'a person's access in such a way or to such an extent that the very essence of the right is impaired.'[5]

28 They must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim pursued.[6] In this connection, the European Court of Human Rights has held that 'the right of access to a tribunal is breached when the way it is regulated ceases to serve the purposes of legal certainty and the proper administration of justice and becomes a kind of obstacle to the litigant's dispute being decided on its merits by the competent court'.[7]

29 The existence of procedural barriers, whether it results from excessive formalism, overly strict interpretation of a procedural rule or the fact that there are rules barring certain persons concerned from bringing court proceedings, amounts to an unjustified restriction of the right of access to a court, when it deprives the applicants of the possibility of invoking a legal remedy.[8]

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[5] ECHR, Association Burestop 55 and Others v. France, nos. 56176/18, 56189/18, 56232/18, 56236/18, 56241/18 and 56247/18, § 66, 1 July 2021

[6] See, to that effect: ECHR, Edificaciones March Gallego S.A. v. Spain, 19 February 1998, no. 28028/95, § 34; ECHR, Markovic and Others v. Italy, no. 1398/03, § 99, 14 December 2006

[7] ECHR, Association Burestop 55 and Others v. France, § 66, 1 July 2021

[8] See, to that effect, for example: ECHR, The Holy Monasteries v. Greece, 9 December 1994, nos. 13092/87 and 13984/88, § 83; ECHR, Louli-Georgopoulou v. Greece, no. 22756/09, § 48, 16 March 2017; ECHR, Association Burestop 55 and Others v. France, nos. 56176/18, 56189/18, 56232/18, 56236/18, 56241/18 and 56247/18, 1 July 2021

30 Thus it is clear from article 9 of the Aarhus Convention, in conjunction with Article 6 of the European Convention on Human Rights, that an association's right of access to a court in defence of collective interests or its own interests must be specifically protected when the matter concerns environmental protection.

B. The independence and impartiality of the body established by law

31 Article 9 of the Aarhus Convention provides that there must be 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 of the Convention.

32 Article 6 of the European Convention on Human Rights extends this requirement to constitutional courts examining an appeal lodged directly against a law if the domestic legislation provides for such a remedy.[9] The court's impartiality is to be determined through a twofold approach.

33 This should involve a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case. There should also be an objective test, that is to say, to ascertain whether the tribunal itself and, among other aspects, its composition offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

34 Thus two kinds of situation typically lead to a lack of impartiality on the part of a judicial body. One is functional in nature. It concerns, for example, the performance by the same person of more than one type of duty in the judicial process or the existence of hierarchical or other links between the judge and other actors in the proceedings.[10] The other situation is related to the individual concerned and to the nature and degree of the link in question. It could arise from the conduct of the judge in a given case or from the existence of links with a party to the dispute or to one party's representative.

35 A functional situation likely to raise fears of a lack of impartiality on the part of a judicial body is one in which members of that body perform judicial duties and extra-judicial duties in the same case.

36 Any direct participation in the adoption of legislation or regulations may be enough to cast doubt on the judicial impartiality of someone who later has to give judgment in a dispute as to whether there are grounds for departing from the legislation or regulations in question.[11]

V. NATURE OF ALLEGED NON-COMPLIANCE

A. Unjustified, disproportionate barriers to the right of access to justice, created by restrictions on the standing of associations having a sufficient interest and on environmental protection associations bringing proceedings against planning consents

[9] Voggenreiter v. Germany, no. 47169/99, §§ 31-33 and § 36 and the references cited, ECHR 2004-I

[10] Micallef v. Malta, 2009, §§ 97-98

[11] *Ibidem*, §§ 55-58, where the Court concluded that there had been a violation of Article 6 § 1, on the ground that a judge had played a direct part in adopting the development plan at issue in the proceedings; compare also Pabla Ky v. Finland, 2004, § 34 – a case of non-violation.

1. The objectives of legal certainty for planning consents and of combating unreasonable legal actions.

37 In order to assist the Committee in its consideration of the Communication, it is useful to refer to the preparatory parliamentary documents that have led to the adoption of successive restrictions on associations' right of access to a court to bring proceedings against planning consents. Article L. 600-1-1 was first added to the Planning Code by the Law of 13 July 2006 on a National Commitment to Housing (the ENL Law), and provided from then on that it was admissible for an association to take legal action against a decision relating to land occupation or use only if its articles of association had been filed at the prefecture before the planning application was displayed at the mayor's office. (Document 28)

38 This provision was introduced by an amendment explaining the legislature's aim at the outset: to limit unreasonable legal actions on the part of associations – actions 'which are purely opportunistic, attempting to contrive the withdrawal of projects in which substantial investment has already been made, or which are brought by residents' associations motivated by considerations of purely private interest'. (Document 29)

39 The 'unreasonable legal actions' envisaged here were those defined by the Planning Code, in the version in force on 1 January 2019, as actions introduced in circumstances which go beyond protecting the applicant's legitimate interests and which are excessively detrimental to the recipient of the planning consent. However, where a properly established association whose main objective is to protect the environment initiates legal proceedings, it is presumed to be acting within the bounds of its legitimate interests. (Document 30)

40 Article L. 600-1-1 of the Planning Code was subsequently amended by Article 80 of the 2018 ELAN Law, and now provides: 'It is admissible for an association to take legal action against a decision relating to land occupation or use only if its articles of association have been filed at the prefecture at least a year before the planning application is displayed at the mayor's office.' (Document 31) This change was made by amending the Law. (Document 32)

41 The definition of unreasonable legal actions laid down in Article L. 600-7 of the Planning Code was significantly extended by Article 80 of the ELAN Law, removing the presumption that court actions brought against planning consents by properly established environmental protection associations are legitimate. Such associations are now no longer presumed to be acting within the bounds of their legitimate interests – that is, protecting the environment – but are presumed to be acting unreasonably. (Document 33) The currently applicable version of Article L. 600-1-1 strays far from the initial objective of the legislature; this is clear from the parliamentary debate on the amendment, in which some Members of Parliament spoke in favour of re-establishing the presumption that environmental protection associations initiating proceedings against planning consents are not acting unreasonably. (Document 34)

42 While purporting to combat unreasonable legal actions, in reality the amendments made to the legislation in 2018 are intended to counter legitimate actions brought by those who live or work near planned developments or by environmental protection associations.

43 Removing the presumption that legitimate actions brought by environmental protection associations are 'reasonable' and replacing it with a presumption that actions against planning consents are illegitimate is a clear infringement of article 9, paragraph 2, of the Convention.

2. The absence of any need for a new restriction on the public's access to justice in environmental matters

44 There is no demonstrable need for the public's right of access to justice in environmental matters to be subject to the restriction introduced by the above-mentioned provisions, a fact that has been established by numerous public reports (Document 35) and even by the Impact Study on the Draft Law. (Document 36) In fact, according to the Government, between 98.4% and 98.8% of the many planning consents granted each year are not challenged in any way.

45 The proper administration of justice is a legitimate aim, and would justify this restriction if there had been a significant growth in planning litigation: but this is not the established reality of the matter. The average number of cases remains at a relatively low rate. Legitimate planning disputes represent only a minority of cases [between 5% and 6.7% of all cases filed] and therefore the administrative courts are far from overburdened with them. (Documents 37 to 42)

46 When it comes to applications seeking damages for unreasonable legal actions brought under the Planning Code, the Impact Study on the Draft Law shows that, between 2013 and 2015, almost all the 200 counterclaims for damages were dismissed and that only 3 judgments found the actions concerned to be unreasonable. (Document 43)

47 Specifically, between 2013 and 2015, of 35,471 planning cases filed before the administrative courts, only 200 – i.e. 0.56% – were the subject of claims for damages on the grounds that the actions concerned were 'unreasonable', and almost all of these counterclaims were dismissed. Only 3 of the cases filed – i.e. 0.01% – were found to be 'unreasonable'.

48 Therefore the established reality of the matter is that almost no planning consents are challenged in court, that there is no significant growth in planning litigation and that, of the very small number of legal cases filed against planning consents, only a tiny proportion can be held to be unreasonable.

3. The absence of any direct link between this restriction on the right of access to justice and the objective of legal certainty in combating unreasonable legal actions

49 Restricting the admissibility of an association's legal action by requiring it to have existed for a year before the planning consent is posted at the mayor's office does nothing to prevent unreasonable legal actions. There is no established link between the length of time an association has been in existence and any qualitative weakness in its arguments that could unnecessarily trouble the court in a particular legal action.

4. The disproportionate impairment of the public's right of access to justice in environmental matters

50 It follows from all the above-mentioned provisions that, in order to guarantee the public's right of access to justice in environmental matters under the Convention, environmental protection associations – whether or not their articles of association have been filed at the prefecture at least a year before the planning application is displayed at the mayor's office – must be regarded as 'the public concerned' having a sufficient interest to bring proceedings against planning consents.

51 The provisions of Article L. 600-1-1 of the Planning Code, which de facto deny legal standing to environmental protection associations that have not filed their articles of association at least a year before the planning application is displayed, impair the right of access to justice for the public concerned, thus infringing article 9, paragraph 2, of the Convention.

52 In order to be consistent with the Convention, any new requirements laid down by Article L. 600-1-1 of the Planning Code should not be overly burdensome or politically motivated, should aim to remove or reduce technical barriers to access to justice and should be based on objective criteria that are not unnecessarily exclusionary.

53 Yet the time-based criterion imposed – so that 'it is admissible for an association to take legal action against a decision relating to land occupation or use only if its articles of association have been filed at the prefecture at least a year before the planning application is displayed at the mayor's office' – has no objective bearing on whether or not the action is unreasonable. The provisions of Article L. 600-1-1 of the Planning Code have introduced new requirements that constitute technical barriers to justice, relying on an unnecessarily exclusionary criterion, thus infringing article 9, paragraphs 3 and 5, of the Convention.

54 On the other hand, local associations that have existed for more than a year but whose articles of association were filed at the prefecture less than a year before the planning application was displayed at the mayor's office have been essentially deprived of any judicial remedy and therefore, in order to bring proceedings, they are forced to turn to other associations that have been registered for more than a year. However, that possibility in itself is not capable of satisfying the requirements for access to justice, because, first, associations that have filed their articles of association more than a year earlier may not have the same interest in the disputed planning consent and, secondly, they could receive numerous requests of this kind, which would have to be dealt with selectively on the basis of criteria that would not be subject to review.

55 Such a system gives rise, by its very nature, to a filtering of appeals in environmental matters that is directly contrary to the spirit of article 9 of the Convention, which entails the broadest possible access to justice for the public in environmental matters.

56 Moreover, the provisions of Article L. 600-1-1 of the Planning Code encourage a restrictive interpretation of the legal standing of environmental protection associations, in that they admit legal actions only from those that have filed their articles of association at least a year before display of the planning application, thus infringing article 9.

57 The new requirements laid down by Article L. 600-1-1 of the Planning Code should pursue a legitimate aim and there should be a reasonable relationship of proportionality between any means employed to restrict the conditions of admissibility for associations and the intended aim of legal certainty.

58 Here, there is no reasonable relationship of proportionality between the means employed and the aim pursued, since the established reality of the matter is that almost no planning consents are challenged in court, there is no significant growth in planning litigation and, of the very small number of legal cases filed against planning consents, only a tiny proportion are challenged on the grounds that they are unreasonable and, of those, only a minuscule number have been held to be unreasonable.

59 The new requirements laid down by the amended version of Article L. 600-1-1 of the Planning Code have ceased to pursue the aims of legal certainty and the proper administration of justice and instead represent a barrier preventing any association, including an environmental protection association, that has not filed its articles of association at least a year before the application is displayed, from having its dispute settled on the merits by the competent court, thus infringing article 9, paragraphs 2, 3 and 5, of the Aarhus Convention, oriented and underpinned by the right to a fair trial under the European Convention for the Protection of Human Rights.

B. The lack of impartiality of the Constitutional Council, which is responsible for considering appeals in environmental matters

1. General infringement of the right of access to impartial justice because of the way constitutional justice is currently administered

60 Order No. 58-1067 of 7 November 1958 on the institutional law governing the Constitutional Council requires appointed members of the Constitutional Council to take an oath promising to carry out their duties 'with complete impartiality'.

61 In practice, the Constitutional Council has the power of self-organization, which means it makes its own rules: therefore its Internal Rules of Procedure should implement the guarantees of impartiality required before the Constitutional Council. (Document 27)

62 However, Ms Gourault and Mr Mézard did not abstain, despite the lack of objective impartiality arising from their sitting as members of the court ruling on this case. And indeed, the rules governing the operation of the Constitutional Council provide that 'the fact that a member of the Constitutional Council took part in drawing up the legislative provision, the constitutionality of which is at issue, shall not be a ground for recusal'.

63 In other words, the Internal Rules of Procedure automatically fail to take objective bias into account. Therefore, in the case at issue here, it was impossible to guarantee that the Constitutional Council would comply with the requirement for impartiality of justice in environmental matters.

64 Given the positions of Ms Gourault and Mr Mézard, former Government ministers who had taken part in drawing up the legislative provision at issue and then became judges of the constitutionality of this same provision, the public – and particularly the two associations, 'The Sphinx' and FNE – were entitled to doubt their ability to treat the parties (the Government and 'The Sphinx') equally, without any preconceived opinion and without prejudging the matter.

65 Thus there is a systemic infringement of the requirement for impartiality for the public in environmental matters before the Constitutional Council, and this runs completely counter to the requirements of article 9 of the Convention.

66 The situation is all the more at odds with the Convention because the Internal Rules of Procedure also restrict the time conditions for admissibility of an application for recusal and do not guard against instances of bias that may appear between the date set for receipt of initial observations and the hearing date. In this case, that was the period during which Ms Gourault was appointed to the Constitutional Council.

67 An application for recusal is admissible only if it is lodged at the General Secretariat of the Constitutional Council before the date set for receipt of initial observations. Yet in the 'Sphinx' proceedings, the deadline for receipt of initial observations was set at 16 February 2022 at 6 PM – before Ms Gourault was appointed to the Council on 1 March. It was impossible to apply for her recusal as a member of the Council.

68 There is no reason why the conditions for admissibility of an application for recusal from the Constitutional Council should be limited. Furthermore, they are much more restrictive than the conditions for application for recusal before the administrative courts, which may be made at any time before the end of the hearing. There is no justifiable reason for this difference between courts.

69 As a consequence, for any cases on environmental matters introduced by the public before the Constitutional Council, the Internal Rules of Procedure for a priority preliminary ruling on the issue of constitutionality do not guard against instances of bias that come to light during the case. Thus there is a systemic failure to guarantee the required impartiality, which runs completely counter to the requirements of article 9 of the Convention.

2. The specific infringement of the principle of impartiality because of the presence of Mr Jacques Mézard and Ms Jacqueline Gourault

70 When asked for a priority preliminary ruling on the issue of constitutionality, the Constitutional Council, following its Internal Rules of Procedure, gives its judgment on the basis of the Constitution and with full jurisdiction, determining whether or not a legislative provision infringes the rights and freedoms guaranteed by the Constitution. Inasmuch as the Constitutional Council has special powers allowing it to repeal *erga omnes* any legal provision that it finds incompatible with the Constitution, it can be considered to have the characteristics of a 'tribunal' within the meaning of the European Convention on Human Rights. Thus there is no doubt that the requirement for impartiality applies to the administration of constitutional justice. Indeed, Article 3 of Institutional Order No. 58- 1067 of 7 November 1958 states that appointed members of the Constitutional Council are to take an oath promising to carry out their duties 'with complete impartiality'. It is clear that this requirement for impartiality was not observed in the course of the procedure for a priority preliminary ruling on the constitutionality of Article L. 600-1-1 of the Planning Code, which concluded with Decision No. 2022-986 QPC of 1 April 2022.

71 At the sitting of 31 March 2022, the Constitutional Council was composed inter alia of Ms Jacqueline Gourault and Mr Jacques Mézard. It is accepted that Ms Gourault and Mr Mézard had, as ministers, personally carried through and publicly supported the new provisions of the ELAN Law, including the amendment to Article L. 600-1-1 of the Planning Code, before sitting on the Constitutional Council called upon to rule on the constitutionality of these provisions.

72 Given this suspicion of demonstrable bias, these two members ought to have refrained from sitting in this capacity, citing the requirement for impartiality. However, on the basis of the Constitutional Council's Internal Rules of Procedure, which fail to recognize this situation of objective bias, the two former ministers did not recuse themselves (Document 27)

73 It is absolutely clear that Mr Mézard and Ms Gourault could not sit as members of the Constitutional Council to rule on this matter without jeopardizing the court's apparent impartiality, which relies on both a subjective and an objective assessment, and thus their presence manifestly infringed article 9 of the Convention.

VI. USE OF DOMESTIC REMEDIES

74 All available domestic remedies have been used for the purpose of trying to rectify the situation of non-compliance that forms the subject matter of this Communication.

75 Before Versailles Administrative Court: an action for annulment and a summary application for suspension of the project planning consent as a matter of urgency, brought on 7 and 20 July 2021. On that occasion, a separate written pleading was submitted, seeking to lift the restriction on the legal standing of environmental protection associations under Article L. 600-1-1 of the Planning Code by requesting a priority preliminary ruling on the issue of constitutionality. By order of 27 July 2021, Versailles Administrative Court refused to refer the question for a priority preliminary ruling on the issue of constitutionality and, on the basis of the restriction, dismissed The Sphinx's court action.

76 Before the Conseil d'Etat: an appeal to the Conseil d'Etat against the Administrative Court's order was submitted on 30 July 2021. By decision of 31 January 2022, the Conseil d'Etat referred a question to the Constitutional Council for a priority preliminary ruling on whether Article L. 600-1-1 of the Planning Code is compatible with the Constitution and it stayed proceedings on dismissal of the association's court action until the Constitutional Council resolved the issue.

77 Before the Constitutional Council: the question for a priority preliminary ruling on the issue of constitutionality was referred to the Council on 1 February 2022, and 'The Sphinx', the association that had raised the question, submitted its observations on 15 February 2022. On 16 February and 3 March, FNE submitted observations demonstrating that, as an environmental protection association, it had a special interest in intervening. (Documents 44 and 45) The Government argued to the contrary. (Documents 46 and 47)

78 By Decision No. 2022-986 QPC of 1 April 2022, the Constitutional Council found that the provisions of Article L. 600-1-1 of the Planning Code do not impair the right of access to justice for environmental protection associations and are compatible with the Constitution.

79 These domestic remedies have failed to rectify the non-compliance, and there are no other remedies available.

VII. USE OF OTHER INTERNATIONAL PROCEDURES

80 None.

VIII. CONFIDENTIALITY

81 None of the information in this Communication needs to remain confidential. **However, we would like to specifically request** that telephone numbers and email addresses relating to the natural persons who represent 'The Sphinx' and Greenpeace and are signatories to the Communication remain confidential, in order to avoid any risk of prosecution, persecution or harassment.

IX. SUPPORTING DOCUMENTATION (COPIES, NOT ORIGINALS)

Document 1 FNE: Official approval
Document 2 FNE: Articles of association and Official recognition as a public-interest organization
Document 3 FNE: Extract from Minutes
Document 4 FNE: Special authority to act for the association

Document 5 'The Sphinx': Articles of association
Document 6 'The Sphinx': Declaration to the Prefecture amending Articles of association

Document 7 'The Sphinx': Minutes of the General Meeting - 4 July 2022

Document 8 Greenpeace France: Articles of association
Document 9 Order of the Ministry for Inclusive Ecological Transition of 15 March 2019 (Greenpeace: Official approval)
Document 10 Greenpeace: Delegation of powers

Document 11 Summary application for suspension - 'The Sphinx':
Document 12 Request for referral of a question for priority preliminary ruling on the issue of constitutionality
Document 13 Order of Versailles Administrative Court, 27 July 2021
Document 14 Conseil d'Etat Decision of 31 January 2022
Document 15 Decision No. 2022-986 QPC of 1 April 2022

Document 16 Decree of 21 June 2017
Document 17 Decree of 16 October 2018
Document 18 Decision of 22 February 2019
Document 19 Members of the Constitutional Council: Jacques Mézard
Document 20 Speech in the National Assembly - 3 October 2018
Document 21 *L'agence* article - 20 June 2018

Document 22 Decree of 16 October 2018
Document 23 Decision of 1 March 2022
Document 24 Members of the Constitutional Council: Jacqueline Gourault
Document 25 Press release of 27 November 2018
Document 26 Circular of 21 December 2018

Document 27 Internal Rules of Procedure: Priority preliminary rulings on the issue of constitutionality

Document 28 Article L. 600-1-1 of the Planning Code, introduced by Law No. 2006-872 of 13 July 2006
Document 29 Amendment No. 186 rect. ter - 6 April 2006
Document 30 Article L. 600-7 of the Planning Code, in the version in force from 19 August 2013 to 1 January 2019
Document 31 Article L. 600-1-1 of the Planning Code, in the version in force from 1 January 2019 (Amended by Law No. 2018-1021 of 23 November 2018 - Article 80)
Document 32 Amendment No. Com-229
Document 33 Article L. 600-7 of the Planning Code, in the version in force from 1 January 2019 (Amended by Law No. 2018-1021 of 23 November 2018 - Article 80)
Document 34 Extract: Parliamentary sitting of 19 July 2018 - full record of debates
Document 35 Extract: Report No. 630 (2017-2018), drawn up by Ms Dominique ESTROSI SASSONE on behalf of the Senate Committee on Economic Affairs, 4 July 2018
Document 36 Extract: Impact Study on the Draft ELAN Law

Document 37 Extract: Public Report on the judicial activities of administrative courts - 2013
Document 38 Extract: Public Report on the judicial activities of administrative courts - 2014
Document 39 Extract: Public Report on the judicial activities of administrative courts - 2015
Document 40 Extract: Public Report on the judicial activities of administrative courts - 2018
Document 41 Extract: Public Report on the judicial activities of administrative courts - 2019
Document 42 Extract: Public Report on the judicial activities of administrative courts - 2020

Document 43 Extract: Proposals for faster, more efficient planning consent proceedings:

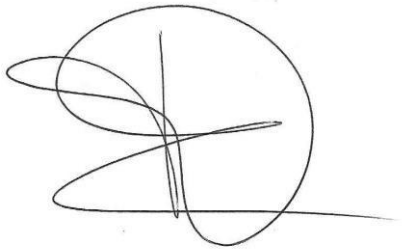
Report to the Minister for Regional Cohesion by Working Group under Christine Maugüé, Councillor of State

Document 44 FNE: Statement in intervention - Further observations
Document 45 FNE: Response to Prime Minister's Note to the Constitutional Council

Document 46 Prime Minister's initial observations
Document 47 Prime Minister's Note to the Constitutional Council during its deliberations

X. SIGNATURES

Paris, 10 November 2022



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