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Appendix:
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Regarding: Memo concerning Communication ACCC/C/2015/134 Belgium in the context of a communication submitted before the *Compliance Committee* of the Aarhus Convention

Mr President,

The present memo aims to outline the system which has been implemented in the Walloon Region (Belgium), with a view to complying with the stipulations of the Aarhus Convention regarding access to environmental information, and more specifically access to justice in the context of such a request.

This memo has been drafted in the context of a communication submitted before the *Compliance Committee* of the Aarhus Convention by Mr Francis Doutreloux and by the non-profit association Avala, who postulate that in the context of three cases requesting information to the Municipality of Stavelot, *"The Belgian State has infringed the right of access to environmental information, guaranteed by articles 1, 3 and 4 of the Aarhus Convention and that, furthermore, in 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)".*

It will also include a critical analysis of the grievances voiced by the communicant against the Walloon system.

1. Access to environmental information in the Walloon Region

Access to environmental information in the Walloon Region is organised by Book I of the Environmental Code[1].

This states as a principle in article D.10 that (free translation):

> *"**Art. D. 10**. The right of access to environmental information held by the public authorities is guaranteed to all members of the public, without the obligation to show a legitimate interest.*
> *The public authorities disseminate and make available to the public the environmental information which they have in their possession.*

[1] This is available at http://environnement.wallonie.be

Without prejudice to the application of the provisions regarding the procedures of public participation, the present provision has as its objective:

1° to guarantee the right of access to environmental information held by the public authorities, or held on their behalf, and to establish the basic conditions and practical modalities of the exercising of this right;

2° to monitor whether the environmental information is automatically and incrementally made available and disseminated among the public, in order to achieve the broadest possible systematic provision and dissemination of this information to the public. To this end, it is advisable to promote the use, among other things, of information telecommunication technologies or electronic technologies, whenever these are available."

Articles D.12 et seq organise access to environmental information from the public authorities who hold the information in question. The principle is that all environmental information held by the public authority must be communicated to the applicant within a period of one month. This period can be extended by one month if the volume and complexity of the information are such that the initial period of one month cannot be respected.

The text stipulates cases in which the public authority can refuse access to environmental information. These cases are listed in a non-exhaustive manner.

The text also stipulates cases in which the public authority can limit the information requested. Here again, the hypotheses are listed in a non-exhaustive manner.

The grounds for a refusal or a limitation are interpreted restrictively, taking into account the interest which the dissemination of the information may have for the public. For every particular case, the public authority needs to weigh the public interest served by the dissemination against the interest served by the refusal to disseminate it.

Every total or partial refusal to communicate the information is the subject of a justified decision, and written notification is sent to the applicant, within the period established for responding to the request for information.

The notification of refusal must clearly indicate the possibilities and the modalities of remedy available to the applicant.

2. Remedy regarding access to environmental information

In the event of refusal or in the absence of a response from the authority to whom the request is addressed, the applicant has a right of legal remedy before the Appeal Commission for the Right of Access to Environmental Information (CRAIE for short). This remedy is organised by article D.20.6 of the same Book, stating the following (free translation):

*"**Art. D.20.6.** Any applicant who considers that his request for information has been ignored, illegitimately or unduly rejected, partially or fully, or that it has been insufficiently taken into consideration or has not been handled in compliance with the present chapter, may lodge an appeal with the Appeal Commission for the Right of Access to Environmental Information against the acts or omissions of the public authority concerned.*

The remedy must be an appeal lodged to the secretariat of the Appeal Commission in a letter sent by registered post, or by any other medium which confers a certified date and is defined by the Government. The appeal must be lodged within fifteen days following receipt of the notification of the contested decision or, in the absence of such a decision, within the fifteen days following the expiry of the periods specified in article D.15.".

Concerning the periods and the content of the decision, Book I of the Code provides the following stipulations in its articles D.20.11 and D.20.12 (free translation):

> *"**Art. D.20.11**. The Appeal Commission shall make its decision within the month following receipt of the petition. However it may extend this period, in a justified decision; the extension(s) may not exceed a total of forty five days.*
>
> ***Art. D.20.12.** Besides the justification, the decision shall indicate:*
> *1° the identity and domicile of the applicant;*
> *2° the identity and administrative office of the public authority to whom the information request was made;*
> *3° if necessary, the surnames, first names, domicile and capacity of the persons who have represented or assisted them;*
> *4° if necessary, the convocation, appearance and hearing of the persons interviewed;*
> *5° if necessary, the deposit of written observations;*
> *6° the judgement, and the date and place where it was made;*
> *7° the period established by the Appeal Commission, taking into account the various interests in attendance, at the expiry of which the applicant can exercise the right to the information which has been recognised following the appeal procedure.*
>
> *The decision is signed by the president and the secretary.".*

The CRAIE's decision is a decision and not a simple opinion. The CRAIE, which is an administrative authority, therefore has its own decision-making power.

In accordance with the principles of administrative law, its decisions, like all other unilateral decisions made by an administrative authority, have an enforceable character.

The CRAIE does not have *proprio motu* power to produce the requested information. Nevertheless, the applicant, having obtained a favourable decision from the CRAIE, can avail him or herself of this decision before the public authority to which it is addressed.

The public authority to whom the decision is addressed must take it into account and execute it, without being able to modify the terms or disregard its application.

It should be noted that, in the vast majority of cases, the system described above does not create any problems in particular and the administrative authority in default respects the decision of the CRAIE.

3. Appeals following the decision of the Appeal Commission

3.1 Appeals against the decision of the Appeal Commission

The decision of the CRAIE is a decision from an administrative authority. It has binding legal effects, and is likely to cause a grievance to the public authority to whom the decision is addressed, or to the applicant of environmental information if it confirms the refusal of access to environmental information.

The definitive character of this decision should also be borne in mind. The decision of the CRAIE effectively exhausts its competence and this decision ends the appeal procedure.

As such, an action for annulment, and possibly an action for suspension, is open before the Supreme Administrative Court of Belgium, within a period of 60 days.

As holder of the jurisdiction for annulment, the Supreme Administrative Court of Belgium will examine whether the decision of the CRAIE is sufficiently justified in fact and in law and, if necessary, will proceed to its annulment. The CRAIE must, in this case, rule again on the request which had been addressed to it. The check carried out by the Supreme Administrative Court of Belgium is a legality check, which can be extended to, but which may not exceed, a check of the manifest error of assessment by the authority having taken on the contested decision, this manifest error being equated to an illegality.

3.2 Appeals in the event of non-execution of a decision of the Appeal Commission

In the event that the CRAIE has made a decision ordering the public authority to issue the environmental information which it holds, and this public authority refuses to comply, the beneficiary of the right of access to environmental information shall be free to bring the case before the ordinary courts, in accordance with the rules of common law, with a view to obtaining the execution of the CRAIE's decision.

During the examination of this request, the judge should take into account the decision of the CRAIE, and will not rule on the relevance of the information request, but only on the refusal of the public authority to apply the decision of the CRAIE. The court seized will consequently be able to sentence this public authority to indemnities or periodic penalties in the event that the non-execution of the CRAIE's decision persists.

Another possibility open to the applicant is the lodging of an appeal before the Supreme Administrative Court of Belgium against the implicit decision of refusal by the authority in possession of the environmental information to issue the information in execution of the CRAIE's decision. This appeal can be initiated on expiry of a period of four months from the date of the formal notice to make a ruling, which is notified by the applicant.

Here again, the Supreme Administrative Court of Belgium will observe in principle the non-execution of the CRAIE's decision which is nonetheless binding on the administrative authority, and will annul the implicit decision of the administrative authority to not comply with the decision of the CRAIE.

It can be seen that in the cases of non-execution of the CRAIE's decisions, one or more judicial appeals are open to the applicant. In reality, the administrative authority has no reason not to execute these decisions, given the adverse repercussions which this non-execution is likely to give rise to (legal fees, court costs and an unavoidable conviction).

4. Examination of the communication ACCC/C/2015/134 before the *Compliance Committee*

4.1 Provisions invoked by the communicant

The first grievance outlined by the communicant is the fact that the Aarhus Convention, by virtue of its articles 1 and 4, guarantees the right of access to environmental information within a period of one month, whereas in the context of the three cases argued in the grievance, the plaintiffs had to wait for more than one year to be able to have access to a part of the information.

The second grievance criticises the remedy system provided for by Walloon legislation, and more specifically what the communicant describes as "the system's lack of effectiveness", and that the decision of the CRAIE, the administrative authority, *"does not conclude with any element which gives it immediate effect, unlike judgments of the courts of law"*. The communicant continues by maintaining that *"the fact that CRAIE decisions are unenforceable means that the system of access to information cannot have any direct effect. 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"*.

According to the communicant, *"the crux of their 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"*.

In support of the second grievance, the communicant outlines paragraphs 1, 3 and 4 of article 9 of the Aarhus Convention.

4.2 Critical examination of the grievances and analysis of the Walloon system in light of the Aarhus Convention

It can be asserted that the system implemented by the Walloon legislation sufficiently meets the objectives of the Aarhus Convention.

In practice, as mentioned *supra*, the Walloon Environmental Code imposes the obligation on public authorities to issue environmental information which is the subject of an access request within a period of one month, except for the reasons explicitly specified by the provisions of the Code, which reproduce the Aarhus Convention.

In the event of absence of a response or refusal by this public authority, a legal remedy has been provided for by the regional legislator before an Appeal Commission - the CRAIE. The Walloon legislator wanted to guarantee the impartiality and independence of this body. The procedure is free of charge and rapid, given the timeframes imposed by the legislation on the CRAIE to make its decision.

Concerning the first grievance relating to the issuing of the information with a period of one month, the Walloon Region absolutely declares the existence of this obligation in its legislation. In the event of non-compliance with this obligation, adequate legal remedies are open, and a grievance cannot be made to the Walloon Region for not having taken the necessary provisions to respect the stipulations of the Aarhus Convention. The fact that, in certain cases, the period necessary for obtaining the environmental information is longer than one month, particularly in the event of refusal or absence of a response by the public authority, or referral to appeal bodies, stems from the system provided for by the Convention itself.

In practice, it is the non-compliance with this period of one month or the refusal by the administrative authority which opens the right to lodge an appeal. Under these circumstances, it would be difficult to see how the period of one month could still apply.

This first grievance does therefore not appear to be relevant since it is formulated separately from the second grievance.

Concerning the second grievance regarding the alleged lack of effect of the legal remedy system implemented by the Walloon Region, the content of paragraphs 1 3 and 4 of article 9 of the Aarhus Convention, on which the communication is based, should be recalled.

These provisions are worded as follows:

> *"**Art. 9.1**. 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.*

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."

Article 9, paragraph 3, does not seem to be relevant for the examination of the case submitted by the communicant, given that the communication specifically concerns the legal remedies regarding access to environmental information, which are specially governed by the paragraphs 1 and 4 of article 9.

It can be seen that the system initiated by article 9, paragraph 1, instructs Parties to give the possibility to formulate a legal remedy to those under the administration.

This legal remedy can be initiated before a judicial body, but in this case must be able to be initiated beforehand before an impartial and independent administrative body.

In practice, by specifying that *"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"* (our underlining), the Convention emphasises the necessity of designating a body which is able to specifically meet the objectives of the Convention, specifically concerning the rapidity and low cost of the procedure.

Even if this desire for rapidity is reiterated more generally in article 9, paragraph 4, which stipulates that *"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"*, and therefore seems to refer to all remedy procedures, it can be noted that the Convention makes a distinction between a legal remedy, which constitutes common law, and a first-line remedy system which is more rapid, before another body in a better position to meet the objectives of the Convention in terms of rapidity and cost for those under the administration.

It is clear from the foregoing that the communicant wrongly considers that the decision of the CRAIE is not binding on the public authority which refuses to communicate environmental information. In practice, itself constituting an administrative authority vested with decision-making powers, the CRAIE makes decisions vested with enforceability. It would be different if the CRAIE only had the power to deliver opinions.

The enforceability of the CRAIE's decisions, which therefore has the power of injunction with regard to the defaulting public authority, can subsequently be implemented by the judge, in the event that the refusal by the public authority persists.

Under this scenario, common law applies, as mentioned *supra*. The enforceability of the CRAIE's decision implies that the question of whether the request for access to information is well-founded, as well as the outcome obtained from the dispute, are in principle not in doubt [2]. This judge's decision will be vested with the authority of res iudicata when recourse to ordinary legal remedy can no longer be exercised against it.

[2] It is appropriate to set aside the hypothesis in which the CRAIE's decision would itself be unlawful. Under this scenario, the judge would be able to disregard its application.

Finally, it should be noted that the text of the Aarhus Convention provides that *"the Final decisions under this paragraph 1 shall be binding on the public authority holding the information".*

As explained in the *Implementation guide* of 2014, the system provided for by article 9 of the Convention does not imply that all the decisions made within the scope of legal remedy must be binding.

> *"Under the Convention, final decisions under article 9, paragraph 1, must be binding on the public authority that holds the requested information. The Convention does not require every decision under paragraph 1 to be binding, only final ones. So, the various mechanisms and opportunities for appeal can work in combination to reach a final binding decision[3]."*

In fact, it can be noted that this position seems to be shared by the European Commission, which made its observations known in the context of a complaint lodged against it in the same case. Indeed, the plaintiff also considered that the regional legislation governing the matter contravened Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 91/313/EEC, and also contravened the Aarhus Convention.

In the response given to the plaintiff by the Commission, the latter also considered that the system provided for by the Walloon Region complies both with the stipulations of the directive and those of the Aarhus Convention, specifying nonetheless that, like the Kingdom of Belgium, *"this position is confirmed by the analysis given in the explanatory documents ("Implementation guide") of the Convention, drafted by the UN Economic Commission for Europe (UNECE), second edition, 2014, pages 191 and 192".*

In the same response, the Commission emphasises that it *"should be noted that article 9, paragraph 4 of the Aarhus Convention refers to adequate and effective remedies, including injunctive relief as appropriate (the Commission's underlining). In other words, an injunction does not need to be provided for in every circumstance, but only insofar as it is appropriate and practicable.".*

Conclusion

It follows from the elements presented here that the communicant wrongly considers that there is no clear system of sanctions attached to the remedy open before the Appeal Commission for the Right of Access to Environmental Information (CRAIE) by the Walloon legislation.

I hope that we have been able to demonstrate the conformity of the remedy system in place in the Walloon Region with the provisions of the Aarhus Convention.

I remain at your disposal, and wish to extend my warmest regards.

The Director-General,

[signature]

Brieuc Quévy

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[3] UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE – The Aarhus Convention – Implementation guide, 2014, page 192.