



# Economic and Social Council

Distr.: General  
14 September 2020

Original: English

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## Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Sixty-eighth meeting

Geneva, 23–27 November 2020

Item 9 of the provisional agenda

#### Communications from members of the public

## Findings and recommendations with regard to communication ACCC/C/2015/135 concerning compliance by France

Adopted by the Compliance Committee on 10 March 2020

### I. Introduction

1. On 4 November 2015, Mr. Patrick Janin (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a failure by France to comply with its obligations under article 9 (2) of the Convention.<sup>1</sup>
2. More specifically, the communicant alleges that a decision by the Conseil d'État to dismiss, for lack of standing, his petition against a ministerial order authorizing the destruction of animal pests violated article 9 (2) of the Convention.
3. At its fifty-first meeting (Geneva, 15–18 December 2015), the Committee determined on a preliminary basis that the communication was admissible.<sup>2</sup>
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 11 March 2016.
5. On 9 August 2016, the Party concerned provided its response to the communication, and on 19 September 2016, the communicant provided comments thereon.

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<sup>1</sup> The communication and related documentation from the communicant, the Party concerned and the Committee are available at [www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2015135-france.html](http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2015135-france.html).

<sup>2</sup> ECE/MP.PP/C.1/2015/9, para. 60.



6. On 23 May 2018, the Committee wrote to the Party concerned and the communicant seeking their views on whether, given the substance of the communication, they would consider it appropriate for the Committee to proceed to commence its deliberations on the substance of the communication without holding a hearing. At the same time, the Committee invited the Party concerned and the communicant, should they each be of the view that a hearing was not needed, to provide any final written submissions by 27 June 2018.

7. On 31 May and 8 June 2018, respectively, the communicant and the Party concerned each submitted comments to the effect that it was appropriate for the Committee to proceed to commence its deliberations without holding a hearing.

8. On 25 June 2018, the Party concerned submitted its final written submissions. The communicant did not provide any further written submissions.

9. The Committee completed its draft findings through its electronic decision-making procedure on 1 November 2019. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 6 November 2019. Both were invited to provide comments by 18 December 2019. The communicant and the Party concerned provided comments on 29 November and 17 December 2019 respectively.

10. At its sixty-sixth meeting (Geneva, 9–13 March 2020), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its sixty-seventh meeting (Geneva, 6–10 July 2020). It requested the secretariat to send the findings to the Party concerned and the communicant.

## **II. Summary of facts, evidence and issues<sup>3</sup>**

### **A. Legal framework**

#### **Legislation concerning pests**

11. Article R. 427-6 of the Environmental Code provides the legal basis for establishing by ministerial order a list of native animal species to be classified as pests, the periods stipulated for their destruction and the methods of destruction to be used.<sup>4</sup>

#### **Public participation**

12. Article 7 of the Charter for the Environment establishes the right of everyone to participate in public decision-making likely to affect the environment, in the conditions and to the extent provided for by law.<sup>5</sup>

13. Article L. 120-1 of the Environmental Code sets out the procedure for public participation in decision-making affecting the environment.<sup>6</sup>

#### **Access to justice**

14. Under the administrative case law of the Party concerned, to have standing to challenge an administrative decision, the petitioner must have a sufficiently definite, direct personal interest.<sup>7</sup> The petitioner must show that the act he or she is seeking to have annulled

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<sup>3</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>4</sup> Party's response to the communication, p. 1.

<sup>5</sup> Ibid.

<sup>6</sup> Communication, p. 2, and Party's response to the communication, p. 1. Article L. 120-1 was amended and re-numbered as L. 123-19-1 by order No. 2016-1060 of 3 August 2016, see Party's comments on the draft findings, 17 December 2019, p. 1.

<sup>7</sup> Party's response to the communication, p. 3.

places him or her in a special position.<sup>8</sup> The administrative court will find this interest sufficient provided that the harm to the petitioner is not unduly indefinite or indirect.<sup>9</sup>

15. More specifically, when an appeal is lodged by a natural person, a non-recognized association or other legal person, the interest on which the applicant relies must meet the following conditions:

(a) The interest must be legitimate: It cannot be intended to safeguard an illegitimate situation. It can be of a moral or material nature, individual or collective. It must, however, be to a certain degree specific in nature;

(b) It must be relevant and appropriate: The applicant's status must be connected with the decision at issue;

(c) The interest in acting must be sufficiently personal: The applicant requires an interest of his or her own;

(d) The nature of the interest invoked by the applicant to establish the link between the interest alleged by the applicant and the contested measure must be direct (or not unduly indirect);

(e) Finally, the interest to act must be definite.<sup>10</sup>

16. Pursuant to article L. 142-1 of the Environmental Code, environmental protection associations have standing to bring proceedings before the administrative courts for any complaint relating to the objectives of the association as set out in their articles of association.<sup>11</sup>

17. The assessment of whether a petitioner has a sufficiently definite, direct personal interest is to be made by the administrative courts.<sup>12</sup>

## B. Facts

18. On 30 June 2015, the Minister of Ecology, Sustainable Development and Energy issued a ministerial order implementing article R. 427-6 of the Environmental Code (see para. 11 above) and establishing a list of species of animals classified as pests, the periods stipulated for their destruction and the method of destruction to be used (the 2015 order).<sup>13</sup>

19. On 11 August 2015, the communicant filed a petition with the Conseil d'État requesting the annulment of the 2015 order on the ground of ultra vires.<sup>14</sup> Specifically, the communicant alleged the infringement of article 7 of the Charter for the Environment (see para. 12 above) because the public consultation procedure regarding the preparation of the 2015 order, organized pursuant to article L. 120-1 of the Environmental Code (see para. 13 above) and in which the communicant personally took part, was defective.<sup>15</sup> The communicant also claimed that article R. 427-6 of the Environmental Code was insufficiently precise in that it failed to provide the safeguards required for effective exercise of the right of public participation and failed to comply with article 7 of the Charter for the Environment.<sup>16</sup>

20. In his petition, the communicant asked the Conseil d'État to refer the matter to the Constitutional Council for a priority preliminary ruling on the issue of whether article L. 120-

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Party's final written submissions, 25 June 2018, pp. 2 and 3.

<sup>11</sup> Party's response to the communication, p. 3.

<sup>12</sup> Ibid.

<sup>13</sup> Communication, annex 1, p. 1.

<sup>14</sup> Ibid.

<sup>15</sup> Communication, p. 2, and Party's response to the communication, p. 1.

<sup>16</sup> Communication, annex 1, p. 1.

1 of the Environmental Code was consistent with the requirements of article 7 of the Charter for the Environment.<sup>17</sup>

21. On 28 August 2015, the Conseil d'État informed the parties that it might base its decision on a point of its own motion, namely that the communicant could not demonstrate an interest giving him standing to request the annulment of the 2015 order.<sup>18</sup>

22. On 7 September 2015, the communicant submitted a statement to the Conseil d'État in which he claimed to have an interest in requesting the annulment of the 2015 order for three reasons. First, article 7 of the Charter for the Environment and article 9 of the Convention mean that everyone has the right to participate in, and initiate proceedings against, decisions that affect the environment. Second, he participated in the public participation procedure during the preparation of the 2015 order. Third, he has a long-standing personal interest in wildlife and its preservation, has held responsible posts in several nature protection associations engaged in this area and has published numerous articles on the subject.<sup>19</sup>

23. On 6 October 2015, the Ministry of Ecology, Sustainable Development and Energy presented its submissions, contending that the petition was inadmissible because the communicant had failed to demonstrate a personal interest in contesting the 2015 order.<sup>20</sup>

24. By decision No. 392550 of 23 October 2015, the Conseil d'État found the communicant's petition to be inadmissible for lack of standing on the ground that the communicant had failed to demonstrate a definite, direct personal interest in the annulment of the 2015 order.<sup>21</sup>

### **C. Admissibility**

25. The Party concerned challenges the admissibility of the communication for two reasons. Firstly, the Party concerned submits that the 2015 order falls outside article 9 (2) of the Convention because it does not concern matters within the scope of article 6. Secondly, it submits that the criteria for standing in its administrative case law are objective and in full accordance with the spirit of article 9 (2).<sup>22</sup>

26. The communicant does not make any submissions concerning the admissibility of his communication, nor does he reply to the submissions of the Party concerned on this point.

### **D. Substantive issues**

#### **Applicability of articles 6, 7 and 8**

27. The communicant asserts that the 2015 order is covered by articles 6 to 8 of the Convention, though he does not further substantiate this assertion.<sup>23</sup>

28. The Party concerned states that the 2015 order is not an administrative decision permitting an activity within the scope of article 6. It submits that the order instead frames a regulatory mechanism to control animal species classified as pests found in mainland France and therefore falls under article 8 of Convention.<sup>24</sup>

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<sup>17</sup> Ibid.

<sup>18</sup> Communication, annex 1, p. 2, and annex 2, p. 1.

<sup>19</sup> Communication, annex 1, p. 2, and communicant's comments on the Party's response to the communication, 19 September 2019, p. 1.

<sup>20</sup> Communication, annex 1, p. 2.

<sup>21</sup> Communication, pp. 1 and 2.

<sup>22</sup> Party's comments on preliminary admissibility, 8 December 2015, pp. 1 and 2.

<sup>23</sup> Communication, p. 2.

<sup>24</sup> Party's comments on preliminary admissibility, 8 December 2015, p. 1, and Party's response to the communication, pp. 2 and 3.

**Article 9 (2)**

29. The communicant submits that his communication exclusively concerns compliance with article 9 (2) of the Convention with respect to his personal right to have standing to challenge the 2015 order.<sup>25</sup>

30. The communicant acknowledges that he was able to initiate a review procedure before a court of law within the meaning of article 9 (2) but alleges that, as a result of the Conseil d'État's very restrictive assessment of his legal interest to bring proceedings, the substance of his petition was not considered, and his request for a referral to the Constitutional Council for a priority preliminary ruling was dismissed without consideration.<sup>26</sup>

31. The communicant states that he does not dispute that article 9 (2) allows Parties to determine in their national law what constitutes a "sufficient interest" but he submits that this must be in compliance with the Convention. Neither does he challenge, in principle, the concept of a sufficiently definite, direct personal interest.<sup>27</sup>

32. The communicant claims, however, that the Conseil d'État has "unfettered discretion" in assessing petitioners' legal interests in bringing actions on the grounds of ultra vires, including in environmental matters, and that it does not consider itself bound by legislation, the Constitution, or even by international conventions to which France is a party, including the Aarhus Convention.<sup>28</sup> The communicant argues that this approach is incompatible with the protection of a "sufficient interest" under article 9 (2) and runs counter to the objective of giving the public concerned wide access to justice enshrined in that provision, the realization of which requires criteria that are not arbitrary and are sufficiently liberal when assessing a litigant's legal interest in bringing proceedings.<sup>29</sup>

33. The communicant also submits that there is "a flagrant contradiction" between the Convention and the Conseil d'État's decision. This results not only from the legal standard applied by the Conseil d'État, but also from the way it applies this through its policy of regulating access to the administrative courts and from the fact that it is intent on not regarding the environment as a special field with respect to the right of access to justice and the standing of petitioners.<sup>30</sup>

34. The communicant disputes the submissions by the Party concerned (see para. 38 below) that the administrative courts' approach to assessing standing is "flexible" and "in accordance with the Convention's objective of granting the public concerned wide access to justice". The communicant submits that, on the contrary, the current case law of the Conseil d'État is characterized by two features: first, the Conseil d'État does not consider itself bound by the Convention; and second, its case law over the past decade or more has been marked by a distinct movement, noted in the legal literature on French administrative law, particularly in environmental matters, towards tightening the conditions for access to the administrative courts.<sup>31</sup>

35. The communicant claims that the Conseil d'État's dismissal of his challenge of the 2015 order for lack of standing has rendered article 9 (2) ineffective with respect to access to justice in environmental matters for natural persons acting individually. He submits that in the circumstances of the present case, the dismissal had the practical effect of restricting access to justice to legal entities only, notably environmental associations.<sup>32</sup>

36. The communicant denies that he claims that article 9 (2) gives "everyone" a right to judicial remedy against any decision likely to affect the environment. He submits rather that, taking into account his personal situation, namely his commitment to nature protection and his constant activity in that field over many decades through his membership of, and active

<sup>25</sup> Communicant's comments on Party's response to the communication, 19 September 2016, p. 1.

<sup>26</sup> Communication, p. 3.

<sup>27</sup> Communicant's comments on Party's response to the communication, 19 September 2016, p. 1.

<sup>28</sup> Communication, p. 3.

<sup>29</sup> Ibid., pp. 3 and 4.

<sup>30</sup> Communicant's comments on Party's response to the communication, 19 September 2016, p. 4.

<sup>31</sup> Ibid., p. 2.

<sup>32</sup> Ibid.

participation and holding of responsible positions in, national and local environmental associations, the Conseil d'État's decision leads to non-compliance with the requirements of article 9 (2).<sup>33</sup> On this point, he cites academic commentary that takes the view that the Conseil d'État failed to take account of article 9 of the Convention in dismissing the communicant's petition.<sup>34</sup> The communicant claims that the decision of the Conseil d'État was therefore directly and manifestly contrary to the Convention, specifically to the objective of giving the public concerned within the meaning of article 2 (5), including natural persons, wide access to justice.<sup>35</sup> The communicant further submits that it logically follows from article 7 of the Charter for the Environment that the fact that he participated in the public process of making a decision likely to affect the environment gives him a legal interest in bringing court proceedings against that decision.<sup>36</sup>

37. The Party concerned submits that article 9 (2) does not apply to this case. Firstly, the Party concerned states that the 2015 order falls outside the scope of article 6, being rather within the scope of article 8. Secondly, the Party concerned states that the appeal procedure provided for in article 9 (2) of the Convention has not been extended by provisions of national law to decisions under article 8. Therefore, the Party concerned submits that it has not failed to comply with the requirements of article 9 (2).<sup>37</sup>

38. The Party concerned further submits that the criteria for standing established in its domestic case law are objective, and that the administrative courts' approach to assessing whether or not they have been met is flexible and in accordance with the Convention's objective of granting the public concerned wide access to justice, while at the same time being concerned not to encourage people to bring proceedings where the effect on their legitimate interests has not been sufficiently established.<sup>38</sup>

39. The Party concerned submits specifically with respect to natural persons challenging regulatory acts that the principles applied by the courts in determining standing achieve a balance that guarantees a right of appeal to protect individual interests, while refusing to recognize a right of appeal in the public interest (*actio popularis*). Thus, the applicant who presents himself as a consumer, a citizen, or a taxpayer in the broad sense does not have a personal, direct or certain interest and the mere defence of legality is not sufficient to establish such an interest. The Party concerned refers to a number of decisions of the Conseil d'État, which it submits support its position in this regard.<sup>39</sup>

40. The Party concerned provides case examples of judicial assessments of whether the criteria for standing were fulfilled in various contexts. It submits that the legal interest of actors other than environmental associations is widely recognized and enables such actors to have wide access to the courtroom provided that certain conditions are satisfied.<sup>40</sup>

41. With respect to the communicant's challenge of the 2015 order, the Party concerned submits that the Conseil d'État's application of the criteria for standing in the communicant's case is consistent with well-established, relevant administrative case law, and submits that, in dismissing the communicant's application, the Conseil d'État did not fail to comply with article 9 of the Convention.<sup>41</sup>

42. The Party concerned submits that the communicant is not justified in maintaining that article 9 of the Convention gives everyone a right to a judicial remedy against any decision likely to affect the environment. The Party concerned also submits that article 9 (2) and (3) do not require that every person who take parts in a public participation procedure regarding a draft decision likely to affect the environment should be given legal standing to challenge that decision, in the absence of provisions of national law to that effect.<sup>42</sup> In this regard, the

<sup>33</sup> Ibid., p. 1.

<sup>34</sup> Ibid., pp. 2 and 3.

<sup>35</sup> Communicant's comments on Party's response to the communication, 19 September 2016, p. 3.

<sup>36</sup> Communication, p. 4.

<sup>37</sup> Party's final written submissions, 25 June 2018, pp. 1 and 2.

<sup>38</sup> Party's response to the communication, p. 3.

<sup>39</sup> Party's final written submissions, 25 June 2018, p. 3.

<sup>40</sup> Ibid., pp. 2 and 3.

<sup>41</sup> Party's response to the communication, pp. 3 and 4.

<sup>42</sup> Ibid., pp. 1 and 2.

Party concerned submits that the provisions of national law regarding public participation in decision-making covered by article 8 do not provide a specific procedure for judicial remedy.<sup>43</sup> Rather, the availability of a judicial remedy in such cases is to be determined in accordance with the rules of ordinary law, including the case law of the administrative courts.<sup>44</sup>

43. The Party concerned submits that the communicant's personal situation was effectively taken into consideration by the Conseil d'État. It points out that, while the communicant's interest in wildlife conservation and the fact that he took part in the public participation procedure are related to the subject matter of the contested decision, the Conseil d'État found that they did not amount to circumstances demonstrating that the act he was seeking to have annulled placed him in a special position, and therefore the communicant's interest was not sufficiently established.<sup>45</sup>

44. Finally, the Party concerned also submits that it should be emphasized that the Conseil d'État has held that article 2 of the Charter for the Environment, which transposes into national law the stipulations of the Convention and guarantees the right and duty of "everyone to take part in the preservation and the improvement of the environment", cannot, by itself, confer on any person who invokes it a sufficient interest to challenge any administrative decision on the grounds of abuse of authority.<sup>46</sup>

#### **Requirement for legal representation before the Conseil d'État**

45. The communicant claims that "under the combined provisions of articles R. 432-1, R. 613-5 and R. 733-1 of the Code of Administrative Justice, only lawyers authorized to appear before the Conseil d'État and the Cour de Cassation may make oral submissions on the day of the sitting at which the case will be judged," and that this placed an additional restriction on the consideration of his case. The communicant states that this requirement adds to his claim that he has been subject to a wrongful impairment of his environmental civic rights, of which the Convention is one basis. He does not elaborate further on this claim.<sup>47</sup>

46. The Party concerned does not comment on the communicant's allegations on this point.

### **III. Consideration and evaluation by the Committee**

47. France deposited its instrument of approval of the Convention on 8 July 2002. The Convention entered into force for France on 6 October 2002.

#### **Admissibility**

48. The Committee observes that the 2015 order was issued on the basis of articles R. 427-6 and L. 120-1 of the Environmental Code, which is clearly part of the national law of the Party concerned relating to the environment. The communicant and the Party concerned differ as to how the 2015 order should be characterized under the Convention. The communicant would seem to claim that the order is a permitting decision under article 6 of the Convention and therefore article 9 (2) is the applicable provision of the Convention regarding access to justice (see para. 27 above). In contrast, the Party concerned submits that the 2015 order is a generally applicable legally binding normative instrument under article 8 of the Convention (see para. 28 above). Despite this difference, there is common ground that the 2015 order was the outcome of a decision-making process related to the environment. Based on the foregoing, the Committee considers that the communicant's allegations fall within the scope of the Convention.

<sup>43</sup> Ibid., p. 3.

<sup>44</sup> Party's response to the communication, p. 3.

<sup>45</sup> Ibid.

<sup>46</sup> Party's final written submissions, 25 June 2018, p. 5.

<sup>47</sup> Communication, p. 5.

49. The communicant submits he has exhausted the domestic remedies available to challenge the 2015 order (see paras. 19–24 above) and this is not disputed by the Party concerned.

50. The Committee accordingly finds the communication to be admissible.

### **Scope of consideration**

51. With respect to his claim that the requirement that only certain authorized lawyers may make oral submissions at the hearing further restricted his rights (see para. 45 above), the Committee notes that the communicant has not explained in which respect this violates the Convention and the Committee will accordingly not examine this claim further.

### **Article 9 (2)**

52. In a number of its findings, the Committee has made clear that the names of decisions in the domestic law of a Party are not decisive in determining how they should be categorized under the Convention, rather this is to be determined by the legal functions and effects of the decision.<sup>48</sup>

53. According to the Party concerned, the 2015 order is not covered by article 6, but by article 8 of the Convention.<sup>49</sup> The communicant does not categorize the 2015 order by any specific provision under articles 6–8 of the Convention. He claims that, by denying him access to a review procedure before a court of law to challenge the 2015 order, the Party concerned has failed to comply with article 9 (2).

54. Article 9 (2) of the Convention requires Parties to ensure access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 of the Convention. Without excluding that the 2015 order may, as the Party concerned asserts, fall under article 8 of the Convention, since the communicant's allegations concern article 9 (2), the Committee focuses its examination on whether it could amount to a decision subject to article 6. If the order is not subject to the provisions of article 6, then article 9 (2) does not apply to the communicant's allegations.

55. Article 6 (1) (a) requires Parties to apply the provisions of article 6 to decisions on whether to permit proposed activities listed in annex I to the Convention. The activity permitted by the 2015 order, namely "a list of native animal species to be classified as pests, the periods stipulated for their destruction, and the methods of destruction" does not correspond to any of the activities listed in paragraphs 1 to 19 of annex I to the Convention and the communicant has not claimed that it does.

56. The communicant likewise does not contend that the public participation procedure concerning the 2015 order in which he participated was part of an environmental impact assessment procedure, as envisaged in paragraph 20 of annex I of the Convention. The mere fact that the legislation of the Party concerned provides for some form of public participation in the preparation of ministerial orders does not in itself satisfy the requirements of paragraph 20 of annex I. Rather, the public participation procedure must have been carried out as part of an environmental impact assessment procedure in accordance with national legislation.

57. In the light of the above, the Committee considers that the 2015 order does not fall within the scope of article 6 (1) (a) of the Convention.

58. Article 6 (1) (b) of the Convention provides that "each Party shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions". The communicant does not claim that the order is a decision subject to article 6 (1) (b) and no evidence has been put before the Committee to indicate that the order would indeed fall

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<sup>48</sup> See, for example, ECE/MP.PP/C.1/2006/4/Add.2, para. 29, ECE/MP.PP/C.1/2007/4/Add.1, para. 65, and ECE/MP.PP/2008/5/Add.4, para. 30.

<sup>49</sup> Party's response to the communication, p. 3, and Party's final written submissions, 25 June 2018, p. 2.

within the scope of that provision. Accordingly, the Committee considers that the 2015 order is not a decision subject to article 6 (1) (b) of the Convention either.

59. Since the 2015 order is not a decision subject to the provisions of article 6, article 9 (2) of the Convention is not applicable to the present case either. The Committee accordingly finds that the Party concerned has not failed to comply with article 9 (2) of the Convention in the circumstances of this case.

### Article 9 (3)

60. Paragraph 14 of the annex to decision I/7 mandates the Committee to examine compliance issues if and as appropriate.<sup>50</sup> As it has made clear in previous findings, the Committee is neither bound to address all the allegations raised in a communication, nor to review compliance only in the light of the specific provisions of the Convention invoked by the parties.<sup>51</sup> With this in mind, though article 9 (3) was not raised by the communicant, having found that article 9 (2) is not applicable, the Committee will examine the communicant's allegations in the light of article 9 (3) of the Convention.

61. Article 9 (3) requires each Party to ensure that, "where they meet the criteria, if any, laid down in national law", members of the public are able to challenge acts and omissions which contravene provisions of national law relating to the environment.

62. In its findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom of Great Britain and Northern Ireland), the Committee observed that:

The Committee has repeatedly held that, when evaluating compliance with article 9, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in paragraph 18 of the preamble of the Convention that 'effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced'.<sup>52</sup>

63. With respect to the criteria for standing under article 9 (3), in its findings on communication ACCC/C/2005/18 (Denmark), the Committee held that:

While article 9, paragraph 3, refers to 'the criteria, if any, laid down in national law', the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action ('*actio popularis*') in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On [the other] hand, the Parties may not take the clause 'where they meet the criteria, if any, laid down in its national law' as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging act[s] or omissions that contravene national law relating to the environment.<sup>53</sup>

64. In the above findings, the Committee elaborated further:

The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a substantial individual interest..., provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to wildlife protection.<sup>54</sup>

65. In its findings on ACCC/C/2008/32 (Part II) (European Union), the Committee underlined that the term "members of the public" in the Convention includes, but is not

<sup>50</sup> ECE/MP.PP/2/Add.8.

<sup>51</sup> See, for example, ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/2008/5/Add. 6, para. 59), and ACCC/C/2007/21 (European Community) (ECE/MP.PP/C.1/2009/2/Add.1, para. 28).

<sup>52</sup> ECE/MP.PP/C.1/2016/10, para. 76. See also ECE/MP.PP/C.1/2013/4, para. 52.

<sup>53</sup> ECE/MP.PP/2008/5/Add.4, para. 29. See also ECE/MP.PP/C.1/2006/4/Add.2, para. 35.

<sup>54</sup> ECE/MP.PP/2008/5/Add.4, para. 31.

limited to, non-governmental organizations (NGOs). The Committee made clear that barring all members of the public except NGOs was not in accordance with article 9 (3).<sup>55</sup>

66. With respect to the lack of standing for a particular individual to challenge a particular act or omission under article 9 (3), in its findings on communication ACCC/C/2006/18 (Denmark), the Committee made clear that:

The lack of such an opportunity for the communicant does not in itself necessarily amount to non-compliance with article 9, paragraph 3. ... Rather, the Committee will have to consider to what extent some members of the public – individuals and/or organizations – can have access to administrative or judicial procedures [to challenge that act].<sup>56</sup>

67. It follows from paragraphs 61–65 above, that article 9 (3) does not grant a right to every member of the public to challenge every act or omission which may contravene national law relating to the environment. Rather, article 9 (3) permits Parties to lay down criteria in their national law regarding which members of the public are entitled to have access to administrative or judicial procedures to challenge a particular act or omission. However, any such criteria must be in line with the purpose reflected in the eighteenth paragraph of the preamble of the Convention that “effective judicial mechanisms should be accessible to the public including organizations, so that its legitimate interests are protected and the law is enforced”. Accordingly, Parties may not introduce or maintain so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment. Moreover, criteria for standing that bar all members of the public except NGOs would not comply with article 9 (3) either.

68. In the present case, the communicant does not challenge the criteria for standing for natural persons laid down in national law, namely that the petitioner must demonstrate a sufficiently definite, direct personal interest (see paras. 14, 15 and 31 above). Rather, he complains about the application of those criteria by the administrative courts of the Party concerned and in particular by the Conseil d’État in his petition regarding the 2015 order (see paras. 32–34 above).

69. In that regard, the communicant does not claim that environmental associations would not have had standing to challenge the 2015 order. Rather, he seems to acknowledge that they would have (see para. 35 above).

70. Nor does the communicant provide any evidence to demonstrate that other natural persons, for example those who live or work in or recreationally use the areas covered by the 2015 order, would be denied standing. His sole claim is that he personally was denied standing and that this amounts to a breach of the Convention.

71. In his pleadings to the Conseil d’État, the communicant claimed he should be granted standing to challenge the 2015 order for three reasons (see para. 22 above). First, because article 7 of the Charter for the Environment and article 9 of the Convention mean that everyone has the right to participate in, and initiate proceedings against, decisions that affect the environment. Second, since he took part in the public participation procedure during the preparation of the 2015 order. Third, because of his interest in wildlife and its preservation, reflected in his publication of numerous articles in specialized journals and his involvement through the years as a founding member or administrator of environmental protection associations. While it is not for the Committee to examine whether the communicant’s interpretation of French law is correct, the question is whether the ruling by the Conseil d’État of 23 October 2015 denying the communicant standing to challenge the 2015 order was compatible with article 9 (3) of the Convention. The Committee examines each of these points below.

<sup>55</sup> ECE/MP.PP/C.1/2017/7, para. 93.

<sup>56</sup> ECE/MP.PP/2008/5/Add.4, para. 32.

72. With respect to the communicant's first argument, the Committee repeats that article 9 (3) of the Convention does not establish an *actio popularis* that would mean that any person can challenge any decision, act or omission related to the environment.

73. Concerning the communicant's claim that he should have had standing to challenge the 2015 order due to his demonstrated environmental experience and commitment, the Committee considers that such factors in themselves do not necessarily provide for standing under the Convention.

74. Finally, regarding his claim that his involvement in the public participation procedure regarding the 2015 order should be a sufficient legal basis for standing under the Convention, the Committee points out that the right under the Convention to participate in decision-making in environmental matters is separate from the right to have access to justice in environmental matters. As the Committee clarified in its findings on communication ACCC/C/2012/76 (Bulgaria), the Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure and introducing such a general requirement for standing would not be in line with the Convention.<sup>57</sup> At the same time, participation by a member of the public in an administrative procedure does not automatically bestow upon that person a right of standing under article 9 (3) to challenge an act or omission related to that procedure, unless such a right would be in accordance with the criteria for standing laid down in the national law. While the Committee reiterates that any criteria set out in national law should be applied in the light of the eighteenth paragraph of the preamble of the Convention (see para. 62 above),<sup>58</sup> the lack of an opportunity for the communicant himself to challenge the 2015 order does not in itself necessarily amount to non-compliance with article 9 (3).<sup>59</sup>

75. In addition, as pointed out in paragraph 70 above, the communicant has not demonstrated that other natural persons, such as those who live or work in or recreationally use the areas covered by the 2015 order, would likewise be denied standing.

76. Based on the above, the Committee considers that the communicant has not demonstrated that the decision of the Conseil d'État to reject his challenge to the 2015 order on the ground of lack of standing amounted to non-compliance with article 9 (3) of the Convention. The Committee thus finds that the Party concerned has not failed to comply with article 9 (3) of the Convention in the circumstances of this case.

#### IV. Conclusions

77. In the light of the above considerations, the Committee finds that the Party concerned has not failed to comply with article 9 (2) or (3) of the Convention in the circumstances of this case.

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<sup>57</sup> ECE/MP.PP/C.1/2016/3, para. 68, and ECE/MP.PP/2017/33, paras. 57–60.

<sup>58</sup> See ECE/MP.PP/C.1/2016/10, para. 76.

<sup>59</sup> ECE/MP.PP/2008/5/Add.4, para. 32.