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Compliance Committee of the
Aarhus Convention
Environment Division
United Nations Economic Commission for Europe

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RE: Comments of the Kingdom of Belgium concerning compliance by the Kingdom of Belgium regarding the validation of sectoral environmental norms for wind turbines (ACCC/C/2022/192 (Belgium))

Dear Committee Members,

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

First and foremost, the Kingdom of Belgium wishes to thank the Committee for the opportunity to deliver comments on the compliance by the Kingdom of Belgium regarding the validation of sectoral environmental norms for wind turbines.

In what follows, we will provide the Committee with the necessary background information for it to be able to assess, after further consideration, the admissibility of the Communication as well as the absence of compliance issues referred to in the Communication. Thereafter, we will set out the reasons as to why the Kingdom of Belgium believes the Communication is inadmissible and, in any case, why the allegations contained in the Communication are unfounded, and certainly do not constitute a breach of the provisions of the Aarhus Convention by the Kingdom of Belgium.

To ease the Committee's reading, we have include a table of contents below:

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

(a) *Introduction*

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

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

The question put forward by the communicants is in essence whether the Constitutional Court's assessment in its judgement No. 142/2021 of 14 October 2021 of the constitutionality of the Flemish Decree of 17 July 2020 validating the sectoral environmental norms for wind turbines (hereinafter: "*the Validation Decree*") is in conformity with the provisions of the Aarhus Convention. By the aforementioned decree, the Flemish Parliament validated an irregular act of the Executive (i.e. the Flemish Government) as a result of which this legal act retains its effects for a limited period of three years.

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

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

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

Prior to 2011, *Vlarem II* did not encompass any specific legally binding standards for wind turbines. A first coordinated approach to the permitting of wind turbines was introduced by the Circular EME/2000.01 laying down the "*Assessment framework and conditions for the installation of wind turbines*", which was adopted by the Flemish Government on 17 July 2000 (hereinafter: "*the Circular of 2000*").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] ECJ 27 October 2016, No. C-290/15, *D'Oultermont a.o.*

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

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

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

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

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

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

The potential annulment of existing consents and the impossibility to grant new consents for wind turbine projects were likely to have significant implications for the electricity supply in Belgium and would have jeopardised the attainment of the binding renewable energy targets under EU law (see preparatory works cited in the judgment of the Constitutional Court No. 142/2021 of 14 October 2021, Annex III, paragraphs. B.2.16 and B.25.17).

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

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

2.2 Validation Decree and the new sectoral norms

8. In essence, the Validation Decree covers the point of illegality by which section 5.20.6 of Vlarem II and the Circular of 2006 were affected as a consequence of the ruling of the Court of Justice of 25 June 2020 in light of international, European and national provisions on environmental assessments for a limited period of time. Indeed, the Validation Decree ties the legislative validation of the illegal sectoral environmental norms for wind turbines for a maximum period of three years to an injunction to the Flemish Government to adopt new sectoral norms following an environmental assessment, within a period of maximum three years following the publication of the Validation Decree in the Belgian Official Gazette on 24 July 2020 (i.e. 23 July 2023).

Furthermore, the validation of the sectoral environmental norms for wind turbines is limited to the point of law on which the Court of Justice had ruled, i.e. the violation of international, European and national rules on environmental assessments for plans and programmes. It should be stressed from the outset that the only legal consequence of the Validation Decree in the field of access to justice is that individual development consents for wind turbine projects granted in the Flemish Region on the basis of the Order and the Circular of 2006 cannot, for a maximum period of three years ending on 23 July 2023, be challenged on the mere fact that these instruments are incompatible with the international, European and national provisions on environmental assessments and public participation. The Validation Decree does not preclude members of the public concerned to raise, during this period of time, any other plea of law against the Order and the Circular of 2006, and – indeed – the develop consent itself in proceedings before the civil and administrative courts to challenge the legality of those consents. In addition, the Validation Decree does not affect the right of the members of the public concerned to seek damages before the civil courts, provided that they can prove a personal injury as a result of such consent (see judgement of the Constitutional Court No. 142/2021 of 14 October 2021, paragraph B.14.2, referring to the preparatory works). The main concern of the Validation Decree is to avoid legal uncertainty, with the aim of safeguarding the energy supply of Belgium as well as the attainment of the renewable energy targets, both of which are imperative reasons of overriding public interest that, under EU as well as national law, allow for limitations on the right of access to justice in environmental matters.

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

> "*Article 1. This decree regulates a regional matter.*
>
> *Art. 2. A section 6 is added to Title V, Chapter 4, of the Decree of Flemish Parliament of 5 April 1995 laying down general provisions on environmental policy*[5]*, inserted by the Decree of 25 April 2014 and amended by the Decree of 27 October 2017, which reads as follows:*

[5] In Dutch: "*Het Decreet houdende Algemene Bepalingen inzake Milieubeleid*". Title V of this Decree transposes the European directives on environmental impact assessments for both plans and programmes as well as projects (i.e.: the SEA-Directive and Directive

"Section 6. Peculiar validation".

Art. 3. In Title V, Chapter 4, of the same Decree, an Article 5.4.15 is added to Section 6, added by Article 2, which reads as follows:

"*Art. 5.4.15. Section 5.20.6 of chapter 5. 20 of Part 5 of the Order of the Flemish Government on the general and sectoral norms with regard to environmental health of 1 June 1995, inserted by the Order of the Flemish Government amending the Order of the Flemish Government of 6 February 1991 on the adoption of regulations concerning environmental consents and amending the Order of the Flemish Government on the general and sectoral norms with regard to environmental health of 1 June 1995, as regards updating the aforementioned orders in relation to technical developments of 23 December 2011 and last amended by the Decree of the Flemish Council of 3 May 2019 amending various decrees relating to the environment and agriculture, shall be declared valid with effect from the date of its entry into force. The declaration of validity shall apply until the date of entry into force of the new sectoral norms for installations for the generation of electricity by means of wind energy which the Flemish Government approves after carrying out an environmental impact assessment, and shall in any case cease to apply after a period of a maximum of three years from the entry into force of this Article.*

Circular EME/2006/01-RO/2006/02 of 12 May 2006 laying down the assessment framework and conditions for the implantation of wind turbines shall be declared valid with effect from the date of its entry into force. The declaration of validity is valid until the date of entry into force of Circular RO/2014/02 of 25 April 2014 laying down the assessment framework and conditions for the implantation of wind turbines.

The declaration of validity, mentioned in the first and second paragraphs, is limited to the violation of the international, European and national provisions on the obligation to carry out an environmental impact assessment for certain plans and programs, in particular Article 7 of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Articles 2 to 9 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, and Chapter II of Title IV of this Decree, for failure to carry out an environmental impact assessment.".

Art. 4. In title V, chapter 4, of the same decree, an article 5.4.16 is added to Section 6, added by Article 2, which reads as follows:

2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment) in the Flemish legal order.

"Art. 5.4.16. The Flemish Government shall lay down new sectoral environmental norms for installations for the generation of electricity by means of wind energy, which shall enter into force within a maximum period of three years from the entry into force of this Article. Such sectoral standards shall be subject to a prior environmental impact assessment in accordance with Title IV, Chapter II."

Art. 5. This Decree shall enter into force on the day of its publication in the Belgian Official Gazette." (emphasis added)

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

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

- a description and clarification of the intentions of the proposed plan or program;
- a proposal on the scope and level of detail of the environmental assessment;
- a proposal on the substantive approach of the environmental assessment (including the methodology).

A public consultation was held between 15 December 2021 and 12 February 2022 to allow the members of the public to submit observations on the information to be included in the environmental report (scoping). Following the public inquiry and consultations of the different advisory bodies, Team Omgevingseffecten (the Flemish authority competent for impact assessments) drew up guidelines on the information to be supplied in the draft environmental assessment on 9 May 2022 (scoping advice).

Based on the draft environmental assessment, the Flemish Government adopted a draft Order laying down the new sectoral environmental norms for wind turbines on 28 October 2022. The draft environmental assessment as well as the draft Order of 28 October 2022 were submitted to a public inquiry and consultations of the different advisory bodies between 22 November 2022 and 20 January 2023. During the public inquiry, members of the public, including the communicants, were able to submit their observations on, inter alia, the draft sectoral norms to the competent authorities, in accordance with Article 5.4.4. of the Decree of 5 April 1995 concerning general provisions relating

to environmental policy (in Dutch: "*Decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid*" or "*DABM*").[6]

Following the public participation, the Flemish competent authority, Team Omgevingseffecten, approved the environmental assessment by decision of 21 April 2023. The Flemish Government adopted the new wind turbine norms in the form of a draft Order in a second reading by decision 5 May 2023, taking due account of the outcome of the environmental assessment and the public participation procedure. At the time writing, the draft Order was pending before the Legislation section of the Council of State, after which the Flemish Government will adopt the draft Order in accordance with the formal decision-making process, which should be finalised by 23 July 2023 at the latest. As it stands now, the draft sectoral wind turbine norms will not significantly alter the existing and validated wind turbine norms, thereby confirming that the latter do not cause a significant adverse effect on environment and health.

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

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

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

[6] An overview of the results of the public participation is available through the following link: https://www.milieuinfo.be/dms/d/d/workspace/SpacesStore/db928586-2a71-45b4-b766-4cf85ab874ef/PL0277_Bijlage%204_Inspraakreacties.pdf (in Dutch). The document entails the comments and questions submitted by members of the public as well as the public authorities and advisory bodies on the draft sectoral norms and the underlying environmental assessment.

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

For the purpose of the present Communication, the pleas relating to the right of access to justice and the Aarhus Convention are relevant.

The Constitutional Court assessed the pleas relating to the right of access to justice under paragraphs B.8.1 to B.15 of the judgement:

French official text of the Ruling:

> *II. En ce qui concerne le droit d'accès au juge*
>
> *B.8.1. Dans le premier moyen dans les affaires nos 7440, 7441, 7442 et 7448, dans la sixième branche du moyen dans les affaires nos 7445, 7446 et 7454 et dans les première et troisième branches du premier moyen dans les affaires nos 7449, 7455 et 7456, les parties requérantes font valoir que la disposition attaquée n'est pas compatible avec les articles 10, 11 et 13 de la Constitution, lus en combinaison avec l'article 6 de la Convention européenne des droits de l'homme, avec le principe de la non-rétroactivité, avec les droits de la défense, avec le principe de l'égalité des armes, avec l'interdiction d'excès et de détournement de pouvoir, et avec le principe de la sécurité juridique, en ce que la validation législative attaquée interfère dans des litiges pendants, alors qu'elle n'est pas justifiée par des circonstances exceptionnelles ni par des motifs impérieux d'intérêt général.*
>
> *B.8.2. Dans le premier moyen dans les affaires nos 7440, 7441, 7442 et 7448 et dans la deuxième branche du premier moyen dans les affaires nos 7449, 7455 et 7456, les parties requérantes font valoir que la disposition attaquée n'est pas compatible avec les articles 10, 11 et 13 de la Constitution, lus en combinaison avec l'article 6 de la Convention européenne des droits de l'homme, en ce que, pour l'autorité, l'effet utile de la validation attaquée, même à supposer qu'elle soit justifiée par des circonstances exceptionnelles ou par des motifs impérieux d'intérêt général, ne l'emporte pas sur ses effets à l'égard des parties qui attaquent devant une juridiction le permis où l'activité d'une éolienne.*
>
> *B.8.3. Dans la cinquième branche du moyen dans les affaires nos 7445, 7446 et 7454 et dans le premier moyen dans les affaires nos 7449, 7455 et 7456, les parties requérantes font valoir que la disposition attaquée n'est pas compatible avec les articles 10 et 11 de la Constitution, en ce que des personnes qui sont préjudiciées par des plans et programmes qui ont été adoptés sans avoir été soumis à une évaluation des incidences sur l'environnement et qui ont été validés par le décret attaqué, ne peuvent plus invoquer cette violation en justice, alors que des personnes qui sont préjudiciées par des plans et programmes qui ont aussi été adoptés sans avoir été soumis à la participation du public ni à une évaluation des incidences*

sur l'environnement, mais qui n'ont pas été validés par le décret attaqué, peuvent encore invoquer cette violation devant le juge.

B.8.4. Dans le quatrième moyen dans les affaires nos 7440, 7441, 7442 et 7448, les parties requérantes font valoir que la disposition attaquée n'est pas compatible avec les articles 10, 11 et 13 de la Constitution, lus en combinaison avec l'article 6 de la Convention européenne des droits de l'homme, en ce qu'elle empêche d'invoquer devant le juge la circonstance que la section 5.20.6 du Vlarem II n'a pas été préalablement soumise à une évaluation des incidences sur l'environnement.

B.9.1. L'article 13 de la Constitution dispose :

« Nul ne peut être distrait, contre son gré, du juge que la loi lui assigne ».

Le droit d'accès au juge serait vidé de tout contenu s'il n'était pas satisfait aux exigences du procès équitable, garanti par l'article 6, paragraphe 1, de la Convention européenne des droits de l'homme, par l'article 14 du Pacte international relatif aux droits civils et politiques et par un principe général de droit. Par conséquent, lors d'un contrôle au regard de l'article 13 de la Constitution, il convient de tenir compte de ces garanties.

B.9.2. Le droit d'accès au juge, tel qu'il est garanti, entre autres, par l'article 13 de la Constitution, lu en combinaison avec l'article 6 de la Convention européenne des droits de l'homme, n'est pas absolu et peut être soumis à des limitations, notamment en ce qui concerne les conditions de recevabilité d'un recours, pour autant que de telles restrictions ne portent pas atteinte à l'essence de ce droit et pour autant qu'elles soient proportionnées à un but légitime.

Le droit d'accès à un tribunal se trouve atteint lorsque sa réglementation cesse de servir les buts de sécurité juridique et de bonne administration de la justice et constitue une sorte de barrière qui empêche le justiciable de voir son litige tranché au fond par la juridiction compétente (CEDH, 27 juillet 2006, Efstathiou e.a. c. Grèce, § 24; 24 février 2009, L'Erablière ASBL c. Belgique, § 35).

B.9.3. La disposition attaquée n'a pas pour conséquence que les décisions en matière de permis qui renvoient à la section 5.20.6 du Vlarem II ne sont plus attaquables devant le juge administratif ou devant le juge civil. Comme il est exposé en B.2.15, la disposition attaquée n'a validé cet arrêté qu'en ce qu'il est contraire à des « dispositions internationales, européennes et nationales relatives à l'obligation d'exécution d'une évaluation de l'impact sur l'environnement pour certains plans et programmes ». La section 5.20.6 du Vlarem II n'est donc élevée rétroactivement au rang décrétal que dans une mesure limitée.

Pour le surplus, ces normes sectorielles conservent la force juridique d'un arrêté du Gouvernement flamand. Conformément à l'article 159 de la Constitution, le juge administratif et le juge civil restent donc pleinement compétents pour les contrôler au regard de toutes les normes juridiques supérieures qui ne concernent pas l'obligation d'exécution d'une évaluation des incidences sur l'environnement.

B.10.1. La non-rétroactivité des lois est une garantie ayant pour but de prévenir l'insécurité juridique. Cette garantie exige que le contenu du droit soit prévisible et accessible, de sorte que le justiciable puisse prévoir, dans une mesure raisonnable, les conséquences d'un acte déterminé au moment où cet acte est accompli. La rétroactivité ne se justifie que si elle est indispensable à la réalisation d'un objectif d'intérêt général.

S'il s'avère que la rétroactivité a en outre pour but ou pour effet d'influencer dans un sens l'issue de procédures juridictionnelles ou que les juridictions soient empêchées de se prononcer sur une question de droit bien précise, la nature du principe en cause exige que des circonstances exceptionnelles ou des motifs impérieux d'intérêt général justifient l'intervention du législateur, laquelle porte atteinte, au préjudice d'une catégorie de citoyens, aux garanties juridictionnelles offertes à tous.

B.10.2. Plusieurs affaires sont actuellement pendantes devant le Conseil pour les contestations des autorisations dans lesquelles les parties requérantes, soulevant une exception d'illégalité, font valoir que les normes sectorielles en matière d'éoliennes ne sont pas valables parce qu'elles n'ont pas été soumises, préalablement à leur adoption, à une évaluation des incidences sur l'environnement. L'arrêt de la Cour de justice du 25 juin 2020 étaie cet argument, mais, dans ces affaires, la disposition attaquée prive les parties requérantes de la possibilité d'encore invoquer utilement cet argument devant le Conseil pour les contestations des autorisations.

Par conséquent, la disposition attaquée influence dans un certain sens l'issue de procédures juridictionnelles et elle ne saurait être justifiée que par des circonstances exceptionnelles ou par des motifs impérieux d'intérêt général.

B.10.3. Le législateur peut empêcher que des actes du pouvoir exécutif soient attaqués en raison de l'illégalité dont ils sont entachés, notamment en validant ces actes, mais une telle validation, quand elle ne concerne pas un simple vice de forme, ne peut constituer qu'un remède ultime (arrêt n° 114/2013, B.10; arrêt n° 119/2015, B.35.1).

La disposition attaquée perpétue temporairement l'absence d'une évaluation des incidences sur l'environnement des normes sectorielles flamandes en matière d'éoliennes, préalablement à leur adoption. La réalisation d'une évaluation préalable des incidences sur l'environnement ne concerne pas un simple vice de forme. L'évaluation des incidences sur l'environnement prévoit une large publicité, qui offre aux intéressés une possibilité effective

de faire connaître leurs observations et leurs objections afin que les autorités publiques puissent dûment en tenir compte. Elle offre une garantie pour la sauvegarde du droit à la protection d'un environnement sain et à un bon aménagement du territoire (article 23, alinéa 3, 4°, de la Constitution), ainsi que pour le développement durable auquel le législateur décrétal doit tendre (article 7bis de la Constitution). La validation attaquée des normes sectorielles en matière d'éoliennes ne peut dès lors constituer qu'un remède ultime.

B.10.4. La Cour européenne des droits de l'homme a jugé qu'un législateur peut neutraliser rétroactivement les effets préjudiciables eux-mêmes rétroactifs d'une évolution jurisprudentielle inattendue si son intention est de rétablir la sécurité juridique mise à mal par cette jurisprudence ayant dénoncé une pratique administrative dont la légitimité n'avait jusqu'alors jamais été sérieusement mise en cause (CEDH, 10 novembre 2020, Vegotex International Belgique SA c. Belgique, § 73).

B.10.5. La section 5.20.6 partiellement validée du Vlarem II a été insérée par l'arrêté du Gouvernement flamand du 23 décembre 2011. Comme il est exposé en B.2, ce n'est qu'ensuite que la Cour de justice a progressivement conféré, dans sa jurisprudence, une interprétation large du champ d'application de la directive 2001/42/CE. Au moment de l'adoption de cet arrêté, il ne pouvait donc raisonnablement être présumé que ce dernier relèverait du champ d'application de cette directive et le Gouvernement flamand pouvait se baser sur le texte de la directive et sur les travaux préparatoires pour en déduire qu'une évaluation préalable des incidences sur l'environnement n'était pas requise.

B.10.6. Comme il est exposé en B.2.6 à B.2.10, l'évolution de la jurisprudence de la Cour de justice quant au champ d'application de la directive 2001/42/CE a d'ailleurs été remise en cause par l'avocat général Kokott, par les juridictions suprêmes de plusieurs États membres, dont la Cour constitutionnelle belge, et par la doctrine. Pour cette raison, le Conseil pour les contestations des autorisations, juridiction administrative spécialisée en aménagement du territoire et en droit de l'environnement, par son arrêt du 4 décembre 2018, a posé dix questions préjudicielles à la Cour de justice, d'une part, pour obtenir de plus amples précisions quant au champ d'application de la directive 2001/42/CE et, d'autre part, pour demander à la Cour de justice de reconsidérer sa jurisprudence.

Dans ce contexte, le Gouvernement flamand et le législateur décrétal n'avaient pas à prévoir la portée de l'arrêt que la Cour de justice rendrait le 25 juin 2020 et ils pouvaient attendre le prononcé de cet arrêt pour y remédier.

B.11.1. Les articles 3 et 4 du décret du 17 juillet 2020 sont indissociablement liés. La mission confiée au Gouvernement flamand par l'article 4 de ce décret remédie pour l'avenir l'illégalité dont était entachée la section 5.20.6 du Vlarem II. La validation décrétale prévue

à l'article 3, attaqué, remédie aux conséquences de cette illégalité pour le passé et pour la période nécessaire pour édicter les nouvelles normes sectorielles.

Cette remédiation pour le passé vise à mettre fin à l'insécurité juridique née de ce que, depuis l'arrêt du 25 juin 2020, tout permis accordé pour la construction et l'exploitation d'éoliennes qui est basé sur les normes sectorielles a un fondement juridique précaire.

B.11.2. Dès lors que la section 5.20.6 validée du Vlarem II a été insérée par l'arrêté du Gouvernement flamand du 23 décembre 2011, il n'est plus possible de saisir le Conseil d'État, section du contentieux administratif, pour qu'il apprécie la validité de cet arrêté ayant une portée générale. Le Conseil d'État ne peut donc pas non plus en maintenir les effets, comme il l'a fait par son arrêt n° 239.886 du 16 novembre 2017, dans l'affaire d'Oultremont e.a., en ce qui concerne les normes sectorielles wallonnes en matière d'éoliennes.

La disposition attaquée vise à écarter ces risques en validant temporairement les normes sectorielles flamandes en matière d'éoliennes, sur la base desquelles des permis ont été accordés depuis le 12 mai 2006 pour la construction et l'exploitation d'éoliennes et sur la base desquelles des permis seront accordés dans les trois années suivant l'entrée en vigueur du décret du 17 juillet 2020. En vertu de l'article 36 du décret du 4 avril 2014 « relatif à l'organisation et à la procédure de certaines juridictions administratives flamandes », le Conseil pour les contestations des autorisations peut uniquement décider que les « effets juridiques de la décision entièrement ou partiellement annulée sont maintenus en tout ou en partie ou sont maintenus provisoirement pour un délai [qu'il] détermine ». Il ne peut que maintenir les effets juridiques de décisions d'autorisation individuelles, dès lors qu'il n'est pas compétent pour annuler des normes réglementaires. Le président du tribunal de première instance n'est pas compétent non plus pour maintenir les effets juridiques des actes individuels ou réglementaires de l'autorité publique qu'il juge irréguliers.

B.11.3. Partant, après l'arrêt du 25 juin 2020, les juridictions devant lesquelles était invoquée à titre incident l'illégalité de cet arrêté, fondée sur l'argument que cet arrêté n'avait pas été préalablement soumis à une évaluation des incidences sur l'environnement, ne pouvaient que décider d'en écarter l'application.

Ensuite, il n'existait pas, pour ces juridictions, d'autres normes en matière de bruit, d'ombre portée et de sécurité au regard desquelles elles auraient effectivement pu contrôler la décision accordant un permis pour la construction ou l'exploitation d'une éolienne. En effet, les normes environnementales générales contenues dans la partie IV du Vlarem II ne prévoient pas de normes en matière d'ombre portée, ni de normes de sécurité quant aux risques spécifiques liés aux éoliennes.

Le chapitre 4.5 du Vlarem II contient effectivement des normes de bruit générales, mais ces normes ne peuvent pas non plus être appliquées aux permis autorisant la construction et l'exploitation d'éoliennes. L'application de la section 5.20.6 du Vlarem II ayant été écartée, le juge doit effectivement revenir à l'article 5.20.5.1, § 2, du Vlarem II, tel qu'il était applicable avant l'adoption de l'arrêté du Gouvernement flamand du 23 décembre 2011. Aux termes de cette disposition, « [p]ar dérogation aux dispositions du chapitre 4.5, aucune norme de bruit [n'était] applicable » aux installations de production d'énergie hydroélectrique et aux installations de captage de l'énergie éolienne en vue de la production de l'énergie.

B.11.4. L'insécurité juridique ainsi créée affecte tous les parcs éoliens déjà autorisés, voire opérationnels, dont le permis renvoie à la section 5.20.6 du Vlarem II, ainsi que tous les parcs éoliens prévus. Dans les travaux préparatoires du décret attaqué, les différentes hypothèses font l'objet du commentaire suivant :

« - hypothèse A : un projet de parc éolien dont les permis sont définitifs et qui est depuis entièrement achevé et en exploitation : possibilité qu'un juge fasse cesser l'exploitation dans le cadre d'une action en cessation (environnementale);

- hypothèse B : un projet de parc éolien dont les permis sont définitifs, mais dont la construction et l'exploitation n'ont pas encore débuté : possibilité qu'un juge fasse cesser l'exploitation dans le cadre d'une action en cessation (environnementale) une fois que le permis sont mis en œuvre, ou qu'il intervienne préventivement pour empêcher que le permis soit mis en œuvre, par exemple dans le cadre d'une action en cessation environnementale;

- hypothèse C : un projet de parc éolien dont les permis sont contestés devant les juridictions administratives ou civiles mais n'ont pas encore été mis en œuvre : risque que le permis soit annulé ou que son illégalité soit déclarée;

- hypothèse D : un projet de parc éolien dont les permis sont contestés devant les juridictions administratives ou civiles et dont la mise en œuvre a déjà commencé : risque que le permis soit annulé ou que son illégalité soit déclarée;

- hypothèse E : un projet de parc éolien dont la procédure administrative d'octroi du permis n'est pas encore achevée : risque de refus du permis en raison de l'illégalité des normes VLAREM ou du permis;

- hypothèse F : un projet de parc éolien futur : risque que le permis ne soit pas accordé en raison de l'illégalité des normes VLAREM ou du permis » (Doc. parl., Parlement flamand, 2019-2020, n° 423/1, p. 10).

B.11.5. Par conséquent, seule une norme législative pouvait remédier rétroactivement au non-respect de l'obligation de procéder à une évaluation des incidences sur l'environnement dont il s'est avéré post factum qu'elle aurait dû être réalisée avant l'adoption de la section 5.20.6 du Vlarem II. Dans cette optique, la disposition attaquée doit être considérée comme le remède ultime.

B.12.1. En outre, par la validation attaquée, le législateur décrétal vise également à écarter les conséquences négatives que l'arrêt de la Cour de justice du 25 juin 2020 risque d'avoir en ce qui concerne les objectifs belges en matière d'énergie renouvelable et en matière d'approvisionnement en énergie.

B.12.2.1. L'article 3, paragraphe 1, et l'annexe I, partie A, de la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 « relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables et modifiant puis abrogeant les directives 2001/77/CE et 2003/30/CE » ont imposé à la Belgique un objectif contraignant en matière de production d'énergie renouvelable : à l'horizon 2020, au moins 13 % de la consommation finale brute de la Belgique en matière d'électricité devaient provenir de sources d'énergie renouvelable.

Conformément à l'article 32, paragraphe 4, du règlement (UE) 2018/1999 du Parlement européen et du Conseil du 11 décembre 2018 « sur la gouvernance de l'union de l'énergie et de l'action pour le climat, modifiant les règlements (CE) n° 663/2009 et (CE) n° 715/2009 du Parlement européen et du Conseil, les directives 94/22/CE, 98/70/CE, 2009/31/CE, 2009/73/CE, 2010/31/UE, 2012/27/UE et 2013/30/UE du Parlement européen et du Conseil, les directives 2009/119/CE et (UE) 2015/652 du Conseil et abrogeant le règlement (UE) n° 525/2013 du Parlement européen et du Conseil », cet objectif est devenu un minimum contraignant. La Belgique doit dorénavant éviter que sa part de sources d'énergie renouvelable dans la consommation finale brute d'électricité mesurée sur une période d'un an soit inférieure à 13 %. Si ce minimum n'est pas atteint pendant un an, des mesures supplémentaires doivent être mises en œuvre pour qu'il soit atteint dans un délai d'un an.

Le Plan national belge en matière d'énergie et de climat qui a été établi en exécution de l'article 3, paragraphe 1, de ce règlement, postule que la part d'énergie renouvelable dans la production d'énergie belge s'élèvera à 17,5 % à l'horizon 2030.

B.12.2.2. Dès lors qu'en vertu de l'article 6, § 1er, VII, f), de la loi spéciale du 8 août 1980, les régions sont compétentes pour les nouvelles formes d'énergie, elles jouent un rôle crucial dans la réalisation de ces objectifs.

Dans le Plan flamand en matière d'énergie et de climat 2021-2030, le Gouvernement flamand s'est engagé à porter la production d'énergie éolienne terrestre de 2 736 GWh en 2020 à 4 994 GWh en 2030.

B.12.2.3. Comme il est exposé dans les travaux préparatoires du décret attaqué, l'arrêt de la Cour de justice du 25 juin 2020 peut avoir pour effet de compromettre la réalisation de ces objectifs, en ce que, du fait de cet arrêt, l'exploitation d'éoliennes opérationnelles dont le permis renvoie aux normes sectorielles peut être mise à l'arrêt et en ce que, dans l'attente de nouvelles normes sectorielles, des permis ne peuvent pas être délivrés correctement pour de nouvelles éoliennes. Il ressort de cet exposé que la perte de production d'énergie éolienne pourrait dépasser 4 000 GWh (Doc. parl., Parlement flamand, 2019-2020, n° 423/1, pp. 14-17).

B.12.3. Les travaux préparatoires indiquent également que, si la production d'électricité de toutes les éoliennes pour lesquelles un permis a été délivré à partir du 12 mai 2006 devait être mise en péril, le marché risquerait d'être privé d'une capacité de 1 117 MW, alors que la capacité de production actuelle de la Belgique s'élève à 24 340 MW (ibid., pp. 17-18).

Lorsqu'il évalue l'impact de cette perte sur la sécurité d'approvisionnement, le législateur décrétal peut tenir compte de l'effet cumulé de la menace qui pèse sur la capacité de production d'énergie éolienne et de la menace qui découle de la sortie prévue du nucléaire, qui privera encore le marché belge d'une capacité de production allant jusqu'à 6 000 MW.

L'approvisionnement en électricité regroupe une multitude de sources d'énergie, de sorte que la garantie d'une capacité suffisante requiert une évaluation globale. Cette thèse n'est pas contredite par le fait que la sortie du nucléaire relève des compétences fédérales, alors que la production d'énergie éolienne constitue une compétence régionale, dès lors que tant les formes de production qui relèvent des compétences fédérales que celles qui relèvent des compétences régionales doivent faire l'objet d'une approche globale.

B.13. Compte tenu de la justification précitée, et eu égard au caractère temporaire et limité de la validation telle qu'elle est prévue par la disposition attaquée, il peut être admis que cette validation constitue le remède ultime pour garantir la sécurité juridique, la sécurité d'approvisionnement et la réalisation des objectifs contraignants en matière de production d'énergie renouvelable, dans l'attente de l'entrée en vigueur des nouvelles normes sectorielles pour les éoliennes. Dans cette circonstance, une validation est admissible.

B.14.1. Ces motifs et circonstances justifient également la différence de traitement entre les justiciables qui invoquent devant le juge l'absence d'une évaluation des incidences sur l'environnement en ce qui concerne la section 5.20.6 du Vlarem II et les justiciables qui invoquent la même absence d'évaluation pour d'autres projets.

B.14.2. En outre, la disposition attaquée ne porte pas atteinte à la possibilité pour les riverains d'éoliennes de réclamer devant le juge des dommages-intérêts pour le préjudice qu'ils subiraient du fait de l'absence d'une évaluation préalable des incidences sur l'environnement de la section 5.20.6 du Vlarem II.

Conformément à la jurisprudence de la Cour de justice, les États membres sont tenus de réparer tout préjudice causé par l'omission d'une évaluation des incidences sur l'environnement (CJUE, 7 janvier 2004, C-201/02, Wells, points 66 et 70; CJUE, 14 mars 2013, C-420/11, Jutta Leth, point 37). Les modalités procédurales applicables relèvent de l'ordre juridique interne de chaque État membre en vertu du principe de l'autonomie procédurale des États membres, mais elles ne peuvent pas être moins favorables que les modalités régissant des situations similaires de nature interne (principe d'équivalence) et elles ne peuvent pas rendre impossible en pratique ou excessivement difficile l'exercice des droits conférés par le droit de l'Union (principe d'effectivité) (CJUE, 14 mars 2013, C-420/11, Jutta Leth, point 38).

En vertu des articles 1382 et 1383 de l'ancien Code civil, toute personne qui subit un préjudice en raison de l'absence d'une évaluation des incidences sur l'environnement préalable à l'adoption de la section 5.20.6 du Vlarem II peut réclamer devant le juge civil une indemnisation intégrale de ce préjudice, pour autant qu'elle démontre que cette négligence constitue une faute qui présente un lien de causalité direct avec le préjudice subi. Ces critères s'appliquent aussi bien à une violation de règles relevant du droit de l'Union européenne qu'à une violation de règles relevant du droit interne ou de l'obligation générale de prudence. La disposition attaquée n'a aucune incidence sur cette compétence du juge civil et n'influence pas non plus les critères qu'il doit appliquer.

B.14.3. Du reste, ni l'absence d'une évaluation préalable des incidences sur l'environnement de l'insertion de la section 5.20.6 dans le Vlarem II, ni l'absence d'une évaluation préalable des incidences sur l'environnement de l'adoption du décret attaqué n'ont pour conséquence qu'il n'y aurait pas lieu d'évaluer, avant que des permis soient octroyés pour la construction d'éoliennes, les éventuelles incidences de ces éoliennes sur l'environnement.

En effet, les « installations destinées à l'exploitation de l'énergie éolienne pour la production d'énergie (parcs éoliens) » sont elles-mêmes soumises à une évaluation des incidences sur l'environnement, selon les modalités fixées à l'article 4, paragraphes 2 à 4, de la directive 2011/92/UE du Parlement européen et du Conseil du 13 décembre 2011 « concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement » (annexe II, point 3, i)). Le cas échéant, il faudra également réaliser une évaluation appropriée conformément à l'article 6, paragraphes 3 et 4, de la directive 92/43/CEE du Conseil du 21 mai 1992 « concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages ».

Ces dispositions sont transposées dans la législation flamande, en particulier dans les articles 4.3.1 à 4.3.6 du décret du 5 avril 1995 « contenant des dispositions générales concernant la politique de l'environnement », lus en combinaison ou non avec l'article 36ter

du décret du 21 octobre 1997 « concernant la conservation de la nature et le milieu naturel ».

Les riverains de projets éoliens ont ainsi la garantie que les incidences des éoliennes sur l'environnement font l'objet d'une évaluation préalablement à la délivrance des permis.

B.14.4. Enfin, les recours en annulation présentement examinés démontrent que, si l'intervention du législateur décrétal empêche les parties requérantes de faire écarter par le juge l'application des normes sectorielles flamandes en matière d'éoliennes parce qu'il n'a pas été procédé à une évaluation préalable des incidences sur l'environnement, cette intervention ne les prive toutefois pas du droit de soumettre à la Cour l'inconstitutionnalité de la loi qui vise à empêcher que les normes sectorielles puissent être attaquées, en raison de l'illégalité dont elles sont entachées du fait de leur validation.

B.15. Il résulte de ce qui précède que les premier et quatrième moyens dans les affaires nos 7440, 7441, 7442 et 7448, les deuxième, cinquième et sixième branches du moyen dans les affaires nos 7445, 7446 et 7454 et le premier moyen dans les affaires nos 7449, 7455 et 7456 ne sont pas fondés. » (emphasis added)

English translation of the official text of the Ruling:

II. With regard to the right of access to the judge

B.8.1. In the first plea of law in cases nos. 7440, 7441, 7442 and 7448, in the sixth limb of the plea in cases nos. 7445, 7446 and 7454, and in the first and third limbs of the first plea of law in cases nos. 7449, 7455 and 7456, the applicants submit that the contested provision is not compatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 6 of the European Convention on Human Rights, with the principle of non-retroactivity, with the rights of defence, with the principle of equality of arms, with the prohibition of excess and misuse of power, and with the principle of legal certainty, in that the contested legislative validation interferes with pending litigation, whereas it is not justified by exceptional circumstances or by imperative reasons of public interest.

B.8.2. In the first plea of law in cases nos. 7440, 7441, 7442 and 7448 and in the second part of the first plea of law in cases nos. 7449, 7455 and 7456, the applicants submit that the contested provision is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 6 of the European Convention on Human Rights, in that, for the authority, the useful effect of the contested validation, even if it were justified by exceptional circumstances or by overriding reasons of public interest, does not outweigh its effects in relation to parties challenging the permit or the activity of a wind turbine before a court.

B.8.3. In the fifth part of the plea in cases Nos 7445, 7446 and 7454 and in the first part of the plea in cases Nos 7449, 7455 and 7456, the applicants submit that the contested provision is incompatible with Articles 10 and 11 of the Constitution, in that persons who are adversely affected by plans and programmes which were adopted without having been subjected to an environmental impact assessment and which were validated by the contested decree, can no longer invoke this violation in court, whereas persons who are prejudiced by plans and programmes which were also adopted without having been subject to public participation or an environmental impact assessment, but which were not validated by the contested decree, can still invoke this violation before the judge.

B.8.4. In the fourth plea of law in cases Nos 7440, 7441, 7442 and 7448, the applicants submit that the contested provision is incompatible with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 6 of the European Convention on Human Rights, in that it precludes reliance before the court on the fact that section 5.20.6 of Vlarem II has not been subject to a prior environmental impact assessment.

B.9.1. Article 13 of the Constitution states:

> *"No one may be distracted, against his will, from the judge assigned to him by law.*

The right of access to a judge would be rendered meaningless if the requirements of a fair trial, guaranteed by Article 6(1) of the European Convention on Human Rights, by Article 14 of the International Covenant on Civil and Political Rights and by a general principle of law, were not met. Therefore, when reviewing the case under Article 13 of the Constitution, these guarantees must be taken into account.

B.9.2. The right of access to the courts, as guaranteed, inter alia, by Article 13 of the Constitution, read in conjunction with Article 6 of the European Convention on Human Rights, is not absolute and may be subject to limitations, in particular as regards the conditions for the admissibility of an appeal, provided that such limitations do not undermine the essence of this right and are proportionate to a legitimate aim.

The right of access to a court is affected when its regulation ceases to serve the purposes of legal certainty and the proper administration of justice and constitutes a kind of barrier which prevents the litigant from having his or her case decided on the merits by the competent court (ECHR, 27 July 2006, Efstathiou and Others v. Greece, § 24; 24 February 2009, L'Erablière ASBL v. Belgium, § 35).

B.9.3. The contested provision does not mean that decisions on permits referring to section 5.20.6 of Vlarem II can no longer be challenged before the administrative or civil courts. As explained in B.2.15, the contested provision only validated this order insofar as it is contrary to 'international, European and national provisions on the obligation to carry out an

environmental impact assessment for certain plans and programmes'. Section 5.20.6 of Vlarem II is therefore retroactively elevated to the status of a decree only to a limited extent.

For the rest, these sectoral standards retain the legal force of an order of the Flemish Government. In accordance with Article 159 of the Constitution, the administrative court and the civil court therefore remain fully competent to review them with regard to all higher legal standards that do not concern the obligation to carry out an environmental impact assessment.

B.10.1. The non-retroactivity of laws is a guarantee aimed at preventing legal uncertainty. This guarantee requires that the content of the law be foreseeable and accessible, so that the individual can foresee, to a reasonable extent, the consequences of a given act at the time when that act is performed. Retroactivity is only justified if it is indispensable for the achievement of an objective of general interest.

If it turns out that retroactivity also has the purpose or effect of influencing the outcome of court proceedings in one direction or of preventing the courts from ruling on a specific legal issue, the nature of the principle in question requires that exceptional circumstances or overriding reasons of general interest justify the intervention of the legislator, which impairs, to the detriment of one category of citizens, the judicial guarantees offered to all.

B.10.2. Several cases are currently pending before the Council in relation to challenges to authorisations in which the applicants, raising an objection of illegality, argue that the sectoral standards for wind turbines are invalid because they were not subject to an environmental impact assessment prior to their adoption. The judgment of the Court of Justice of 25 June 2020 supports this argument, but in these cases the contested provision deprives the applicants of the possibility of still being able to usefully invoke this argument before the Council in challenges to authorisations.

Therefore, the contested provision influences in a certain sense the outcome of court proceedings and can only be justified by exceptional circumstances or by overriding reasons of public interest.

B.10.3. The legislator may prevent executive acts from being challenged on the grounds of their illegality, inter alia, by validating such acts, but such validation, when it does not concern a mere formal defect, can only be an ultimate remedy (judgment no. 114/2013, B.10; judgment no. 119/2015, B.35.1).

The contested provision temporarily perpetuates the absence of an environmental impact assessment of the Flemish sectoral wind turbine norms prior to their adoption. The carrying out of a prior environmental impact assessment does not concern a mere formal defect. The environmental impact assessment provides for a broad publicity, which offers interested

parties an effective opportunity to make their observations and objections known so that the public authorities can take them into due consideration. It offers a guarantee for the safeguarding of the right to a healthy environment and good spatial planning (Article 23(3)(4) of the Constitution), as well as for the sustainable development to which the legislator must aspire (Article 7a of the Constitution). The contested validation of the sectoral norms on wind turbines can therefore only be a last resort.

B.10.4. The European Court of Human Rights has ruled that a legislator may retroactively neutralise the harmful effects of an unexpected development in case law if his or her intention is to restore legal certainty that has been undermined by that case law, which has denounced an administrative practice whose legitimacy had never before been seriously questioned (ECHR, 10 November 2020, Vegotex International Belgique SA v. Belgium, § 73)

B.10.5. The partially validated section 5.20.6 of Vlarem II was inserted by the Flemish Government Order of 23 December 2011. As explained in B.2, it was only afterwards that the Court of Justice gradually gave a broad interpretation of the scope of Directive 2001/42/EC in its case law. At the time of the adoption of this order, it could therefore not reasonably be assumed that it would fall within the scope of this Directive and the Flemish Government could base itself on the text of the Directive and the preparatory work to deduce that a prior environmental impact assessment was not required.

B.10.6 As explained in B.2.6 to B.2.10, the development of the case law of the Court of Justice regarding the scope of Directive 2001/42/EC has been questioned by Advocate General Kokott, by the supreme courts of several Member States, including the Belgian Constitutional Court, and by legal scholars. For this reason, the Council for Permit Disputes, an administrative court specialising in spatial planning and environmental law, by its judgment of 4 December 2018, referred ten questions to the Court of Justice for a preliminary ruling, on the one hand, in order to obtain further clarification as to the scope of Directive 2001/42/EC and, on the other, to ask the Court of Justice to reconsider its case law.

In this context, the Flemish Government and the decree legislator did not have to foresee the scope of the judgment that the Court of Justice would deliver on 25 June 2020 and could wait for the delivery of this judgment to remedy this.

B.11.1. Articles 3 and 4 of the decree of 17 July 2020 are inseparably linked. The task entrusted to the Flemish Government by Article 4 of this decree remedies the illegality of section 5.20.6 of Vlarem II for the future. The validation of the decree provided for in Article 3, which is the subject of the appeal, remedies the consequences of this illegality for the past and for the period necessary to enact the new sectoral standards.

This remedy for the past is intended to put an end to the legal uncertainty that has arisen because, since the judgment of 25 June 2020, any permit granted for the construction and operation of wind turbines that is based on the sectoral norms has a precarious legal basis.

B.11.2. Since the validated section 5.20.6 of Vlarem II was inserted by the Order of the Flemish Government of 23 December 2011, it is no longer possible to resort to the Council of State, administrative Section, for an assessment of the validity of this order of general application. The Council of State cannot therefore maintain the effects of this order, as it did in its judgment no. 239.886 of 16 November 2017 in the case of d'Oultremont and others, with regard to the Walloon sectoral norms on wind turbines.

The contested provision aims to avert these risks by temporarily validating the Flemish sectoral norms for wind turbines, on the basis of which permits have been granted since 12 May 2006 for the construction and operation of wind turbines and on the basis of which permits will be granted within three years of the entry into force of the decree of 17 July 2020. Under Article 36 of the Decree of 4 April 2014 'on the organisation and procedure of certain Flemish administrative courts', the Council for Permit Disputes can only decide that 'the legal effects of the wholly or partially annulled decision shall be maintained in whole or in part or shall be maintained provisionally for a period of time [that it] determines'. It can only maintain the legal effects of individual authorisation decisions, as it is not competent to annul regulatory norms. The president of the court of first instance is also not competent to maintain the legal effects of individual or regulatory acts of the public authority that he considers irregular.

B.11.3 Therefore, after the judgment of 25 June 2020, the courts before which the illegality of this order was invoked as an incidental plea, based on the argument that this order had not been subject to a prior environmental impact assessment, could only decide to set aside its application.

Secondly, there were no other noise, shadowing and safety standards against which these courts could effectively review the decision to grant a permit for the construction or operation of a wind turbine. Indeed, the general environmental standards contained in Part IV of Vlarem II do not provide for shadowing standards or safety standards in relation to the specific risks associated with wind turbines.

Chapter 4.5 of Vlarem II does contain general noise standards, but these standards cannot be applied to permits for the construction and operation of wind turbines either. Since the application of section 5.20.6 of Vlarem II has been ruled out, the judge must effectively revert to article 5.20.5.1, § 2, of Vlarem II, as it was applicable before the adoption of the Flemish Order of 23 December 2011. According to this provision, "[b]y way of derogation from the

provisions of Chapter 4.5, no noise standards [were] applicable" to hydroelectric power generation installations and wind energy collection installations for energy production.

B.11.4. The legal uncertainty thus created affects all wind farms that have already been authorised or are even operational and whose permit refers to section 5.20.6 of Vlarem II, as well as all planned wind farms. In the preparatory works of the contested decree, the different hypotheses are commented on as follows:

"Hypothesis A: a wind farm project with final permits which has since been fully completed and in operation: possibility of a judge to stop the operation in the context of an (environmental) injunction;

- hypothesis B: a wind farm project whose permits are final, but whose construction and operation have not yet started: possibility that a judge stops the operation in an (environmental) injunction once the permit is implemented, or intervenes preventively to prevent the permit from being implemented, for example in an environmental injunction;

- hypothesis C: a wind farm project whose permits are contested in the administrative or civil courts but which has not yet been implemented: risk that the permit will be cancelled or declared illegal;

- hypothesis D: a wind farm project whose permits are contested in the administrative or civil courts and whose implementation has already begun: risk that the permit will be cancelled or declared illegal;

- hypothesis E: a wind farm project for which the administrative procedure for granting the permit has not yet been completed: risk of refusal of the permit due to the illegality of the VLAREM norms or the permit;

- hypothesis F: a future wind farm project: risk that the permit will not be granted due to the illegality of the VLAREM norms or the permit' (Doc. parl., Flemish Parliament, 2019-2020, no. 423/1, p. 10).

B.11.5. Therefore, only a legislative norm could retroactively remedy the failure to carry out an environmental impact assessment that, post factum, should have been carried out before the adoption of section 5.20.6 of Vlarem II. In this respect, the contested provision must be regarded as the ultimate remedy.

B.12.1. Furthermore, by means of the contested validation, the decretal legislator also aims to avert the negative consequences that the judgment of the Court of Justice of 25 June 2020 may have with regard to the Belgian renewable energy and energy supply objectives.

B.12.2.1. Article 3(1) and Annex I, Part A of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 "on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC" set a binding target for Belgium with regard to the production of renewable energy: by 2020, at least 13% of Belgium's gross final consumption of electricity had to come from renewable energy sources.

In accordance with Article 32(4) of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 "on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council", this target has become a binding minimum. Belgium must now ensure that its share of renewable energy sources in gross final consumption of electricity measured over a period of one year does not fall below 13%. If this minimum is not reached within one year, additional measures must be implemented to reach it within one year.

The Belgian National Energy and Climate Plan, which was drawn up in accordance with Article 3(1) of this Regulation, assumes that the share of renewable energy in Belgian energy production will be 17.5% by 2030.

B.12.2.2. Since the regions are responsible for new forms of energy under Article 6(1)(VII)(f) of the Special Act of 8 August 1980, they play a crucial role in achieving these objectives.

In the Flemish Energy and Climate Plan 2021-2030, the Flemish Government has committed itself to increasing onshore wind energy production from 2,736 GWh in 2020 to 4,994 GWh in 2030.

B.12.2.3. As explained in the preparatory work for the contested decree, the judgment of the Court of Justice of 25 June 2020 may have the effect of jeopardising the achievement of these objectives, in that, as a result of this judgment, the operation of operational wind turbines whose permit refers to the sectoral standards may be brought to a halt and in that, pending new sectoral standards, permits cannot be properly issued for new wind turbines. It appears from this presentation that the loss of wind energy production could exceed 4,000 GWh (Flemish Parliament Parl. Doc., 2019-2020, no. 423/1, pp. 14-17).

B.12.3. The preparatory work also indicates that if the electricity production of all wind turbines for which a permit has been issued as of 12 May 2006 were to be jeopardised, the market would risk being deprived of a capacity of 1,117 MW, whereas Belgium's current production capacity amounts to 24,340 MW (ibid., pp. 17-18).

When assessing the impact of this loss on security of supply, the decretal legislator can take into account the cumulative effect of the threat to wind power capacity and the threat from the planned nuclear phase-out, which will still deprive the Belgian market of up to 6,000 MW of generation capacity.

The supply of electricity is made up of a multitude of energy sources, so that the guarantee of sufficient capacity requires a comprehensive assessment. This is not contradicted by the fact that the phase-out of nuclear power is a federal responsibility, while wind power generation is a regional responsibility, since both federal and regional forms of generation need to be addressed comprehensively.

B.13. In view of the above justification, and taking into account the temporary and limited nature of the validation as provided for by the contested provision, it can be accepted that this validation constitutes the ultimate remedy to ensure legal certainty, security of supply and the achievement of binding targets for renewable energy production, pending the entry into force of the new sectoral standards for wind turbines. In this circumstance, validation is admissible.

B.14.1 These reasons and circumstances also justify the difference in treatment between litigants who invoke before the court the absence of an environmental impact assessment with regard to section 5.20.6 of Vlarem II and litigants who invoke the same absence of assessment for other projects.

B.14.2. Furthermore, the contested provision does not affect the possibility for neighbouring residents of wind farms to claim damages before the courts for the harm they suffer as a result of the absence of a prior environmental impact assessment in section 5.20.6 of Vlarem II.

According to the case law of the Court of Justice, Member States are obliged to repair any damage caused by the omission of an environmental impact assessment (CJEU, 7 January 2004, C-201/02, Wells, paragraphs 66 and 70; CJEU, 14 March 2013, C-420/11, Jutta Leth, paragraph 37). The procedural arrangements applicable are a matter for the domestic legal order of each Member State by virtue of the principle of the procedural autonomy of the Member States, but they may not be less favourable than the arrangements governing similar situations of a domestic nature (principle of equivalence) and they may not render impossible in practice or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness) (CJEU, 14 March 2013, C-420/11, Jutta Leth, paragraph 38).

According to Articles 1382 and 1383 of the former Civil Code, any person who suffers damage as a result of the absence of an environmental impact assessment prior to the adoption of Section 5.20.6 of Vlarem II may claim full compensation for this damage before the civil court, provided that he can show that this negligence constitutes a fault which has

a direct causal link with the damage suffered. These criteria apply equally to a breach of EU law and to a breach of national law or of the general duty of care. The contested provision does not affect this competence of the civil court, nor does it influence the criteria it must apply.

B.14.3. Moreover, neither the absence of a prior environmental impact assessment of the insertion of section 5.20.6 in Vlarem II nor the absence of a prior environmental impact assessment of the adoption of the contested decree means that there is no need to assess the possible environmental impact of wind turbines before permits are granted for their construction.

Indeed, "installations for the use of wind energy for energy production (wind farms)" are themselves subject to an environmental impact assessment, as set out in Article 4(2)-(4) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 "on the assessment of the effects of certain public and private projects on the environment" (Annex II, point 3(i)). Where appropriate, an appropriate assessment in accordance with Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 "on the conservation of natural habitats and of wild fauna and flora" will also be required.

These provisions are transposed into Flemish legislation, in particular in articles 4.3.1 to 4.3.6 of the decree of 5 April 1995 "containing general provisions concerning environmental policy", whether or not read in conjunction with article 36ter of the decree of 21 October 1997 "concerning nature conservation and the natural environment".

This ensures that the environmental impacts of wind turbines are assessed before permits are issued.

B.14.4. Finally, the actions for annulment examined here show that, although the intervention of the decretal legislator prevents the applicants from having the Flemish sectoral norms on wind turbines ruled out by the court because a prior environmental impact assessment was not carried out, this intervention does not deprive them of the right to submit to the Court the unconstitutionality of the law that is intended to prevent the sectoral norms from being challenged on the grounds that they are unconstitutional.

B.15. It follows from the foregoing that the first and fourth pleas in law in Cases Nos 7440, 7441, 7442 and 7448, the second, fifth and sixth limbs of the plea of law in Cases Nos 7445, 7446 and 7454 and the first plea of law in Cases Nos 7449, 7455 and 7456 are unfounded. (emphasis added)

Regarding the applicability of the Aarhus Convention, the Court ruled that, since the Validation Decree does not validate one or more specific permits and does not qualify as a plan or programme within the meaning of Article 7 nor as an "*executive regulation or a generally applicable legally*

binding rule that may have a significant effect on the environment" within the meaning of Article 8 of the Aarhus Convention, those provisions do not apply (paragraphs B.26.2 and B.26.3 of the Ruling of 14 October 2021):

French official text of the Ruling:

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

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

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

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

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

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

3.1 Preliminary remark regarding the admissibility of Communication ACCC/C/2022/192

13. During its seventy-sixth meeting, the Compliance Committee has considered the admissibility of the communication and has determined it to be admissible on a preliminary basis. More in particular, the Compliance Committee found the Communication to "*relate to the procedures and obligations regulated by the provisions of the Aarhus Convention*" and therefore considers the content of the communication not to be irrelevant.

14. Where the Kingdom of Belgium acknowledges that the allegations set out in Communication ACCC/C/2022/192 "*relate*" to the provisions of the Aarhus Convention, it still believes that the Communication does not meet the conditions for admissibility. Indeed, the mere relation of the content of the communication to the provisions of the Aarhus Convention does not suffice to deem it admissible. The Kingdom of Belgium therefore kindly requests the Committee to reconsider the determination of admissibility of the Communication on the basis of the arguments as set out below under headings 3.2 and 3.3.

3.2 Conditions for the admissibility of communications by the public

15. As explained under paragraph 97 of the "*Guide to the Aarhus Convention Compliance Committee*", the Committee shall consider any communication from the public, unless it determines that the communication does not meet the requirements set out in paragraph 20 of the Annex to

Decision I/7 adopted by the first meeting of the Parties to the Aarhus Convention.[7] A communication shall therefore be found inadmissible if the Committee determines that it is:

a) anonymous; or

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

c) manifestly unreasonable; or

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

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

Furthermore, paragraph 100 of the aforementioned Guide adds that the Committee may determine that a communication, while broadly appearing to fulfil the admissibility requirements of paragraph 20 of the Annex to Decision I/7, after careful consideration does not pass a threshold of *de minimis.* In such cases, the Committee may find the communication inadmissible on the grounds that by not passing the *de minimis* threshold with respect to the communication's relevance and importance in the light of the purpose and functions of the Committee, the communication is incompatible with the provisions of decision I/7. In the previous guidance document on the Aarhus Convention Compliance Mechanism, it is further explained that the *de minimis* threshold is aimed to focus on the Committee's resources on communications that raise important aspects of non-compliance.[8]

16. The Committee has already expressed its concern that the review mechanism of the Aarhus Convention should not be used to review cases of unsuccessful environmental litigation, which is clearly not the purpose of the Committee.[9]

Furthermore, the Committee has found that a communication was manifestly unreasonable pursuant to paragraph 20 (c) of the Annex to Decision I/7 where the factual circumstances of the case proved that legal redress was ultimately granted.[10]

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

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

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

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

A communication does not meet admissibility requirement d) as mentioned above, where the communicant fails to demonstrate that the allegations made in the communication fall within the scope of the provisions of the Convention.[11]

3.3 Application of the criteria for admissibility to Communication ACCC/2022/192

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

17. As the Committee has already stated in previous findings, its aim is not to serve as an instance of appeal against a judicial outcome with which a member of the public is dissatisfied.[12]

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

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

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

- "*la Cour constitutionnelle (belge) a – en l'espèce certes erronément – considéré (dans l'arrêt n° 142/2021 du 14 Octobre 2021 que « les articles 7 et 8 de la Convention d'Aarhus ne s'appliquent pas (…)».*"[13]

- "*la Cour constitutionnelle viole la Convention d'Aarhus en soutenant que le décret du 17 juillet 2020 de validation n'est ni « un plan ou programme » (au sens de l'article 7 de la*

[11] E.g.: communication ACCC/C/2019/170/Kazakhstan; communication ACCC/C/2019/167/Kazakhstan.

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

[13] Page 5 of the Communication.

Convention) ni « une disposition réglementaire et autre règle juridiquement contraignante d'application générale qui peuvent avoir un effet important sur l'environnement » (au sens de l'article 8 de la Convention)."[14]

- "*la cour constitutionnelle a erronément rejeté l'applicabilité des articles 7 et 8 de la Convention d'Aarhus au décret de validation du 17 juillet 2020.*"[15]

- "*l'erreur de la Cour constitutionnelle (et du législateur du 17 juillet 2020) s'explique comme suit.*"[16]

- "*le législateur décrétal et la Cour constitutionnelle ont ainsi méconnu l'article 7 de la Convention.*"[17]

- "*dans l'arrêt n° 142/2021, la Cour constitutionnelle déclare donc erronément que le décret du 17 juillet n'est pas « un plan ou programme » (au sens de l'article 7 de la Convention d'Aarhus).*"[18]

- "*le décret du 17 juillet 2020 et l'arrêt de la Cour constitutionnelle n° 142/2021 méconnaissent tout autant l'article 8 de la Convention d'Aarhus (juncto les articles 6 et 9 de la Convention d'Aarhus).*"[19]

- "*dans l'arrêt n° 142/2021, la Cour constitutionnelle soutient donc ici erronément que le décret du 17 juillet d2020 de validation des normes éoliennes n'est pas à qualifier comme « une disposition réglementaire et autre règle juridiquement contraignante d'application générale qui peuvent avoir un effet important sur l'environnement » (au sens de l'article 8 de la Convention).*"[20]

[14] Page 10 of the Communication.

[15] Page 11 of the Communication.

[16] Page 11 of the Communication.

[17] Page 12 of the Communication.

[18] Page 14 of the Communication.

[19] Page 14 of the Communication.

[20] Page 15 of the Communication.

- "*ce faisant, la Cour constitutionnelle et le législateur décrétal du 17 juillet 2020 méconaissent donc également les articles 9.2 et 9.3 de la Convention d'Aarhus (juncto l'article 8 de la Convention).*"[21]

- "*le raisonnement de la Cour constitutionnelle est toutefois erroné en droit.*"[22]

- "*inexact est l'argument de la Cour constitutionnelle pour rejeter l'application des articles 9.2 et 9.3.*"[23] (emphasis added)

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

In a recent determination of 18 November 2019 concerning a communication by a NGO alleging that Belgium had failed to comply with Articles 9 (3) and (4) of the Convention with respect to a judgment of the Council of State, the Committee rightly dismissed the communication on the grounds that "*the Committee (...) is not a redress mechanism and that the communication expressly states that it concerns a single specific case of alleged non-compliance and does not allege that there is a wider problem with the legal framework or judicial practice of the Party concerned with respect to the implementation of article 9(3) and (4) of the Convention*"[24].

Moreover, it is important to note that the judgement criticised by the communicants in their communication was rendered by the Belgian Constitutional Court, which has a particular expertise and responsibility in safeguarding the protection of fundamental rights, including the international and European obligations relating to public participation rights and the right of access to a court. The State Parties did not task the Committee to rule on the merits of a specific judgment of a national court, let aside of a constitutional court.

20. Since the essence of the Communication relates to the communicants' dissatisfaction with the procedural outcome of the action they have brought before the Belgian Constitutional Court, it must therefore be declared inadmissible. To determine otherwise, would set a precedent for the

[21] Page 17 of the Communication.

[22] Page 19 of the Communication.

[23] Page 21 of the Communication.

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

Convention's compliance mechanism being used to revise cases of unsuccessful environmental litigation, which was clearly not its purpose[25].

21. In light of the above, the Kingdom of Belgium kindly requests the Committee to reconsider its preliminary position and declare the Communication inadmissible.

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

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

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

In addition, in so far as the communicants put forward that the sectoral environmental norms contained in section 5.20.6 of Vlarem II should have been subject to an environmental assessment, including a public participation procedure, this discussion has been settled by the European Court of Justice in its ruling of 25 June 2020[26]. The illegality of these sectoral environmental norms is the reason why the Flemish Parliament intervened by adopting the Validation Decree. The discussion on this matter is therefore without object, making it manifestly unreasonable and irrelevant to raise the issue again before the Committee.

24. Secondly, it must be clear from the outset that the subject-matter of the Communication relates to a remediation by the Flemish Region of a breach of EU law (i.e. the SEA Directive) following the judgment of the European Court of Justice of 25 June 2020 in Case C-24/19. The means for reparation for breaches of international law is a matter of domestic law, in this case EU law and Belgian constitutional law. The case law of the European Court of Justice and the Belgian Constitutional Court allow for the maintenance of the effects of an illegality as a means for reparation

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

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

under strict conditions, including conformity with principles of international law, and only for the period of time strictly necessary to remedy that illegality. The Constitutional Court in its judgment of 21 October 2021 made that assessment under national and international law and validated the reparation conceived by the Flemish Region in the form of the Validation Decree, taking into account the imperative reasons of overriding public interest at stake.

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

In addition, as to the alleged violation of the right of access to justice, the Kingdom of Belgium wants to stress the fact that the Validation Decree does not impair the right of the public (including the communicants) to act before a court of law against any wind turbine project in the Flemish Region. The only effect of the Validation Decree is that the public cannot raise a violation of the national and international obligations relating to environmental assessments for a maximum period of three years, until the entry into force of new wind turbine norms. The Validation Decree is therefore very limited in scope and has been subject to a review procedure before the Constitutional Court, which guaranteed the communicants' constitutional right of access to a court.

The situation at hand does not amount to a systematic violation of the right of access to justice under Aarhus Convention, as demonstrated by the proceedings that have led to the judgment of the Constitutional Court of 21 October 2021 and in which the communications were able to put forward their grievances relating to the alleged violation of the Convention. The Communication does not relate to a denial of access to judicial procedures, but rather reflects dissatisfaction with their outcome. It is therefore clear that the grievances of the communicants (if any) do not meet the *de minimis* threshold either.

25. In light of the above, the Kingdom of Belgium kindly requests the Committee to reconsider its preliminary position and declare the Communication inadmissible

4 REGARDING THE ALLEGED BREACHES OF THE AARHUS CONVENTION

4.1 Summary of the allegations as set out in Communication ACCC/C/2022/192

26. The communicants allege a breach of Articles 6, 7, 8, 9(2) and 9(3) of the Aarhus Convention. In essence, the Communication consists of two main arguments.

The first argument raises an alleged breach of Articles 7 (read together with Article 6) and 8 of the Aarhus Convention. In particular, the communicants argue that the Constitutional Court has breached the Aarhus Convention where it stated that the Validation Decree does not qualify as a "*plan or programme*" within the meaning of article 7 of the Convention, nor as an "*executive regulation and/or generally applicable legally binding normative instrument*" within the meaning of Article 8 of the Convention. According to the communicants, the Validation Decree is in essence "*a procedural extension*" of the sectoral environmental norms for wind turbines. The communicants allege that the Validation Decree would acknowledge the applicability of Article 7 of the Aarhus Convention to these norms, since Article 3 of the Validation Decree stipulates that "*the declaration of validity (...) is limited to the violation of the international, European and national provisions on the obligation to carry out an environmental impact assessment for certain plans and programs, in particular Article 7 of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (...)"* (emphasis added). Therefore, since section 5.20.6 of Vlarem II are to be qualified as a "*plan or programme*" in the sense of Article 7 of the Aarhus Convention, the Validation Decree itself should - according to the communicants - obtain the same qualification. The communicants argue that the Validation Decree and section 5.20.6 of Vlarem II should at least be regarded as one inseparable instrument for which there should be "*effective public participation at an appropriate stage*" during the preparatory stage as required by Article 8 of the Aarhus Convention.

The second argument asserts that the Constitutional Court incorrectly ruled that the Validation Decree does not breach Articles 9(2) and 9(3) (read together with Article 8) of the Aarhus Convention. More in particular, the communicants argue that the Validation Decree makes it impossible for administrative or civil courts to declare an individual permit unlawful on the grounds that it was adopted on the basis of sectoral environmental norms for wind turbines, where those sectoral environmental norms themselves have been found illegal due to the absence of a prior environmental assessment and public participation.

4.2 Rebuttal of the allegations as set out in Communication ACCC/C/2022/192

(a) *The Aarhus Convention does not prohibit the validation of a breach*

27. The exact nature of the allegations of the communications is not always clear. At times, they criticise the Constitutional Court's ruling, then again, they target the alleged unlawfulness of the Validation Decree and the Flemish sectoral norms for wind turbines.

The discussion before your Committee, however, is not whether the Flemish wind turbine norms are illegal or not in light of the provisions of the Aarhus Convention. That question has been settled by the Flemish legislator, in the sense that the lack of public participation in the drafting of the Flemish sectoral wind turbine norms assumedly violates Article 7 of the Aarhus Convention. That is precisely the reason why the Validation Decree covers that illegality, too.

The context in which the present Communication is brought before your Committee is of a different nature. The essence of the debate here is in fact whether a Party, after having found a breach of the Convention, may or may not for imperative reasons of overriding public interest preserve the internal legal order for a limited period of time from the legal effects of such illegality, whilst undertaking a remediation exercise to cease that breach of the Convention. The answer to that question is not to be found in the Aarhus Convention itself, since the Convention does not state what Parties need to do in response to a breach of a Convention. Indeed, the Convention does entail any provision that would oblige a Party to retract with immediate effect an act that is in violation of the Aarhus Convention, nor does it impose an obligation on a national judge to set aside or annul with retroactive effects such act. What consequences are to be tied to a breach of the Aarhus Convention in the context of permitting procedures remains a matter of national procedural law. As a general principle of international law, a State responsible for an internationally wrongful act is under the obligation to bring the international legal order in conformity with its international obligations. Precisely that is the aim of the Validation Decree and the remediation exercise that the Flemish Region is undertaking ever since the entry into force of that decree.

Neither the Aarhus Convention, nor the general principles of international law preclude a State from upholding, for a limited period of time, the effects of an deemed illegal under international law, whilst at the same time undertaking a remediation exercise to bring the international legal order in conformity with its international obligations.

In the opinion of the Kingdom of Belgium, the discussion that the communicants try to unfold before your Committee is therefore, and given the remediation that is taking place, not one that falls within the ambit of the Aarhus Convention, but remains a matter a national law. The Kingdom of Belgium therefore respectively asks the Committee to reject the Communication on that ground alone, with any further considerations.

28. In what follows, the Kingdom of Belgium will, to the extent necessary, reply to the general statements made by the communicants in view of the alleged violations of Articles 6, 7, 8, 9(2) and 9(3) Aarhus Convention.

(b) ***The Aarhus Convention does not apply to the Validation Decree and the latter does not violate its provisions***

29. The Kingdom of Belgium believes that the Validation Decree falls outside of the scope of the Aarhus Convention.

The Validation Decree is a legislative act of the Flemish Parliament. As the Compliance Committee has already stated in its earlier findings, the question whether or not an act falls under the provisions of the Aarhus Convention is to be determined on a contextual basis, taking into account the legal effect of the case at hand.[27] Furthermore, when determining how to categorize the relevant acts or decisions under the Convention, their labels under domestic law of the Party concerned are not decisive.[28]

In what follows, the Kingdom of Belgium will set out the reasons why it believes that the Validation Decree does not fall under Articles 6, 7, 8 or 9 of the Convention and why, in any case, the Validation Decree does not breach any of said provisions.

(i) *The Validation Decree does not fall within the scope of Article 6 of the Aarhus Convention*

30. The communicants argue that there is a breach of Article 6 of the Aarhus Convention. However, the communicants fail to set out the reasons as to why they believe the Validation Decree is incompatible with Article 6 of the Convention.

31. Article 6 of the Aarhus Convention applies to individual decisions relating to permit activities listed in Annex I to the Convention and to other activities that may have a significant effect on the environment. However, as stated by the Constitutional Court in its ruling dated 14 October 2021, it is not necessary to verify whether the Validation Decree has a significant effect on the environment as it suffices to consider that it does not concern a "*specific activity*" in the sense of

[27] E.g.: communication ACCC/C/2010/53 United Kingdom of Great Britain and Northern Ireland, paragraph 82.

[28] E.g.: communication ACCC/C/2008/26 Austria, paragraph 55.

Article 6.[29] Indeed, as recognised by the communicants, the Validation Decree does not permit individual wind turbine projects, nor does it validate individual permit consents.[30]

32. There is no violation of Article 6 Aarhus Convention. The Communication must be dismissed on that ground.

(ii) *The Validation Decree does not fall within the scope of Article 7 of the Aarhus Convention nor does it breach that provision*

33. Article 7 of the Aarhus Convention orders Parties to make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment. To the extent appropriate, Parties should also endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

The Convention does not define the terms "plans", "programmes" or "policies". As set out by the Compliance Committee, a typical plan or programme *"(a) is often regulated by legislative, regulatory or administrative provisions; (b) has the legal nature of a general act (often adopted finally by a legislative branch); (c) is initiated by a public authority, which (d) provides an organized and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which (e) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision."*[31]

It follows from characteristic (b) and (c) that a plan or programme can have the legal nature of a general act initiated by a public authority. Under Article 2(2), the definition of "public authority" "*does not include bodies or institutions acting in a judicial or legislative capacity*." As such, merely the preparatory works to a legislative act *can* qualify as a plan or programme under Article 7, in so far as those preparatory works do not emanate from an authority acting in a judicial or legislative capacity. In any case, the legislative act itself does not fall within the scope of Article 7. Given that the Validation Decree was entirely prepared, discussed and adopted by the legislative branch in the Flemish Parliament (see *infra*), without involvement of the executive branch (Flemish Government), Article 7 Aarhus Convention does not apply. The Constitutional Court therefore correctly found that the Validation Decree is not a plan or programme in the sense of Article 7 of the Convention.[32]

[29] Cf. paragraph B.26.2 of the ruling of the Constitutional Court dated 14 October 2021: "*Without it being necessary to ascertain whether the contested provision has a significant effect on the environment, it is sufficient to find that it does not concern a "specific activity" within the meaning of Article 6. Indeed, the contested provision does not validate specific permits*." (freely translated)

[30] Cf. n 21 of Communication ACCC/C/2022/192.

[31] Cf. communication ACCC/C/2014/105 Austria, paragraph 127.

[32] Cf. paragraph B.26.3 of the ruling of the Constitutional Court of 14 October 2021.

34. Thus, there is no violation of Article 7 of the Aarhus Convention. The Communication must be dismissed on that ground.

(iii) *The Validation Decree does not fall within the scope of Article 8 of the Aarhus Convention nor does it breach that provision*

35. Article 8 of the Aarhus Convention provides that 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*". Thus, the obligations under Article 8 of the Aarhus Convention only apply to instruments prepared by public authorities.

As already indicated, it follows from Article 2(2), *in fine* of the Aarhus Convention that a body or institution acting in a judicial or legislative capacity does not qualify as a "*public authority*" in the sense of Article 8 of the Convention. Indeed, as indicated in the first version of the Implementation Guide to the Aarhus Convention[33] the applicability of the Convention to law-making in the strict sense was thoroughly discussed during the negotiations leading up to the conclusion of the Convention. This is reflected in the preambular provision that recognizes "*the desirability of transparency in all branches of government*" and invites "*legislative bodies to implement the principles of this Convention in their proceedings*". Eventually, the Parties to the Convention decided not to provide specific requirements for parliaments, considering this a prerogative of the legislative branch.

The most recent version of the Implementation Guide to the Aarhus Convention[34] indicates that Article 8 includes "*the participation of public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature*". The intention of Article 8 appears to be "*to cover* ***governmental "law-making"****, without thereby interfering with the parliamentary process"*[35] (emphasis added). As such, the preparation of a draft law by the executive branch can indeed fall within the scope of Article 8 of the Aarhus Convention.

In the Flemish Region, there are two ways for formal laws (so-called *decrees*) to be established, depending on what branch initiates the procedure. Under the first option, the Flemish Government adopts a "draft decree" (in Dutch: "*ontwerp van decreet*") and submits it to the Flemish Parliament for further discussion and formal adoption. Under the second option, the initiative comes from one

[33] United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide*, 2000, available at: https://unece.org/fileadmin/DAM/env/pp/acig.pdf.

[34] United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide*, 2014, available at: https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

[35] Secretariat to the Aarhus Convention, *Public participation in strategic decision-making*, MP.PP/WG.1/2003/5, p. 6, available at: https://unece.org/fileadmin/DAM/env/documents/2003/pp/wg.1/mp_pp_wg_1_2003_5_e.pdf.

or more members of the Flemish Parliament, that submit a "proposal for decree" (in Dutch: "*voorstel van decreet*") which is then further discussed within the Parliament up until adoption.

The Validation Decree came about on the initiative of the Flemish Parliament through a proposal for decree submitted on 14 July 2020 by several members of Parliament. The entirety of the adoption process thus played out within the Flemish Parliament (legislative branch in the strict sense), which held a plenary session on 15 July 2020[36] during which all members of parliament were able to express their views on the proposal for decree. There was no involvement of the Flemish Government (executive branch) in the drafting process whatsoever.

Since the Validation Decree is an act of the legislative branch (the Flemish Parliament) and did not involve the executive branch in its drafting process, it does not fall under Article 8 of the Aarhus Convention as such. Therefore, the Constitutional Court rightfully held that Article 8 of the Aarhus Convention does not apply to the Validation Decree since the notion *"public authorities" "does not include bodies or institutions acting in a legislative capacity"*.[37]

36. Thus, the Validation Decree does not violate Article 8 of the Aarhus Convention. The Communication must be dismissed on that ground.

(iv) *No violation of Article 9(2) and 9(3) of the Aarhus Convention*

37. If correctly understood, the Communicants argue that the Validation Decree as well as the Ruling of the Constitutional Court violate Article 9(2) and 9(3) of the Aarhus Convention

38. Article 9(2) of the Aarhus Convention provides access to justice regarding "*any decision, act or omission"* relating to public participation and decision-making under Article 6. As set out in the most recent version of the Implementation Guide to the Aarhus Convention[38], national law could equally apply Article 9(2) to other relevant provisions of the Convention, such as the acts under Articles 7 or 8. However, the text of the Convention only requires the obligations under Article 9(2) to be met in relation to decisions, acts or omissions under Article 6 of the Convention.

Furthermore, the Communicants seem to argue that, even though the Validation Decree itself does not fall within the scope of Article 6 of the Convention, it still breaches Article 9(2) in so far as (i) it validates a breach of Article 7 of the Aarhus Convention and (ii) Article 7 itself refers to Article 6, paragraphs 3, 4 and 8. This argument should be dismissed, given that the scope of Article 9(2) of the

[36] A recording of the plenary session of 15 July 2020 is available through the following link: https://www.vlaamsparlement.be/plenaire-vergaderingen/1416511/verslag/1417323.

[37] Cf. paragraph B.26.3 of the ruling of the Constitutional Court dated 14 October 2021.

[38] United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide*, 2014, available at: https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

Convention refers to Article 6 of the Convention only. The fact that some obligations under Article 6 of the Convention apply to plans and programmes as defined under Article 7 too, does not extent the scope of Article 9(2) of the Convention to those plans and programmes.

Given that the Validation Decree does not permit or validate any individual activity, it does not amount to a decision or act in the sense of Article 6 of the Convention. Therefore, the Constitutional Court rightfully held that since Article 6 of the Aarhus Convention does not apply to the Validation Decree is not in breach of its Article 9(2).[39]

39. Article 9(3) of the Aarhus Convention, on the other hand, requires access to review procedures for public review of the substantive and procedural legality of acts and omissions of private persons and public authorities concerning national law relating to the environment. As indicated *supra* under No. 35, the Validation Decree is an act of the legislative branch, and not an act or omission of a private person or a public authority, as defined under Article 2(2) of the Convention. Therefore, the Validation Decree is not an act for which the Aarhus Convention provides a right to an administrative or judicial review procedure under Article 9(3).

It follows from the above that the Validation Decree itself does not breach Article 9(2) and 9(3) of the Aarhus Convention as it does not fall within the scope of these provisions.

In so far as the Communicants allege that the Validation Decree violates Article 9(2) and 9(3) of the Aarhus Convention due to the fact it precludes national judges to find individual permit consents for wind turbine projects to be unlawful on the basis that they are adopted in application of (illegal) sectoral norms for wind turbines (so called plea of illegality under Belgian constitutional law), it should be stressed that these provisions do not provide a right to make such argument in order to obtain an annulment of a permit decision. Indeed, the aim of the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention as well as national laws relating to the environment, enforced by law. As such, access to justice means "*access for the public to procedures where legal review of alleged violations of the Convention and national laws relating to the environment can be requested*".[40]

Therefore, the obligations under Article 9(2) and 9(3) are of a procedural nature without imposing any obligations on Parties regarding the outcome of the procedures. It is true that the Validation Decree limits the possibilities for substantive review of the legality of individual licensing decisions of specific wind turbine activities in the sense that such review procedures can no longer invoke the invalidity of the sectoral norms for wind turbines in light of an alleged violation of "*the international,*

[39] Cf. paragraph B.26.2, third paragraph of the ruling of the Constitutional Court dated 14 October 2021.

[40] United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide*, 2014, 187, available at: https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

European and national provisions on the obligation to carry out an environmental impact assessment for certain plans and programs, in particular Article 7 of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Articles 2 to 9 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, and Chapter II of Title IV of this Decree, for failure to carry out an environmental impact assessment".

However, the right to judicial review under Article 9(2) and 9(3) of the Convention does not confer any enforceable right to private individuals to raise a specific plea of illegality or to obtain the annulment of an illegal act. These are matters of national law. As a result, the limitation of the substantive review of individual licensing decisions (by excluding the possibility to make a specific argument relating to the absence of an environmental assessment and public participation in the decision-making process of wind turbine norms) does not in itself amount to a breach of Article 9(2). Furthermore, the Validation Decree itself was subject to a review procedure before the Constitutional Court. Since the Constitutional Court confirmed the legality of the Validation Decree, it also declared the limitation on the substantive review to be compatible with the stringent conditions for legislative validation. The impact of the Validation Decree on the right of access to justice in environmental matters was indeed extensively discussed by the Court in paragraphs B.8.1 to B.15 of its Ruling of 14 October 2021 (see *supra* No. 12). The Constitutional Court assessed the constitutionality of the limitation of that right in light of the strict conditions that apply to such limitations under European and national law.

It should be stressed that the Aarhus Convention does not pronounce itself on the question of remediation in case of a violation of its provisions. In any case, as the Constitutional Court confirmed, the Validation Decree merely limits the scope for substantive review; it does not limit access to justice in order to challenge an individual licensing decision for wind turbines on any other plea of law. In addition, the Validation Decree itself was subject to a judicial review procedure before the Constitutional Court, guaranteeing the public a constitutional review of the decree. In their Communication, the communicants criticise the Ruling of the Constitutional Court for not having correctly assessed their plea under Article 9(2) and 9(3) of the Aarhus Convention, without including those considerations of the Court in their argument. Indeed, the communicants did not even allege a breach of Article 9(2) and 9(3) in the proceedings before the Constitutional Court (see summary of their pleas of law under paragraphs A.6 –A.7.7 of the Ruling of 14 October 2021, Annex III), making their claim that the Constitutional Court did not respond to their claim under Article 9 of the Convention void.

In light of the above, the Kingdom of Belgium believes that the Validation Decree does not breach Article 9.2 or Article 9.3 of the Aarhus Convention.

5 CONCLUDING REMARKS

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

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

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

In case the Committee should confirm the admissibility of Communication ACCC/C/2022/192, the Kingdom of Belgium respectfully requests the Committee to find that the arguments put forward in the Communication do not amount to an issue of non-compliance with the provisions of the Aarhus Convention on the following grounds:

- the Aarhus Convention does not preclude Parties from resorting to a legislative validation in the context of a remediation;

- since the Validation Decree does not validate individual permit consents, it does not fall within the scope of Article 6 of the Aarhus Convention;

- the Validation Decree is an act of the legislative branch and therefore does not qualify as a plan or programme under Article 7 of the Aarhus Convention;

- the Validation Decree is an act of the legislative branch during the preparation of which the executive branch was not involved, and therefore falls outside of the scope of Article 8 of the Aarhus Convention;

- since Article 6 of the Aarhus Convention does not apply to the Validation Decree, the latter falls outside of the scope of Article 9(2) of the Convention. Furthermore, since the Validation Decree is an act of the legislative branch, which does not qualify as a "*public authority*", Article 9(3) of the Convention does not apply either. Finally, since the obligations under the access to justice pillar of the Convention are of a procedural nature, the fact that the Validation Decree limits the scope of substantive review on one particular point does not amount to a breach of Article 9(2) or 9(3) of the Convention. This is all the more true since

the Validation Decree itself has been subject to a review procedure before the Constitutional Court.

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In light of the above, the Kingdom of Belgium – as the Party concerned – respectfully requests the Committee to find Communication ACCC/C/2022/192 inadmissible or, in any case, find that the arguments put forward in the Communication do not amount to an issue of non-compliance with the provisions of the Aarhus Convention.

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

Yours sincerely,

Guan Schaiko° Hannah Dusauchoit

For:

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

Stibbe

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

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