Aarhus Convention Compliance Committee (ACCC)

Communication ACCC/C/2015/134

# Memo on behalf of the Walloon Region (Kingdom of Belgium)

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## I. Summary of facts and of the Walloon system of access to environmental information

The facts that have given rise to the Communication from Mr Doutreloux and Avala ASBL were set out in the Communication itself, in the communicants' letters of 20 November 2015, 27 September 2016 and 4 October 2017 and in the Walloon Region's Memorandum of 2 August 2016.

The relevant rules on access to environmental information in the Walloon Region ('the Walloon system') were explained in the Walloon Region's Memo of 2 August 2016.

## II. General observations

1.

The communicants do not state how or in what respect the Walloon system infringes Articles 1 and 3 of the Aarhus Convention ('the Convention'). Therefore there is no need to consider the Communication from the point of view of those articles.

2.

The communicants do not dispute that:

- the Walloon Region does have a system for access to environmental information;

- the issue they raise in the Communication concerns only environmental information that is not already accessible via the Internet, where there would be no need to request it from an administrative authority;

- under the Walloon system, when an administrative authority refuses a request for environmental information, the applicant is entitled to use a twofold remedy: review by a special administrative body – the Appeal Commission for the Right of Access to Environmental Information ('the CRAIE') – and, where the administrative authority does not comply with a CRAIE decision requiring it to supply the environmental information requested, review before the ordinary courts.[1] Indeed, the present communicants have pursued these two specific remedies on several occasions.

[1] In Belgian law, the courts with jurisdiction over an administrative authority's failure to comply with a CRAIE decision requiring it to make environmental information available are indisputably the ordinary courts, not the Conseil d'Etat (Council of State – the Supreme Administrative Court of Belgium): where a public authority is "obliged to grant an access request[,] it is […] solely for the ordinary courts to assume responsibility" (RENDERS D., B. GORS and C. THIEBAUT, 'La procédure d'accès aux documents administratifs [Procedures for access to administrative documents]'. In D. RENDERS (ed.), *L'accès aux documents administratifs [Access to Administrative Documents],* Brussels, Bruylant, 2008, p. 574); "the ordinary courts unquestionably have jurisdiction" *inter alia* "to order a recalcitrant administrative authority, on pain of a financial penalty, [to comply with the decision of an appeal body that has declared the decision valid]" (MD's addition) (ANDERSEN R., 'Les procédures de recours en matière d'accès à l'information environnementale en Belgique [Review procedures for access to administrative documents]'. In *Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne: Bilan et perspectives [Ten Years of Access to Environmental Information in International, European and Domestic Law: Evaluating the Past and the Future],* Brussels, Bruylant, 2003, p. 216). Similarly, see also DEBROUX P., J.-B. LEVAUX and V. MICHIELS, 'Les voies de recours [Remedies]'. In V. MICHIELS (ed.), *La publicité de l'administration - Vingt ans après, bilan et perspectives [Twenty Years of Administrative Publicity: evaluating the past and future of the 1994 Law],* Brussels, Bruylant, 2015, p. 260.

3.
The communicants do not dispute that:
- the CRAIE review procedure is free of charge;
- the CRAIE is an independent administrative authority and is therefore independent and impartial within the meaning of the Convention;
- the CRAIE has the power to vary a decision: this means it can re-evaluate all the particulars of a request for environmental information, not confining itself to review of the legality of the administrative authority's adverse decision;[2]
- the Walloon system requires the CRAIE to come to its decisions within a brief period of time and that the CRAIE fulfils this requirement;
- in practice, the CRAIE's actions are generally effective.

Indeed, the tangible results of CRAIE review procedures, which the communicants have highlighted in the Communication and in their subsequent letters, clearly do not allow them to dispute these factors.

4.
Finally, the communicants do not dispute that:

- the Walloon system offers a twofold remedy in accordance with the second subparagraph of Article 9, paragraph 1, of the Convention;

- the ordinary courts, when considering an administrative authority's failure to comply with a CRAIE decision, can direct the authority concerned to provide the environmental information requested and also, where appropriate, award compensation to the applicant;[3]

- judgments of the ordinary courts are enforceable and are in actual fact effective, *inter alia* through ancillary measures for enforcement and for financial penalties.

## III. Examination of the first complaint: non-compliance, in three specific cases, with an alleged one-month time limit

1.
Under Article 4, paragraphs 1 and 7, of the Convention, it is clear that an administrative authority which receives a request for environmental information has one month to make the information concerned available or to notify the applicant that it refuses the request.

2.
In the circumstances of the specific cases referred to by the communicants, there was no breach of this time-limit.

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[2] DEBROUX P., J.-B. LEVAUX and V. MICHIELS, 'Les voies de recours [Remedies]'. In V. MICHIELS (ed.), *La publicité de l'administration - Vingt ans après, bilan et perspectives [Twenty Years of Administrative Publicity: evaluating the past and future of the 1994 Law],* Brussels, Bruylant, 2015, p. 227; ANDERSEN R., 'Les procédures de recours en matière d'accès à l'information environnementale en Belgique [Review procedures for access to administrative documents]'. In *Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne: Bilan et perspectives [Ten Years of Access to Environmental Information in International, European and Domestic Law: Evaluating the Past and the Future]*, Brussels, Bruylant, 2003, p. 205.

[3] RENDERS D., B. GORS and C. THIEBAUT, 'La procédure d'accès aux documents administratifs [Procedures for access to administrative documents]'. In D. RENDERS (ed.), *L'accès aux documents administratifs [Access to Administrative Documents],* Brussels, Bruylant, 2008, p. 603.

Article D.15 of the [Walloon] Environmental Code provides that:

> "1. The public authority shall make the environmental information requested available to the applicant:
>
> a. as soon as possible or, at the latest, within one month after the receipt of the request [...]".

Article D.20.6 of the Environmental Code is worded as follows:

> "Any applicant who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of the present chapter may seek a review of the acts or omissions of the public authority concerned before the Appeal Commission for the Right of Access to Environmental Information.
>
> The appeal shall be lodged by application to the Secretariat of the Appeal Commission for the Right of Access to Environmental Information in a letter sent by registered post or by any other means certifying the date, as determined by the Government. The appeal must be lodged within 15 days of receipt of the notification of the contested decision or, in the absence of such a decision, within 15 days of expiry of the periods prescribed in Article D.15." (MD's emphases).

It is clear from the combination of these articles that if the administrative authority does not reply to a request for environmental information within a month of the date of the request, the applicant may seek a CRAIE review. In other words, failure on the part of the administrative authority to make a decision within a month is tantamount to an implicit refusal, which is subject to appeal before the CRAIE.

The communicants do not dispute this, since, in all the specific cases that they are putting forward, they appealed to the CRAIE because they had not received a decision from the administrative authority within a month.

3.
In any event, contrary to what the communicants appear to be suggesting, the one-month time-limit referred to in Article 4 of the Convention relates only to the administrative authority's decision on the request for environmental information: it does not cover procedures for reviewing an adverse decision.

This is confirmed, in so far as that seems necessary, by the use – with no further clarification – of the adjective "timely" in Article 9, paragraph 4, of the Convention.

## IV. Examination of the second complaint: alleged failure to "guarantee that the Commission's decisions will be put into effect"

Although it remains somewhat unclear, a second allegation against the Walloon system can be inferred from the section of the Communication that states: "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".

1.

Contrary to what the communicants appear to be suggesting, CRAIE decisions are enforceable: they are binding on the administrative authority, which, under the rule of law in Belgium, must comply with them.

Thus,

- the Environmental Code expressly provides that the CRAIE shall make decisions and not simply give opinions;

- in Belgian administrative law, all administrative decisions are "enforceable", which means in particular that they are "binding on the persons to whom they are addressed, who are obliged to obey the requirements of the decision, even if this means further demands are placed on them";[4]

- under Article D.20.12 of the Environmental Code, any CRAIE decision must indicate:

> "7) the deadline set by the Appeal Commission, taking into account the various interests involved, on expiry of which the applicant may exercise the right of access to information acknowledged as a result of the review procedure" (MD's emphasis).

The fact that CRAIE decisions are enforceable is further confirmed by the fact that, if the administrative authority fails to comply with these decisions, the applicant for environmental information has a remedy before the ordinary courts.

2.
It is wrong to claim, as the communicants seem to be maintaining, that the Walloon system does not provide for any penalties in cases where administrative authorities fail to comply with CRAIE decisions even though these decisions are enforceable.

Administrative authorities that do not respond favourably to requests for environmental information are identified by name in CRAIE decisions, which are published in full on its website and in specialist periodicals such as *Aménagement-Environnement [Environment and Planning]*. Administrative authorities that do not comply with CRAIE decisions are identified by name in relevant court judgments, which are published in general or specialist legal journals. Consequently, recalcitrant administrative authorities are seen to be undermining the requirements of the rule of law and lay themselves open to public humiliation.

In addition, reluctance on the part of an administrative authority to comply with the applicable law can lead its supervisory authority to intervene. The communicants clearly understand this, since, in the cases they are putting forward, they applied to the Local Government Minister on at least two occasions.

Finally – and, again, where an administrative authority fails to comply with a CRAIE decision – proceedings may be brought against the authority concerned before the ordinary courts and, in that context, the following remedies may be sought:

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[4] RENDERS D., *Droit administratif général [General Administrative Law],* Bruylant, Brussels, 2015, p. 361, citing Council of State case C.E., no. 179.913, 20 February 2008, Municipality of Schaerbeek. See also: "the decisions of administrative authorities (both statutory and individual) are enforceable of themselves. An administrative authority is considered to be in the right, notwithstanding any dispute or administrative review, unless and until a court upholds a complaint brought by a person subject to the administrative measure concerned" (BATSELE D., T. MORTIER and M. SCARCEZ, *Manuel de droit administratif [Handbook of Administrative Law],* Bruylant, 2010, p. 498). Maurice-André Flamme confirms that any administrative decision is "enforceable *ex officio*" (FLAMME M.-A., *Droit administratif, Tome premier [Administrative Law, Volume One],* Bruylant, Brussels, 1989, pp. 8 to 10).

- an order directing the authority concerned to provide the environmental information requested;

- subjecting failure to comply with this order to a financial penalty;

- an award of compensation to the applicant.[5]

3.
In fact, this system, with its two-stage remedy, functions perfectly in most cases: it is extremely rare for an administrative authority not to comply with a CRAIE decision, and it is extremely rare for any administrative authority not to try to avoid being brought before the courts, let alone convicted.

The effectiveness of this system, which is established by the actual facts, is perhaps explained, wholly or in part, by the fact that the CRAIE cannot make failure to comply with its decisions subject to a financial penalty: in practice, administrative authorities, which by their nature are resistant to openness, adhere to the Walloon system precisely because they do not perceive it as too intrusive.

The legal literature confirms, both expressly[6] and by implication,[7] that the system works properly.

This is also confirmed by the decisions of the courts. It is true that, in one or two instances, the Justice of the Peace of Malmedy-Spa-Stavelot has convicted an administrative authority of failure to comply with a CRAIE decision, in connection with various requests for environmental information submitted to the Municipality of Stavelot by the communicants at a certain time. But these are most probably special cases, which seem to have arisen in the context of a particular relationship between the Municipality and the communicants.[8]

The latter's' lawyer is particularly familiar with CRAIE decisions and with responses to them by the administrative authorities, since he was responsible for introducing, on behalf of clients, some 50% of all appeals to the CRAIE[9] in each of the years 2015, 2016 and 2017. Yet in the Communication under discussion here, he mentions:

- only <u>three</u> actions brought before a Justice of the Peace – and, what is more, all at the request of the same persons and against the same administrative authority;

- and only <u>two</u> cases in which an administrative authority was convicted of failure to comply with a CRAIE decision.

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[5] ANDERSEN R., 'Les procédures de recours en matière d'accès à l'information environnementale en Belgique [Review procedures for access to administrative documents]'. In *Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne: Bilan et perspectives [Ten Years of Access to Environmental Information in International, European and Domestic Law: Evaluating the Past and the Future]*, Brussels, Bruylant, 2003, p. 216.

[6] DELNOY M. and R. SMAL, 'La publicité de l'administration en matière environnementale [Public access to administrative documents in environmental matters]'. In V. MICHIELS (ed.), *La publicité de l'administration - Vingt ans après, bilan et perspectives [Twenty Years of Administrative Publicity: evaluating the past and future of the 1994 Law],* Brussels, Bruylant, 2014, p. XXX, http://M1.handle.net/2268/174596; DEBROUX P., J.-B. LEVAUX and V. MICHIELS, 'Les voies de recours [Remedies]'. In V. MICHIELS (ed.), *La publicité de l'administration - Vingt ans après, bilan et perspectives [Twenty Years of Administrative Publicity: evaluating the past and future of the 1994 Law],* Brussels, Bruylant, 2015, p. 228.

[7] No one who has contributed to the legal literature on the CRAIE suggests that it functions in any way unsatisfactorily; nor do they mention any actions before the ordinary courts – at least, not from the same angle as the criticisms expressed in the Communication.

[8] See, for example, http://verviers.lameuse.be/30272/article/2017-01-10/stavelot-menacee-dune-amende-de-1000-euros-par-jour ; https://vlex.be/vid/-57899263.

[9] 2015: 25 appeals out of a total of 48; 2016: 20 appeals out of a total of 46; 2017: 36 appeals out of a total of 73.

4.
All of this aside, and in any event, the Convention does not require that there should be any penalties for non-compliance with the decisions of a review body such as the CRAIE.

The second subparagraph of Article 9, paragraph 1, of the Convention merely requires that "[i]n the circumstances where a Party provides for such a review by a court of law", it should 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": there is no requirement for a penalty for non-compliance. Even more crucially, it follows from the third subparagraph of Article 9, paragraph 1, that "the Convention does not [even] require that the decision taken as a result of this procedure [of reconsideration ... or review by an independent and impartial body other than a court of law] is binding on the public authority holding the information",[10] only that "final decisions under this paragraph 1 [must] be binding on the public authority holding the information" (MD's additions). In other words, in providing that CRAIE decisions are binding on the administrative authorities, the Walloon system goes beyond the requirements of the Convention, which would allow CRAIE measures to have the status of mere opinions – as is the situation in other systems of public access to administrative matters in Belgium.[11]

It is true that Article 9, paragraph 4, of the Convention provides that "the procedures referred to in paragraphs 1, 2 and 3 [...] shall provide adequate and effective remedies". But as far as Article 9, paragraph 1 – the only provision at issue here – is concerned, it is obvious that the remedy envisaged is the system of review in its entirety, which here means the CRAIE review procedure followed, if necessary, by proceedings before the ordinary courts. And it is common ground that an ordinary court can subject its orders or convictions to measures, such as financial penalties, intended to guarantee that they will be put into effect.

## V. Examination of the third complaint: alleged high costs of judicial review

Although it remains somewhat unclear, a third allegation against the Walloon system can be inferred from the Communication, as follows: proceedings before the courts seeking to remedy an administrative authority's failure to comply with a CRAIE decision are (too) costly.

1.
First and foremost, the communicants do not produce any figure or any document that could substantiate their claim that costs in these cases are high. *Inter alia* and especially, the cost of their lawyer's involvement in the various administrative and judicial procedures referred to in the Communication remains unknown. The high costs alleged by the communicants have thus not been substantiated.

2.
Proceedings before a Justice of the Peace are recognised as the least expensive of any in the Belgian court system:

[10] SAMBON J., 'L'accès à l'information en matière d'environnement: de quelques difficultés théoriques et pratiques [Access to environmental information: some theoretical and practical difficulties]'. In D. RENDERS (ed.), *L'accès aux documents administratifs [Access to Administrative Documents],* Brussels, Bruylant, 2008, p. 693.
[11] DEBROUX P., J.-B. LEVAUX and V. MICHIELS, 'Les voies de recours [Remedies]'. In V. MICHIELS (ed.), *La publicité de l'administration - Vingt ans après, bilan et perspectives [Twenty Years of Administrative Publicity: evaluating the past and future of the 1994 Law],* Brussels, Bruylant, 2015, p. 228.

- the filing fee for a case like the one at issue here is probably about 25 euros;

- the only cost associated with applying to initiate proceedings is the amount that the applicant must pay for the summons to be served: this "varies between 150 and 250 euros"[12] – which is extremely reasonable. Moreover, since it has failed to implement an enforceable decision, the administrative authority is more than likely to be convicted by the Justice of the Peace and this will probably mean that the cost of the summons will be awarded against the authority,[13] with the result that, in the end, none of those costs will have to be borne by the applicant. Against that background, it is probably unnecessary to mention the eventuality that the defendant voluntarily enters an appearance, which avoids the cost of a summons;

- and it is equally unnecessary to mention the fact that the assistance of a lawyer is not compulsory – which is especially relevant to the remedy at issue here, not only because it is heard before a Justice of the Peace (the court designed to be "the closest to ordinary citizens"[14]) but also and above all because the matters involved are, on the whole, generally very straightforward. Even if, despite everything, an applicant for environmental information decides to involve a lawyer, at the end of the trial he or she will receive a case preparation allowance intended to cover all or part of the lawyer's fees and, in view of the straightforward nature of the proceedings, there is no evidence that the fees actually due will be higher than that allowance, *a fortiori* because (i) the allowance is set by the court, which has a power of discretion,[15] and (ii) it is common knowledge that the average fees of lawyers at the Francophone Bar in Belgium are some of the lowest in Europe.

It is difficult to describe this system as prohibitively expensive within the meaning of Article 9, paragraph 4, of the Convention.

3.
Lastly, any assessment of whether or not the judicial review procedure is prohibitively expensive must take into account the opportunity for preliminary review by the CRAIE, which is free of charge – a fact that is not disputed by the communicants.

## VI. Examination of the fourth complaint: alleged slowness of judicial review

Although it remains somewhat unclear, a fourth allegation against the Walloon system can be inferred from the Communication, as follows: proceedings before the courts seeking to remedy an administrative authority's failure to comply with a CRAIE decision are (too) slow.

1.
First and foremost, the communicants do not clearly identify an average length of time for proceedings before the Justice of the Peace, nor provide copies of judgments that support their claims in this regard.

Examination of the Communication and its annexes reveals that only one of the cases referred to by the communicants required a conviction in court, namely the one relating to the L'Eau Rouge campsite at Stavelot. A single case obviously does not provide an adequate basis on which to ascertain an average period of time for proceedings before the Justice of the Peace, particularly as in this instance the judgment related only to a part of the environmental information requested,

[12] https://www.tribunaux-rechtbanken.be/sites/default/files/public/content/le juge de paix.pdf
[13] https://www.tribunaux-rechtbanken.be/sites/default/files/public/content/le juge de paix.pdf
[14] https://www.tribunaux-rechtbanken.be/sites/default/files/public/content/le juge de paix.pdf
[15] See ACCC, 18 June 2017, XXX.

which the administrative authority had as yet failed to produce.

This complaint has thus not been substantiated.

2.
One could reasonably hope not to be contradicted by the communicants when stating that Justices of the Peace preside over courts with some of the smallest backlogs of cases in Belgium. Furthermore, Justices of the Peace generally rule very quickly on litigation before them.

3.
Examination of the cases in which the communicants actually brought proceedings before a Justice of the Peace shows that they generally took two or three months to start proceedings. The average length of time for obtaining a judgment from the Justice of the Peace obviously cannot include the time it takes to initiate proceedings, which can only be the responsibility of the communicants themselves.

4.
The communicants make only very limited mention of the possibilities for an applicant to have his or her case dealt with before a Justice of the Peace in short pleadings, summary proceedings or on the basis of a fast-track timetable for exchange of pleadings when the particular circumstances of the case warrant this.

For example, a case of non-compliance with a CRAIE decision may be heard by the Justice of the Peace in short pleadings and thus settled when the court sits to commence the proceedings.

Nor is there anything to prevent an application for summary proceedings – that is, for the case to be treated as urgent. The communicants' claim in this regard is inconsistent with the best school of thought on this point: "Where a court hearing an application for interim measures orders the production of documents, does it fail to have regard to the interlocutory nature of its responsibilities, since this is a measure that appears to be irreversible? Such an interpretation seems restrictive and oversimplifies the nature of an interim measure. The reversibility or otherwise of the measure is not important. The only restriction that applies to the measure is that it should not cause 'irremediable and irreparable' harm to one of the parties. The 'interim effect of the measure, which in actual fact means that the court adjudicating the substance cannot be bound by the determination of the judge who heard the application for interim relief, must not be confused with the reversibility or otherwise of the measure imposed'."[16] Indeed, this academic article is quoting a judgment of the Verviers Court of First Instance ruling in summary proceedings where a municipality was ordered to provide copies of building permits.[17]

5.
The communicants mention in turn proceedings lasting "several months" and lasting "six months".

Whichever it is, assuming that this reflects the real situation and without taking into account the possibilities for abbreviated procedures mentioned above, such periods of time cannot reasonably be considered too long for a judicial review. In its findings and recommendations of 28 June 2013,[18] the Compliance Committee took the view that a year was a reasonable length of time. Similarly, cases in which the European Court of Human Rights considered that proceedings before the courts

[16] RENDERS D., B. GORS and C. THIEBAUT, 'La procédure d'accès aux documents administratifs [Procedures for access to administrative documents]'. In D. RENDERS (ed.), *L'accès aux documents administratifs [Access to Administrative Documents],* Brussels, Bruylant, 2008, p. 607, citing Civ. Tournai (ref.), 25 October 2000, *Revue de Jurisprudence de Liège, Mons et Bruxelles (J.L.M.B.)*, 2001, p. 515.
[17] Civ. Verviers (ref.), 15 November 1993, *Aménagement-Environnement (Amén.)*, 1993, p. 267.
[18] ACCC/C/2011/62.

had been unreasonably long related to periods of nine years and seven months,[19] 13 years and four months,[20] five years and five months,[21] five years and 11 months,[22] 12 years and seven months[23] and five years.[24]

Finally and indisputably, the length of a judicial review procedure cannot be assessed by reference to the period of one month envisaged in Article 4, paragraphs 1 and 7, of the Convention, which concerns only the decision to be made by an administrative authority when it receives a request for environmental information.

6.
Lastly, any assessment of the speed of judicial review procedures must take into account that the Walloon system allows for the possibility of review by the CRAIE – which, as is not disputed by the communicants, acts quickly.

## VII. Conclusions

In the light of the above, it is apparent that the Walloon system for compliance with the Convention has been planned so that:

- an administrative authority's refusal of a request for environmental information may be challenged by applying to an independent administrative authority (the CRAIE) for the decision to be varied – and the CRAIE's involvement is free, rapid and, in the great majority of cases, effective;

- the rare cases in which an administrative authority does not comply with a CRAIE decision may be brought before the ordinary courts, where the cost of access is more than reasonable and where judgments may not only be obtained quickly but also made subject to penalties for non-compliance;

- the (rare) specific cases referred to by the communicants – which essentially concern only the communicants – do not in any way establish the contrary.

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Liège, 23 February 2018

On behalf of the Walloon Region,
as Counsel,

M. Delnoy

[19] ECHR, Milasi v. Italy, 25 June 1987, Series A no. 119.
[20] ECHR, Baggetta v. Italy, 25 June 1987, Series A no. 119.
[21] ECHR, B. v. Austria, 28 March 1990, Series A no. 175.
[22] ECHR, Rouille v. France, no. 50268/99, 6 January 2004.
[23] ECHR, Clinique Mozart SARL v. France, no. 46098/99, 8 June 2004.
[24] Hamer v. Belgium, no. 21861/03, ECHR 2007-V (extracts).