Cause list numbers 5912, 5959, 5960, 5962, 5965, 5968, 6017, 6018 and 6020
Judgment no. 103/2015 of 16 July 2015

J U D G M E N T

In the case of: the actions for partial annulment of the Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State, instituted by H.B. and others, by the non-profit association "Groupe d'Etude et de Réforme de la Fonction administrative" (GERFA) and Catherine Van Nypelseer, by the non-profit association "Aktiekomitee Red de Voorkempen" and others, by Pierre Goblet and others, by the "Ordre des barreaux francophones et germanophone", by the non-profit association "Inter-Environnement Wallonie" and others, by the Flemish Bar Association and Edgar Boydens, and by Wim Raeymaekers.

The Constitutional Court,

Composed of Presidents A. Alen and J. Spreutels, and judges E. De Groot, L. Lavrysen, J.-P. Snappe, J.-P. Moerman, E. Derycke, T. Merckx-Van Goey, P. Nihoul, F. Daoût, T. Giet and R. Leysen, assisted by Registrar P.-Y. Dutilleux, under the chairmanship of President A. Alen,

Delivers the following judgment after deliberation:

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I. *Purpose of the actions and judicial procedure*

a. By an application addressed to the Court by registered letter sent on 28 May 2014 and received by the court registry on 30 May 2014, an action was instituted for the annulment of Article 13 of the Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State (insertion of a Chapter V in Title V and reintroduction of Article 38 of the coordinated laws of 12 January 1973 on the Council of State concerning the administrative loop), published in the *Belgisch Staatsblad* of 3 February 2014, *erratum* in the *Belgisch Staatsblad* of 13 February 2014, by H.B., A.M., M.A., P.D., F.B., the non-profit association "Ademloos", the non-profit association "Straatego", and the non-profit association "Aktiekomitee Red de Voorkempen", assisted and represented by Me P. Vande Casteele, lawyer at the Bar of Antwerp.

b. By an application addressed to the Court by registered letter sent on 12 July 2014 and received by the court registry on 14 July 2014, an action was instituted for the annulment of Articles 6, 8 and 11 of the Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State (published in the *Belgisch Staatsblad* of 3 February 2014, *erratum* in the *Belgisch Staatsblad* of 13 February 2014), by H.B., A.M., M.A., G.B., P.V., the non-profit association "Ademloos", the non-profit association "Straatego", and the non-profit association "Aktiekomitee Red de Voorkempen", assisted and represented by Me P. Vande Casteele.

c. By an application addressed to the Court by registered letter sent on 17 July 2014 and received by the court registry on 18 July 2014, an action was instituted for the annulment of Articles 11 and 13 of the same Act by the non-profit association "Groupe d'Etude et de Réforme de la Fonction administrative" (GERFA) and Catherine Van Nypelseer.

d. By an application addressed to the Court by registered letter sent on 18 July 2014 and received by the court registry on 22 July 2014, an action was instituted for the annulment of Articles 6, 8, 10(2), 11 and 13 of the same Act by the non-profit association "Aktiekomitee Red de Voorkempen", the non-profit association "Ademloos", the non-profit association "Straatego", H.B., L.P., M.A., D.M., L.M. and P.M, assisted and represented by Me P. Vande Casteele.

e. By an application addressed to the Court by registered letter sent on 25 July 2014 and received by the court registry on 28 July 2014, an action was instituted for the annulment of Articles 7(3) and (5), 10(2) and (7), 11 and 13 of the same Act by Pierre Goblet, Yvette Van den Eynde, Philippe Delaunoy, Jean Rossitto and Raoul Godar.

f. By an application addressed to the Court by registered letter sent on 28 July 2014 and received by the court registry on 29 July 2014, an action was instituted for the annulment of Article 13 of the same Act by the "Ordre des barreaux francophones et germanophone", assisted and represented by Me J.-F. Cartuyvels, lawyer at the Bar of Marche-en-Famenne.

g. By an application addressed to the Court by registered letter sent on 1 August 2014 and received by the court registry on 4 August 2014, an action was instituted for the annulment of Articles 2(3), 3, 6, 11 and 13 of the same Act by the non-profit association "Inter-Environnement Wallonie", the non-profit association "Inter-Environnement Bruxelles", the non-profit association "Bond Beter Leefmilieu Vlaanderen", the non-profit association "Greenpeace Belgium", the non-profit association "Bruxelles Nature", the non-profit

association “Ligue des Droits de l’Homme”, and the non-profit association “Liga voor Mensenrechten”, assisted and represented by Me J. Sambon, lawyer at the Bar of Brussels.

h. By an application addressed to the Court by registered letter sent on 1 August 2014 and receved by the court registry on 4 August 2014, an action was instituted for the annulment of Article 13 of the same Act by the Flemish Bar Association and Edgar Boydens, assisted and represented by Me S. Verbist, lawyer at the Bar of Antwerp.

i. By an application addressed to the Court by registered letter sent on 4 August 2014 and received by the court registry on 5 August 2014, an action was instituted for the annulment of Article 11 of the same Act by Wim Raeymaekers.

Those cases, registered under numbers 5912, 5959, 5960, 5962, 5965, 5968, 6017, 6018 and 6020 on the cause list of the Court, were joined together.

[…]

Regarding the contested Act

B.1. The Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State aims to improve the way the Council of State works (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 2). The applicants demand the annulment of Articles 2(3), 3, 6, 7(3) and (5), 10(2) and (7), 11 and 13 of this Act.

The main purpose of the contested provisions is to provide the Council of State with certain instruments or to streamline existing instruments in order to make the settlement of administrative disputes more effective. They relate to several aspects of the reform: the administrative loop, the suspension of the time limit for lodging an appeal, the action for suspension, the mandate *ad litem*, the loss of interest, the interest in the ground, the maintenance of the effects, the extension of the time limit, the cause-list fee and the procedural indemnity.

Regarding the admissibility

B.2.1. The Council of Ministers disputes the admissibility of the actions for annulment and the applications to intervene. The objections put forward concern the interest and the legal standing.

B.2.2. The Constitution and the Special Act of 6 January 1989 on the Constitutional Court require that each natural person or legal entity instituting an action for annulment must demonstrate an interest. Only persons whose situation might be directly and adversely affected by the contested act can demonstrate an interest.

Under the same Special Act, any person demonstrating an interest may address his remarks to the Court in a statement in connection with any action for annulment which the Court is called upon to adjudicate. A person demonstrates such an interest by proving that his situation may be directly affected by the judgment that the Court will deliver on that action.

B.2.3. Most of the applicants have already previously instituted actions for annulment before the Council of State and are making a reasonable case for doing so again in the future. Consequently, they are demonstrating the legally required interest.

B.2.4. Despite what the Council of Ministers contends, the "Ordre des barreaux francophones et germanophone", applicant in case no. 5968, and the Flemish Bar Association, applicant in case no. 6018, demonstrate the legally required interest. Article 495 of the Judicial Code permits those Bar Associations to take initiatives that promote the interests of lawyers and litigants. On the strength of that Article, they can challenge the provision which provides for the possibility of using the administrative loop before the Administrative Litigation Section of the Council of State.

B.2.5. Now that in each of the joined cases at least one of the applicants demonstrates an interest in the annulment of the contested articles and their action can be allowed, the Court does not need to investigate whether the other applicants have a case.

B.2.6. Since the intervening parties add no material arguments to the contentions brought forward by the applicants and supported by the intervening parties, there is no reason to investigate whether their intervention is admissible.

B.3.1. The Council of Ministers disputes the admissibility of most of the grounds for supposedly being insufficiently expounded. It also repeatedly contends that a ground cannot be allowed because the Court has no authority of direct review against treaty provisions, certain articles of the Constitution and general principles.

B.3.2. The Court is authorized to review regulations with force of law against the rules that divide the powers between the federal State, the communities and the regions, as well as against the articles of Title II (“The Belgians and their rights”) and Articles 143(1), 170, 172 and 191 of the Constitution.

All grounds allege the infringement of one or more of those rules, the observance of which is guaranteed by the Court. Insofar as the applicants also make reference to treaty provisions, other articles of the Constitution and general principles, the Court will only take them into consideration insofar as an infringement of those rules is adduced, read in conjunction with the provisions and principles in question. To that extent, the grounds are admissible.

B.3.3. In order to satisfy the requirements of Article 6 of the Special Act of 6 January 1989 on the Constitutional Court, the grounds must not only indicate which of the rules, the observance of which is guaranteed by the Court, have been infringed, but must also specify which provisions infringe those rules, and explain in what respect those rules have supposedly been infringed by the provisions in question.

The Court investigates the grounds insofar as they satisfy the aforementioned requirements.

B.3.4. Finally, insofar as the Council of Ministers disputes the interest of the applicants in certain grounds, it suffices to recall that when the applicants have an interest in the annulment of the contested provisions, they additionally do not need to demonstrate an interest in each of the grounds.

B.4. The objections are dismissed.

Regarding the administrative loop (Article 13 of the contested Act)

B.5. The applicants in cases nos. 5912, 5960, 5965, 5968, 6017 and 6018 request the annulment of Article 13 of the contested Act. They argue that said provision infringes Articles 10, 11, 13, 23 and 32 of the Constitution, whether or not read in conjunction with other constitutional provisions, general legal principles and provisions of international law.

Since the contentions against the contested provision are closely connected, the grounds should be investigated together.

B.6. The Administrative Litigation Section of the Council of State adjudicates by means of judgments on actions for annulment for infringement of substantive forms or forms prescribed on pain of nullity, excess or misuse of power, instituted against acts and regulations (Article 14(1)(1) of the coordinated laws on the Council of State).

As a rule, the Administrative Litigation Section annuls a contested administrative act if it is unlawful. This is not the case, however, if the irregularity could not affect the scope of the decision taken, if it did not deprive the parties involved of a guarantee, or if it does not have the effect of influencing the authority of the performer of the act (Article 14(1)(2) of the coordinated laws on the Council of State).

B.7. The contested Article 13 inserts in Title V of the coordinated laws on the Council of State a Chapter V, entitled "The Administrative Loop", which contains the following amended Article 38:

"(1) In the case of an action for annulment referred to in Article 14(1), the Administrative Litigation Section may order the respondent by interlocutory judgment to remedy, or arrange to have remedied, a defect in the contested act or the contested regulation.

This administrative loop can only be used after the parties have had the opportunity to make their comments known concerning its proposed use.

The interlocutory judgment determines the manner and time period in which remedying must take place. This time period may be extended at the request of the respondent. Where the remedy involves passing a new act or regulation, the subject of the action will be extended to that act or regulation.

The remedy may only apply to the defects specified in the interlocutory judgment. Remedying those defects must not affect the substance of the act or regulation.

(2) The administrative loop cannot be used in the following cases:

1° The defect cannot be remedied within a period of three months, unless it can be shown that the defect can be remedied within a reasonable time;

2° The respondent lacks the necessary power of decision to remedy the defect;

3° The respondent expressly refuses the application of the procedure;

4° Remedying the defect will not result in the final settlement of the pending lawsuit

(3) If the application of the administrative loop is only proposed in the interlocutory judgment, the parties have fifteen days from the notification of this judgment to make known their position on the application of the administrative loop.

The Administrative Litigation Section then decides on the application of the administrative loop in accordance with paragraph 1.

(4) As soon as the respondent has implemented the interlocutory judgment referred to in paragraph 1, it shall immediately notify the Council of State thereof in writing, as well as of the manner in which the defect has been remedied. If the Council of State receives no such notification within fifteen days after the expiration of the remedying time set in the interlocutory judgment, the contested act or regulation will be annulled.

The other parties have fifteen days to make their comments known after being notified by the Administrative Litigation Section of the manner in which the defect has been remedied.

If the Administrative Litigation Section finds that the defect has not been fully remedied or that the remedy is impaired by new defects, the amended act or regulation or, where appropriate, the new act or regulation will be annulled.

If the defect has been fully remedied, the consequences of the administrative loop will apply with retroactive effect and the appeal will be dismissed.”

B.8. The aforementioned provision provides for the possibility of using the so-called administrative loop, by which is meant "ordering the respondent by interlocutory judgment to remedy, or arrange to have remedied, a defect in the contested act or contested regulation".

The introduction of that possibility was justified as follows in the parliamentary proceedings:

"The Council of State is now authorized to propose to the respondent, in the context of a lawsuit of which it is seized, to make use of the possibility to remedy a reported irregularity during the course of the proceedings in order to avoid annulment. The fact that the purpose of this authorization is to amend a decision shows that the use of the administrative loop cannot have the effect of altering the substance of the amended decision. This is in line with the position which the Flemish Community adopted in its decree of 6 July 2012 amending various provisions of the Flemish Town and Country Planning Code with respect to the Council for Permit Disputes" (*Parl. St*., Senate, 2012-2013, no. 5-2277/1, p. 28).

If the application of the administrative loop leads to the full remedying of the reported irregularity, that remedy will apply with retroactive effect and the Council of State will dismiss the appeal.

B.9. The administrative loop, as regulated by the contested provision, can only be applied if certain conditions are fulfilled.

B.10.1. Firstly, the irregularity in the contested administrative act must be remediable. This is not the case, for instance, if the administrative authority involved in the procedure is not empowered to remedy the defect.

In addition, the irregularity must be remedied within a reasonable time period, in principle three months. This condition is set in order to "prevent proceedings before the Council of State being excessively prolonged by the use of the administrative loop" (*Parl. St*., Senate, 2012-2013, no. 5-2277/1, p. 28).

B.10.2. Secondly, the administrative authority must give its consent. The express willingness of the relevant authority to help remedy the irregularity is an essential requirement for the success of the administrative loop. The procedure cannot be meaningfully

applied if "the respondent is unwilling to lend its cooperation" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 28).

B.10.3. Thirdly, remedying the irregularity should lead to the final settlement of the pending lawsuit. That condition is not fulfilled "if during the proceedings before the Council of State other defects were found that do not qualify for application of the administrative loop" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 28). In the latter case, it first needs to be investigated whether "any other grounds are well-founded", which requires that "all grounds must be investigated" (*ibid*., p. 29).

B.10.4. Finally, the result of remedying the irregularity must be not only that the contested administrative act is no longer unlawful, but also that the administrative act remains unchanged in substance. Article 38 of the coordinated laws on the Council of State, as reintroduced by the contested Article 13, expressly provides that remedying the defects must have no impact on the substance of the act or regulation.

The parliamentary proceedings offer the following clarification:

"The observance of those conditions, particularly the first condition, coupled with the circumstance that relying on the administrative loop must not have the effect of altering the scope of the amended decision, means that irregularities that need to be remedied can only occur at the end of the administrative procedure. Those irregularities are therefore of little significance. Examples of the impact study or hearing cited do not appear to be relevant, even if the former led to the annulment of the planning permission in the well-known 'Wijnegem tramline' case, which actually originated the introduction of the administrative loop in the procedure before the Council of State. In both cases, formalities are involved that may alter the contested decision, if the public authorities agree to take those formalities into consideration. It is also impossible to redo the impact study in such a short time. As regards the reasons for the decision, the loop cannot give rise to new ones. However, one can imagine the case of a statement of reasons by reference where the part containing the statement of reasons appears in the administrative file but has not been brought to the notice of the applicant, prior to or at the same time as the act proper. The absence of the formal statement of reasons for the act may also be remedied by using the loop mechanism if it is simply a matter of formulating in the act the reasons that are contained in the administrative file. Other examples include the problem of missing or illegible signatures on an instrument" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 29).

B.11.1. The applicants argue that the contested provision infringes in a discriminatory manner the principle of judicial independence and impartiality.

B.11.2. The principles of judicial independence and separation of powers are fundamental to the rule of law.

B.11.3. The judicial review carried out by the Council of State involves external and internal legality review, which does not go so far that it can substitute its assessment for the discretionary power of assessment of the administrative authority. In its review, the court must not be led by the discretionary principle, since that would be incompatible with the principles governing relations between the administrative authority and the courts of law.

Establishing the substance of a discretionary decision, more particularly as a result of remedying an irregularity, is a matter for the administrative authority rather than for the courts. The administrative authority concerned may decide, for instance when it believes that remedying the irregularity may have an impact on the substance of the contested decision, not to avail itself of the possibility of using the administrative loop.

B.11.4. By allowing the Council of State, when it suggests making use of the administrative loop, to make known its position on the outcome of the lawsuit, which should nevertheless lead to the same decision, the contested provision infringes in a discriminatory manner the principle of judicial independence and impartiality.

B.12.1. The applicants argue that the contested provision infringes in a discriminatory manner the rights of defence, the adversarial principle, and the right of access to justice.

B.12.2. Under the contested provision, the Council of State may order the administrative authority "by interlocutory judgment" to apply the administrative loop.

B.12.3. Where a court of law adduces a fact that serves to influence the settlement of a dispute, such as in this case the order to apply the administrative loop, the adversarial principle means that the parties should be able to debate on it (see, *mutatis mutandis*, ECHR, 16 February 2006, *Prikyan and Angelova* v. Bulgaria, §42; 5 September 2013, *Čepek* v. Czech Republic, §45). Unlike Article 4.8.4 of the Flemish Town and Country Planning Code, as annulled by judgment no. 74/2014, the contested provision guarantees the adversarial principle.

B.12.4. Nevertheless, the application of the administrative loop may, however, have consequences for interested parties who did not appeal against the decision and did not intervene in the proceedings. Unlike Article 4.8.4 of the Flemish Town and Country Planning Code, as annulled by judgment no. 74/2014, the contested provision does not contain the condition that the interested parties, whether or not litigants in the action in question, must not be disproportionately prejudiced by the application of the administrative loop.

The right of access to justice is a general legal principle that must be guaranteed for every person in accordance with Articles 10 and 11 of the Constitution. A decision that is taken with application of the administrative loop must not be excluded from the right of access to justice. The restriction of that right for a certain category of interested parties is not commensurate with the objective pursued by the decree-giver, which is essentially to streamline and speed up the settlement of administrative disputes.

B.12.5. By not providing for the possibility of appealing against a decision that was taken with application of the administrative loop after its notification or publication, the contested provision impairs in a discriminatory manner the right of access to justice.

B.13.1. The applicants argue that the formal obligation to state reasons, as enshrined in the Act of 29 July 1991 on the formal reasoning of administrative acts, has been infringed in a discriminatory manner.

B.13.2. Articles 1 to 3 of the Act of 29 July 1991 provide:

“Article 1. For the purposes of this Act, the following definitions apply:

- Administrative act:

Unilateral legal act of individual scope emanating from an administrative authority and intended to have legal consequences for one or more subjects or for another administrative authority;

- Administrative authority:

The administrative authorities as referred to in Article 14 of the coordinated laws on the Council of State;

- Subject:

Any natural person or legal entity in its relations with the administrative authority

Art. 2. The administrative acts of the administrative authorities referred to in Article 1 must be formally reasoned.

Art. 3. The required statement of reasons must specify in the instrument the legal and factual considerations underlying the decision.

It must be conclusive."

B.13.3. Those provisions generalize the obligation to formally state the reasons for administrative acts of individual scope. The formal reasoning of the acts in question is a right of the subject, who is thus given additional guarantees against arbitrary administrative acts of individual scope.

B.13.4. By allowing the relevant administrative authority to rectify an individual administrative act that is not formally reasoned by supplying the requisite statement of reasons after the application of the administrative loop, the contested provision impairs the right of the addressee of the act, as well as any other interested party, enshrined in the Act of 29 July 1991, to take immediate cognizance of the reasons justifying the decision if they are cited in the act proper. The right to formal reasoning makes it possible to strengthen the judicial control of administrative acts of individual scope and the observance of the principle of equality of arms in the context of administrative litigation.

The formal obligation to state reasons, which is meant to enable the subject to assess whether there are grounds for lodging the appeals at its disposal, would be pointless if the subject only learns the reasons on which the decision is based after having lodged an appeal.

Furthermore, Article 6(9) of the Aarhus Convention, signed on 25 June 1998, on access to information, public participation in decision-making and access to justice in environmental matters requires that the text of the administrative decision, insofar as it falls within the scope of the Treaty, is made accessible to the public, "along with the reasons and considerations on which the decision is based".

B.14. It follows from the above that the contested provision should be annulled.

Since the other contentions contained in the grounds cannot lead to a broader annulment, they do not need to be investigated.

B.15. Since the legislature's efforts to arrive at an effective and definitive dispute settlement should be applauded, the question came up whether the effects of the annulled Article 13 should be maintained for a certain length of time so as not to impair the principle of legal certainty and to allow the legislature to adopt a new regulation that does not give rise to the aforementioned constitutional objections.

Now that there is no urgent need for the Council of State to keep applying the administrative loop pending action by the legislature, the effects of the annulled provision do not need to be maintained.

Regarding the suspension of the time limit for lodging an appeal (Article 7(3) of the contested Act)

B.16. The applicants in case no. 5965 request the annulment of Article 7(3) of the contested Act. They argue that the provision in question infringes Article 23 of the Constitution, whether or not read in conjunction with the Aarhus Convention, European directives and the proportionality principle.

B.17. The purpose of Article 7(3) of the contested Act is to align the procedure before an ombudsman with the procedure before the Council of State. It inserts the following paragraph between the second and third paragraph of Article 19 of the coordinated laws on the Council of State:

"When a complaint is lodged against an act or regulation that is appealable within the meaning of Article 14(1) with a person vested by law, decree or ordinance with the office of ombudsman, within one of the limitation periods referred to in the second paragraph, this period shall be suspended for the benefit of the party lodging the complaint. The remaining part of that period starts to run either from the moment when the complainant is notified of the decision not to hear his complaint or to dismiss it, or upon the expiration of a four-month period starting from the submission of the complaint, if the decision is not taken sooner. In the latter case, the complainant proves this with a certificate issued by the ombudsman in question."

B.18. The parliamentary proceedings show that the measure is intended to "strike a balance between the willingness to give the mediation every chance of success and an excessive prolongation of the time limit for lodging an appeal. The plaintiff will always be entitled to a sixty-day period in which to lodge his appeal with the Council of State, irrespective of whether or not he has decided to take recourse to mediation" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, pp. 17-18).

B.19. Article 9 of the Aarhus Convention stipulates:

"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or,

alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment stipulates:

“1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”

B.20. The ground fails to conclusively indicate in what respect the contested provision infringes the adduced review standards. On the contrary, by more effectively aligning the existing procedures, the provision actually appears to promote compliance with the obligations arising from the international law provisions adduced and cited in B.19, read in conjunction with Article 23 of the Constitution.

B.21. The ground is unfounded.

Regarding the action for suspension (Article 6 of the contested Act)

B.22. The applicants in cases nos. 5959 and 6017 request the annulment of Article 6 of the contested Act. They argue that this provision infringes Articles 10, 11 and 23 of the

Constitution, whether or not read in conjunction with other Constitutional provisions, general legal principles and provisions of international law.

B.23. The Administrative Litigation Section of the Council of State not only has the power to annul an administrative act. It may also order the suspension of its enforcement. Article 6 of the contested Act replaces Article 17 of the coordinated laws on the Council of State as follows:

"1. The Administrative Litigation Section has the sole authority, after having heard or duly summoned the parties, to suspend by judgment the enforcement of an act or regulation that is liable for annulment by virtue of Article 14(1) and (3), and to order all measures that are necessary to safeguard the interests of the parties or persons with an interest in the settlement of the case.

Such suspension or interim injunctive relief may be ordered at any time if:

1° the case is too urgent for a hearing in an action for annulment; and

2° at least one valid ground is adduced to justify *prima facie* the annulment of the act or regulation

Notwithstanding the first and second paragraph, the suspension or interim injunctive relief cannot be demanded once the report referred to in Article 24 has been submitted. In that case, however, any party with an interest may lodge a well-reasoned request to the president of the chamber that was seized of the application to set an urgent hearing. An action for suspension or for interim injunctive relief filed between the submission of the report and the notification thereof is equated with a well-reasoned request. The president adjudicates on that request by court order. If the urgency appears to be justified, he will set the hearing as soon as possible, at the latest within two months after receipt of the request, and may change the time limits for the submission of the final statements accordingly.

2. The action for suspension or interim injunctive relief contains a statement of the facts which, according to the applicant, justify the urgency that is invoked in support of this application.

At the request of the respondent or the intervening party, the Administrative Litigation Section takes into consideration the probable consequences of the suspension of enforcement or the interim injunctive relief for all interests that may be prejudiced, as well as with the public interest, and may decide not to order the suspension or interim injunctive relief if the negative consequences thereof outweigh the benefits to a manifestly disproportionate extent.

If the Administrative Litigation Section dismisses an action for suspension or interim injunctive relief for lack of urgency, a new action may only be brought if it is based on new facts that justify the urgency of the action. Furthermore, the Administrative Litigation Section may also set a time limit within which no new action for suspension or interim injunctive relief can be brought if the only new fact being invoked is the lapse of time.

3. No opposition or third-party proceedings can be instituted against judgments on actions for suspension or interim injunctive relief, nor are they open to review.

Judgments ordering suspension or interim injunctive relief may be withdrawn or changed at the request of the parties.

4. In case of an emergency that is irreconcilable with the time needed to deal with the action for suspension or interim injunctive relief referred to in paragraph 1, suspension or interim injunctive relief may be ordered, even before an action for annulment has been brought, according to a procedure that differs from that for the suspension and interim injunctive relief referred to in paragraph 1.

In that case, such suspension or interim injunctive relief may even be ordered without all parties having been summoned. In the latter case, the judgment ordering the provisional suspension or interim injunctive relief summons the parties to appear before the chamber as soon as possible, which will decide on the confirmation of the suspension or interim injunctive relief.

The suspension and interim injunctive relief ordered before the application for annulment of the act or regulation will be terminated immediately if it turns out that, within the time limit set in the procedural rules, no application for annulment had been filed in which grounds are adduced that justified it.

5. The president of the chamber or the member of the Council of State appointed by him adjudicates within forty-five days on the action for suspension or interim injunctive relief. If suspension or interim injunctive relief was ordered, the application for annulment is adjudicated within six months after delivery of the judgment.

6. The Administrative Litigation Section may annul the act or regulation according to an accelerated procedure determined by the King, if the respondent or the party with an interest in the settlement of the case has failed to submit an application for continuation of proceedings within thirty days from the notification of the judgment ordering the suspension or interim injunctive relief or confirming the provisional suspension or interim injunctive relief.

7. With regard to the applicant, a presumption of waiver of proceedings exists if the applicant, after an action for suspension of an act or regulation or an action for interim injunctive relief has been dismissed, fails to submit an application for continuation of proceedings within thirty days from the notification of the judgment.

8. The judgment ordering the suspension, provisional suspension of enforcement of an act or regulation, or provisional measures may, at the request of the applicant, impose a periodic penalty on the public authority in question. In that case, Article 36(2) to (5) applies.

9. If the suspension of enforcement or interim injunctive relief is ordered for misuse of power, the case is referred to the general assembly of the Administrative Litigation Section.

If the general assembly does not annul the act or regulation against which the action for annulment has been brought, the suspension or interim injunctive relief ceases to have effect

forthwith. In that case, the case is referred to the chamber that was originally seized for a hearing of any other grounds.

10. If the chamber authorized to adjudicate on the merits of the case does not annul the act or regulation against which the action for annulment has been brought, it shall lift the suspension and interim injunctive relief that was ordered."

B.24. With this provision, the legislature sought to improve the interim injunction proceedings (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 4). To that end, it primarily (1) provided for the possibility of instituting an action for suspension and interim injunctive relief once the action for annulment has been filed, (2) replaced the concept of "risk of serious detriment that is difficult to remedy" by the concept of "urgency", and (3) expressly requested the Council of State in certain circumstances to weigh up the interests at stake before suspending the enforcement of an administrative act or ordering interim injunctive relief.

Those measures are explained as follows in the parliamentary proceedings:

"The Council of State receives numerous applications that are filed as a 'single application', in other words, an application requesting both the annulment of an administrative act and the suspension of its enforcement (for the relevant figures, see the annual report of the Council of State). This manner of filing actions for suspension proves counterproductive. It encourages actions for suspension to be filed as a matter of course, resulting in a proliferation of reports and court sessions. It is possible, however, that there is no special circumstance that requires the Council of State to adjudicate as a matter of urgency on the case of which it is seized. The present preliminary draft law abandons this system in favour of an action for suspension that can be brought subsequent to the action for annulment if that action is still pending and if the urgency of the matter justifies it. The action for suspension is accessory to the action for annulment.

At this moment, the suspension of enforcement of the effects of an administrative act also requires proof of the existence of valid grounds and a risk of serious detriment to the applicant that is difficult to remedy. Valid grounds are those that are *prima facie* capable of leading to the annulment. The present reform does not alter this condition. The risk of serious detriment that is difficult to remedy covers several aspects that must be proven. It gives rise to abundant and at times disparate case law, which makes this concept difficult to objectify. It requires a meticulous investigation at the expense of the investigation into the validity of the grounds. The draft law abandons the second condition in favour of the clearer and evolutionary condition of urgency. This concept takes account of the usual timeframe that should be pursued for hearing an action for annulment.

The right to weigh up the interests at stake, which currently only exists with respect to disputes relating to public contracts, is expressly extended to all administrative acts. This weighing of interests, however, is only done if the negative effects of the suspension outweigh the benefits to a manifestly unreasonable extent" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, pp. 4-5).

B.25. The contentions being adduced do not concern the first two measures. The contentions of the applicants in case no. 6017 are only directed against the third measure (case no. 6017), more particularly the right to weigh up the interests at stake as enshrined in Article 17(2)(2) of the coordinated laws on the Council of State.

In that connection, the parliamentary proceedings explain:

"Finally, if the respondent or the intervening party so requests, the cancellation of the condition of serious detriment that is difficult to remedy is mitigated by the obligation for the Council of State to weigh up the interests at stake. Since the beginning of 2010, the Council of State has shown great caution in the matter of public contracts, where the weighing up of interests was introduced for emergency proceedings. This caution will have to be even greater now, since the weighing up of interests is generalized to the entire ordinary suspension proceedings. The Council of State can only apply this if the negative effects of the suspension appear to the Council of State to be manifestly unreasonable in light of the benefits" (*Parl. St*., Senate, 2012-2013, no. 5-2277/1, pp. 15-16).

The applicants argue that the right to weigh up the interests at stake (1) substantially impairs the protection of the environment, (2) discriminates against the litigants, and (3) restricts in a discriminatory manner the right of access to justice.

B.26.1. Article 23 of the Constitution provides:

"Everyone has the right to lead a life in keeping with human dignity.

To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.

These rights include among others:

[…]

4° the right to the protection of a healthy environment;

[…]".

B.26.2. With regard to the protection of the environment, Article 23 of the Constitution implies a *standstill* obligation, which prevents the competent legislature from substantially

impairing the level of protection afforded by the applicable law, for no reason connected with the general interest.

B.26.3. The case law dating from before the contested provision came into effect shows that the Council of State has on several occasions already effected a weighing up of interests before adjudicating on an action for suspension, not only in the matter of public contracts by virtue of a specific legal provision, but in other matters as well by virtue of Article 17 of the coordinated laws on the Council of State. It is an inherent feature of interim injunction proceedings that the court must weigh the disadvantages of the immediate enforcement of the contested provisions for the applicants against the disadvantages for the general interest that a suspension might entail. In a judgment of 27 March 1997, the Council of State held with regard to the environment and town and country planning:

"11.1. Whereas the intervening party requests the Council of State to weigh up the interests at stake, as the court in interim injunction proceedings had done in its ruling of 29 November 1996;

11.2. Whereas the Council of State does not see how the economic interests of the intervening party should prevail over the peaceful living environment which the applicant may claim for, say, two weekends per month by virtue of Article 5.32.10.2(4) of VLAREM II; whereas this is all the more compelling since, for existing installations, the aforementioned article already provides by transitional arrangement for a relaxation of the prohibition and distance rules established by Article 5.32.10.2(1)" (Council of State, 27 March 1997, no. 65.694).

In other judgments, the Council of State dismissed the weighing of interests in actions for suspension. A judgment of 1 February 2013 reads "in the absence of any legal provision that provides for it, the Council of State, having found that a well-founded ground is adduced in an admissible action for annulment, cannot refrain from the annulment of the contested decision on the basis of a weighing of interests" (Council of State, 1 February 2013, no. 222.344), and consequently dismisses such a weighing of interests in an action for suspension.

B.26.4. The contested provision confirms the right which the Council of State has to weigh up the interests at stake in an action for suspension or interim injunctive relief. Nevertheless, the legislature has imposed strict conditions on that right.

Firstly, only at the request of the respondent or the intervening party can the Council of State take into account the probable effects of the suspension of enforcement or of the interim injunctive relief for all the interests that may be infringed, as well as the public interest.

Furthermore, the Council of State can only decide not to order the suspension or interim injunctive relief if the adverse consequences outweigh the benefits to a manifestly unreasonable extent.

Finally, the Council of State may only weigh up the interests at stake with a view to a provisional settlement of the dispute in the context of an action for suspension or interim injunctive relief, but not in the assessment of the merits in the context of an action for annulment.

B.26.5. The aforementioned conditions which the legislature has imposed on the right to weigh up the interests at stake compel the observation that the contested provision has not significantly diminished the existing protection of the environment.

B.27. It is part of the court's job in interim injunction proceedings to ensure that the interests at stake are weighed in a carefully considered and well-reasoned manner, and that it is not decided unfairly not to order the suspension or interim injunctive relief if for the rest the demand meets the relevant conditions. Since the weighing of interests is an inherent part of a court judgment, the contested provision does not impair in a discriminatory manner the right of access to justice.

B.28. Since the Council of State has the power to suspend and annul an administrative act, the contested provision does not infringe in a discriminatory manner Article 9(4) of the Aarhus Convention, and Article 6(4) of Directive 2011/92/EU.

B.29.1. The contentions of the applicants in case no. 5959 are directed against the confirmation in Article 17(3)(1) that judgments in an action for suspension are not open to review. This exclusion from review was already provided for by the former Article 17(2)(2). It now also applies to judgments in an action for interim injunctive relief.

The contested provision is thought to give rise to discrimination vis-à-vis the action for annulment and civil interim injunction proceedings, and to impair in a discriminatory manner the right of access to justice, enshrined in the adduced provisions of the Convention, in the event of unfair procedural conduct.

B.29.2. The difference in treatment between certain categories of persons resulting from the application of different procedural rules in different circumstances does not constitute discrimination as such. There would only be discrimination if the differential treatment resulting from the application of those procedural rules were to entail a disproportionate restriction of the rights of the persons involved.

[…]

B.30. The grounds are unfounded.

[…]

Regarding the loss of interest (Article 8 of the contested Act)

B.37. The applicants in case no. 5959 request the annulment of Article 8 of the contested Act. They argue that this provision infringes Articles 10, 11 and 13 of the Constitution, whether or not read in conjunction with Article 6 of the European Convention on Human Rights, the right of access to justice, and Article 9 of the Aarhus Convention.

B.38. The contested provision replaces Article 21 of the coordinated laws on the Council of State. The second paragraph of that article regulates, as in the past, the further progress of the proceedings in the event that the applicant fails to submit certain statements in time. It reads as follows:

"If the applicant fails to observe the time limits for the submission of its statement of rejoinder or explanatory statement, the Section shall adjudicate forthwith, after having heard the parties so requesting, and having established the absence of the requisite interest."

B.39. Before the contested provision entered into force, Article 21(2) of the coordinated laws on the Council of State already contained the same arrangement. All that has changed is that "additional statement" has been replaced by "explanatory statement".

It is precisely that modification which the applicants criticize. They argue that an applicant who is not required to answer a statement of reply – because the respondent did not submit such a statement – is still obliged to submit an explanatory statement, on pain of losing the requisite interest in the lawsuit. It would not be reasonably justifiable to treat an applicant who has not submitted an explanatory statement in the same way as an applicant who fails to submit a statement of rejoinder after notification of the respondent's statement of reply. Moreover, the measure would be evidence of excessive formalism, while the loss of interest in the lawsuit would constitute an unfair limitation of the right of access to justice.

B.40.1. The right of access to justice is not absolute. The conditions which the legislature imposes on the exercise of that right must not, however, have the effect of restricting it to such an extent as to impair its essence. That would be the case if the restrictions serve no lawful purpose, or if there is no reasonable proportionality between the means employed and the aim being pursued. The compatibility of the restrictions with the right of access to justice depends on the particularities of the lawsuit at issue and is assessed in the light of the process as a whole (ECHR, 24 February 2009, *L'Erablière* v. Belgium, §36; 29 March 2011, *RTBF* v. Belgium, §§69-70).

B.40.2. In its judgment no. 112/2013 of 31 July 2013, the Court judged as follows on the previous version of Article 21(2) of the coordinated laws on the Council of State:

"B.9.1. The rule that failure to submit a statement of rejoinder within the appointed time limit induces the Council of State to find in principle that the requisite interest is absent was inserted in the coordinated laws by Article 1 of the Act of 17 October 1990.

This rule, which attaches 'stringent consequences to non-observance of the time limits', forms part of a set of measures designed to shorten the length of proceedings before the Administrative Litigation Section of the Council of State in order to eliminate the backlog of cases in that court of law (*Parl. St.*, Senate, 1989-1990, no. 984-1, pp. 1-3; *ibid*., no. 984-2, p. 2).

B.9.2. When the registry of the Council of State notifies the respondent's statement of reply to the applicant, it includes the text of Article 21(2) of the coordinated laws of 12 January 1973 (Article 14b(2) of the Regent's Decree of 23 August 1948, replaced by Article 1

of a Royal Decree of 26 June 2000), in order to remind the author of the action for annulment of the consequences of failure to observe the sixty-day time limit in which to transmit his statement of rejoinder.

The content of that statement need not be more than a notification by the applicant that its interest remains.

If the aforementioned sixty-day time limit is not observed, the registry of the Council of State notifies the author of the action for annulment and the other parties that the Administrative Litigation Section will establish the absence of the requisite interest on the part of the author of the action for annulment, unless one of those parties asks to be heard (Article 14b(1)(1) of the Regent's Decree of 23 August 1948, replaced by Article 1 of a Royal Decree of 26 June 2000). When such a request is formulated, all parties are summoned to appear and to be heard at short notice (Article 14b(1)(3) of said Regent's Decree, replaced by Article 1 of said Royal Decree). The applicant is then free to state the reasons for transmitting its statement of rejoinder after the expiration of the appointed time limit (*Parl. St.*, Senate, 1989-1990, no. 984-1, p. 3). In that way it can escape the heavy penalty of inadmissibility of the action, which in principle is the result of non-observance of the aforesaid time limit, by proving the existence of force majeure (Council of State, 24 October 2001, no. 100.155, *Willicquet*; 2 March 2007, no. 168.444, *Royal Federation of Belgian Carriers and others*; 29 June 2012, no. 220.116, *Robe*; 11 September 2012, no. 220.559, *TNT Airways*).

B.9.3. The restriction of the right of access to justice by virtue of the contested provision is therefore in reasonable proportion to the lawful aim being pursued."

B.40.3. There is no reason to arrive at a different conclusion with regard to the current wording of the same provision. The obligation, if the respondent does not submit a statement of reply, to submit an explanatory statement within the time limit, of which the content need not be more than the simple confirmation that the applicant persists in its claim, is a formal requirement which, in relation to the aim being pursued, is not a disproportionate inconvenience. The legislature is entitled to expect from every applicant its cooperation in ensuring a fast and efficient legal procedure before the Council of State, which implies that every applicant must scrupulously follow the different stages of the proceedings and show a permanent interest in the continuation of the judicial procedure.

B.41. The ground is unfounded.

Regarding the interest in the ground (Article 2(3) of the contested Act)

B.42. The applicants in case no. 6017 request the annulment of Article 2(3) of the contested Act. They argue that this provision infringes Articles 10, 11, 23 and 27 of the

Constitution, whether or not read in conjunction with provisions of international law and with the right of access to justice. The contested provision is thought to give rise to a difference in treatment between the applicants depending on the kind of irregularity claimed, which may have an impact on the scope of the decision taken, or may or may not have a specific impact on their personal situation, and depending on whether or not they can demonstrate that the irregularity claimed can have an impact on the scope of the decision taken. Consequently, the contested provision would impair in a discriminatory manner the right of access to justice for associations that defend a collective interest and would substantially impair the protection of the environment.

B.43. As was mentioned under B.6, the Administrative Litigation Section of the Council of State adjudicates by means of judgments on actions for annulment for infringement of substantive forms or forms prescribed on pain of nullity, excess or misuse of power, instituted against acts and regulations (Article 14(1)(1) of the coordinated laws on the Council of State).

As a rule, the Administrative Litigation Section annuls a contested administrative act if it is unlawful. However, the contested provision inserts in Article 14(1) a new second paragraph, which provides:

"The irregularities referred to in the first paragraph only give rise to annulment if, in this case, they could have had an impact on the scope of the decision taken, deprived the parties concerned of a guarantee, or had the effect of influencing the authority of the originator of the act."

B.44.1. In the parliamentary proceedings, the tenor of this provision was explained as follows:

"Inspired by the Danthony judgment that was delivered in December 2011 by the general assembly of the Council of State in France, the draft Act reiterates the necessity of an interest in the ground. The idea is to prevent the pronouncement of an annulment on the grounds of an irregularity that would have had no practical consequences for the applicant's situation.

[…]

The purpose of this new provision is to recall the necessity of an interest in the ground and so to prevent the pronouncement of an annulment on the grounds of an irregularity that would have had no practical consequences for the applicant's situation, did not deprive the applicant of a guarantee, or did not have the effect of influencing the authority of the originator of the act. This measure, however, does not affect the case law relating to the

provisions concerning public policy, and does not change the concept of an interest in the ground as interpreted by the Council of State. It also has nothing to do with the authority of the originator of the act or even the essential formalities that might have an impact on this" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, pp. 4 and 11).

B.44.2. The purpose of the contested provision is to embed in the law the requirement of an interest in the ground, as this emerges from the established case law of the Administrative Litigation Section of the Council of State. According to that case law, the applicant can in principle only admissibly invoke an irregularity if that irregularity damages its interests.

B.44.3. Firstly, the applicants seem to fear that they would no longer be able to rely on an irregularity before the Administrative Litigation Section of the Council of State if that irregularity does not affect their personal situation. Neither the measure itself nor its clarification in the parliamentary proceedings provides a basis for that fear. The contested provision simply requires that the irregularities in question could affect the scope of the decision taken, deprived the parties concerned of a guarantee, or had the effect of influencing the authority of the originator of the act. Although the parliamentary proceedings indicate that the annulment can be pronounced on the grounds of an irregularity "whereas that irregularity would not have had any practical consequences for the applicant's situation", it makes no reference to the applicant's personal situation.

In that interpretation, the contested provision does not have the scope which the applicants attribute to it and does not give rise to the alleged differences in treatment. More particularly, the measure does not imply that an applicant association pursuing a collective interest can only adduce grounds in which the association has a personal interest. Quite the opposite: as was the case before the contested provision came into effect, such an association can continue to invoke irregularities that impair the collective interest which it pursues.

B.44.4. As far as European Union law is concerned, more specifically Article 10b of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (current Article 11 of Directive 2011/92/EU), the Court of Justice held:

"37. First of all, it should be noted that the first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure 'to challenge [their] substantive

or procedural legality', without in any way limiting the pleas that could be put forward in support of such an action.

38. With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation.

39. The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes a sufficient interest and impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned 'wide access to justice'.

40. With regard to actions brought by environmental protection organisations, the second and third sentences of the third paragraph of Article 10a of Directive 85/337 add that, to that end, such organisations must be regarded as having either a sufficient interest or rights which may be impaired, depending on which of those conditions for admissibility is adopted in the national legislation.

41. Those various provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which – as is stated in recital 5 to Directive 2003/35 – EU law should be 'properly aligned'.

42. It follows that, whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article.

43. Lastly, it should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

44. Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

45. With regard to legislation such as that at issue in the main proceedings, although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337, such a limitation

cannot be applied as such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337.

46. If, as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.

47. It follows first that the concept of 'impairment of a right' cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation.

48. It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect." (CJEU, 12 May 2011, C-115/09, *Bund für Umwelt und Naturschutz Deutschland*; ECLI:EU:C:2011:289).

The Court of Justice subsequently ruled that Article 10b of Directive 85/337/EEC (current Article 11 of Directive 2011/92/EU) precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorizing projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337/EEC (current Article 1(1) of Directive 2011/92/EU), on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

B.44.5. Secondly, the applicants seem to fear that they would no longer be able to rely on an irregularity before the Administrative Litigation Section of the Council of State if they are unable to prove that the adduced irregularity might have an impact on the scope of the decision taken. Neither the measure itself nor its clarification in the parliamentary proceedings provides a basis for that fear. On the contrary, the wording of the contested provision indicates that the Council of State itself had to conclude that the contested decision would not have been different without the procedural defect invoked by the applicant.

In that interpretation, the contested provision therefore does not have the scope that the applicants attribute to it and does not give rise to the alleged difference in treatment. More particularly, the measure does not imply that it is up to the applicant to prove that the irregularity invoked can have an impact on the scope of the decision taken.

B.44.6. With regard to Article 10b of Directive 85/337/EEC (current Article 11 of Directive 2011/92/EU), the Court of Justice held:

"47. In the present case, concerning, in the first place, the criterion that there must be a causal link between the procedural defect invoked and the content of the final contested decision ('the condition of causality'), it is to be noted that, by requiring Member States to ensure that the members of the public concerned have the opportunity to bring an action challenging the substantive or procedural legality of decisions, acts or omissions falling within the scope of Directive 85/337, the Union legislature – as has been pointed out in paragraph 36 above – has in no way limited the pleas in law that may be put forward in support of an action. In any event, it was not the intention of the legislature to make the possibility of invoking a procedural defect conditional upon that defect's having an effect on the purport of the contested final decision.

48. Moreover, given that one of the objectives of that directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that directive.

49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a Member State, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.

50. In that regard, it should be borne in mind that Article 10a of that directive leaves the Member States significant discretion to determine what constitutes impairment of a right (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 55).

51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of Article 10a of that directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked."

(CJEU, 7 November 2013, C-72/12, *Gemeinde Altrip*; ECLI:EU:C:2013:712).

The Court of Justice subsequently ruled that subparagraph (b) of Article 10b of Directive 85/337/EEC, as amended by Directive 2003/35/EC (current Article 11(1), subparagraph (b), of Directive 2011/92/EU) must be interpreted as not precluding national courts from refusing to recognize impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of the case-file documents submitted to that court or body, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337/EEC (see also the opinion of Advocate General M. Wathelet of 21 May 2015 in case C-137/14, *European Commission v. Federal Republic of Germany*, paragraphs 95-101).

B.44.7. Now that the contested provision is open to an interpretation that is compatible with European Union law, both the Court and the Council of State are required to interpret that provision in accordance with European Union law (CJEU, 13 November 1990, C-106/89, *Marleasing*, paragraph 8).

B.45. Subject to the interpretations referred to in B.44.3, B.44.5 and B.44.6, the ground is unfounded.

Regarding the maintenance of the effects (Article 3 of the contested Act)

B.46. The applicants in case no. 6017 request the annulment of Article 3 of the contested Act. They argue that this provision infringes Articles 10, 11, 13 and 23 of the Constitution, whether or not read in conjunction with Article 159 of the Constitution and provisions of international law.

B.47. The right of the Council of State to maintain the effects of an annulled administrative act is set down in Article 14c of the coordinated laws on the Council of State. Before the contested Act entered into force, that provision read as follows:

"If the Administrative Litigation Section so deems necessary, it shall designate, by way of general decision, which effects of the annulled regulatory provisions must be considered maintained or be provisionally maintained for the time it specifies."

The contested provision replaced Article 14c as follows:

"At the request of a respondent or intervening party, and if the Administrative Litigation Section so deems necessary, it shall designate which effects of the annulled individual acts or, by way of general decision, which effects of the annulled regulations must be considered final or be provisionally maintained for the time it specifies.

The measure referred to in the first paragraph may only be ordered for exceptional reasons justifying an impairment of the legality principle, by a specially reasoned decision and after adversarial proceedings. Such a decision may take into account the interests of third parties."

B.48. As in the previous wording of Article 14c, it belongs to the discretion of the Council of State whether or not to maintain temporarily or definitively certain effects of the annulled administrative act; however, this maintenance can from now on only be ordered at the request of a respondent or intervening party, for exceptional reasons that justify an impairment of the legality principle, after adversarial proceedings and by a specially reasoned decision that may take into account the interests of third parties. Moreover, in the new wording of Article 14c, the effects of annulled regulations as well as those of annulled individual acts can be maintained.

The contentions of the applicants, however, do not concern the above-mentioned amendments to Article 14c, but the effects of a maintenance decision. The applicants complain that litigants can no longer challenge the legality of an administrative act if the Council of State maintains its effects in pursuance of Article 14c, whereas they can do so if Article 14c is not applied, in particular when a breach of European Union law is adduced. As a result of the conditions that emerge from the case law of the Court of Justice, a difference in treatment between litigants is also thought to exist according to whether they adduce an infringement of European Union law or an infringement of internal law. Finally, the contested

provision is also said to significantly impair the protection of the environment due to the fact that the effects of an annulled administrative act can be maintained, even if an infringement of European Union law on the protection of the environment has been found, and also if such an infringement was relied upon but the administrative act was annulled on a different ground.

B.49. The parliamentary proceedings clarify the purport of the contested provision as follows:

"The retroactive effect of an annulment decision may in certain cases have disproportionate effects or, more particularly, impair the principle of legal certainty.

By judgment no. 18/2012 of 9 February 2012, the Constitutional Court held that the right of the Council of State to modulate the effects of its judgments over time is not contrary to Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 159. This judgment was confirmed across the board by judgment no. 14/2013 of 21 February 2013.

This right currently only exists for regulatory acts. The draft Act extends it to individual acts. The maintenance of their effects will have to be requested by the respondent or intervening party and may only be decided in exceptional circumstances following adversarial proceedings between the parties. The legislature thus aims to strengthen the guarantees attached to the implementation of this exceptional procedure, which is extended to individual acts." (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 5)

B.50.1. The Court has already been heard on the compatibility of Article 14c, before its amendment by the contested provision, with Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 159 of the Constitution, in the interpretation according to which it does not allow the litigant to secure the non-application by the courts and tribunals of a regulatory decision that the Council of State has annulled, but of which the effects are maintained, whereas the litigant has that possibility if Article 14c is not applied.

In its judgment no. 18/2012 of 9 February 2012, the Court held:

"B.8.1. Although the incidental judicial legality review of administrative acts, as provided for in Article 159 of the Constitution, could originally be conceived as absolute, other constitutional provisions and provisions of international treaties cannot now be disregarded for the purpose of determining the scope of those acts.

Article 160 of the Constitution enshrines the existence of the Council of State. On the basis of that Article, the legislature can determine its powers and procedures. Insofar as the constitutional legislature thus sought to enshrine the objective legality review of administrative acts, the judicial legality review set out in Article 159 of the Constitution must

reasonably take into account the effectiveness of the annulment decisions of the Council of State and the terms and conditions that may be attached to those decisions.

Moreover, the review provided for in Article 159 of the Constitution should be interpreted in conjunction with the principle of legal certainty inherent in the internal legal system, as well as in the legal system of the European Union and the European Convention on Human Rights (see judgment no. 125/2011, B.5.4). The Court takes that principle into account when it carries out its review on the basis of the constitutional provisions against which it conducts its direct review.

B.8.2. It follows that, although Article 159 of the Constitution does not expressly contain any limitation of the way set forth therein in which the legality review is carried out, such a limitation may nevertheless be justified if it is necessary to ensure observance of other constitutional provisions or fundamental rights. The legislature, which is required to safeguard the principle of legal certainty, must regulate the way in which the administrative act is reviewed, which may involve restrictions on the incidental judicial legality review, provided that those restrictions are in proportion to the legal objective being pursued.

B.9.1. When investigating the observance by the legislature of the principle of equality and non-discrimination and of Article 13 of the Constitution, the Court must also take into consideration the rights that Article 6.1 of the European Convention on Human Rights grants to litigants.

B.9.2. That provision guarantees for everyone the right to be heard by a court of law in any dispute relating to his civil rights and obligations. It follows that such a right of access is inherent in the right to a fair trial (ECHR, 21 February 1975, *Golder* v. United Kingdom, §36).

Although the right of access to justice is fundamental to the rule of law, that right is not absolute, and 'there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication' (*ibid.*, §38).

B.9.3. The European Court of Human Rights has thus repeatedly accepted that acts of public authorities maintain their effect, despite their irregularity, because of the obligation to observe the principle of legal certainty (ECHR, judgment, 26 June 1996, *Mika* v. Austria; ECHR, judgment, 16 March 2000, *Walden* v. Liechtenstein; ECHR, judgment, 6 November 2003, *Roshka* v. Russia; ECHR, 22 July 2010, *P.B. and J.S.* v. Austria, §§48-49).

In this connection, the legislature endeavoured to find a balance between the principle of legality of regulatory acts, enshrined in Article 159 of the Constitution, and the principle of legal certainty. It has entrusted a court of law with the care of determining whether exceptional reasons justify the maintenance of the effects of an unlawful regulatory act, subject to the requirement that this is only possible by way of general decision so as to avoid any discrimination between litigants. If the Council of State so deems necessary in light of the circumstances of the case, it may nevertheless exclude from the maintenance of the effects of the annulled regulation those litigants who have brought an action for annulment against that regulation in a timely manner, with due regard for the principle of equality and non-discrimination.

B.9.4. It follows that the legislature, in adopting the provision at issue, has achieved a fair balance between the importance of remedying any situation that is contrary to the law, and the concern that existing situations and raised expectations should not be jeopardized in the course of time."

B.50.2. The Court was also heard on the compatibility of Article 14c, before its amendment by the contested provision, with Articles 10 and 11 of the Constitution, insofar as it gives rise to a difference in treatment between persons who may be confronted with the annulment of a regulatory provision and persons who may be confronted with the annulment of an individual decision.

In its judgments no. 154/2012 of 20 December 2012 and no. 14/2013 of 21 February 2013, the Court held:

"B.5. It is for the legislature, in accordance with Articles 10 and 11 of the Constitution, to achieve a fair balance between the importance of remedying any situation that is contrary to the law, and the concern that existing situations and raised expectations should not be jeopardized in the course of time.

B.6. Nevertheless, the need – in exceptional cases – to prevent the retroactive effect of an annulment from jeopardizing 'existing legal situations' (*Parl. St.*, Senate, 1995-1996, no. 1-321/2, p. 7) may arise with regard to individual decisions as well as regulatory provisions.

However, the legislature, in achieving the fair balance referred to in B.5, could have borne in mind that the risk of disproportionate effects of an annulment is greater in the case of a regulatory provision which by definition is addressed to an unspecified number of persons.

B.7. Without ruling on the constitutionality of any other option, such as that which the legislature considered during the parliamentary proceedings referred to in B.2.3, the Court finds that it is not without reasonable justification to limit the possibility of maintaining the effects to regulatory provisions."

B.50.3. In the judgments mentioned above, which were delivered in answer to references for a preliminary ruling, the Court consistently limited its investigation to the assumption that none of the elements of the dispute fall within the scope of European Union law.

Consequently, in those judgments the Court did not have to take into account the restrictions that may ensue from European Union law with regard to the maintenance of the effects of national statutes that should be annulled or set aside because they are contrary to that law.

B.50.4. According to the Court of Justice, the maintenance of effects may be impeded by European Union law. According to a judgment of 8 September 2010, a provisional suspension of the ousting effect which a directly applicable rule of European Union law has on national law that is contrary thereto can only be allowed by the Court of Justice; the conditions of such a suspension can be determined solely by the Court of Justice (CJEU, Grand Chamber, 8 September 2010, C-409/06, *Winner Wetten*, paragraph 67).

The same obligation exists when the Council of State has declared that the annulment of regulatory provisions only has effect at a later date. A provisional suspension of the ousting effect which a directly applicable rule of European Union law has on national law that is contrary thereto can only be allowed by the Court of Justice.

B.50.5. Although in a judgment of 28 February 2012 the Court of Justice ruled that the maintenance of the effects of a national measure that has been annulled for breach of European law is compatible with European law, it imposed restrictions on this. The Court of Justice allows such maintenance of effects if the court is presented with the "existence of an overriding consideration relating to the protection of the environment" (CJEU, Grand Chamber, 28 February 2012, C-41/11, *Inter-Environnement Wallonie*, paragraph 58). The Court of Justice went on to rule as follows:

"Where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and it finds that the 'plan' or 'programme' was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested 'plan' or 'programme'. However, in view of the specific circumstances of the main proceedings, the referring court can exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure in so far as:

- that national measure is a measure which correctly transposes Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;

- the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;

- annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and

- the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied."

B.50.6. Now that Article 14c, as amended by the contested provision, having regard to the conditions contained therein, should be interpreted in a manner compatible with European Union law, as interpreted by the Court of Justice, the Constitutional Court, the Council of State and any other court of law is required to interpret that provision in accordance with European Union law (CJEU, 13 November 1990, C-106/89, *Marleasing*, paragraph 8). On the one hand, it follows that the Council of State, when annulling an act or regulation for breach of European Union law, cannot in principle apply the aforementioned Article 14c, unless the conditions set forth in the aforementioned judgment of 28 February 2012 of the Court of Justice have been fulfilled. On the other hand, the other courts of law, when the Council of State annuls an act or regulation for breach of another rule than a rule of European Union law and applies the aforementioned Article 14c, should, where appropriate, refuse to apply a national measure that conflicts with Union law, irrespective of the judgment of the Administrative Litigation Section of the Council of State which has deferred the date on which that national measure, held to be unconstitutional, is to lose its binding force (see, *mutatis mutandis*, CJEU, 19 November 2009, C-314/08, *Filipiak*, paragraph 85).

B.51. Subject to the interpretation referred to in B.50.6, the ground is unfounded.

[…]

Regarding the cause-list fee (Article 10(2) and (7) of the contested Act)

B.57. The applicants in case no. 5965 request the annulment of Article 10(2) and (7) of the contested Act. They argue that this provision infringes Articles 10, 11, 170 and 172 of the Constitution, read in conjunction with Article 11 of Directive 2011/92/EU and with the proportionality principle.

B.58. Article 30(1)(2) of the coordinated laws on the Council of State, as replaced by Article 10(2) of the contested Act, provides:

"The Royal Decree referred to in the first paragraph sets, among other things, the limitation periods for the submission of the applications and actions referred to in Articles 11 and 14, which must be at least sixty days; it lays down the conditions for interventions, objections and third-party proceedings, as well as actions for review; it sets an amount above which no penalty can be forfeited; it determines the allocation of resources to the budgetary fund referred to in Article 36(5); it sets the rates of costs, expenses and fees: those fees must not exceed 225 euros; it provides for the facility of second-line legal assistance for insolvent individuals; it lays down detailed rules for the settlement of costs, expenses and fees; it specifies in which cases the parties or their lawyers can jointly decide that the case need not be heard in open court."

Article 10(7) of the contested Act repeals Article 30(5), first to third paragraph and fifth paragraph, and (6) to (9), of the coordinated laws on the Council of State. The applicants request the annulment of that repeal provision in order to avoid a loophole in the law if the Court were to annul Article 10(2) of the contested Act.

B.59.1. The applicants argue that (1) the cause-list fee is a kind of tax, the regulation of which cannot be delegated to the King, (2) the difference in payment method between legal entities governed by public law and other applicants is discriminatory, and (3) making each individual applicant in a joint application pay the cause-list fee would render the proceedings excessively costly.

B.59.2. In its judgment no. 124/2006 of 28 July 2006, the Court held that the fee referred to in Article 30(1)(2), which constitutes a tax, is also an element of the judicial procedure and that it can be a condition for initiating or continuing the judicial procedure. The Court subsequently held:

"B.9. The legislature decided to vest the King with the power to determine the judicial procedure to be followed by the Administrative Litigation Section of the Council of State (Article 30(1)(1) of the laws coordinated on 12 January 1973), as well as with the power to set 'the rate of the costs and expenses, as well as the stamp duty and registration fee' (Article 30(1)(2), third sentence).

The latter authorization does not appear to be compatible with Article 170(1) of the Constitution, since it concerns the essential elements of a tax.

B.10.1. Nevertheless, Article 160(1) of the Constitution provides:

‘There is a Council of State for all Belgium, the composition, competences and functioning of which are determined by the law. However, the law can give the King the power to establish the procedure in accordance with the principles that it determines.’

B.10.2. The second sentence of that provision maintains the division of powers between the legislature and the executive as determined in the coordinated laws on the Council of State in force at the time when Article 160 of the Constitution was promulgated on 29 June 1993. It confirms that the legislature is empowered to determine the fundamental rules of the judicial procedure before the Administrative Litigation Section of the Council of State, and that it is for the King to elaborate the details of the procedure (*Parl. St.*, House of Representatives, 1992-1993, no. 831/1, pp. 2-3, 4; *ibid*., no. 831/3, p. 3).

In that constitutional review, it was pointed out that the circumstance that, since the establishment of the Council of State, the judicial procedure has been regulated by the King had not impaired the rights of litigants (*ibid.*, no. 831/3, pp. 4 and 7).

The second sentence of the above-mentioned constitutional provision relates to the matters that could be regulated by the King by virtue of the coordinated laws on the Council of State as they were in force at the time (*ibid.*, no. 831/3, pp. 5 and 7; *Parl. St.*, Senate, B.Z. 1991-1992, no. 100-48/2°, p. 3).

Consequently, the constitutional legislature has established the constitutionality of the authorization given to the King by virtue of which Article 70(1)(2) of the Regent’s Decree of 23 August 1948, as was in force at the time, was adopted.

The Court is not empowered to rule on an option of the constitutional legislature.

B.10.3. It follows that the authorization given to the King by the third sentence of Article 30(1)(2) of the laws coordinated on 12 January 1973 has Article 160(1) of the Constitution as its legal basis and therefore cannot infringe Articles 10, 11 and 170 of the Constitution.”

B.59.3. The above-mentioned judgment related to an earlier version of Article 30(1)(2) in which the tax due concerned the ‘stamp duty and registration fee’, but that tax corresponds to the tax referred to in the same provision, as replaced by Article 10(2) of the contested Act, and which in the parliamentary proceedings is regarded as a cause-list fee (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 22).

For the same reasons as those set out in the above-mentioned judgment, Article 30(1)(2) of the coordinated laws on the Council of State, as replaced by Article 10(2) of the contested Act, has Article 160 of the Constitution as its legal basis, and so the authorization given to the King by the fifth and seventh sentence of that second paragraph cannot infringe Articles 10, 11, 170 and 172.

B.59.4. The other contentions of the applicants are not connected with the contested provisions but, in the case at issue, with their implementation.

B.60. The ground is unfounded.

Regarding the procedural indemnity (Article 11 of the contested Act)

B.61. The applicants in cases nos. 5959, 5960, 5962, 5965, 6017 and 6020 request the annulment of Article 11 of the contested Act. They argue that this provision infringes Articles 10, 11, 13, 23 and 27 of the Constitution, whether or not read in conjunction with other constitutional provisions, general legal principles, and provisions of international law.

Since the grounds adduced against the contested provision are closely connected, they should be investigated together. The contentions set out in those grounds can be summed up as invoking an infringement of:

- the equality principle, (1) since the applicants and respondents are treated equally, whereas they are in essentially different situations, (2) since parties that do not use the services of a lawyer do not qualify for the procedural indemnity, (3) since applicants are treated differently depending on whether the respondent public authority, in whose favour the case is decided, acted with or without the assistance of a lawyer, (4) since legal entities do not have the benefit of second-line legal assistance, and therefore also do not qualify for a limitation of the procedural indemnity payable by a party receiving second-line legal assistance, (5) since applicants are treated differently depending on whether the Council of State annuls the contested rule or applies the administrative loop, and (6) since the contested provision makes no allowance for the difference in financial capacity between the applicants and the respondent public authorities, (7) or for the situation of applicants who do not qualify for second-line legal assistance yet do not have the financial means to afford a lawyer;

- the right of access to justice, since the risk of having to pay the procedural indemnity constitutes an additional barrier to challenging an administrative act and makes proceedings in environmental matters prohibitively expensive, which would also impair the guarantees

enshrined in the Aarhus Convention and European Union law, the standstill obligation ensuing from Article 23 of the Constitution, and the right to property;

- the freedom of association, since associations are restricted in their right to appear in court without the assistance of a lawyer;

- the freedom of establishment and the free provision of services, since the procedural indemnity only applies in case of assistance by a lawyer;

- the legality principle, since the King is empowered to determine the scope of the definition of "insolvent persons";

- the jurisdiction of the ordinary courts and tribunals and of the Council of State as enshrined in Articles 144 and 160 of the Constitution.

The contention of the applicant in case no. 6020 is not only directed against Article 11, but also against the aforementioned Article 10 of the contested Act, insofar as it empowers the King to provide for the granting of the benefit of second-line legal assistance to insolvent persons.

B.62. Article 11 of the contested Act introduces an arrangement that enables the Administrative Litigation Section of the Council of State to award a procedural indemnity to the successful party. It inserts in the coordinated laws on the Council of State an Article 30/1, which provides:

"1. The Administrative Litigation Section may award a procedural indemnity, which is a lump-sum contribution towards the costs and lawyers' fees of the successful party.

After having sought the opinion of the Flemish Bar Association and the 'Ordre des barreaux francophones et germanophone', the King sets by a decree established after consultation in the Council of Ministers the basic amounts and the minimum and maximum amounts of the procedural indemnity, depending on, among other things, the nature of the case and the significance of the dispute.

2. The Administrative Litigation Section may, by a specially reasoned decision, reduce or increase the indemnity, without however exceeding the maximum and minimum limits set by the King. In its assessment it shall take into consideration:

1° the financial capacity of the unsuccessful party in order to reduce the amount of the indemnity;

2° the complexity of the case;

3° the manifestly unreasonable nature of the situation.

If the unsuccessful party receives second-line legal assistance, the procedural indemnity is set at the minimum amount determined by the King, except in the case of a manifestly unreasonable situation. In this connection, the Administrative Litigation Section shall adduce special reasons to justify its decision to increase or reduce the amount.

If several parties are entitled to the procedural indemnity at the expense of one or more successful parties, the amount thereof must not exceed twice the maximum procedural indemnity which can be claimed by the beneficiary who is entitled to demand the highest indemnity. The Administrative Litigation Section divides the indemnity between the parties.

No party can be required to pay an indemnity for the intervention of the lawyer of another party over and above the amount of the procedural indemnity. The intervening parties are neither entitled to that procedural indemnity, nor can they be obliged to pay it."

B.63. With the introduction of the procedural indemnity, the legislature pursued a dual objective: first, to put an end to the obligation for subjects to institute new legal proceedings before the civil court by virtue of Article 1382 of the Civil Code with a view to securing an indemnity for the lawyers' fees they have incurred and, secondly, to improve the management of the public finances by preventing public authorities from having to bear the costs of two different lawsuits before two different courts of law when a litigant contests one and the same administrative act:

"The applicant in whose favour the case is decided by the Council of State must currently bring an action before the ordinary courts in order to secure the recovery of its lawyers' fees, unless an amicable settlement is reached with the other party. […]

However, it seems inconsistent with the principle of good government to require a subject to institute new legal proceedings if the action before the Administrative Litigation Section of the Council of State was successful for that party. Moreover, the public authorities are confronted with a double indemnity, one for the action before the Council of State and another for the subsequent action before the court of justice, which is contrary to a sound management of the public finances" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 24).

The parliamentary proceedings in preparation for the challenged provision also show that the new Article 30/1 of the coordinated laws on the Council of State is inspired by the procedural indemnity as currently applicable in proceedings before the civil and criminal courts. The legislature's intention was to opt for a system that complies with the case law of

the Court. The differences between the procedural indemnity system before the civil and criminal courts and the system before the Council of State are explained by the particular features of an action before the Administrative Litigation Section of the Council of State:

"The proposed provision sets out to set up a similar system as that established by the Judicial Code, where the Administrative Litigation Section of the Council of State has the option to decide on the recoverability of the lawyers' fees. That option must be to the benefit of the parties in whose favour the case was decided, restricted to the plaintiffs and defendants. […]

As in Article 1022 of the Judicial Code, criteria are set out in the new Article 30/1 of the coordinated laws on the Council of State to justify a reduction or increase in the basic amounts being awarded, within the limits of the minimum and maximum amounts to be provided for by Royal Decree. Those criteria are sufficiently broad to encompass the criteria that are highlighted in the case law of the Court of Justice of the European Union (Judgment of 11 April 2013, C-260/11, *Edwards and Pallikarapoulos*)" (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, pp. 24-25).

B.64.1. In its judgment no. 48/2015 of 30 April 2015, the Court dismissed an action for annulment of the contested provision, in which some of the same contentions were adduced as in the present actions.

B.64.2. With regard to the alleged infringement of Articles 10 and 11 of the Constitution, the Court held in its judgment no. 48/2015:

"B.11.1. Firstly, the applicants believe that, having regard to judgment no. 96/2012 of 15 July 2012, an arrangement whereby a public authority can claim a procedural indemnity is in breach of the equality principle. In that judgment, the Court is said to have held that it was justified that the public authority cannot secure the recovery of its costs and lawyers' fees from the applicant whose action has been dismissed by the Council of State.

B.11.2. In addition, the applicants argue that the contested provision infringes the principle of equality and non-discrimination, insofar as it is not similar to the arrangement set out in Articles 1017 to 1019 of the Judicial Code as regards (1) the rate of the costs, expenses, fees and procedural indemnity, (2) the general nature of the procedural indemnity, and (3) the collective multiplication of the costs.

B.11.3. Finally, the applicants claim that the equality principle has been infringed because the legislature, contrary to what has recently been stipulated with regard to penalties in proceedings before the Council of State, has failed to provide that the fine for a manifestly wrongful appeal would from now on be awarded to the other party.

B.12.1. In its aforementioned judgment no. 96/2012, the Court held that the non-recoverability of lawyers' fees by the public authority in whose favour the case has been

decided before the Council of State was not unconstitutional, since the public authority as the performer of the contested administrative act has all the relevant information to defend that act. It therefore held that Article 1022 of the Judicial Code does not infringe Articles 10 and 11, interpreted in the sense that it does not apply to legal proceedings before the Council of State.

B.12.2. Nevertheless, it cannot be inferred from that judgment that the introduction by the legislature of a system for the recovery of costs and lawyers' fees for legal proceedings before the Administrative Litigation Section of the Council of State is contrary to the principle of equality and non-discrimination.

In that judgment, the Court held that it is for the legislature to decide whether a procedural indemnity system should be introduced for the Council of State.

In accordance with Recommendation no. R(81)7 of the Committee of Ministers of the Council of Europe on measures facilitating access to justice, the winning party should in principle, except in special circumstances, obtain from the losing party recovery of its costs including lawyers' fees, reasonably incurred in the proceedings.

B.12.3. If the legislature chooses to introduce a procedural indemnity system for legal proceedings before the Administrative Litigation Section of the Council of State, it should take into account, when working out the details of such a system, not only the differences between legal proceedings before the Council of State and legal proceedings before the civil court, but also the many other – at times conflicting – interests and principles at stake.

B.13.1. Regarding the possible infringement of the principle of equality and non-discrimination, insofar as the contested arrangement is not similar to the arrangement set out in Articles 1017 to 1019 of the Judicial Code, it ensues from the parliamentary proceedings referred to in B.8.2 and B.8.3 that Article 11 of the Act of 20 January 2014 sets out to introduce a system that is similar to that of Article 1022 of the Judicial Code, to protect litigants and to avoid a dual indemnity at the expense of the public authorities, thereby promoting a sound management of the public finances, with the legislature also taking into account the essential differences between the various judicial procedures.

B.13.2.1.1. Regarding the difference in treatment between litigants who are parties in a civil action and those who are parties in an action before the Administrative Litigation Section of the Council of State, in particular with regard to the rate of costs, expenses, fees and procedural indemnity, it should be noted that, in accordance with the contested Article 30/1 of the coordinated laws on the Council of State, only the procedural indemnity is introduced in the proceedings before the Administrative Litigation Section of the Council of State, so that the aforementioned article does not affect the other costs, expenses and fees.

As regards the procedural indemnity proper, the King is entrusted under Article 30/1(1)(2) with setting the 'basic amounts and the minimum and maximum amounts of the procedural indemnity, depending on, among other things, the nature of the case and the significance of the dispute'. Consequently, the alleged discriminatory treatment, supposing it is real, would not ensue directly from the contested Article 11 of the Act of 20 January 2014, but from the aforementioned Royal Decree of 28 March 2014.

B.13.2.1.2. The Court cannot rule on the constitutionality of a Royal Decree or of an administrative act.

B.13.2.2.1. Regarding the difference in treatment between litigants who are parties in a civil action and those who are parties in an action before the Administrative Litigation Section of the Council of State, in particular with regard to the general nature of the procedural indemnity, it should be noted that the arrangement of Article 30/1 of the coordinated laws on the Council of State is based on the general arrangement of Article 1022 of the Judicial Code and provides that the unsuccessful party must pay a lump-sum procedural indemnity, even if there is no question of vexatious legal proceedings. The award of a procedural indemnity in accordance with Article 1022 of the Judicial Code is general in scope and is only excluded in the hypothesis of Article 1017(2) of the Judicial Code. Such exclusion, however, has not been adopted in Article 30/1 of the coordinated laws on the Council of State.

The circumstance that the legislature, by introducing the procedural indemnity in objective litigation, did not provide for an exception similar to that which it instituted in judiciary law for the litigation of socially insured persons is not such as to deprive the measure of its reasonable character.

B.13.2.2.2. With the aforementioned exception in judiciary law, the legislature sought to guarantee proceedings that are free of charge for socially insured persons whose social security rights are contested (*Parl. St.*, House of Representatives, 2005-2006, DOC 51-2594/001, p. 63). In its judgments nos. 200/2009 and 18/2010, the Court held that this exception was constitutional.

Moreover, the wording of Article 30/1 of the coordinated laws on the Council of State make it possible, by a well-reasoned decision, not to set a procedural indemnity or to set the procedural indemnity due at a symbolic amount if the Council of State finds that it would be unreasonable to set the indemnity at the minimum amount determined by the King. The Administrative Litigation Section is thus authorized to modulate the size of the procedural indemnity, taking into account the financial capacity of the unsuccessful party, the complexity of the case, and the manifestly unreasonable nature of the situation (Article 30/1(2) of the coordinated laws on the Council of State). It cannot therefore be adduced that the Administrative Litigation Section has a general restricted authority in this matter, leaving no room for flexibility.

B.13.2.3.1. Regarding the difference in treatment between litigants who are parties in a civil action and those who are parties in an action before the Administrative Litigation Section of the Council of State, in particular with regard to collective petitions filed with the Administrative Litigation Section of the Council of State, which would give rise to the payment of as many times the procedural indemnity as there are petitioners, it should be noted that the aforementioned procedural rule is to be found in Article 70(3) of the Regent's Decree of 23 August 1948 regulating the judicial procedure before the Administrative Litigation Section of the Council of State.

B.13.2.3.2. As was already mentioned in B.13.2.1.2, the Court cannot rule on the constitutionality of a Regent's Decree or of an administrative act.

B.14.1. The observation that the lawyers' fees of an applicant are different from those of a public authority because those costs are not necessary for the public authority does not make

the contested arrangement any less reasonable. After all, the potential cost of a lawsuit can influence both the decision to institute an action for annulment or an action for suspension and the decision to defend oneself against such an action. The financial situation of the various litigants can be aggravated to the same degree by the fees and costs of a lawyer.

Moreover, the procedural indemnity is awarded to the successful party, whether it be the applicant or the respondent. The procedural indemnity establishes an equal treatment of the applicant and the respondent, given the commensurate aggravation of their financial situation. For the rest, it is not for the Court to decide on the necessity of the lawyers' fees and costs that have been incurred by a public authority acting as opposite party before the Administrative Litigation Section of the Council of State.

B.14.2. Finally, the payment of the periodic penalty, one half to the applicant and the other half to the Penalty Management Fund, is regulated by Article 36(5) of the coordinated laws on the Council of State, while Article 37(6) of the same laws provides for payment of the fine for manifestly wrongful appeal into the Fund in question. The matter of the recoverability of lawyers' fees, which is regulated in the contested provision, has nothing to do with the matter of the periodic penalty payment or that of the fine for wrongful appeal.

B.15. The first part of the only ground is unfounded."

B.64.3. With regard to the alleged infringement of Articles 10 and 11 of the Constitution, read in conjunction with the right of access to justice, the Court held in its judgment no. 48/2015:

"B.18.1. The right of access to justice is a general legal principle that must be guaranteed to every person in accordance with Articles 10 and 11 of the Constitution, Articles 6 and 13 of the European Convention on Human Rights, and Article 47 of the Charter of Fundamental Rights of the European Union. It is an essential aspect of the right to a fair trial and is fundamental to the rule of law. The right of access to a court of law relates to both the freedom to engage in legal proceedings and the freedom to defend oneself.

B.18.2. The right of access to justice, however, is not absolute. It may be subject to financial restrictions, insofar as those restrictions do not impair the very essence of that right. The restrictions of that right must be in reasonable proportion to the legitimate aim pursued (ECHR, *Stagno* v. Belgium, 7 July 2009, §25). The relevant regulations must pursue the principle of legal certainty and the proper administration of justice, and as such must not give rise to restrictions that prevent the litigant from bringing the substance of his dispute before the competent court (ECHR, *Stagno* v. Belgium, 7 July 2009, §25; *RTBF* v. Belgium, 29 March 2011, §69).

B.19.1. It may be assumed that the introduction of a procedural indemnity could put up a financial restriction to the right of access to justice, in particular for litigants with limited means.

The legislature, however, has made sure to safeguard the right of access to justice for all persons seeking justice.

B.19.2. The legislature has chosen to strictly define the conditions of recoverability by limiting the increase in the procedural indemnities and giving the courts power of discretion to adjust the amount, within the limits set by the King, in order to make allowance for special circumstances, such as the financial capacity of the unsuccessful party. With this arrangement, the consequences of recoverability can be mitigated for the party that has lost the case and lacks substantial financial means.

Furthermore, the procedural indemnity represents a lump-sum rather than full compensation; the Council of State, like the ordinary courts, can in certain cases deviate from the basic amount, within the margins set by the Royal Decree, and can even award a symbolic sum if it would be unreasonable to award the minimum indemnity (*Parl. St.*, Senate, 2012-2013, no. 5-2277/1, p. 25).

B.20. The second part of the only ground is unfounded."

B.64.4. With regard to the alleged infringement of Article 23 of the Constitution, read in conjunction with the Aarhus Convention and Directive 2011/92/EU, the Court held in its judgment no. 48/2015:

"B.22. With respect to the right to legal assistance, Article 23 of the Constitution implies a *standstill* obligation, which prevents the competent legislature from substantially impairing the level of protection afforded by the applicable law, for no reason connected with the general interest. In that connection, it should be pointed out that Article 23 of the Constitution does not in any way prohibit the legislature from introducing a procedural indemnity arrangement.

B.23.1. The Court of Justice of the European Union held that the objective of the Aarhus Convention and Directive 2011/92/EU is to ensure wide access to justice for litigants (CJEU, 15 October 2009, C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, paragraph 45; 16 July 2009, C-427/07, *Commission v. Ireland*, paragraph 82; 12 May 2011, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e.V.*, paragraph 39; 11 April 2013, C-260/11, *Edwards and others*, paragraph 31; 13 February 2014, C-530/11, *Commission v. United Kingdom*, paragraph 44). The avoidance of excessive costs helps to achieve that access to justice.

B.23.2. The prohibitively expensive nature of proceedings should be assessed taking into account all the costs borne by the party involved (CJEU, 16 July 2009, C-427/07, *Commission v. Ireland*, paragraph 92; 11 April 2013, C-260/11, *Edwards and others*, paragraphs 27 and 28).

B.23.3. According to the Court of Justice, a national court, for the purpose of assessing whether or not judicial proceedings are prohibitively expensive, must take into account both objective and subjective elements:

"38. It follows that, as regards the methods likely to secure the objective of ensuring effective judicial protection without excessive cost in the field of environmental law, account must be taken of all the relevant provisions of national law and, in particular, of any national legal aid scheme as well as of any costs protection regime, such as that referred to in

paragraph 16 of the present judgment. Significant differences between national laws in that area do have to be taken into account.

39. Furthermore, as previously stated, the national court called upon to give a ruling on costs must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

40. That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since, as has been stated in paragraph 32 of the present judgment, members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.

41. As regards the analysis of the financial situation of the person concerned, the assessment which must be carried out by the national court cannot be based exclusively on the estimated financial resources of an 'average' applicant, since such information may have little connection with the situation of the person concerned.

42. The court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages (see, by analogy, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 61).

[…]

45. The requirement that judicial proceedings should not be prohibitively expensive cannot, therefore, be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal" (CJEU, 11 April 2013, C-260/11, *Edwards and others*, paragraphs 38-42 and 45; ECLI:EU:C:2013:221).'

It should be inferred from the case law of the Court of Justice that the assessment whether or not certain costs are prohibitively expensive should not be made merely on a subjective basis, that the competent court must take into account the financial situation of the person concerned, and may also take into account whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, and the potentially frivolous nature of the claim at its various stages (CJEU, 11 April 2013, C-260/11, *Edwards and others*, paragraphs 38-42 and 45; 13 February 2014, C-530/11, *Commission v. United Kingdom*, paragraphs 46-51).

B.24.1. First of all, it should be pointed out that the procedural indemnity is a lump-sum compensation for the cost and fees of the lawyer of the successful party, and not full compensation for the costs of the successful party.

As was mentioned in B.12.2, it belongs to the discretion of the legislature, when setting up an arrangement for the recovery of costs and lawyers' fees, to choose the formula which it deems most appropriate, bearing in mind the many – at times conflicting – interests and principles at stake.

B.24.2. The Royal Decree of 28 March 2014 on the procedural indemnity referred to in Article 30/1 of the coordinated laws on the Council of State sets the basic amount as well as the minimum and maximum amounts of the procedural indemnity. The Administrative Litigation Section of the Council of State, when awarding the procedural indemnity, may deviate from the basic amount set in the Royal Decree, without exceeding the maximum and minimum limits, and taking into account the financial capacity of the unsuccessful party, the complexity of the case, and the manifestly unreasonable nature of the situation. The Administrative Litigation Section may also deviate from the minimum amount set by the King if a person receiving second-line legal assistance finds himself in a manifestly unreasonable situation. With this arrangement, the consequences of recoverability can be mitigated for the party that has lost the case and lacks substantial financial means.

B.24.3. Therefore the procedure for awarding a procedural indemnity before the Administrative Litigation Section of the Council of State meets the conditions stipulated by the Court of Justice.

The procedural indemnity arrangement introduced by the contested Article 11 of the Act of 20 January 2014 cannot therefore be regarded as "excessive costs".

B.25. The third part of the only ground is unfounded."

B.65.1. The contentions of the applicants in the cases currently investigated largely coincide with the contentions that were dismissed by judgment no. 48/2015.

B.65.2. By appearing before the Council of State without the assistance of a lawyer, regardless of whether or not he is eligible for second-line legal assistance, the applicant voluntarily waives the right to receive a procedural indemnity if he wins the case. Naturally he reserves the right to claim compensation for his loss before the judicial court by virtue of Article 1382 of the Civil Code. Bearing in mind the discretion available to the legislature in this matter, the contested provision has no disproportionate consequences, nor does it, insofar as it might restrict the right to property, the freedom of establishment, the free provision of services and the freedom of association, impair those rights and freedoms in a disproportionate manner.

B.65.3. Similarly, the fact that in some cases the respondent public authority chooses to appear before the Council of State without the assistance of a lawyer can mean that when the case is decided in favour of the public authority the applicant will not have to pay a

procedural indemnity. That fact has no disproportionate consequences for the litigant and therefore cannot deprive the contested measure of its reasonable justification.

B.65.4. Finally, insofar as the applicants in case no. 5962 argue that the contested Act reserves the benefit of second-line legal assistance and that of the limitation of the procedural indemnity payable by a party receiving second-line legal assistance for insolvent natural persons and excludes insolvent legal entities from that benefit, the ground is unfounded. That difference in treatment does not ensue from the contested provisions, but from the Royal Decree implementing those provisions. The relevant authorization, which is based on Article 160(1) of the Constitution (see the above-mentioned judgment no. 124/2006 of 28 July 2006), is not inconsistent with that constitutional provision, since it only permits the King to work out the details of an arrangement of which the principles have been established by the legislature. The aforementioned constitutional provision is no impediment to the contested arrangement, nor is Article 144 of the Constitution, which the applicants in case no. 5965 rely upon. By virtue of Article 144 of the Constitution, the legislature can, according to the rules it has decided, authorize the Council of State to determine the effects in civil law of its judgments.

B.66. The grounds are unfounded.

For those reasons,

The Court

- annuls Article 13 of the Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State;

- subject to the interpretations referred to in B.44.3, B.44.5, B.44.6 and B.50.6, dismisses the remainder of the actions.

Thus pronounced in Dutch, French and German, in accordance with Article 65 of the Special Act of 6 January 1989 on the Constitutional Court, on 16 July 2015

The Registrar, The President,

P.-Y. Dutilleux A. Alen