Additional information, requested on 18 November 2015

By a letter dated 18 November 2015, the Secretariat to the Aarhus Convention Compliance Committee has asked the communicants, Mr Francis Doutreloux and Avala ASBL, to clarify their communication on two points:

I) TO CLEARLY EXPLAIN ALL THE DOMESTIC REMEDIES THAT WERE USED IN EACH CASE TO DATE, INCLUDING A CHRONOLOGY OF THESE

A. Case 1: request for access to information about the municipal swimming pool at Stavelot[1]

1) 29 August 2014: request for access to information sent to the Municipality of Stavelot by Avala ASBL.

2) 8 October 2014: in the absence of a reply to its request for access to information, Avala ASBL applied for an administrative review before the Appeal Commission for the Right of Access to Environmental Information ('the CRAIE').

3) 28 November 2014: the CRAIE decided that the communicant's application was admissible and well founded, and that the Municipality of Stavelot should, within 8 days of notification of the CRAIE Decision, supply copies of the information requested.

4) 20 January 2015: as the Municipality of Stavelot had still not supplied the information despite the CRAIE Decision being notified during December 2014, the communicant initiated proceedings against the Municipality of Stavelot before the Justice of the Peace at Malmedy-Spa-Stavelot, seeking an order for production of the documents requested, on pain of a financial penalty, and claiming damages from the Municipality.

At the introductory hearing on 4 February 2015, despite the communicant's submission that the case should be heard immediately, as it required only short pleadings,[2] a procedural timetable was set, providing for exchange of pleadings, to be followed by oral arguments on 16 September 2015.

[1] A covered swimming pool has an impact on the neighbourhood and also potentially on the area's water (possible discharges of toxic chlorine waste).

[2] On the basis of Article 735 of the Code of Civil Procedure, which provides that:

"1. In cases where only short pleadings are required, it is possible to argue the case at the introductory hearing or to have it referred to a hearing which will take place shortly thereafter. Any party before the court who wishes to make use of this accelerated procedure must indicate this in the originating application or in the defence, giving reasons.

2. Where the parties agree on short pleadings, leave must be granted for the accelerated procedure. The court refers the case to the introductory hearing or to a hearing which will take place shortly thereafter; it also sets the duration of the hearing. (...)".

5) 31 March 2015: as the information requested had not been supplied, the communicant wrote to the Walloon Region's Minister for Local Government to ask him, first, to send a Special Commissioner[3] and, secondly, to commence a disciplinary case against members of the Stavelot local authority.

6) 17 April 2015: the Minister for Local Government sent the communicant a purely formal reply.

7) 30 June 2015: as the information requested had not been supplied, the applicant again approached the Minister for Local Government about the matter.

8) 16 July 2015: the Minister for Local Government ***invited*** the Stavelot local authority to implement the CRAIE Decision.

9) 7 September 2015: the Municipality of Stavelot supplied the information requested.

10) 16 September 2015: the Justice of the Peace took formal notice of the fact that the information had been supplied, and reserved judgment on the communicant's claim for damages.

B. Case 2: request for access to information about the L'Eau Rouge campsite

1) 26 August 2014: the communicant, Mr Francis Doutreloux, sent the Municipality of Stavelot a request for access to environmental information concerning "various permits and plans associated with the applications for permits granted to the L'Eau Rouge campsite".

2) 3 October 2014: as the information had not been supplied within one month, the communicant applied to the CRAIE for an administrative review.

3) 28 November 2014: the CRAIE decided that the communicant's application was admissible and well founded, and that the Municipality of Stavelot should, within 8 days of notification of the CRAIE Decision, supply copies of the various permits and plans associated with the applications for permits granted to the L'Eau Rouge campsite.

4) 20 January 2015: as the information had not been supplied even though the Commission's Decision had been notified during December 2014, the communicant initiated proceedings against the Municipality of Stavelot before the Justice of the Peace at Malmedy-Spa-Stavelot, seeking an order for production of the documents requested, on pain of a financial penalty, and claiming damages from the Municipality.

5) 4 February 2015: at the introductory hearing, despite the communicant's submission that the case should be heard immediately, as it required only short pleadings, a procedural timetable was established, setting time-limits for written pleadings to be filed and a hearing for oral arguments on 16 September 2015.

6) 31 March 2015: the communicant wrote to the Walloon Region's Minister for Local Government to ask him, first, to commence a disciplinary case against members of the Stavelot local authority and, secondly, to send a Special Commissioner.

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[3] Article L3116 of the Local Democracy and Decentralization Code provides that: "The supervisory authority may appoint a Special Commissioner by decree when a legal person governed by public law and referred to in Article L3111-1(1) [a municipality, province or inter-municipal body] fails to provide information or details requested, or to implement measures prescribed by statutes, decrees, regulations or articles of association or by a decision of the courts that has acquired the force of *res judicata*. The Special Commissioner concerned is empowered to take all such measures as necessary in the place and stead of the failing authority, within the limits of the powers vested in him or her by the decree appointing a Special Commissioner."

7) 30 June 2015: despite the Minister's formal reply of 24 April 2015, the situation did not change in any way; therefore the communicant wrote to the Minister for Local Government again.

8) 16 July 2015: the Minister for Local Government ***invited*** the Stavelot local authority to supply the information requested.

9) 19 August 2015: the Municipality of Stavelot supplied part of the information requested, but sent the communicant only a copy of the campsite's environmental permit and a copy of the planning permit for the campsite swimming pool. However, the plans that had formed the annexes to these permits – mentioned in the texts of both the request for access to information and the CRAIE Decision – were not appended.

10) 27 August 2015: the communicant wrote to the Minister for Local Government in the aim of alerting him to the fact that the Municipality of Stavelot's obligation to supply information had been fulfilled only in part.

11) 16 September 2015: at the hearing, the Municipality of Stavelot submitted that it intended to supply the remainder of the information requested within one month. The Justice of the Peace therefore postponed the case to 7 October 2015.

12) 30 September 2015: the Minister for Local Government ***invited*** the Municipality of Stavelot to fully implement its obligation to allow access to the information.

13) 7 October 2015: the remainder of the information requested (copies of the plans) had not been supplied to the communicant. The Justice of the Peace sent the case to the General List. When the case is heard, the communicant will submit a request for judgment to be reserved on the case as it stands, so that the Municipality of Stavelot can be ordered to supply the information, on pain of a financial penalty. As yet, no date has been set for the hearing.

14) 20 November 2015: to date, the plans have still not been supplied to the communicant.

C. Case 3: request for access to information on the Municipality of Stavelot's intentions for the access ramps at the old Francorchamps motor-racing circuit

1) 23 June 2014: the communicant, Mr Francis Doutreloux, sent the Municipality of Stavelot a request for access to information concerning the Municipality's intentions for the access ramps at the old Francorchamps motor-racing circuit.

2) 28 July 2014: as the information requested by the communicant had not been supplied within one month, he applied to the CRAIE for an administrative review.

3) 2 October 2014: as the information had still not been supplied, the CRAIE decided that the communicant's application was admissible and well founded, and that the Municipality of Stavelot should supply him, within 8 days of notification of the CRAIE Decision, with a copy of its decision to extend the licence under which it had granted Parc de l'Eau Rouge Ltd a right to temporary occupation of the access ramps at the old Francorchamps motor-racing circuit.

4) 15 December 2014: as the information had still not been supplied to the communicant even though the CRAIE Decision had been notified during October 2014, he initiated proceedings against the Municipality of Stavelot before the Justice of the Peace at Malmedy-Spa-Stavelot, seeking an order for supply of the information, on pain of a financial penalty, and claiming damages from the Municipality.

5) 7 January 2015: the Municipality of Stavelot did not appear at the introductory hearing, and so the case was heard with short pleadings, by default.

6) 31 March 2015: the communicant wrote to the Walloon Region's Minister for Local Government to ask him to send a Special Commissioner and to commence a disciplinary case.

7) 12 August 2015: judgment of the Justice of the Peace at Malmedy-Spa-Stavelot, ordering the Town of Stavelot to supply, within 8 days of judgment being given, a copy of its decision to extend the licence under which it had granted Parc de l'Eau Rouge Ltd a right to temporary occupation of the access ramps at the old Francorchamps motor-racing circuit, on pain of a per diem penalty of €50 for failure to comply within 8 days of service of the judgment.

8) 19 August 2015: the Municipality of Stavelot partially fulfilled its obligation by supplying the text of the temporary occupation licence; however, it did not send the associated plan.

9) 13 October 2015: the Municipality of Stavelot finally fulfilled its obligation by also supplying a copy of the plan associated with extension of Parc de l'Eau Rouge Ltd's licence for the access ramps at the old Francorchamps motor-racing circuit.

D. Domestic remedies used before the communication of 9 October 2015

In each case, the communicants:

- applied for an administrative review before the Appeal Commission for the Right of Access to Environmental Information;

- asked the Minister for Local Government to intervene, suggesting in particular that he send a Special Commissioner and commence a disciplinary case;

- brought judicial proceedings (here, before a Justice of the Peace) against the recalcitrant administrative authority, seeking an order with the force of *res judicata* for supply of the information requested, on pain of a financial penalty.

In addition, on 18 September 2015, the communicants sent a joint complaint to the European Commission, in which they criticized the general system for access to environmental information in Belgium, through the example of these three cases.

E. Domestic remedies used since the communication of 9 October 2015

On 17 November 2015, the communicants also sent a complaint to the Public Prosecutor, requesting a criminal investigation into the conduct of all the members of the Stavelot local authority, on the basis of these three cases (the offence alleged was conspiracy on the part of public officials).

II) TO DESCRIBE ANY AVAILABLE DOMESTIC REMEDIES WHICH HAVE NOT SO FAR BEEN USED OR EXHAUSTED, TOGETHER WITH AN EXPLANATION OF WHY EACH HAS NOT

1) The communicants wish to explain first of all that, in two of these three cases, the information was finally supplied, and this explains why other domestic remedies have not been used.

2) Information in connection with the second case (the request for access to information on the various permits granted to the L'Eau Rouge campsite, with relevant plans) has been supplied only in part: copies of the permits have been provided, but the associated plans have not yet been supplied.

That aspect of the matter is still the subject of a case pending before the Justice of the Peace at Malmedy-Spa-Stavelot, which will undoubtedly, in the end, lead to a writ of execution being obtained, requiring supply of the information requested.

This also explains why no other remedy has been sought in connection with this particular case.

3) The communicants should explain that they might have contemplated the possibility of appeal before the Conseil d'Etat (Council of State) pursuant to Article 14(3) of the Lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973 (Consolidated Acts of 12 January 1973 on the Council of State – 'the Consolidated Acts'), based on an administrative authority's implicit refusal to implement a CRAIE Decision instructing it to provide access to information requested. Under this provision:

> "Where an administrative authority is under an obligation to make a decision and the party concerned has given it formal notice to do so within four months, but the authority has not made 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 any 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 communicants draw the Committee's 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 a CRAIE review (which is only completed some 4 months – on average – after the request for access to information was 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 for the information to be supplied (in practice, 8 days). The process of appeal to the Council of State can only be started 4 months after this ***formal notice*** has been sent. Then the fact that the average duration of annulment proceedings before the Thirteenth Chamber of the Council of State is 2 years also has to be taken into account.[4]

The communicants would also like to draw the Committee's attention to the fact that, if the public authority still failed to implement the Decision following a Council of State judgment, it would again 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.

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[4] 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 made. The communicants 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.

In view of the considerations outlined above, this entire procedure involves a minimum period of 2½ years.[5] This completely infringes the right of access to environmental information and conflicts with Directive 2003/4/EC, under which information must be made available "as soon as possible or, at the latest, within one month after […] receipt" (emphasis added).

The communicants 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).

4) Finally, the communicants would like to point out, for the Committee's information, that it is not possible to contemplate bringing action in such cases 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 circumstances such as those in these cases, an interlocutory ruling would effectively be a ruling on the merits,[6] which is impossible.

III) MAIN POINTS

The communicants point out that there has been an obvious infringement of the right of access to information in these three specific cases, because the time taken to supply the information was close to a year.

The communicants also point out that, apart from these three specific cases – which also represent examples, and certainly deplorable ones – they are complaining of **general non-compliance by Belgian law** with the Aarhus Convention and the right of access to information guaranteed by the Convention.

[signed]
Liège, 9 November 2015
For the communicants,
their counsel,
Alain LEBRUN,
Lawyer.

[5] 4 months (before the CRAIE) + 4 months (formal notice period) + 2 years (Council of State proceedings).

[6] Let us 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 Code of Civil Procedure, 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 I, 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).