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Object : Observations-ACCC/C/2022/197 France

Members of the Aarhus Convention Compliance Committee,

I would like to make a few comments on Article L. 600-1-1 of the Urban Planning Code, which is the subject of the communication you received in the case ACCC/C/2022/197 France.

I am currently Associate Professor in Public Law at the University of Burgundy and I have completed several academic works in environmental law as well as on the issue of access to justice of associations in French law, including my PhD thesis (*The collective action of private groups in French public law*, Université Paris 1 Panthéon-Sorbonne, Thèse.dactyl., 2020, 981 p.). I have therefore followed with interest the exchanges published and I would like to make some additional observations about the treatment that the French Planning Code reserves to the access to justice of associations.

French planning law contains numerous derogations and some of these provisions also reserve special treatment for associations.

For example, Article L. 600-1-1 of the Planning Code restricts the standing of associations that are likely to guarantee the effectiveness of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters by challenging administrative decisions relating to land occupation or land use.

To do this, the article uses a temporal condition that has been strengthened over time. In principle, in the litigation of the annulment of administrative acts, the standing of associations to act in defense of a collective interest is assessed with regard to their statutes and the date of introduction of their appeal[1]. This is no longer the case since 2006 in the dispute over the cancellation of land occupation and land use permits. Indeed, Law No. 2006-872 of 13 July 2006, by creating Article L. 600-1-1 in the Planning Code, has conditioned the admissibility of the action for annulment of the associations to the deposit of their statutes in prefecture prior to the posting in town hall of the request to obtain the administrative decision at issue. Then, with Law No. 2018-1021 of 23 November 2018, Article L. 600-1-1 required them to make this deposit at least one year before the posting.

This derogatory legislation applied in the " La Sphynx " case violates in several respects the stipulations of Article 9 of the Convention which guarantee access to justice of members of the "public" and the "public concerned".

Thus, as demonstrated by the communicators, the provisions of Article L. 600-1-1, alone or combined with others, undermine the substance of the right of associations to take legal action. They are also unconventional in that they introduce differences of treatment incompatible with the Convention.

Indeed, the §4 and §5 of Article 2 of the Convention present non-governmental organizations as belonging to the "public" and the "public concerned" and do not allow Parties to treat them more unfavourably than other members of these groups. Article 2 §5 on the "public concerned" even requires the recognition of a presumption of interest by certain non-governmental organizations working for the protection of the environment. With regard to the "public" referred to in §4 of Article 2, the §9 of Article 3 of the Convention states that it " have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities".

[1] Council of State, 6th and 2nd subsections combined, 24 October 1994, *Commune de la Tour du Meix*, n° 123316

This is not the case in French law. Article L. 600-1-1 of the Planning Code causes unconventional discriminations, on the one hand, between associations and other categories of members of the "public" or the "public concerned" (1) and, on the other hand, between associations concerning the access to justice (2).

1. UNCONVENTIONAL DISCRIMINATION BETWEEN ASSOCIATIONS AND OTHER CATEGORIES OF MEMBERS OF THE "PUBLIC" OR "PUBLIC CONCERNED"

Article L. 600-1-1 of the Planning Code is applicable only to appeals of associations regardless of the interest they seek to defend in court. It thus derogates from the provisions of Article L. 600-1-3 of the same code which also regulate the standing of other members of the "public" or the "public concerned" with another temporal condition[2]. This condition is then much less restrictive. First of all, it applies only to appeals against some of the decisions mentioned in Article L. 600-1-1 [3]. In addition, it only requires to have an interest to act on the date of posting in town hall of the request of the petitioner. Finally, it is not absolute since Article L. 600-1-3 allows applicants to benefit from an exception to this framework of their condition to act by demonstrating the existence of "special circumstances".

There is no justification for such a difference in treatment against associations, neither the fact that they are legal persons, nor the nature of the interests they can defend in court. Thus, the appeals that companies can exercise to defend their patrimonial interests do not fall within the scope of Article L. 600-1-1 but that of Article L. 600-1-3. Moreover, Article L. 600-1-1 does not just apply to recourses that associations can exercice to defend the collective interest mentioned in their statutes. Like other members of the "public" or "public concerned", associations may have personal interests affected by land occupation or land use authorizations and may wish to defend them in court. This is the case, for example, where an association regularly occupies a property to carry out its activities and a construction project risks directly affecting its conditions of occupancy. In this case, even if it regularly occupies it on the date of posting in the town hall of the application for authorization, Article L. 600-1-1 prevents it from recognizing the standing to act if it has not deposited its statutes in the prefecture at least one year before that date.

This difference in treatment is therefore irrational and incompatible with the Convention. It leads to neutralizing the pillar of the "public" and the "public concerned". Thus it risks to create a blind spot in the protection of the rights provided for by the Convention.

Certainly, as the Government suggests in its response, individuals, and in particular members of the association, are not affected by this legal limitation of their standing to act. Nevertheless, there is no guarantee that this will compensate for this neutralization of the right of access to justice of associations. The access to justice of these individuals also encounters legal and material obstacles that the action of associations must allow to overcome.

First, the Planning code prevents them from defending a collective environmental interest in the presence of a land use or occupation permit. Indeed, their appeals then fall within the scope of Article L. 600-1-2 of the Planning Code. This article frames the recognition of their standing to act by allowing them to defend in court only the personal interest they would have as immediate neighbors of the future construction[4]. Article L. 600-1-2 imposes in addition to strictly assess the impairment of this personal interest. Thus, the members of the association cannot claim an infringement of an interest of the same nature as that which can be defended by the association, and nothing guarantees that they are neighbours close enough to the disputed construction to acces to justice.

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[2] Article L. 600-1-3 of the Planning Code: «Except for the applicant to justify special circumstances, the interest to act against a building permit, demolition or development is assessed at the date of posting in town hall of the request of the petitioner».
[3] These are "building, demolition or development permits" and not any "land occupation or land use" decisions.
[4] Article L. 600-1-2 of the Planning code:
"A person other than the State, the local authorities or their groupings or an association is admissible to lodge an appeal for excess of power against a decision on the occupation or use of land governed by this Code only if the construction, the development or authorized project is likely to directly affect the conditions of occupancy, use or enjoyment of the property that it holds or occupies regularly or for which it benefits from a promise to sell, lease, or a preliminary contract mentioned in article L. 261-15 of the Construction and Housing Code.
This section does not apply to decisions challenged by the petitioner."

In addition to this legal obstacle, individuals may obviously encounter material obstacles to access to justice in environmental matters. As the European Court of Human Rights has pointed out[5], it is precisely the action of associations with means and an high level of expertise which makes it possible to remove such material obstacles.

In doing so, it is impossible to consider that the individual members of the association will in any case be able to replace it. The temporal condition imposed by Article L. 600-1-1 is therefore not only a legal obstacle to the legal action of associations. It leads to maintaining the legal and material obstacles that other members of the "public" and the "public concerned" may encounter to access to justice in environmental matters.

2. UNCONVENTIONAL DISCRIMINATION BETWEEN ASSOCIATIONS

Article L. 600-1-1 also introduces discrimination between associations that is not more rational and consistent with the provisions of the Convention.

To assess compliance with the temporal condition, Article L. 600-1-1, as interpreted by the French Council of State, considers only the deposit in the prefecture of statutes intended to give the association standing to act against the contested administrative decisions. It therefore makes a distinction between associations that have filed statutes in prefecture giving them standing to act for at least one year at the time of posting of the petitioner's request and associations that have not filed such statutes in prefecture or have more recently filed.

In its reply, the French Government considers that this temporal condition and this duration of one year make it possible to assess whether «the association has a real existence» and that they only lead to limiting access to justice of *ad hoc* associations that are at the origin of abusive appeals. It even considers, on the basis of European case law, that such a criterion of distinction is quite compatible with the Convention.

Nevertheless, this argument is not convincing in more than one respect.

First, the Government has still failed to demonstrate the necessity of this condition by proving the link between these associations and abusive remedies. In addition, the Government is unaware of the scope of the deposit in prefecture of the statutes of the associations provided for by the law of 1 July 1901 on association agreements and, therefore, the scope of the difference in treatment it creates between the associations belonging to the "public" or the "public concerned".

On the one hand, the deposit of statutes in prefecture is not in French law the birth certificate of the association, it is rather a baptism certificate. This optional administrative formality just allows certain associations having their head office in France and certain associations having their head office abroad but an establishment in France to obtain legal personality[6], that is to say, a patrimonial autonomy. Before this deposit, French law recognizes their legal existence. Unreported associations can then carry out information and awareness-raising activities and participate in public debate. They can even defend in court the collective interest sought by their corporate object by exercising an action for annulment identical to that which the association «La Sphinx» had initiated before the national courts[7].

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[5] ECHR, 4th Section, 27 April 2004, *Gorraiz Lizarraga et al. v. Spain*, no. 62543/00, §38.

[6] Article 5 of the Law of 1 July 1901 on association agreements :
"Any association that wishes to obtain the legal capacity provided for in section 6 must be made public by its founders.
The prior declaration will be made to the representative of the State in the department where the association will have its head office. It will make known the title and the object of the association, the headquarters of its establishments and the names, professions and domiciles and nationalities of those who, in any capacity, are responsible for its administration. A copy of the articles is attached to the declaration. It will be given as a receipt within five days.
When the association has its head office abroad, the prior declaration provided for in the preceding paragraph shall be made to the representative of the State in the department where the head office of its principal establishment is located.
The association is made public only by an insertion in the Official Journal, on production of this receipt.
The associations are required to make known, within three months, all changes in their administration, as well as all amendments to their statutes.
These amendments and changes are enforceable against third parties only from the day they are declared."

[7] Council of State, Assembly, 31 October 1969, *Syndicat de défense des canaux de la Durance et du sieur Blanc*, No. 61310: "Whereas under Article 2 of the Law of 1 July 1901 "associations of persons may be formed freely without prior authorization or declaration"; whereas it follows from this that associations, even if not declared, may claim legal existence; whereas, if,

Since 2006, such associations have been deprived of their means of action in planning matters. Contrary to the Government's response, French law therefore makes it possible to deny access to the judge of associations that exist legally and have been active in the field of the environment for years at the time of the posting in town hall of the request of the petitioner.

On the other hand, an association may have legal personality without having deposited its statutes in a French prefecture.

First of all, these are associations based in the departments of Haut-Rhin, Bas-Rhin or Moselle in France which are subject to a special local law that provides for a registration procedure with the judicial court[8]. These are then associations which, although having their head office abroad and not having an establishment in France, have legal personality in application of the law of the State to which they belong. With regard to these foreign associations, the Constitutional Council imposed on the French courts to consider that the law of 1 July 1901 does not prevent the recognition of their legal personality if they want to act in court to defend their patrimonial interests for example. However, the Constitutional Council also specified that these associations must then act in compliance with the other rules governing the admissibility of legal actions before French courts[9]. This includes, in the case of planning litigation, the temporal condition imposed by Article L.600-1-1 whose compliance is assessed only by considering the specific administrative formality that the deposit of statutes in a French prefecture constitutes. Given the terms used in Article L. 600-1-1, these foreign associations, whose legal personality is recognized by the French courts, are thus deprived of the possibility of taking legal action in the presence, for example, of a project of cross-border interest.

Until now, no interpretation of the Constitutional Council or the Council of State has made it possible to correct the discrimination resulting from this editorial anomaly by recognizing an equivalence between the various procedures allowing to obtain the legal personality for the purposes of Article L. 600-1-1.

Thus, with regard to these local and foreign associations, Article L. 600-1-1 of the Planning Code causes an other discrimination incompatible with the stipulations of §2 of Article 9 and §3 of Article 9 read in the light of §9 of Article 3.

Thank you for your attention to these few observations, please accept, Members of the Committee, the assurances of my highest consideration

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pursuant to Articles 5 and 6 of the same Act, undeclared associations do not have the capacity to sue for property rights, the absence of the declaration does not preclude them from seeking recourse for excess of power, all legally constituted associations were entitled to challenge the legality of administrative acts adversely affecting the interests they are tasked with defending".

[8] Article 21 of the Local Civil Code.

[9] Constitutional Council, decision no. 2014-424 QPC of 7 November 2014, §7 : « Considering, nevertheless, that the provisions of the third subparagraph of Article 5 of the Law of 1 July 1901 do not have the object of depriving associations with their registered office abroad that have legal personality in accordance with the law applicable to them but do not have any establishment in France of the capacity to participate in proceedings before the French courts, subject to the rules applicable to the admissibility of court actions, and that they cannot be interpreted to this effect without causing an unjustified encroachment on the right to effective judicial relief; that, subject to this reservation, the contested provisions do not violate the requirements laid down by Article 16 of the 1789 Declaration ».