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

Public communication
To the Aarhus Convention Compliance Committee

COMMENTS ON FRANCE'S REPLY

I. FOR

The "FRANCE NATURE ENVIRONNEMENT" association, headquartered at 2 rue la clôture 75019 Paris.

Represented by
Mr Jérôme Graefe (Parts 3 and 4)
Legal
Tel: [redacted]
Mail: [redacted]

FNE is recognized as being of public utility and approved under Article L. 141-1 of the Environmental Code, its purpose is to protect the environment (Exhibits 1,2).

The association "La Sphinx", whose head office is located at [redacted] Gif-sur-Yvette.

Represented by
Mr Thomas Vezin (Exhibit 7)
General Secretary of the association

Sphinx's purpose is *"to protect, conserve and restore the natural spaces, resources, environments and habitats surrounding the École polytechnique campus."* (Exhibits 5 and 6). It has referred a question to the Conseil constitutionnel concerning article L600-1-1, which infringes the right of access to a judge.

The "GREENPEACE FRANCE" association, headquartered at 13 rue d'Enghien, 75010 PARIS, France

Represented by
Mrs Clara Gonzales (Room 10)
Legal

Greenpeace France is an environmental protection association. It is approved for environmental protection under article L.141-1 of the French Environment Code. (Exhibits 8 and 9)

All correspondence with the Committee should be sent to: [redacted]

II. AGAINST France

III. COMMENTS ON FRANCE'S REPLY

In a memorandum submitted on June 12, 2023, France responded to the Review Committee's requests for information on France's compliance with the provisions of the Aarhus Convention relating to access to justice (ACCC/C/2022/197).

The communicants wish to make the following comments on the French response: to make it easier to read, they have reproduced their initial submission and added to it in response, framed in red.

In order to contest the criticisms voiced by the communicants concerning access to an impartial environmental judge in France, the latter relies mainly on decisions handed down by its own supreme courts, without ever comparing them with the case law and doctrine of the bodies responsible for ensuring compliance with the relevant provisions of the Convention. Clearly not taking the measure of your Committee's missions, it even goes so far as to claim that certain provisions of the Convention have no direct effect before its domestic courts (P.13 and 19 Response from France).

The operation of these supreme jurisdictions, which is currently the subject of much debate in France[1] , is at the heart of the dispute brought to your attention.

A. Summary of facts

1 In the field of town planning, the French government is successively restricting access to justice for associations, particularly those whose aim is to protect the environment, as set out in Articles 2 and 3 of the Convention.

2 Among the latest restrictions, Article L. 600-1-1 of the French Urban Planning Code, as amended by the so-called "ELAN" law on the pretext of combating abusive appeals, restricts the conditions for admissibility to act against urban planning authorizations to associations whose articles of association were filed **at least one year before** the application for authorization was posted.

3 This restriction has no direct link with the objective of legal certainty and combating abusive appeals. There is no causal link between the length of time an association has been in existence, the illegality of a planning permission and the quality of the appeal lodged. In view of the virtually zero rate of contested town planning authorizations, the extremely low proportion of appeals deemed to be abusive, and the absence of litigation inflation before the courts, this superfluous restriction on the right of access to justice appears disproportionate.

4 When the appeal was lodged against this new restriction on the right of access to justice in environmental matters guaranteed by the Convention, the right of associations to have their appeal examined by an independent and impartial tribunal was not respected before the Constitutional Council: two former ministers who had previously publicly supported the new restriction imposed by article L. 600-1-1 of the town planning code on the Government, gave their opinion as judges before the Constitutional Council on the conformity of the said provisions with the Constitution.

[1] See, for example, the difficulties arising from the triple administrative, hierarchical and jurisdictional competence of the Vice-President of the Conseil d'Etat, rejected by the Conseil d'Etat itself in its decision no. 464355 of March 10, 2023 (Exhibit 48).

5 In France, there is a systemic violation of the right of access to an independent and impartial tribunal in environmental matters before the Constitutional Council, due to the operation of the constitutional justice system, whose rules of procedure refuse to recognize situations of objective partiality as grounds for recusal, in violation of the requirement of impartiality, and unjustifiably limit in time the admissibility of recusal requests.

B. Details of all facts

6 By order dated April 2, 2021, the mayor of Palaiseau granted Total Paris-Saclay, on behalf of the French State, a building permit for the construction of an innovation and research center on the École Polytechnique campus, with a floor area of 12,420 $m^{2.}$

7 Opposed to the project because of its environmental impact, but also because it contravenes the mission of the École Polytechnique, which has no vocation to collaborate with an oil group, the association has filed an action for annulment and a summary suspension[2] before the Administrative Court of Versailles[3] , with a view to having the project's authorization suspended as a matter of urgency on July 7 and 20, 2021. (Exhibit 11)

8 His action was dismissed at first instance on the basis of article L. 600-1-1 of the town planning code as amended by the so-called "ELAN" law of November 23, 2018, which restricts the conditions for admissibility of appeals by associations - including environmental protection associations - against town planning authorizations by providing that *"An association is only admissible to act against a decision relating to the occupation or use of land if the association's articles of association were filed with the prefecture at least one year before the petitioner's application was posted in the town hall."*.

9 Indeed, while Sphinx, created in 2017, already had a direct interest as a student association on the campus concerned, it had not filed its new bylaws incorporating environmental protection at least a year before the application was posted.

10 During the initial proceedings, La Sphynx requested that a priority question of constitutionality be referred to it[4] , considering that this legal provision of the town planning code, which required it to have filed its articles of association at least one year prior to the posting of the application, infringed its rights and freedoms guaranteed by the Constitution. (Exhibit 12) However, the court rejected this request by order dated July 27, 2021. (Exhibit 13)

[2] Summary suspension is an emergency procedure for asking a judge to prevent the immediate execution of an illegal administrative decision.

[3] The administrative court judges disputes between private individuals and public authorities. It is the first court to hear a case.

[4] The question prioritaire de constitutionnalité is the right of any party to a trial or proceeding to argue that a legislative provision infringes the rights and freedoms guaranteed by the Constitution.

11 The association lodged an appeal[5] with the Conseil d'Etat against the order of July 27, 2021 rejecting its request for a priority question of constitutionality relating to article L. 600-1-1. The Conseil d'Etat finally referred this question to the Conseil constitutionnel, which received the application on February 1, 2022er . (Exhibit 14)

12 In decision no. 2022-986 QPC of April 1, 2022, the French Constitutional Council ruled that the provisions of the article, which stipulate that only associations that have filed their articles of association at least one year prior to the posting of the petitioner's request at the town hall are eligible to lodge such an appeal, do not disproportionately infringe the right to an effective legal remedy and are in line with the Constitution. (Exhibit 15). At its meeting on March 31, 2022, the Constitutional Council was composed of : Mrs Jacqueline Gourault, Mr Jacques Mézard.

13 Mr. Jacques Mézard was appointed on June 21, 2017 by decree Minister of Territorial Cohesion until October 16, 2018, then appointed member of the Constitutional Council by decision of February 22, 2019 took office on March 12, 2019. (Exhibit 16,17,18,19). Mr. Jacques Mézard, then Minister of Territorial Cohesion, spoke at the National Assembly on October 3, 2018 about amending Article L. 600-1-1 of the Urban Planning Code to combat abusive appeals favorably (Exhibit 20), similarly in a press article in L'agence "L'ambition du projet de loi ÉLAN? Libérer et protéger", Jacques Mézard, Minister for Territorial Cohesion" (Exhibit 21).

14 Madame Jacqueline Gourault was appointed Minister for Territorial Cohesion and Relations with Territorial Communities on October 16, 2018, succeeding Jacques Mézard, and was then appointed a member of the Constitutional Council by a decision dated March 1, 2022, to take up her duties on March 14. (Exhibits 22,23,24). By press release dated November 27, 2018 Jacqueline Gourault, then Minister for Territorial Cohesion and Relations with Territorial Communities referred to the concrete solutions of the ELAN law explicitly including the criticized measure restricting access to justice. (Exhibit 25). Furthermore, on December 21, 2018, in her capacity as Minister, Jacqueline Gourault issued a circular outlining the immediate application provisions of the ELAN law relating in particular to article L. 600-1-1 of the urban planning code which is the subject of the dispute. (Exhibit 26).

15 In this way, Mrs Jacqueline Gourault and Mr Jacques Mezard publicly supported the new provisions of the ELAN law, including the amendment to L. 600-1-1 of the urban planning code, as ministers, before sitting as judges on the Constitutional Council called upon to rule on the conformity of the said provisions with the Constitution. Mr Jacques Mezard and Mrs Jacqueline Gourault could not therefore sit as members of the Constitutional Council without undermining the court's appearance of impartiality.

16 However, the operating rules of the Conseil constitutionnel (rules of procedure) (Exhibit 27) stipulate that *"the fact that a member of the Conseil constitutionnel has participated in the drafting of the legislative provision that is the subject of the question of constitutionality does not constitute grounds for recusal"*. The petitioners could not request the recusal of Mrs Gourault and Mr Mézard. The impartiality of the court was therefore not guaranteed. Moreover, the requirement of impartiality is systematically violated before constitutional courts, since the rules of procedure refuse to recognize a situation of objective partiality.

[5] Some first-instance decisions by administrative judges cannot be appealed. The only way to challenge them is to appeal to the Conseil d'Etat.

17 What's more, the rules, which restrict the temporal conditions for admissibility of an application for recusal, do not protect against situations of partiality that might arise between the date set for receipt of the first observations and the date of the QPC hearing. In the case of decision no. 2022-986 QPC, however, Jacqueline Gourault was appointed to the Constitutional Council after the date of receipt of the first observations.

IV. PROVISIONS OF THE AGREEMENT CITED FOR NON-COMPLIANCE

18 The provisions that France has failed to observe are those of articles 2 and 9 of the Aarhus Convention (hereinafter the Convention) concerning access to impartial justice, inspired and reinforced by the right to a fair trial protected by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHRF).

A. Access to justice

19 The Aarhus Convention requires that members of the *"public concerned"* having a sufficient interest or asserting an impairment of a right, have standing to bring an action to challenge the substantive and procedural legality of any decision taken in environmental matters.

20 Article 9 of the Convention "[...] encourages a broad interpretation of who may bring a claim under domestic law. A broad interpretation, which would as a general rule allow any interested organization or individual to bring a claim, would considerably reduce a fundamental obstacle to access to justice, and the practice of certain countries shows that this solution would not represent too heavy a burden on the work of courts and other tribunals.[6]

21 The "public concerned" is defined in Article 2(5) as *"the public affected or likely to be affected by, or having an interest in, the environmental decision-making process".*

22 As far as NGOs are concerned, the Convention clearly states that NGOs that meet the conditions set out in Article 2, paragraph 5, are deemed to have a *"sufficient interest"* or rights that could be infringed.

23 The reference to non-governmental organizations *"fulfilling such conditions as may be required under national law"* should not be interpreted as leaving the definition of such conditions entirely to the discretion of the Parties. Their discretion must be seen in the context of the important role that the Convention assigns to NGOs in its implementation, and the clear requirement in Article 3, paragraph 4, that each Party give *"due recognition and support"* to NGOs.[7]

24 While Parties may impose certain requirements on NGOs under national legislation, given the important role played by NGOs in the implementation of the Convention, Parties must ensure that such requirements are not unduly burdensome or politically motivated [...].[8]

25 In addition, all requirements should be consistent with the principles of the Convention, such as the elimination or reduction of technical barriers. Within these limits, Parties may impose certain requirements based on objective criteria which will not be unduly restrictive.

[6] The Aarhus Convention: Application Guide - Second edition, 2014, p.206

[7] The Aarhus Convention: Application Guide - Second edition, 2014, p.58

[8] Ibid p.58

26 The second principal obligation under article 9, paragraph 5, requires Parties to consider the establishment of *"appropriate assistance mechanisms"* aimed at eliminating or reducing obstacles to access to justice. Under paragraph 5 of Article 9, potential obstacles to access to justice may include restrictions on standing.

27 The right of access to the courts is therefore not absolute: limitations intended, in particular, to determine the conditions of admissibility of appeals are possible, provided that they do not restrict *"the access open to the individual in such a way or to such an extent as to affect the very substance of the right"*[9] .

28 In this case, they must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim[10] . In this respect, the European Court of Human Rights has held that *"the right of access to a court is infringed when its regulation ceases to serve the aims of legal certainty and the proper administration of justice and constitutes a kind of barrier which prevents the litigant from having his case decided on the merits by the competent court"*[11] .

29 The existence of procedural barriers, resulting from excessive formalism, the overly rigorous interpretation of a procedural rule or the existence of rules preventing certain subjects of law from taking legal action, constitutes an unjustified restriction on the right of access to a court, when it leads to claimants being deprived of the possibility of availing themselves of a legal remedy[12] .

30 The combined provisions of Article 9 of the Aarhus Convention and Article 6 of the CESDHLF thus show that the right of associations to have access to a court, in defense of collective interests or their own interests, must be the subject of particular protection when environmental protection is at stake.

The government is right to invoke Article 9 of the Aarhus Convention, read in the light of the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). However, this reading is erroneous and completely contrary to the reasoning developed by the ECJ and the ECHR.

Indeed, with regard to ECHR case law, the government points out in its reply that the right of access to the courts is infringed when the strict interpretation of a procedural rule ceases to serve the objectives of legal certainty, and thus prevents the litigant from seeing his case judged on the merits by the competent court[13] (P15 reply from France).

[9] ECtHR, 1 July 2021, Burestop 55 and others v. France, req. nos. 56176/18, 56189/18, 56232/18, 56236/18, 56241/18 and 56247/18, § 66

[10] In this sense: ECtHR, February 19, 1998, Edificaciones March Gallego S.A. v. Spain, req. no. 28028/95, § 34; ECtHR, December 14, 2006, Markovic and Others v. Italy, req. no. 1398/03, § 99.

[11] ECtHR, 1 July 2021, Burestop 55 and others v. France, req. nos. 56176/18, 56189/18, 56232/18, 56236/18, 56241/18 and 56247/18, § 66

[12] In this sense, for example: ECtHR, December 9, 1994, Les Saints Monastères v. Greece, req. nos. 13092/87 and 13984/88, § 83; ECtHR, March 16, 2017, LouliGeorgopoulou -v. Greece, req. no. 22756/09, § 48; ECtHR, July 1, 2021, Burestop 55 and others v. France, req. nos. 56176/18, 56189/18, 56232/18, 56236/18, 56241/18 and 56247/18).

[13] ECHR Efstathiou v. Greece 2009 §24; Nowiński v. Poland, no. 25924/06, § 34, October 20, 2009, Omerović v. Croatia (no. 2), no. 22980/09, § 45

Article L. 600-1-1 of the French Planning Code, adopted with the ostensible aim of combating abusive appeals and ensuring legal certainty, was in fact unnecessary (**see section V.A.2.**). The interpretation of this provision, which in practice leads to a number of associations being denied access to justice, undermines the very substance of this right, without pursuing a proven objective of legal certainty.

With regard to ECJ case law, France points out that, according to the Commission, the granting of *de lege* standing may also be subject to a minimum period of existence. In this respect, the Court's reasoning in the Djurgården judgment concerning membership criteria should be taken into account (P14 reply from France).

According to this judgment, "*The number of members required cannot, however, be fixed by national law at such a level as to run counter to the objectives of Directive 85/337 and, in particular, to facilitate judicial review of the operations covered by it (...). The Swedish government, which acknowledges that, at present, only two associations have at least 2,000 members and thus meet the condition laid down in article 13 of chapter 16 of the Environmental Code, has admittedly argued that local associations could contact one of these two associations and ask them to lodge an appeal. However, this possibility alone does not meet the requirements of directive 85/337, since, on the one hand, these authorized associations may not have the same interest in dealing with an operation of limited scope, and on the other hand, they would run the risk of receiving numerous requests to this effect, within which they would necessarily be led to make a selection according to criteria that would escape all control. Lastly, such a system would, by its very nature, lead to* ***a filtering of environmental appeals in direct contradiction with the spirit of the said directive which, as recalled in point 33 of this judgment, is intended to ensure the implementation of the Aarhus Convention***."[14]

Thus, if a national provision can make standing conditional on a minimum period of existence, it is important to check that the introduction of such a system does not lead to a filtering of appeals contrary to the spirit of the implementation of the Aarhus Convention.

In this case, by making standing to sue subject to the temporal criterion of filing the articles of association with the prefecture one year before the petitioner's application is posted in the town hall, article L. 600-1-1 of the French town planning code *de facto* filters out associations that have filed their articles of association with the prefecture from those that have not, with the former having to rely on the latter if they want their voice to be heard in court.

In other words, an association which, despite having a real activity and a significant number of members, has not filed its articles of association with the prefecture, is deprived of its right to appeal on this sole ground, which is completely indifferent to the reality of its action and the merits of its appeal.

Consequently, a reading of Article 9 of the Aarhus Convention in the light of the ECJ's case law, contrary to the Government's assertion, clearly highlights the infringement of the substance of the right of access to a court by Article L. 600-1-1 of the French Town Planning Code.

Furthermore, the government claims that article L. 600-1-1 of the French town planning code cannot be seen as preventing "*all or almost all environmental associations from taking legal action*" (P15 response from France). This argument is not convincing.

[14] ECJ, October 15, 2009, Djurgården, C-263-08, §47 and §51

It assumes that the right to take legal action would only be attained when an entire category of people is deprived of it, denying the very essence of European case law on the need to ensure that the right of appeal has an effective effect.

Indeed, it is settled case law[15] , recently reaffirmed by the CJEU in a judgment of January 11, 2024, that "*the right of appeal provided for in Article 9(3) of the Aarhus Convention would be deprived of any useful effect if, by imposing such criteria, certain categories of 'members of the public' were denied any right of appeal*"[16] (Exhibit no. 49).

In this case, by denying any right to appeal to associations that have not filed their articles of association with the prefecture, article L. 600-1-1 of the French town planning code contributes to rendering article 9§3 of the Aarhus Convention devoid of any useful effect.

This was the case for the association La Sphinx, which failed to file its articles of association with the prefecture and was therefore denied standing to sue, in breach of article 9 of the Aarhus Convention, read in the light of European case law.

Article 2 paragraph 4 of the Convention specifies that the term "*public" "means one or more natural or legal persons and, in accordance with the law or custom of the country, their associations, organizations or groups".*

The terms of the Convention can only be interpreted to mean that, as associations do not have legal personality, they can also be considered members of the public within the meaning of the Convention. This addition is, however, subject to a condition consisting of a reference to national legislation or practice, but they must nevertheless respect the Convention's objective of guaranteeing wide access to their rights.

Paragraph 5 also refers to associations as the *"public concerned"*. It refers to *"the public affected or likely to be affected by, or having an interest in, the decision-making process; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."*

The provisions of Article 2, paragraphs 4 and 5 of the Convention do not allow non-governmental organizations belonging to the *"public"* and *"public concerned" to* be treated more unfavourably than other members of these groups.

In other words, there must be access to environmental justice without discrimination between members of the *"public"* and the *"public concerned"*. Parties can only impose certain requirements based on objective criteria that will not be unduly restrictive.

B. With regard to the independence and impartiality of the judiciary

[15] CJEU 20 December 2017 Protect Natur, C-664/15 §46 and §48; CJEU, 14 January 2021, Stichting Varkens in Nood and others, C-826/18, §50

[16] CJEU, January 11, 2024, SCP de Avocati AB & CD, C-252/22, §54

31 Article 9 of the Convention provides that a remedy shall be available before a court of law and/or other independent and impartial body established by law to challenge the substantive or procedural legality of any decision, act or omission subject to the provisions of Article 6.

32 Article 6 of the CESDHLF extends this requirement to constitutional courts seized of an appeal directly against a law, if domestic legislation provides for such an appeal[17] . The impartiality of the court is assessed within the framework of a dual approach:

33 A subjective approach, taking into account the judge's personal conviction and conduct, i.e. whether he or she demonstrated personal bias or prejudice in the case; and an objective approach, i.e. determining whether the court offered sufficient guarantees, particularly in terms of its composition, to exclude any legitimate doubt as to its impartiality.

34 Two types of situation thus characterize a lack of impartiality on the part of the jurisdictional body. The first is of a functional nature. It concerns, for example, the exercise by the same person of different functions in the judicial process, or the existence of hierarchical or other links between the judge and other players in the procedure[18] . In the latter case, it is necessary to examine the nature and degree of the link in question. The second is of a personal nature. It arises from the judge's conduct in a given case, or from the existence of links with a party to the dispute or its representative.

35 Among the situations likely to give rise to fears of a lack of impartiality on the part of the jurisdictional body, we would highlight, as regards functional situations, the exercise of jurisdictional functions and extra-jurisdictional functions in the same case.

36 Any direct participation in the adoption of legislative or regulatory texts may be sufficient to cast doubt on the judicial impartiality of a person subsequently called upon to decide a dispute as to whether there are grounds for departing from the wording of the legislative or regulatory texts in question[19] .

[17] Voggenreiter v. Germany, 2004, §§ 31-33 and § 36 and cited references

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

[19] Ibidem, §§ 55-58, where the Court found a violation of Article 6 § 1 on the grounds that a judge had participated directly in the adoption of the development plan at issue in the proceedings, and compare with Pabla Ky v. Finland, 2004, § 34 - no violation.

V. NATURE OF THE ALLEGED NON-COMPLIANCE

A. Unjustified and disproportionate restrictions on the right of access to justice by restricting the standing of associations with a sufficient interest to bring an action and environmental protection associations against town planning authorizations.

1. On the objectives of ensuring the legal certainty of town planning authorizations and combating abusive appeals.

37 To assist the Committee in its examination, reference will be made to the preparatory parliamentary work that led to the adoption of successive restrictions on the right of access to the courts by associations concerning town planning authorizations. Article L. 600-1-1 was inserted into the town planning code by the law of July 13, 2006 on the national commitment to housing, known as the "ENL law", which stipulated that an association could only bring an action against a decision relating to the occupation or use of land if the association's articles of association were filed with the prefecture before the petitioner's request was posted in the town hall. (Exhibit 28)

In its response, France points out that the Conseil constitutionnel ruled that this limitation did not substantially infringe the right of associations to appeal, noting that the restriction on this right concerned only associations whose articles of association had been filed after an application for authorization to occupy or use land had been posted at the town hall (see decision no. 2011138 QPC, June 17, 2011, Association Vivraviry [Recours des associations], points 6, 7). (P.7 Response from France)

This decision by the Constitutional Council is totally irrelevant to the Committee's assessment of France's compliance with its obligations under the Aarhus Convention.

This argument is inoperative before the Committee, which relies above all on the Convention and draws inspiration from other international legal instruments in the field of the environment and human rights.

38 This provision had been introduced by an amendment clarifying the legislator's initial intention to limit abusive recourse by associations "*of pure circumstance who try to negotiate heavily monetized withdrawals or associations of local residents, more motivated by considerations of purely private interest*". (Exhibit 29)

39 The Code de l'urbanisme, in its version in force on January 1, 2019, defines abusive appeals as appeals lodged under conditions that exceed the defense of the applicant's legitimate interests and cause excessive prejudice to the beneficiary of the permit. However, duly registered associations whose main purpose was to protect the environment were presumed to be acting within the limits of their legitimate interests. (Exhibit 30)

40 As a result, Article L. 600-1-1 of the Urban Planning Code was amended by Article 80 of Law No. 2018-10 21 of November 23, 2018, known as the "ELAN" Law, now providing that "*An association is only admissible to act against a decision relating to the occupation or use of land if the association's articles of association were filed with the prefecture at least one year before the*

petitioner's request was posted in the town hall." (Exhibit 31) This modification is the result of an amendment to the law. (Exhibit 32).

41 The definition of abusive recourse set out in article L. 600-7 of the town planning code has been widely extended by the same article 80 of the aforementioned ELAN law, abolishing the presumption of legitimacy of legal action against town planning authorizations by duly declared associations whose main object is the protection of the environment. Henceforth, environmental protection associations are no longer presumed to act within the limits of the defense of their legitimate interests, i.e. environmental protection, but presumed to act abusively. (Exhibit 33). This version, which is now applicable, is far removed from the legislator's primary objective, as was emphasized during the debates, with certain members of parliament wishing to re-establish the presumption of non-abusive recourse granted to environmental protection associations when they act against a town planning authorization. (Exhibit 34).

42 Under the guise of combating abusive appeals, the legislative changes introduced in 2018 are actually aimed at combating legitimate appeals lodged by local residents of urban planning projects or environmental protection associations.

43 The removal of the presumption of legitimate *"non-abusive"* appeals by environmental protection associations in favor of a presumption of illegitimacy of appeals against town planning authorizations clearly violates article 9.2 of the Convention.

Similarly, France points out in its response that the French Constitutional Council declared the new provisions of Article L. 600-1-1 of the French Urban Planning Code to be consistent with the Constitution in its decision no. 2022-986 QPC of April 1, 2022, Association La Sphinx (P.8 France's response).

This decision by the Constitutional Council is totally irrelevant to the Committee's assessment of France's compliance with its obligations under the Aarhus Convention.

This argument is inoperative before the Committee.

In its response, France points out that it is clear from the parliamentary debates on Law no. 2018-1021 of November 23, 2018, as well as from the commentary on the aforementioned QPC decision, that "*Article L. 600-1-1 of the Urban Planning Code meets the objectives of legal certainty and proper administration of justice in that it makes it possible to avoid the creation of associations exclusively for the purpose of dilatory appeals*" (P.15 Response from France).

Contrary to the government's claims, it is hard to understand how this provision pursues an objective of legal certainty, as the main justification given for the real need to restrict abusive appeals from associations has never been demonstrated.

Indeed, despite the reforms to town planning litigation in 2013 and 2018, the government has never been able to establish a clear link between associations and the alleged increase in abusive appeals. As early as the Labetoulle report of April 25, 2013, the working group drew the government's attention to the "*disappearance of the statistical apparatus that existed in the past and which, offering reliable data on administrative decisions taken in application of the town planning code and on the appeals to which they gave rise, enabled <u>better-supported diagnoses to be made</u>*" (Exhibit 50).

Justifying the existence of this provision by the desire to avoid the creation of associations for dilatory purposes has no real bearing, and is backed up by neither physical evidence nor statistics.

Moreover, in the case in point, the La Sphinx association, created in 2017, is in no way an association created for dilatory purposes. The association had a direct interest conferring it standing to act against the project, as an association of students from the campus concerned.

2. On the lack of need for a new restriction on public access to justice in environmental matters

44 Numerous public reports (Exhibit 35) and even the bill's impact study (Exhibit 36) show that the restriction imposed by the above provisions on the public's right of access to justice in environmental matters is unnecessary. According to the French government, 98.4% to 98.8% of the numerous town planning authorizations issued each year are not appealed.

45 The legitimate aim of good administration of justice, which would justify this restriction in view of the inflation of litigation in the field of town planning, has no established material reality. The number of cases remains at a relatively low average rate. These appeals, while legitimate in the field of town planning, represent only a minority of cases (between 5 and 6.7% of the total number of cases registered) and are far from clogging up the administrative courts. (Exhibits 37 to 42)

46 For actions for damages for abusive recourse under the town planning code, the bill's impact study notes that between 2013 and 2015 almost all of the 200 counterclaims for damages were rejected, and that only 3 judgments considered the recourse to be abusive. (Exhibit 43)

47 To sum up, between 2013 and 2015, of the 35,471 cases recorded before the administrative courts in urban planning matters, only 200 or 0.56% were the subject of counterclaims for allegedly "abusive" appeals, almost all of which were dismissed. Only 3 judgments, or 0.01% of the cases recorded, were considered *"abusive"*.

48 The reality is that almost all planning permissions are not appealed, that there is no inflation of litigation in planning matters, and that of the very small number of cases registered against permissions, only a tiny proportion can be considered as abusive appeals.

In its reply, France admits that article L. 600-7 of the French town planning code, which allows the beneficiary of a town planning authorization to obtain compensation before the administrative court in the event of an abusive action brought against the authorization, has been applied in few cases, but that this does not "lead to *the conclusion that abusive actions in town planning matters are residual*", At the *same time*, the legislator is "*focusing on the prevention of abusive recourse by setting limits on the exercise of contentious actions by legal entities, based on objective criteria that prevent the right of association from being used for abusive contentious purposes*. " (P.17 Response from France).

The government insists on restricting associations' access to the courts, even though there is no proven need to do so. It has to be said that the various legislative and regulatory developments in town planning litigation, such as the assessment of the interest of associations in acting against a land use decision on the date of posting of the petitioner's request at the town hall, and on condition that the

articles of association have been filed by this date, introduced by law n°2006-872 of July 13, 2006, has not been enough for the government, which intends to add the condition of one year's existence of the association by article L. 600-1-1 of the town planning code, without ever having assessed the alleged effectiveness of the previous measure.

A new measure restricting the right to take legal action has therefore been taken, even though it has not been established that environmental protection associations are at the origin of abusive appeals. In fact, since the entry into force of article L. 600-7 of the French town planning code, only one taxpayers' association has been sanctioned for abusive recourse, as it included several inadmissibilities[20] . Beyond this marginal example, it is important to emphasize that in 50 years of activity, none of the 6,200 associations of the FNE movement has ever been recognized by a judge as having conducted an *"abusive procedure"*.

Furthermore, according to the Conseil d'Etat's latest public report on the jurisdictional and consultative activity of administrative jurisdictions in 2022, urban planning and development cases account for only 6.0% of cases registered in administrative courts (Exhibit 51).

Thus, France, aware of the relative effectiveness, if any, of article L. 600-7 of the town planning code, has decided to limit upstream the exercise of contentious actions by associations by introducing article L. 600-1-1 of the town planning code, even though there is no material evidence to show that town planning litigation is clogging up the administrative courts, and that projects are being slowed down by purely abusive appeals from phantom environmental protection associations.

3. On the absence of a direct link between the objective of legal certainty in the fight against abusive appeals and the restriction of the right of access to justice

49 The restriction imposed on an association's admissibility to bring an action by the one-year period of existence prior to the posting of the town planning authorization in the town hall has no preventive effect against abusive appeals. There is in fact no established link between the length of time an association has been in existence and the quality of an appeal, which would unnecessarily disturb the judge in view of the weakness of its arguments.

In its response to the Committee, France maintains that setting a one-year time limit for the existence of the association before the petitioner's application is posted at the town hall *"makes it possible to prevent the formation of associations whose sole purpose is to lodge appeals against town planning projects and, thus, to strengthen the legal certainty of individual decisions in the field of town planning."* (P.10 Response from France)

However, setting a one-year time limit for the existence of an association is unrelated to the quality of the arguments put forward in an appeal, which would unnecessarily disturb the judge and in no way reinforce the legal certainty of town planning authorizations.

An association that has been in existence for more than a year is perfectly entitled to lodge an appeal with unfounded arguments, and conversely, an association that has been in existence for less than a year can lodge an appeal with perfectly founded illegalities against the authorization.

Problems will always remain for homebuilders, and this is largely due to the way in which transactions are carried out, as pointed out by the Law Commission in its opinion on the bill on the evolution of

[20] CAA de Versailles, October 3, 2019, Association des contribuables du Dourdannais en Hurepoix, n°18VE01741

housing, development and the digital economy (n°846) (M. Guillaume Vuilletet). Guillaume Vuilletet)[21] : *"[...] The origin of these difficulties is largely due to the way in which the transactions are carried out, through sales in the future state of completion - the use of bank financing and the marketing of housing units prior to their completion do not sit well with the risk of litigation, with both bankers and notaries waiting for the permit to be finalized before financing the construction and signing the deeds enabling the sale of residential property. Although not suspensive in law, appeals do have such an effect in practice. The measures designed precisely to give builders greater security, so as to make litigation less penalizing for project completion - first and foremost the refocusing of the demolition action, the effect of which was perceived as paralyzing for builders - have had a negligible effect."* (Exhibit 52)

So, in a bid to satisfy the real estate builders, the government is multiplying the restrictions on associations' right to take legal action, framing it more and more upstream, even if it means undermining the very substance of this fundamental right, with the illusory aim of achieving zero litigation risk. However, given the very nature of the right to take legal action, there can be no such thing as zero risk of litigation under the rule of law. Moreover, there is nothing to show that legal certainty is guaranteed by limiting the right of associations to take legal action (**cf. V. A. 1.**).

Finally, it should be understood from France's position in its pleadings that the only means identified by the Government to guarantee the safety of real estate projects would be to dissuade associations, including environmental protection associations, from exercising their right to appeal, by restricting this right more and more. This is the rationale behind the government's temporal restriction on the standing of environmental associations, which ignores the terms of the Convention and has proven ineffective.

4. Disproportionate infringement of the public's right of access to justice in environmental matters

50 Thus, it follows from all the above provisions that, in order to guarantee the public's right of access to justice in environmental matters in the light of the Convention, environmental protection associations, regardless of whether or not the association's articles of association were filed with the prefecture at least a year before the petitioner's request was posted in the town hall, must be regarded as the *"public concerned"* with a sufficient interest in acting.

51 The provisions of L. 600-1-1 of the French Planning Code, which *de facto* deny sufficient interest to environmental protection associations that have not filed their articles of association at least one year prior to the posting of the petitioner's application, infringe the right of access to justice of the public concerned, in violation of the provisions of article 9.2 of the Convention.

52 To be in line with the Convention, the new requirements set out in Article L600-1-1 of the French Planning Code should not be excessively burdensome or inspired by political motives, should aim to eliminate or reduce technical obstacles to access to justice, and should be based on objective criteria that are not unduly restrictive.

[21] Opinion of the Law Commission on the draft law on the evolution of housing, development and the digital economy (n°846) (M. Guillaume Vuilletet)

53 However, the temporal criterion imposing *"the filing of the association's articles of association with the prefecture [...] at least one year prior to the posting of the petitioner's request in the town hall"* in order to be admissible to act against a decision relating to the occupation or use of land has no objective connection with the abusive or abusive nature of the appeal. The provisions of article L. 600-1-1 of the French town planning code add new requirements that constitute technical obstacles to justice based on an unduly restrictive criterion, in violation of articles 9.3 and 9.5 of the Convention.

54 On the other hand, local associations set up more than a year ago, but whose articles of association were filed less than a year before the petitioner's request was posted at the town hall, are essentially deprived of any legal recourse, and are forced to turn to other associations whose articles of association were filed more than a year ago to exercise their right of recourse. This possibility alone, however, is not likely to satisfy the requirements of access to justice, since on the one hand, these associations, having filed their articles of association more than a year earlier, may not have the same interest in dealing with the disputed planning permission, and on the other hand, there is a risk of receiving numerous requests in this respect, within which they would necessarily be led to make a selection according to criteria that would escape all control.

55 By its very nature, such a system filters environmental appeals in direct contradiction with the spirit of Article 9 of the Aarhus Convention, which calls for the widest possible access to justice for the public in environmental matters.

56 In addition, the provisions of article L600-1-1 of the French town planning code encourage a restrictive interpretation of the sufficient interest of environmental protection associations to act, by only admitting the admissibility of those who have filed their articles of association at least one year prior to the posting request, in violation of article 9.

57 The new requirements set out in article L600-1-1 of the French town planning code must serve a legitimate purpose, and there must be a reasonable relationship of proportionality between the means used to restrict the admissibility of associations and the aim of legal certainty.

58 In this case, there is no reasonable relationship of proportionality in the means employed, given the established material reality which shows that almost all planning permissions are not appealed, that there is no inflation of litigation in planning matters, that of the small proportion of cases registered against permissions, only a tiny proportion are presumed to be abusive, and that a tiny quantity have been considered to be abusive.

59 The new requirements set out in the new version of article L. 600-1-1 of the Code de l'urbanisme no longer serve the aims of legal certainty and the proper administration of justice, and constitute a barrier that prevents any association, including environmental protection associations that have not filed their articles of association at least one year prior to the posting request, from having their dispute decided on the merits by the competent court, in violation of articles 9, 9.2, 9.3, 9.5 of the Convention inspired and reinforced by the right to a fair trial of the European Convention on Human Rights.

With regard to disregard for the right to an effective remedy, in its response to the Committee, France cites a large number of national court decisions in support of its argument (Decision no. 2013-350 QPC, October 25, 2013, cons. 7; Decision no. 2016-541 QPC, May 18, 2016, paragraphs 8 to 10; Conseil

d'Etat, December 21, 2001, no. 222862, published in the Recueil Lebon; July 30, 2003, no. 247376, mentioned in the tables of the Recueil Lebon; CE, July 22, 2020, no. 440681; Decision no. 2011-138 QPC of June 17, 2011, cons. 6) which are totally irrelevant to the Committee's assessment of France's compliance with its obligations under the Aarhus Convention. (P.12 France's response).

By thus stating that *"the provisions of Article L. 600-1-1 in their version resulting from the ELAN law, do not prevent natural persons with an interest in acting from lodging an appeal against a decision relating to the occupation or use of land",* France again explicitly confirms that the restrictions placed on the right of access to the environmental judge by the criticized provisions are stronger for associations than for other litigants.

Moreover, many of these decisions stem from the Conseil Constitutionnel, whose generic violation of the right of access to impartial justice due to its current functioning, and specific violation of the principle of impartiality, are under discussion before the Committee.

5. Discrimination between associations and other categories of *"member of the public"* or *"public concerned*

The communicating associations endorse all the observations made by Mr. Benjamin POUCHOUX, Senior Lecturer in Public Law at the University of Burgundy, concerning article L. 600-1-1 of the town planning code.

In application of these provisions, to be admissible, the association must have filed its articles of association at least one year prior to the submission of the planning application it is criticizing.

Firstly, this deadline is not directly linked to the date on which the public is invited to participate in the development of the project through electronic participation or a public inquiry. Secondly, the deadline is also unrelated to the date of the decision to authorize the project, sometimes more than a year after the request was made. Thirdly, it is more restrictive for associations than all other legal entities, notably private companies, which need only provide proof of their existence at the date of the application, not one year before.

In fact, the provisions of article L. 600-1-1 of the French Planning Code give rise to unconventional discrimination between associations and other categories of members of the *"public"* or the *"public concerned",* and between associations themselves with regard to access to justice in environmental matters (cf. observations by B. Pouchoux, P.2).

In practice, this provision discriminates between associations which have filed their articles of association with the prefecture and those which have not, even though they are in a similar situation in terms of defending their collective interests and the possibilities of appeal. Moreover, under French law, the administrative formality of filing articles of association with the prefecture does not in principle prevent unregistered associations from taking part in public debate, carrying out actions or bringing actions for annulment[22] . The same applies to foreign associations, for which, following the

[22] Conseil d'Etat, ass. October 31, 1969 Syndicat de défense des canaux de la Durance et du sieur Blanc, n°61310

condemnation of France by the European Court of Human Rights[23] , it is not necessary to be registered with the prefecture in order to take legal action.

As a result, article L. 600-1-1 of the French town planning code discriminates between associations in their access to the courts, between associations that have filed their articles of association with the prefecture a year before the date on which the petitioner's request was posted in the town hall, and those that have not, even though both categories of association have been involved in environmental protection for years and can take action and appeal in this respect.

Worse still, it discriminates in terms of access to justice between environmental protection associations that have not filed their articles of association one year prior to the date on which the petitioner's application is posted in the town hall, and the other individuals or legal entities referred to in article L. 600-1-3[24] , whose interest in acting against a building, demolition or development permit is assessed on the date on which the petitioner's application is posted in the town hall, not one year before.

Indeed, this is the effect produced in the case in point, since the Association La Sphinx, whose amendment to its bylaws incorporating a reference to the environment has not been filed with the prefecture, has been denied standing even though it legally exists and has been taking action since 2017.

Thus, by disregarding the special protection afforded by the Convention to the non-governmental organizations referred to in paragraph 5 of Article 2, by exempting them from the requirement to demonstrate a legal interest in order to be considered a member of the public concerned[25] , the provisions of Article L. 600-1-1 of the French Town Planning Code introduce discrimination between associations. What's more, by placing environmental protection associations at a disadvantage compared with other litigants, these provisions contravene Article 9 of the Aarhus Convention - and in particular its paragraph 2-, without any connection with the objective of reducing litigation.

B. The lack of impartiality of the Constitutional Council in charge of examining environmental appeals.

1. On the generic violation of the right of access to impartial justice due to the current functioning of constitutional justice

60 Ordinance no. 58-1067 of November 7, 1958, the organic law on the Constitutional Council, requires appointed members of the Council to swear to perform their duties *"with complete impartiality".*

61 It is the Constitutional Council's rules of procedure - the result of a self-organizing normative power - which organize the guarantees for the implementation of the requirement of impartiality before the Constitutional Council. (Exhibit 27)

[23] ECHR, Jan. 15, 2009, aff 36497/05 Ligue du monde islamique and Organisation islamique mondiale du secours islamique v/ France

[24] *"Unless the petitioner can justify special circumstances, interest in acting against a building, demolition or development permit is assessed on the date the petitioner's application is posted at the town hall.*

[25] See in particular on these points cases ACCC/C/2010/50, Czech Republic, ECE/MP.PP/C.1/2012/11 §66 (Exhibit 53) and ACCC/C/2005/11, Belgium ECE/MP.PP/C.1/2006/4/Add.2

62 However, Mrs Gourault and Mr Mézard did not abstain, despite the objective lack of impartiality of their presence on the judging panel. In fact, the operating rules of the Constitutional Council stipulate that *"the fact that a member of the Constitutional Council participated in the drafting of the legislative provision that is the subject of the constitutionality question does not constitute grounds for recusal".*

63 In other words, the rules of procedure systematically exclude objective partiality. It was therefore impossible for the Constitutional Council to guarantee compliance with the requirement of impartiality of the judiciary in environmental matters in the case at hand.

64 However, given the positions of Ms Gourault and Mr Mezard, first former government ministers who participated in the drafting of the legislative provision in question, then judges of the constitutionality of this same provision, the public, and particularly Sphinx and France Nature Environnement, were entitled to doubt their ability to treat the parties (the Government & the Sphinx association) equally, without preconceived opinion or pre-judgment.

65 Systemically, the requirement of impartiality is violated for the public in environmental matters before the Constitutional Council, in total contradiction with the requirements of Article 9 of the Convention.

66 The situation is all the more unconventional in that the rules of procedure restrict the time frame for admissibility of an application for recusal, and do not protect against situations of partiality arising between the date set for receipt of the first observations and the date of the hearing, the period during which Jacqueline Gourault was appointed to the Constitutional Council.

67 In fact, an application for recusal is only admissible if it is registered with the General Secretariat of the Constitutional Council before the date set for receipt of initial comments. In the case of the Sphinx procedure, the date for receipt of the first observations was set before Mrs Gourault's appointment to the Council on March 1er , the deadline for interventions being February 16, 2022 at 6:00 pm. It was impossible to request the recusal of a Board member.

68 There is no reason to limit the admissibility of a challenge. In fact, it is much more restrictive than recusal before the administrative courts, which can be formulated right up to the end of the hearing. There is a difference in situation between jurisdictions that is not justified on any grounds whatsoever.

69 In this way, the Rules of Procedure concerning the QPC procedure do not protect against situations of partiality revealed in the course of proceedings for all cases brought before the Constitutional Council by the public in environmental matters. Systemically, the requirement of impartiality is not guaranteed, in total contradiction with the requirements of Article 9 of the Convention.

In its reply to the Committee, France surprisingly maintains that, because of the mandatory three-month time limit within which the Constitutional Council must rule on the constitutionality procedure, it should be accepted that there is no procedural guarantee to protect against a situation of proven partiality, without demonstrating that the introduction of such a guarantee would disproportionately undermine the proper administration of constitutional justice. Moreover, France has shown that it is perfectly possible to lodge applications for recusal before the end of the hearing in administrative

matters, or before the close of the proceedings in civil matters, without undermining the proper administration of justice. (P.20 Response from France)

Even more astonishingly, it is claimed that the situation can be tolerated because it is extremely rare for an appointment to be made after the objection period and before a QPC ruling has been handed down (P.21 France's reply). On the contrary, the present case clearly shows that litigants should be protected from such an eventuality.

It is disingenuously pointed out that as Ms. Gourault's appointment was announced in the media on February 15, 2022, the day before the deadline for submitting initial observations, a request for recusal on the part of the communicants was possible. (P.21 France's reply)

It has to be said that before the official appointment by the President of the Republic, in compliance with the procedural rules governing the appointment of members of the Constitutional Council, it was impossible for the communicators to request the recusal of Jacqueline Gourault, who had neither been appointed nor taken up her position on the Council. Moreover, the communicators could not prejudge the possible positive outcome of the appointment procedure announced in the media.

Indeed, concerning the appointment of the members of the Constitutional Council, article 56 of the Constitution stipulates that *"(para.1) The Constitutional Council comprises nine members, whose term of office lasts nine years and is not renewable. The Constitutional Council is renewed by thirds every three years. Three of the members are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The procedure set out in the last paragraph of article 13 is applicable to these appointments."* (Exhibit 54)

The last paragraph of article 13 of the Constitution stipulates that *"[...] An organic law determines the posts or functions, other than those mentioned in the third paragraph, for which, because of their importance for the guarantee of rights and freedoms or the economic and social life of the Nation, the power of appointment of the President of the Republic is exercised after the public opinion of the competent standing committee of each assembly. The President of the Republic may not make an appointment when the sum of the negative votes in each committee represents at least three-fifths of the votes cast in both committees. The law determines the competent standing committees according to the posts or functions concerned."* (Exhibit 55)

Pursuant to Organic Law no. 2010-837 and Law no. 2010-838 of July 23, 2010 on the application of the fifth paragraph of Article 13 of the Constitution (Exhibit 56), the Law Commissions of the National Assembly and the Senate issue an opinion on the appointment of a member of the Constitutional Council proposed by the President of the Republic.

In accordance with the procedure, the Constitutional Law Committees of the National Assembly and the Senate issued their opinions on February 23, 2022 and approved[26] the appointment proposed by the President of the Republic. The appointment of the Minister concerned was therefore approved after the date on which the application for recusal could be filed. It was also after this date that she was appointed on March 1er 2022, was sworn in on March 8 2022 and took up her duties on March 14 2022. France's argument is not convincing.

In addition, on January 8, 2024, the members of the Constitutional Council were received at the Élysée Palace by the President of the Republic for his New Year's ceremony. They indicated a change in

[26] https://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/secretariat/avis-sur-nominations/jacqueline-gourault-membre-du-conseil-constitutionnel-approbation-par-le-parlement-de-la-nomination-proposee-par-le-president-de-la-republique

procedural practices concerning *"[...] information relating to the processing of the deportation and recusal of a member of our college, so that transparency on these subjects is fully effective".* (Exhibit 57). This information was also included in the Conseil constitutionnel's annual report (Exhibit 58).

In its Decision no. 2023-1058 QPC of July 21, 2023 (Exhibit 59), the Conseil constitutionnel indicated that, in terms of procedural practice, on the one hand, the removal of members would henceforth be mentioned in the citations of the decision itself, and on the other hand, the decisions by which the Conseil is likely to rule on a request for disqualification of one or more of its members would themselves be made public as soon as they were adopted, and not only at the end of the procedure.

It has to be said that this change in procedural practice is not likely to put an end to the generic violation of the right of access to impartial justice still permitted by the operating rules of the Conseil constitutionnel: it is merely intended to enable the public to be informed of this anomaly.

On the other hand, the Conseil's operating rules consistently state that *"the fact that a member of the Conseil constitutionnel has participated in the drafting of the legislative provision that is the subject of the question of constitutionality does not constitute grounds for recusal"*. To this day, the rules of procedure systematically rule out a situation of objective partiality.

In addition, this procedural change introduced by the QPC decision of July 21, 2023 does not remove the restrictive temporal condition for admissibility of the recusal request, which is unjustified.

Since France relies on the case law of the Court of Justice of the European Union, it is worth noting the Court's reasoning in its assembly decisions of February 16, 2022[27] when assessing the guarantees of judicial impartiality that Member States must provide to litigants. On the occasion of two actions for annulment brought by Poland and Hungary against Regulation 2020/2092, based on Article 322 §1 (a) TFEU, the Court recalls the place of the rule of law in the European Union, as a value of the Union, and which implies "*access to justice assured by independent and impartial courts*". In its Grand Chamber decision of December 21, 2023[28] , the Court again recently solemnly reaffirmed this formula, which is destined to become a ritual, according to which the requirement of independence of the courts *"which is inherent in the task of judging, forms part of the essential content of the right to effective judicial protection and of the fundamental right to a fair trial, which is of cardinal importance as a guarantor of the protection of all the rights which individuals derive from Union law, and of the preservation of the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law"*. The structural partiality of the Constitutional Council therefore constitutes a serious violation of the requirement for impartial justice, a value of the European Union that all member states are duty-bound to respect.

Recently, at the conventional level, the European Court of Human Rights has voluntarily relaxed the temporal conditions for admissibility of a challenge request. In fact, the European Court of Human Rights has amended article 28 of its rules on the disqualification of judges, specifying in practical instructions that applications for disqualification are not subject to any time limit, and that a certain flexibility may be allowed when justified by the particular circumstances of the case. The instructions state that *"[...] There is no deadline for the submission of such external applications [...]"*, which means that applicants *"[...] should submit their application for recusal as soon as possible. They will also be able to request recusal at a later stage in the proceedings, for example if a new judge takes office, or if an ad hoc judge is appointed to sit in their case. [...] "*. Better still, the Court even accepts that it may

[27] Case. C-156/21 Hungary v Parliament and Council and Case C-157/21 Poland v Parliament and Council

[28] Case. C-718/21, L. G. v/ Krajowa Rada, pt 61

be possible to make an application for review after the case has been decided, by way of an exceptional action, caused by the existence of concerns as to the impartiality of a judge. Thus *"[...] The imperative of rigorously applying the principle of objective impartiality may exceptionally call for a review of the Court's judgment when it has been shown that grounds exist rendering a judge unfit to sit in the case*". (Exhibit 60)

No review mechanism is provided for in the Rules of Procedure for the QPC procedure before the Constitutional Council, with the result that decisions, as in the present case, tainted by violations of the principle of objective impartiality will never be reviewed, notwithstanding clear doubts as to the impartiality of constitutional judges, as is the case here concerning Ms. Jacqueline Gourault and Mr. Jacques Mezard in the present case.

Systemic violations of the requirements of Article 9 of the Convention persist.

2. On the specific violation of the principle of impartiality due to the presence of Mr. Jacques Mézard and Mrs. Jacqueline Gourault

70. On the occasion of a question prioritaire de constitutionnalité, the Constitutional Council decides, on the basis of constitutional norms and with full jurisdiction, during the procedure organized by its rules of procedure, whether a legislative provision infringes the rights and freedoms guaranteed by the Constitution. Insofar as the Conseil Constitutionnel is endowed with prerogatives which lead it to repeal *"erga omnes"* a legal provision which it deems not to be in conformity with the Constitution, it can be considered to have the characteristics of a *"court" within the* meaning of the European Convention. Thus, there is no doubt that the requirement of impartiality applies to constitutional justice. Moreover, article 3 of the organic ordinance no.°58-1067 of November 7, 1958 states that appointed members of the Constitutional Council swear to perform their duties *"with complete impartiality"*. It has to be said, however, that this requirement for impartiality was not respected in the context of the priority constitutional question procedure concerning article L. 600-1-1 of the French town planning code, which led to decision no. 2022-986 QPC of April 1, 2022.

71. At its meeting on March 31, 2022[29] . Jacqueline Gourault and Jacques Mézard sat on the Constitutional Council's panel of judges. It is a given that Ms. Jacqueline Gourault and Mr. Jacques Mezard had themselves previously directly promoted and publicly supported the new provisions set out in the ELAN law comprising the L. 600-1-1 amendment to the town planning code, as ministers before finding themselves as judges sitting on the Constitutional Council to rule on the conformity of the said provisions with the Constitution.

72 Faced with this suspicion of proven partiality, these two members should have abstained from sitting on the basis of respect for the requirement of impartiality. However, as the Constitutional Council's rules of procedure exclude this case of objective partiality, the two former ministers did not abstain (Exhibit 27).

73. It is clear that Mr Jacques Mezard and Mrs Jacqueline Gourault could not sit and give their opinion as members of the Constitutional Council without undermining the appearance of impartiality of the

[29] https://www.conseil-constitutionnel.fr/media/29805

court, based as much on a subjective assessment as on an objective one, thus manifestly violating article 9 of the Convention.

Surprisingly, France maintains that there was no violation of the principle of the appearance of impartiality, despite the presence of two former ministers who, in the course of their previous government political functions, were directly involved in the drafting of the legislative provisions, and then found themselves judges of the provisions in question.

With regard to Mr. Jacques Mezard, it should be noted that he subsequently felt he had to abstain from sitting on a priority question of constitutionality relating to Article L. 600-8 of the Urban Planning Code, amended by Article 80 of law no. 2018-1021 of November 23, 2018, known as "ELAN", in which he had participated as Minister, concerning the sanction for failure to comply with the obligation to register transactions terminating proceedings relating to an urban planning authorization (Exhibit 61).

Thus, we note a difference in the judge's deferral practice, yet concerning here two similar situations: two questions both relating to legislative provisions amended by the same law known as "ELAN" in which Mr. Jacques Mezard had participated as Minister. In good conscience the judge therefore considered by his discretionary assessment that there was a reason constituting a cause for recusal in the context of the question of September 14, 2023, but not in the context of the question of April 1er 2022, yet concerning two similar provisions.

Consequently, if Mr. Jacques Mezard himself may have thought that a reason for recusal required him to abstain in the context of the question of September 14, 2023 relating to article L. 600-8 of the town planning code, as amended by article 80 of the so-called *"ELAN"* law, the communicators were perfectly able to reasonably doubt the judge's appearance of impartiality in the context of the question of 1er April 2022 relating to article L600-1-1 of the town planning code, also amended by article 80 of the so-called *"ELAN"* law.

As far as Jacqueline Gourault is concerned, it is all the more surprising that France should maintain that there has been no breach of the principle of the appearance of impartiality, even though Gourault is a signatory to the[30] law.

3. On the specific violation of the appearance of impartiality due to the presence of Mr. Jacques Mezard and Mrs. Jacqueline Gourault successively appointed by the same political authority as government ministers and members of the Constitutional Council.

In addition to operating rules that violate the requirements of the Convention, it should be added that, as emphasized in the report of the National Assembly's commission of inquiry into the independence of the judiciary, the composition and appointment process of the members of the Constitutional Council exposes it to a permanent suspicion of partiality, in contradiction with the requirement of an appearance of impartiality in the eyes of litigants (Exhibit 62).

In the case in point, the communicants could legitimately doubt the partiality of Mr. Jacques Mézard and Mrs. Jacqueline Gourault, at least in appearance, not only because of their ministerial functions and then that of constitutional judge, but also in view of the existence of previous professional links with the Government, a party in the lawsuit represented at the hearing, and finally in view of their

[30] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000037642305/2018-11-25/

appointment both as ministers in the Government and then as members of the Constitutional Council by the President of the Republic in office.

Indeed on the proposal of the Prime Minister, Mr. Jacques Mezard was appointed Minister of Territorial Cohesion by the President of the Republic on June 21, 2017[31] (Exhibit 16) who terminated his duties on October 16, 2018[32] (Exhibit 17). Again by the President of the Republic he was appointed member of the Constitutional Council on February 22, 2019[33] . (Exhibit 18)

Similarly, on the proposal of the Prime Minister, Ms. Jacqueline Gourault was appointed Minister of Territorial Cohesion and Relations with Territorial Communities on October 16, 2018[34] (Exhibit 22), who ended her term of office on March 5, 2022[35] . (Exhibit 63). Again by the President of the Republic she was appointed member of the Constitutional Council on March 1er 2022[36] (Exhibit 22).

Between 1er and 5 March 2022, Jacqueline Gourault was both an appointed member of the Constitutional Council, although not yet in office, and a government minister. Given her links with the government during this period, the lack of impartiality is obvious.

Given the previous political and professional ties that existed for over a year between Mr. Jacques Mezard and Ms. Jacqueline Gourault, constitutional judges, and the Government party to the dispute, the lack of impartiality is obvious.

Moreover, given the previous governmental political links between Jacqueline Gourault and Jacques Mézard and the political authority to whom they owe their appointment to the Constitutional Council, namely the President of the Republic who himself promulgated[37] the legislative provisions in question before the Council, the lack of impartiality is all the more glaring.

[31] Decree of June 21, 2017 on the composition of the Government

[32] Decree of October 16, 2018 on the composition of the Government

[33] Decision of February 22, 2019 appointing a member of the Constitutional Council

[34] Decree of October 16, 2018 on the composition of the Government

[35] Decree of March 5, 2022 on the composition of the Government

[36] Decision of March 1, 2022 appointing a member of the Constitutional Council

[37] Act by which the Head of State declares that a law has been duly passed by Parliament and makes it applicable.

VI. USE OF DOMESTIC REMEDIES

74. All domestic remedies have been used to remedy the case of non-compliance which is the subject of the communication.

75. Before the Versailles administrative court: an action for annulment and a summary suspension to suspend planning permission for the project as a matter of urgency on July 7 and 20, 2021. On this occasion, a separate brief was submitted, seeking to put an end to the restriction on the standing of environmental protection associations under article L. 600-1-1 of the town planning code, by raising a priority question of constitutionality. By order of July 27, 2021, the Versailles Administrative Court refused to pass on the priority question of constitutionality and dismissed Sphinx's legal action on the basis of the restriction.

76. Before the Conseil d'Etat: Filing of an appeal with the Conseil d'Etat against the court order on July 30, 2021. By decision of January 31, 2022, the Conseil d'Etat decided to refer to the Conseil constitutionnel the question of whether article L. 600-1-1 of the town planning code was in conformity with the Constitution, and stayed the dismissal of the association's legal action until the Conseil constitutionnel had ruled on the question.

77. Before the Conseil constitutionnel: referral on February 1, 2022 of the priority question of constitutionality raised by the association La Sphinx, which submitted its observations on February 15, 2022. Observations were submitted by France Nature Environnement, an environmental protection association with a special interest in intervening, on February 16 and March 3. (Exhibits 44 and 45). The Government defended itself. (Exhibits 46 and 47)

78. In decision no. 2022-986 QPC of April 1, 2022, the French Constitutional Council ruled that the provisions of article L. 600-1-1 of the town planning code, which do not affect access to justice for environmental protection associations, are in line with the Constitution79. As domestic remedies have failed to remedy the case of non-compliance, there are no other remedies available.

VII. USING OTHER INTERNATIONAL PROCEDURES

80. None.

VIII. PRIVACY

81. None of the information contained in this communication is to be kept confidential. **However, we request** that the telephone numbers and e-mail addresses of the individuals representing La Sphynx and Greenpeace who are signatories to this communication remain confidential in order to avoid any risk of penalization, persecution or harassment.

IX. SUPPORTING DOCUMENTATION

Exhibit 1 FNE approval
Exhibit 2 Articles of association and recognition of public interest
Exhibit 3 Extract of deliberation
Exhibit 4 FNE mandate

Exhibit 5 La Sphinx association bylaws
Exhibit 6 Declaration of modification of articles of association to the prefecture
Exhibit 7 Deliberation Association La Sphinx General Meeting - 04/07/2022

Exhibit 8 Statuts of Greenpeace France
Exhibit 9 Order of the Ministère de la Transition Ecologique et Solidaire of March 15, 2019
Exhibit 10 Delegation of authority Greenpeace

Exhibit 11 Interim suspension of association La Sphinx
Exhibit 12 Priority question of constitutionality
Exhibit 13 Order of the Versailles Administrative Court, July 27, 2021
Exhibit 14 Conseil d'Etat decision January 31, 2022
Exhibit 15 Decision no. 2022-986 QPC of April 1, 2022

Exhibit 16 Decree of June 21, 2017
Exhibit 17 Decree October 16, 2018
Exhibit 18 Decision of February 22, 2019
Exhibit 19 Constitutional Council sheet Jacques Mezard
Exhibit 20 Speech national assembly october 3, 2018
Exhibit 21 Article L'agence June 20, 2018

Exhibit 22 Decree October 16, 2018
Exhibit 23 Decision March 1, 2022
Exhibit 24 Constitutional Council form Jacqueline Gourault
Exhibit 25 Press release dated November 27, 2018
Exhibit 26 Circular of December 21, 2018.
Exhibit 27 Rules of procedure concerning the QPC procedure

Exhibit 28 Article L600-1-1 of the French Urban Planning Code created by Law n°2006-872 of July 13, 2006
Exhibit 29 Amendment N° 186 rect. Ter April 6, 2006
Exhibit 30 Article L600-7 of the French Urban Planning Code version in force from August 19, 2013 to January 01, 2019
Exhibit 31 Article L600-1-1 of the Code de l'urbanisme version in force since January 01, 2019 Amended by LOI n°2018-1021 of November 23, 2018 - art. 80
Exhibit 32 Amendment no. Com-229
Exhibit 33 Article L600-7 du Code de l'urbanisme Version effective since January 01, 2019 Amended by LOI n°2018-1021 of November 23, 2018 - art. 80

Exhibit 34 Extract Session of July 19, 2018 verbatim report of proceedings

Exhibit 35 Extract Report No. 630 (2017-2018) by Ms. Dominique ESTROSI SASSONE, on behalf of the Committee on Economic Affairs, submitted on July 4, 2018.
Exhibit 36 Extract from Etude d'impact projet de loi portant évolution du logement, de l'aménagement et du numérique.

Exhibit 37 Extract Public report on the jurisdictional activities of the administrative courts 2013 Exhibit 38 Extract Public report on the jurisdictional activities of the administrative courts 2014 Exhibit 39 Extract Public report on the jurisdictional activities of the administrative courts 2015
Exhibit 40 Extract Public report on the jurisdictional activities of the administrative courts 2018
Exhibit 41 Extract Public report on the jurisdictional activities of the administrative courts 2019
Exhibit 42 Extract Public report on the jurisdictional activities of the administrative courts 2020

Pièce 43 Extrait Propositions pour un contentieux des autorisations d'urbanisme plus rapide et plus efficace Rapport au ministre de la cohésion des territoires présenté par le groupe de travail présidé par Christine Maugüé, conseillère d'Etat

Exhibit 44 Second FNE comment
Pièce 45 Réponse note délibéré Premier ministre FNE

Exhibit 46 First observation Prime Minister
Exhibit 47 Note délibéré Premier ministre

Exhibit 48 Conseil d'Etat, March 10, 2024, no. 464355
Exhibit 49 CJEU, January 11, 2024, SCP de Avocati AB & CD, C-252/22, §54
Exhibit 50 Extract from Labetoulle Report 04/25/2013
Exhibit 51 Extract Report on the jurisdictional activities of the administrative courts 2022
Exhibit 52 Avis Commission des lois sur projet de loi ELAN - G. Vuilletet (n°846)
Exhibit 53 Notice ACCC/C/2010/50 Czech Republic

Exhibit 54 Article 56 of the Constitution
Exhibit 55 Article 13 of the Constitution
Exhibit 56 LOI n° 2010-838 du 23 juillet 2010 relative à l'application du cinquième alinéa de l'article 13 of the Constitution

Exhibit 57 Greetings from the President of the Republic to the Constitutional Council January 8, 2024
Exhibit 58 Annual Report 2023, Constitutional Council, P12
Exhibit 59 Decision no. 2023-1058 QPC of July 21, 2023
Exhibit 60 Practical instruction on the disqualification of judges - ECHR
Exhibit 61 Decision no. 2023-1060 QPC of September 14, 2023
Exhibit 62 Rapport de la commission d'enquête de l'Assemblée nationale sur les obstacles à l'indépendance du pouvoir judiciaire, September 2, 2020
Exhibit 63 Decree of March 5, 2022 on the composition of the Government

X. SIGNATURES

Paris, February 20, 2022,

Jérôme Graefe

Legal

France Nature Environnement

Thomas Vezin

General Secretary

The Sphinx

Clara Gonzales

Legal

Greenpeace France