Communication to the Aarhus Convention Compliance Committee

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

1) **Mr Francis Doutreloux,** residing at 5, route de Cheneux, 4970 Stavelot, Belgium;

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

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

II. STATE CONCERNED

The Belgian State (or the Kingdom of Belgium).

III. THE COMMUNICATION

A. Facts

1) This communication arises from three situations in which the right of access to environmental information guaranteed by Belgian legislation (both under Article 32 of the Constitution and by decree [Article 10 et seq. of the Environmental Code]), by European legislation (Directive 2003/4/EC) and by international law (the Aarhus Convention) was first of all denied and subsequently unreasonably restricted.

2) The first case concerned the municipal swimming pool at Stavelot and related to obtaining a copy of its combined planning and environmental consent. The request for access to information was submitted on behalf of Avala ASBL on 29 August 2014 (Document No. 1), yet it was only more than a year later, on 7 September 2015, that a response was received and a copy of an application for a combined planning and environmental permit was supplied. However, a Decision of the Walloon Region's Appeal Commission for the Right of Access to Environmental Information ('CRAIE' for short) of November 2014 had ordered the Municipality of Stavelot to supply the information within eight days of notification of the Decision (Document No. 2).[2] In actual fact, the

[1] Law of 27 June 1921 on non-profit associations, international non-profit associations and foundations.

[2] Here it should be explained that CRAIE decisions are always notified in the month following the one in which the decision is

Municipality of Stavelot only supplied the information in September 2015 because it had no choice, since *Avala ASBL* had started proceedings to challenge this inaction on the part of the Municipality of Stavelot (Document No. 3) and the matter was listed to be heard by the Justice of the Peace at Malmedy-Spa-Stavelot on 16 September 2015.

3) The second request for access to information concerned the L'Eau Rouge campsite.[3] A request for access to information regarding this campsite's permits was sent on 26 August 2014 on behalf of Mr Doutreloux. At the time of writing this communication, and despite a CRAIE Decision of 28 November 2014 ordering these permits and the plans relating to them to be supplied to him within eight days of notification of that Decision, his request has still not been fully satisfied. When two permits (the environmental permit for the campsite and the planning permit for the campsite swimming pool) were finally supplied in August 2015, they were sent without the plans that are essential to interpreting them. As in the previous case, the information was undoubtedly sent in August 2015 only in view of the fact that a court hearing of this case, also listed for 16 September 2015, was fast approaching. Moreover, no camping/caravanning permit (or permit for a caravan site) was sent, even though this was a requirement.

4) The third request for access to information concerned the Municipality of Stavelot's intentions for the access ramps at the old Francorchamps motor-racing circuit when the temporary occupation licence agreed on 5 June 2012 came to an end. This request for access to information was made on behalf of Mr Doutreloux on 28 July 2014. Again, more than a year after this request, and despite not only a CRAIE Decision of 2 October 2014 ordering that these documents be supplied eight days after notification of that Decision but also a judgment of the Justice of the Peace at Malmedy-Spa-Stavelot of 12 August 2015 ordering that they be supplied under the CRAIE Decision, it remains the case that not all the required information has been supplied. While it is true that the text of a new temporary licence was supplied on 19 August 2015, the associated plan, mentioned explicitly in the preamble to the licence, which would clarify the extent of the property covered by the licence as granted by the Municipality, was not supplied.

B. Discussion

The communicants claim that 1), in connection with the three above-mentioned cases, the Belgian State, through the Municipality of Stavelot, has infringed the right of access to environmental information guaranteed by articles 1, 3 and 4 of the Aarhus Convention, and that 2), in the light of the fact that the Belgian system of access to environmental information is currently ineffective, and the system in the Walloon Region particularly so, the Belgian State has also infringed article 9 of the Aarhus Convention (general failure to implement the Convention).

1) Articles 1 and 4 of the Aarhus Convention guarantee the right of access to environmental information within one month.

In connection with the three cases explained above (see point III. A), the communicants had to wait more than a year to obtain partial information.

Consequently, the above-mentioned provisions of the Aarhus Convention were infringed.

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made; but this means that one, two or even three weeks may elapse before notification.

[3] This is a campsite that has both its registered office and its established place of business in the Municipality of Stavelot.

2) In Belgian law, under Article D.10 et seq. of the Environmental Code, when an applicant has requested access to environmental information from a public authority and the latter has not replied within one month, the applicant is entitled to seek an administrative review of the authority's omission before the CRAIE, within a period of 15 days.

The ineffectiveness of this system relates primarily to the legal scope of decisions made by the CRAIE, which is the administrative authority.

A CRAIE decision does not conclude with any element that gives it immediate effect, unlike judgments of the courts of law (see Article 790 of the Belgian Code of Civil Procedure, according to which: "The authenticated copy shall contain a full copy of the judgment, preceded by the heading and followed by a clause conferring authority to enforce the judgment, failing which the authenticated copy is not valid.").

The fact that CRAIE decisions are unenforceable means that the system of access to information cannot have any direct effect. So, in practice, nothing forces a public authority to comply with a decision taken by the CRAIE, even though that decision is theoretically binding upon the authority. Therefore the bailiff cannot undertake compulsory enforcement of the decision (Articles 516 and 1494 of the Civil Procedure Code). No other system of coercive payment or financial penalty can be imposed on the authority to which a CRAIE decision is addressed.[4]

Yet, according to article 9 of the Aarhus Convention:

> "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.
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> 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.
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> 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.
>
> (...)
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> 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.
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> 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.

[4] Moreover, it should be noted that there is also no specific criminal penalty for failure to comply with CRAIE decisions.

> Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
>
> (...)"
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> (bold and underlining emphases added).

The communicants conclude from this article of the Convention that CRAIE review is the remedy remaining to citizens when an administrative authority infringes the right of access to information. But if no clear system of sanctions is attached to this remedy, what can it achieve?

In conclusion, the crux of the applicants' allegation of a general failure to implement the Convention is that no enforcement orders are attached to CRAIE decisions and nor is there any other system of sanctions for non-compliance with its decisions.

C. The 'environmental' nature of this case

The Aarhus Convention guarantees the right of access to environmental information.

The three requests for access to environmental information to which no replies were received, and which form the basis of this communication, were requests for access to (i) the combined planning and environmental permit for the Stavelot municipal swimming pool, (ii) various permits (planning permit, combined planning and environmental permit, environmental permit and caravan permit) for the L'Eau Rouge campsite, and (iii) the occupation licence for an access ramp at a former motor-racing circuit.

These requests for access to information therefore most certainly concerned the environment, since planning permits, in particular, are nothing other than consent to make changes to the environment, while the purpose of environmental permits and combined planning and environmental permits is to manage the impact of a given operation on the environment.

IV. NATURE OF ALLEGED NON-COMPLIANCE

In this instance, the communicants submit that:

- The cases of these three requests for access to information are three **specific infringements** of the Aarhus Convention: more precisely, of the right of access to environmental information within a maximum of one month, guaranteed by the Convention;

- The fact that decisions of the Appeal Commission for the Right of Access to Environmental Information do not include an enforcement order – and that there is no other guarantee that the Commission's decisions will be put into effect – is a matter of Belgian law's **general non-compliance** with the Aarhus Convention and with the right of access to information guaranteed by article 1, article 3 and article 4 of the Convention, in breach of article 9, paragraphs 1, 3 and 4.

V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

Article 1, article 3, article 4, paragraphs 1 and 2, and article 9, paragraphs 1, 3 and 4, of the Convention.

VI. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES

1) The communicants point out that there is no domestic legal remedy for the infringement that is the object of their complaint, inasmuch as it is a general failure to implement the Aarhus Convention. The six-month deadline for bringing an action for annulment before the Constitutional Court against the Decree of 16 March 2006 amending Book 1 of the Environmental Code as far as concerns the public's right of access to environmental information, which establishes the right to environmental information in Belgium, has expired, and no general appeal against this legislation is possible.

2) In the specific cases here, the communicants attempted to overcome the absence of enforcement orders in CRAIE decisions by bringing court actions before the Justice of the Peace, with a view to securing compliance with the CRAIE decision by the recalcitrant authority, as well as penalties against it.

However, it must be said that this solution cannot be regarded as a normal, adequate one, because:

- Bringing a court action is costly, since it requires payment for a bailiff's writ (Document No. 3) and payment of counsel's fees;

- Court action itself takes time,[5] particularly because the courts do not always grant the right to a brief hearing (enabling one to put one's arguments when the court sits to commence the proceedings), which means that the court will set out a timetable for the exchange of pleadings – and, consequently, that there will be a minimum of several months before a ruling on the case is given.

These problems create a direct conflict with the right of access to environmental information provided for by the Aarhus Convention, under which the information should be provided "as soon as possible or at the latest within one month after […] receipt" (emphasis added) and which allows only a reasonable charge to be made for obtaining this information – whereas here, being obliged to resort to other remedies makes the cost of access to information prohibitive and unreasonable.

3) Seeking observance of the right of access to environmental information as provided for in European Union law, the communicants have already also asked the Minister for Local Government to send a Special Commissioner, on the basis of Article L.3116-1 et seq. of the Local Democracy and Decentralization Code, to investigate the enforcement of CRAIE decisions (Document No. 5).

[5] See, for example, Document No. 4. The request for access to information was made in June 2014 and the appeal before the CRAIE was lodged on 28 July 2014. The CRAIE Decision was taken on 2 October 2014 and the court action filed on 15 December 2014: the enforceable judgment ordering that the documents be supplied came only on 12 August 2015 – more than a year after the original request!

This approach did not prove successful, since the Minister merely "invited" the Municipality to comply with the law.

4) The communicants have also submitted a complaint to the European Commission against Belgium for breach of European Union law on the right of access to environmental information.

VII. CONFIDENTIALITY

The communicants do not request confidentiality.

VIII. ANNEXES

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

1) Example of a request for access to information;
2) Example of a CRAIE Decision and of its notification letter of the following month;
3) Example of a court summons;
4) Example of a court judgment;
5) Example of a request to send in a special commissioner.

IX. SUMMARY

In the light of this communication's brevity, no summary seems to be necessary.

X. SIGNATURE

For the communicants,
Liège, 8 October 2015
Alain LEBRUN, *[signature]*
Lawyer