COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE

I. INFORMATION ON CORRESPONDENT SUBMITTING THE COMMUNICATION, WITH CONTACT DETAILS

Avala (Association du Val d'Amblève, Lienne et Affluents) ASBL, a non-profit environmental protection association for the Amblève Valley, the River Lienne and its tributaries, a legal entity with legal personality under Belgian law,[1] with its registered office established at 61, Chession, 4987 Stoumont, Belgium, and Business Registration No. 0445.142.896;

Counsel: **Alain Lebrun**, lawyer, in chambers at 6, Place de la Liberté, 4030 Grivegnée, Belgium, which is his **address for service** for the purpose of this Communication.

II. PARTY CONCERNED

The Belgian State (or the Kingdom of Belgium).

III. THE COMMUNICATION

A. Facts

1. By an application submitted on 27 November 2015, Avala (Association du Val d'Amblève, Lienne et Affluents) ASBL, a non-profit environmental protection association for the Amblève Valley, the River Lienne and its tributaries, sought the retroactive annulment of Article 22 of the Order of the Walloon [Regional] Government of 27 August 2015 laying down rules on agricultural cross-compliance, on the ground that it inadequately transposed GAEC 7, which is a rule laid down in Regulation (EU) No 1306/2013 – that is, a ban on cutting hedges and trees during the bird breeding and rearing season[2] – because Article 22[3] specified a 'season' running from 15 April to 30 June, which does not correspond to the biological reality of the period during which the birds in question breed and rear their young.

[1] The second paragraph of Article 1 of the Law of 27 June 1921 on non-profit associations provides: 'A non-profit association has legal personality under the conditions set out in this chapter', while Article 3(1) provides: 'The association obtains legal personality when its articles of association and documents relating to the appointment of managers and, where relevant, of persons entrusted with representing the association under the fourth paragraph of Article 13 are filed in accordance with Article 26h(1)'.

[2] In the light of the underlying objective of the rule, this obviously refers specifically to those birds which nest in hedges and trees.

[3] For the record: Article 22 of the Order of 27 August 2015 provided: 'Farmers shall not cut hedges and trees during the period from 15 April to 30 June'.

To demonstrate that this period does not correspond to reality, Avala produced four extracts from a reference work[4] in order to illustrate the breeding and rearing season of some of the bird species concerned.

2. The report by First Auditor[5]/Head of Division, Michel Quintin, dated 4 December 2017, concluded that 'by way of comparison, Article 68(1) of the Ordinance of the Parliament of the Brussels Capital Region of 1 March 2012 on Nature Conservation, in its subparagraphs (6) and (7), prohibits: "6) disturbing [strictly protected species], intentionally or with knowledge of the implications, notably during the breeding season (…); 7) pruning trees (…) and felling trees between 1 April and 15 August" '; Mr Quintin further noted that, in France, 'the ban on cutting hedges runs from 1 April to 31 July (…)'. This Report for the Hearing went on to say that the applicant 'has produced (…) the text of an article[6] (…) recording the results of a study on determining the period of a ban on cutting hedges and trees in the farming environment in order to protect nesting birds in Wallonia'. (The article in question covers five species that depend on farming environments which are likely to be subject to direct disruption before 15 April.) The Report for the Hearing continued by stating that 'with regard to the end of the breeding season, the article notes that all the species concerned [without exception] are likely to be seriously disturbed by work carried out in July'. The Report then noted that 'for a significant percentage of some bird species, (…) nest-building starts before 15 April (…) and exposure of the nestlings to risk continues beyond 30 June (…)'. Finally, it stated that '(…) the administrative file fails to establish that the procedure to adopt the contested measure took account of GAEC 7 as laid down in Regulation (EU) No 1306/2013 (…)'.
The Report for the Hearing therefore proposed that the Council of State should declare the plea admissible and well founded.

3. In its Reply, dated 20 April 2016, the applicant criticized the defendant – that is, the Walloon Region – for asserting, with no concrete evidence, that the bird breeding and rearing season runs from 15 April to 30 June; it further submitted that to claim, as the Walloon Region does, that if earlier nests are destroyed, the species concerned can still build replacement nests is an assertion completely out of step with the philosophy of Regulation (EU) No 1306/2013. The applicant produced a book by R. Verheyen[7] and gave details of four extracts, which showed – by no means exhaustively – that in Belgium a whole range of species very frequently nests outside the period from 15 April to 30 June. The first completed clutches of European Greenfinch (*Chloris chloris*) eggs appear from the last week of April onwards and continue to be found until mid-August, while European Goldfinch (*Carduelis carduelis*) eggs may be present from early May and nestlings up to mid-September. Clutches of Corn Bunting (*Emberiza calandra*) eggs can be found from early May and broods to the fourth week of July, while Yellowhammers (*Emberiza citrinella*) nest from early April to the first half of August. Exceptionally, Yellowhammer broods can be

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[4] Verheyen R., *Les passereaux de Belgique [Passerines of Belgium]*, 2nd Edition, Brussels, Royal Belgian Institute of Natural Sciences, 1957.

[5] Pursuant to Article 12 of the Decision of the Regent of 23 August 1948 specifying the procedure for claims before the Administrative Litigation Division of the Council of State, the designated Auditor draws up a reasoned report on the case.

[6] This article was provided by AVES, an ornithological studies society.

[7] Verheyen R., *Les passereaux de Belgique [Passerines of Belgium]*, 2nd Edition, Brussels, Royal Belgian Institute of Natural Sciences, 1957.

found as early as the end of March, with some young remaining in the nest as late as the end of October.

4. By its judgment of 9 May 2018 in Case no. 241.458 (Annex 1), the Belgian Council of State dismissed the applicant's action for annulment, even though 'it is probable that (…) the dates used [in Article 22 of the Order] do not fully cover the breeding and rearing season of all birds (…)'; it did so without taking into account the scientific literature provided, on the ground that this documentation 'relates to ornithological arguments, which it is not for the Council of State to resolve'.

B. Use of expertise in cases concerning environmental law

1. One of the characteristic features of environmental law is precisely the technical, non-legal nature of the subject matter. If the court does not have a good command of this, it is incumbent upon it to refer to technical expertise. This power is granted to the court by the first paragraph of Article 20 and by Article 23 of the Decision of the Regent of 23 August 1948 specifying the procedure for claims before the Administrative Litigation Division of the Council of State.[8] Recently, for instance, before coming to its judgment of 26 January 2017, the Council of State appointed two experts in Case no. 237.187, which related to declassification of a legacy waste site.[9] In environmental matters, it is by no means unusual for the courts to make use of expertise. Indeed, 'a court that risks being left on the periphery of the case before it because of the technical nature of the documents involved will, as a matter of course, consult an expert (...)'.[10]

2. Having said this, the situation remains that, in administrative litigation, it is for the administrative authority concerned to demonstrate the reasons for its decision to adopt the contested measure on the basis of studies or reports, which must appear in the administrative file compiled during the procedure. In the present case, the Walloon [Regional] Government has not provided any scientific data on the bird breeding and rearing season in the Walloon Region…

C. Discussion

By this judgment of 9 May 2018, the Council of State has infringed article 9, paragraphs 3 and 4, of the Aarhus Convention in as much as, while Avala ASBL did have access to a review procedure before a court of law to challenge acts and omissions by the Walloon [Regional] Government 'which contravene provisions of its national law relating to the environment',[11] this procedure was not fair and equitable, since the Council of State

[8] The first paragraph of Article 20 provides: 'A Councillor of State, the Auditor-General or the designated Auditor may commission experts and establish their tasks'. Article 23 provides: 'For information purposes, the chamber may hear from experts during the hearings. The Registrar is to invite such experts to appear'.

[9] Council of State case C.E., 26 January 2017, no. 237.178, available at http://www.raadvst-consetat.be/?lang=fr.

[10] Neuray, J.-F., 'Punishing the wilful destruction of protected objects in international criminal law. Observations on the judgment of the International Criminal Court of 27 September 2016, Situation in the Republic of Mali (in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*)', *Aménagement-Environnement (Amén.)*, 2017/2, p.109.

[11] The Aarhus Convention provides explicitly only for the contravention of national law relating to the environment. However, it is mandatory that all the elements of an EU law such as Regulation (EU) No 1306/2013 are to apply in the national law of all European Union countries without further legislation.

dismissed the application for annulment of the contested Order even though, according to the court itself, the dates provided for in Article 22 of the Order were probably wrong: the court took the view that it was not for the Council of State to rule on ornithological arguments.

It is difficult to see precisely how the court could avoid discussing the biology of the species concerned, since Regulation (EU) No 1306/2013 does not specify exact dates of bird breeding and rearing in hedges and trees, leaving the Member State that is subject to the Regulation to determine these on the basis of the particular biogeographical characteristics of its territory. Further confirmation of the error alleged before the Council of State was given *a posteriori* when the Order of the Walloon [Regional] Government of 7 June 2018 amending the Order of the Walloon Government of 27 August 2015 laying down rules on agricultural cross-compliance …[12] corrected these dates. In fact, Article 1 of that Order provides: 'In Article 22 of the Order of the Walloon Government of 27 August 2015 laying down rules on agricultural cross-compliance, repealing the Order of the Walloon Government of 13 June 2014 laying down agricultural cross-compliance requirements and standards (…), the words "15 April to 30 June" are to be replaced by the words "1 April to 31 July" ' – !

The applicant requested the court to grant it the maximum case preparation allowance, i.e. €1,400, under Article 30/1(2)(2) of the Consolidated Acts on the Council of State (case complexity criterion).[13] In the alternative, the applicant claimed this amount on the basis of Article 30/1(2)(3) of the Consolidated Acts, regarding it as manifestly unreasonable – in the light of article 9, paragraph 4, of the Aarhus Convention, which precludes prohibitively expensive procedures in environmental matters – to limit the award here to the standard case preparation allowance. However, at the end of its judgment of 9 May 2018 in Case no. 241.458, the Council of State awarded a case preparation allowance of €700 to the Walloon Region against the applicant, Avala ASBL. For a small non-profit association like Avala ASBL, such an outcome is particularly punitive since, in taking up a substantively convincing case, it could have expected to be entitled to a fixed-rate lump sum of €1,400 to cover the expenses of the action and to the court registration fees of €400 disbursed in advance; in the event, however, it has to bear not only its lawyer's costs and fees but also its registration fees of €400 and a case preparation allowance of €700. Thus it has gone from the prospect of a financial gain reasonably estimated at €1,400 to a real loss of €1,100 – a difference of €2,500. And this against the background of the fact that Avala's accounts filed in 2017 showed an end-of-year balance of €1,581.40 (see Annex 2).

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[12] *Moniteur belge* of 25 June 2018; for the sake of brevity, the full title of the Order of 7 June 2018 has been omitted here.

[13] Article 30/1 of the Consolidated Acts on the Council of State provides:
'1. The Administrative Litigation Division may award a case preparation allowance, which is a flat-rate contribution to the lawyers' costs and fees of the successful party.
After having consulted the French-, German- and Dutch-speaking Bars, the King is to determine, by Decree deliberated in the Council of Ministers, the standard, minimum and maximum amounts of the case preparation allowance, according to, inter alia, the nature of the case and the value of the litigation.
2. The Administrative Litigation Division may, by a decision based on specific reasoning, reduce or increase the payment, without however exceeding the minimum and maximum amounts laid down by the King. In making its assessment, it is to take into account:
1) the unsuccessful party's financial capacity, in order to reduce the amount of the payment;
2) the complexity of the case;
3) the manifestly unreasonable nature of the situation'.

IV. NATURE OF ALLEGED NON-COMPLIANCE

In this instance, the Communicant submits that there has been a specific contravention of the Aarhus Convention – more precisely, of the right to access to justice, in that the proceedings complained of were not fair or equitable and can be viewed, in this specific case, as prohibitively expensive.

V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

Article 9, paragraphs 3 and 4, of the Convention.

VI. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES

1. There is no judicial remedy under Belgian domestic law against decisions of the Council of State [the Supreme Administrative Court of Belgium].

2. It is unlikely that an application to the European Court of Human Rights (ECHR) for violation of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights would have been admissible before the Court at Strasbourg. In a judgment given by the ECHR in *L'Érablière ASBL v. Belgium*,[14] the Court pointed out that 'for Article 6 § 1 to apply in its civil limb, there must be "dispute" over a "right" of a "civil nature" which the applicant can claim, at least on arguable grounds, to be recognized under domestic law (…)'.[15] This was a case regarding the appeal submitted by a local environmental protection association for judicial review of a planning permission. The Court found that there was a sufficient link between the dispute and the right claimed by the legal entity, in particular in view of the status of the association and its founders as potential neighbours of the landfill site at issue and in view of the fact that the aim it pursued was limited in space and in substance.[16] It is true that the objects of the association in question here, Avala ASBL, are 'limited in space', but in the present case it is pursuing a collective interest affecting the successful outcome of bird breeding and rearing – a purely ecological interest that probably differs from the defence of a right of a civil nature as provided for in the European Convention on Human Rights.

A recent application to the ECHR concerning detriment to the interest of an environmental association – failure to take account of an area of forest in a development scheme – was declared inadmissible (see Annex 3).

VII. CONFIDENTIALITY

[14] Judgment of 24 February 2009 in *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, ECHR 2009.

[15] Judgment in *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, ECHR 2009, § 24.

[16] Judgment in *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, ECHR 2009, §§ 28-30.

The Communicant makes no request for confidentiality.

VIII. ANNEXES

In the light of the Committee's wish to limit the size of communications by restricting the number of annexes, the communicant is appending only three illustrative documents. However, all the documents in the case can be placed at the Committee's disposal.

1) **Judgment no. 241.458 of 9 May 2018 of the Belgian Council of State.**
2) **2017 accounts for Avala ASBL.**
3) **ECHR Decision on inadmissibility in Case 978/19.**

IX. SUMMARY

A Belgian Council of State judgment of 9 May 2018 should have ruled on the legal status of the nesting season of birds. In a procedure that was neither fair nor equitable, the Council of State discounted the scientific literature produced, without giving any reasons, and dismissed, without seeking an expert report, the environmental protection association's application, on the ground that this was a technical discussion falling outside the competence of the court – while acknowledging that the association was probably right.

The financial consequences of this judgment for the communicant ***are*** so substantial as to be prohibitive.

X. SIGNATURE

For the communicant,

Liège, 13 May 2019
6, Place de la Liberté,
Alain LEBRUN,
Lawyer.

[signed]