19 November 2015

***European Commission***
***Directorate General for the Environment***
***Directorate - Implementation, Governance & European Semester***
***ENV.D.2 - Enforcement, Cohesion***
***Policy & European Semester, Cluster 2***
***Brussels - Belgium***
***c/o Mr Ion CODESCU***
env-d02-ares@.ec.europa.eu

Dear Sir,

**Our Ref.: DOUTRELOUX / S.A. SCIERIE CLOSE 00000012 AL/LR/2092**
**Your Ref.: CHAP(2015)02656/D/004**

I acknowledge safe receipt of your email of Friday, 23 October 2015, to which I now reply.

1. First of all, I wish to point out that the non-profit association which I represent, alongside Mr Doutreloux, is Avala ASBL (acronym for *Association pour le val d'Amblève, de la Lienne et de ses affluents)* and not Avale ASBL (as in your email).

2. You understand correctly that the crux of the ineffectiveness alleged by my clients lies at the level of decisions made by the Appeal Commission for the Right of Access to Environmental Information ('the CRAIE').

The problem is that there is nothing to ensure that CRAIE decisions are followed by those to whom they are addressed (that is, the public authorities).

In their Complaint, the applicants suggest, by way of example, that CRAIE decisions could, like judgments, be accompanied by an enforcement order. That was merely a suggestion – an example of what could be done to ensure the effectiveness of CRAIE decisions.

Another possibility would be to make failure to comply with a CRAIE decision into a criminal offence or an administrative offence which could result in a fine or even a time-related compensation payment.[1]

Therefore the subject of the applicants' Complaint is not per se the absence of a clause conferring authority to enforce CRAIE decisions, but rather the ineffectiveness of these decisions in the broad.

3. The applicants acknowledge that the CRAIE is not a court of law, but an administrative review body chaired by a magistrate.

[1] By analogy with the scheme of Article 95(9) of the Decree on Environmental Permits of 11 March 1999, according to which "Compensation of twenty times the filing fee referred to in Article 177(2), points 1 and 2, is to be paid by the Region where refusal of a permit results from lack of a decision, both at first instance and on review, and if no summary report has been supplied within the deadline laid down".

4. However, the applicants object vigorously to the Commission's conclusion that:

> "[T]he establishment of the Appeal Commission for the Right of Access to Environmental Information (the CRAIE) by the Decree of 16 March 2006 is to be viewed as the transposition and implementation of Article 6(1) of Directive 2003/4/EC. […] It should also be noted that Article 6(1) of the Directive does not in itself require that the decision taken in the context of such a review must be provided with an element conferring authority to enforce it. In other words, the absence of such an element does not in itself constitute a breach of European law [sic]".

In this connection, the applicants wish to point out that the Directive must be read in conjunction with the Aarhus Convention and in accordance with interpretation of the Convention, which it transposes into European law. Article 9, paragraphs 1 and 4, of the Convention state:

> "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.
>
> (...)
>
> 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.
>
> (...)" (bold and underlining emphases added).

The applicants point out that, within the framework of the Aarhus Convention, even the first remedy must lead to an *effective* decision and one which may, where appropriate, allow for injunctive relief.

In addition, and in so far as it seems necessary, the applicants wish to clarify that it is mandatory to seek CRAIE review and that they could not contemplate applying directly to the Council of State [the Supreme Administrative Court of Belgium] in the case of an administrative authority's failure to respond to a request for access to environmental information.

And it must be acknowledged that the Aarhus Convention provides, in article 9, paragraph 1, for access to a review procedure if a request for information has been ignored, wrongfully refused, whether in part or in full, or inadequately answered – not two reviews.

5. At the end of your letter, you mention the possibility of appeal before the Council of State, based on an administrative authority's implicit refusal[2] to implement a CRAIE decision instructing it to provide access to information requested.

Although your letter does not give any legal basis for this, the applicants presume that you are referring to the possibility covered by Article 14(3) of the Consolidated Acts of 12 January 1973 on the Council of State [lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973] ('the Consolidated Laws'), according to which:

> "Where an administrative authority is under an obligation to make a decision and the party concerned has given formal notice that it must do so within four months, but the authority does not make a decision within that time, its failure to respond is deemed to be a refusal and is open to challenge in the administrative courts. This provision is without prejudice to special legislative provisions establishing a different time-limit or attaching different legal consequences to the administrative authority's failure to respond" (emphasis added).

However, the applicants wish to draw your attention to the fact that this process takes an extremely long time. It is possible to embark on the procedure only after a successful outcome to review by the CRAIE (which is only completed 4 months – on average – after the request for access to information has been made). Moreover, before an application can be made to the Council of State, the recalcitrant authority must be given formal notice to make a decision; this can be done only after expiry of the period prescribed by the CRAIE Decision (in practice, 8 days) for the information to be supplied. The process of appeal to the Council of State can only be started 4 months after *this formal notice* has been sent. It should also be taken into account that annulment proceedings before the 13th Chamber of the Council of State take an average of 2 years.[3]

The applicants would also like to draw your attention to the fact that if, following a Council of State judgment, the public authority still did not implement the Decision, it would be necessary to initiate new proceedings, this time on pain of a financial penalty, on the basis of Article 36(1) of the Consolidated Acts. This entails allowing the administrative authority a reasonable period of time to implement the Decision, sending it another formal notice and then waiting a further 3 months.

In view of the considerations outlined above, this entire procedure involves a minimum period of two and a half years.[4] This not only infringes but is also in complete conflict with the right of access to environmental information as provided for by Directive 2003/4/EC, under which the information must be made available "as soon as possible or, at the latest, within one month after

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[2] Refusal to supply information is almost always implicit.

[3] For example, Case *G/A 211.593/XIII-6898,* which concerns issues of access to environmental information, was filed on 7 February 2014, but no report for the hearing has yet been produced. (Even after it has, there will still have to be an exchange of *final pleadings* and a hearing before a decision can be taken.) In order to illustrate the length of straightforward annulment proceedings relating to the environment (and therefore referred to the 13th Chamber of the Council of State), the applicants submit, in annex, four recent judgments of the Council of State, which are among the most recent available at the date of this letter. Analysis of these leads to the conclusion that a period of 2 years is most certainly the minimum time taken for proceedings relating to the environment before the 13th Chamber of the Council of State. The applicants wish to point out that a judgment *suspending* a decision should not be confused with a judgment *annulling* a decision: if *a suspensory order* is made during the year after the originating application but rules only on the petition for suspension, the annulment proceedings must still be concluded.

[4] 4 months (before the CRAIE) + 4 months (formal notice period) + 2 years (Council of State proceedings).

the receipt" [of the request] (emphasis added).

The applicants also wish to state that they consider such procedures before the Council of State to be ***prohibitively expensive*** (within the meaning of article 9, paragraph 4, of the Aarhus Convention).

6. Finally, the applicants would like to point out, for your information, that it is not possible to contemplate bringing such an action before the Council of State – nor even before the civil courts – through the use of *summary proceedings.* This is because, in Belgian law, *summary proceedings* provide only for an *interlocutory ruling*. In the specific cases to which this Complaint relates, an interlocutory ruling would effectively be a ruling on the merits,[5] which is impossible.

7. In the light of the foregoing, the applicants' Complaint could, in the alternative, be interpreted as alleging that Directive 2003/4/EC has incorrectly transposed the Aarhus Convention.

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We wish to make it clear that we have exhausted all options under Belgian national law before lodging this Complaint with the Commission and that the system of domestic remedies is, without question, ineffective.

I hope the above has provided you with relevant new considerations, and I look forward to hearing from you further.

Yours faithfully,

Alain LEBRUN
Lawyer.
[*signature*]

[5] Imagine that a court made an interlocutory order for supply of the information: this access to information could not subsequently be withdrawn on the merits. This is a straightforward matter of applying the first paragraph of Article 1039 of the Civil Procedure Code, under which "interlocutory orders are without prejudice to the main proceedings". According to the Cour de cassation (Court of Cassation), "interlocutory orders are without prejudice to the main proceedings. However, this does not mean that the court hearing an application for interim measures is prevented from examining the parties' rights, in so far as its orders are without prejudice to those rights; interlocutory orders remain open to challenge and reparable" (Cass., 9 September 1982, *Pas.* 1983, Book 1, p. 48). And according to courts adjudicating on the substance, "a court hearing an application for interim measures may examine the rights of the parties on the merits. Its order is not intended to be irreversible, so it cannot deprive judgment on the merits of useful effect" (emphasis added; Brussels, 26 October 1989, *Revue de Jurisprudence de Liège, Mons et Bruxelles (J.L.M.B.)*, 1989, p. 1309). A summary of these two decisions also appears in annex.

**ADMINISTRATIVE LITIGATION SECTION OF THE COUNCIL OF STATE**

**JUDGMENT**

No. 232.450 of 6 October 2015

A. 208.679/XIII-6601

Cause: 1. Jean-Luc **DOCQUIER**
2. Joëlle **PIRSON**,
both with address for service c/o
Messrs Etienne GREGOIRE and
Antoine GREGOIRE, Lawyers,
21, avenue Blonden
4000 Liège,

versus:

**Municipality of Geer,**
with address for service c/o
Mr Eric LEMMENS, Lawyer,
68/2, boulevard de la Sauvenière
4000 Liège.

Intervener:

**ADEM CHAUFFAGE SPRL,**
with address for service c/o
Mr Patrick HENRY, Lawyer,
7, place des Nations Unies
4020 Liège.

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**13th CHAMBER, COUNCIL OF STATE**

Having regard to the single application of 29 April 2013 by which Jean-Luc DOCQUIER and Joëlle PIRSON requested annulment of the planning permit granted on 19 November 2012 by the local authority of the Municipality of Geer to ADEM CHAUFFAGE, a private limited liability company, to build an industrial warehouse with offices on land situated at 9 A, rue Jean- Baptiste Joannès in Darion-Geer;

**ADMINISTRATIVE LITIGATION SECTION OF THE COUNCIL OF STATE**

**JUDGMENT**

No. 232.469 of 6 October 2015

A. 205.15l/XIII-6252

Cause: **ACTION ET DEFENSE DE L'ENVIRONNEMENT DE LA VALLEE DE LA SENNE ET DE SES AFFLUENTS: ADESA ASBL** for short,

with address for service c/o
Mr Benoît HAVET, Lawyer,
3, allée de Clerlande
1340 Ottignies,

versus:

**Walloon Region,**
represented by the Government of the Region,

with address for service c/o
Ms Bénédicte HENDRICKX, Lawyer,
14 A, rue de Nieuwenhove
1180 Brussels.

Intervener:

**GESTAMP WALLONIE SA,**
with address for service c/o
Messrs Matthieu GUIOT and
Benjamin REULIAUX, Lawyers,
431 F, chaussée de Louvain
1380 Lasne.

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**ACTING PRESIDENT OF THE 13TH CHAMBER,**

Having regard to the application of 7 June 2012 by which ADESA ASBL (Action et Defense de l'Environnement de la Vallee de la Senne et de ses Affluents), a non-profit environmental protection association for the Valley of the River Senne and its tributaries, requested annulment of the combined planning and environmental permit granted by a Ministerial Decision of 6 April 2012 to GESTAMP WALLONIE, a public limited company, to build and operate seven wind turbines and an electrical cabin on the chaussée de Marche at Feluy in the Municipality of Seneffe;

**ADMINISTRATIVE LITIGATION SECTION OF THE COUNCIL OF STATE**

**JUDGMENT**

No. 232.467 of 6 October 2015

A. 198.762/XIII-5767

Cause: **ELECTROLUX BELGIUM SA,**
with address for service c/o
Messrs David HAVERBEKE and
Jens DEBIEVRE, Lawyers,
Box 113, 86 C, avenue du Port
1000 Brussels,

versus:

**Walloon Region,**
represented by the Government of the Region,
with address for service c/o
Mr Etienne ORBAN de XIVRY**,** Lawyer,
29, boulevard du Midi
6900 Marche-en-Famenne.

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**ACTING PRESIDENT OF THE 13TH CHAMBER,**

Having regard to the application of **7** January 2011 by which ELECTROLUX BELGIUM, a public limited company, requested annulment of the order of the Walloon Government of 23 September 2010 "establishing an obligation to take back certain types of waste", published in the *Moniteur belge* of 9 November 2010;

Having regard to duly exchanged responses and replies;

Having regard to the applicant's letter of 10 June 2015 to the Council of State;

Having regard to the report by Mr NEURAY, First Auditor/Head of Division at the Council of State, drawn up on the basis of Article 59 of the General Rules of Procedure;

Having regard to the order of 14 July 2015 summoning the parties to appear at 10 am on 23 September 2015;

Having regard to the notification of that order and of the report to the parties;

**ADMINISTRATIVE LITIGATION SECTION OF THE COUNCIL OF STATE**

**JUDGMENT**

No. 232.449 of 6 October 2015

A. 196.580/XIII-5589

Cause: Pierre **VANDEN BERGHE,**
with address for service c/o
Mr Benoît HAVET, Lawyer,
3, allée de Clerlande
1340 Ottignies,

versus:

1. **Municipality of Lasne,**
with address for service c/o
Mr Bernard FRANCIS, Lawyer,
11, Vieux Chemin du Poète
1301 Bierges,

2. **Walloon Region,**
represented by the Government of the Region,
with address for service c/o
Mr Pierre MOËRYNCK, Lawyer,
34/27, avenue de Tervueren
1040 Brussels.

Interveners:

1. Jacques **HERALY,**
2. Marie-Josée **VAN ACHTER,**
3. Philippe **LOGIE,**
4. André **LOGIE,**

all with address for service c/o
Mr Matthieu GUIOT, Lawyer,
431 F, chaussée de Louvain
1380 Lasne.

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**13th CHAMBER, COUNCIL OF STATE**

Having regard to the single application of 28 May 2010 by which Pierre VANDEN BERGHE requested annulment of the amendment to a development permit granted on 29 March 2010 by the local authority of the Municipality of Lasne to [...]

## Cass. RG 6644, 9 September 1982 (G. / Z.)

### Case-law - 09/09/1982 – Court of Cassation

**" Source**
Arr. Cass. 1982-83, 51; Bull. 1986, 48; J.T. 1982, 727; Pas. 1983, 1, 48; R.W. 1983-84, 1338, note LAENENS, 3.; Rev. trim. dr. fam. 1985, 90.

**Summary 1**

Under Article 584 of the Civil Procedure Code, the President of the court of first instance shall rule by way of interlocutory order, in cases where urgency is acknowledged, in all matters save those in respect of which, according to statute, the courts have no jurisdiction; Article 373 of the Civil Code does not represent an exception to this rule.

Under Article 1039 of the Civil Procedure Code, interlocutory orders are without prejudice to the main proceedings. However, this does not mean that the court hearing an application for interim measures is prevented from examining the parties' rights, in so far as its orders are without prejudice to those rights; interlocutory orders remain open to challenge and reparable.

**Keywords:**

- Interim measures, substance of the case (interlocutory proceedings)
- Interlocutory proceedings in family law
- Exercise of parental authority over the person of the child by non-cohabiting parents
- Urgency (interlocutory proceedings)
- Interim measures (interlocutory proceedings)

**Summary 2**

A judgment that holds, relying on an assessment based in fact, that the appellant has not established the truth of the facts or arguments put forward in claims supporting her defence against the respondent does not contravene the rules on burden of proof.

**Keywords:**

◊ Burden of proof

**Brussels, 26 October 1989**

**" Source**

Cah. dr. jud. 1991, 173; J.L.M.B. 1989, 1309; J.T. 1990, 611; Journ. proc. 1989, liv. 159, 29.

**Summary 1**

Not available

**Keywords:**

- ♦ Conditions for protection (copyright), generalities
- ♦ Fundamental principles of media law
- ◊ Freedom of opinion and expression
- ◊ Interlocutory proceedings, media

**Summary 2**

A court hearing an application for interim measures may examine the rights of the parties on the merits. Its order is not intended to be irreversible, so it cannot deprive judgment on the merits of useful effect.

**Keywords:**

◊ Interim measures, substance of the case (interlocutory proceedings)