Rule of Law Report Belgium - Questions to the Ministries

Pillar I - Justice System

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Pillar II – Anti-Corruption Framework

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Pillar III – Media Pluralism and Media Freedom

[The question below is relevant for both Pillar I and III]

1. Regarding the Recommendation in the 2022 RoL Report as to public access to documents:
   a) The Flemish Legislator introduced a ground of refusal for public access if the application concerns “internal communication”. This ground raised concerns among stakeholders and the 2022 RoL Report recommends, “limiting the grounds for rejection of disclosure
requests”. The Flemish Government informed us end of last year that a complaint had been lodged against that provision at the Constitutional Court. Is any decision or preliminary assessment of the Court known and if yes, could you share the findings with us?

No decision has been made, nor is there any preliminary assessment available

b) At Federal level, stakeholders had complained about lacking a central point of access, too lengthy procedures and the fact that the Commission for Access to Administrative Documents (CTB) would act as a mere advisory body; the 2022 RoL Report had recommended to address these issues. Could you tell us if any steps have been taken in this respect?

Only some stakeholders are complaining about the fact that the Commission for Access to and Reuse of Administrative documents, section freedom of information has no decision making powers but is only an advisory body. In the first half of 2021 there were introduced in Parliament two proposal to adjust the Law of 11 April 1994 regarding freedom of information. The Commission brought out two advices out of proper movement where she has a lot of remarks and also dealt with giving decision making powers to the Commission. She gives an a more nuanced approach than in the past: giving decision powers to the Commission can only when certain conditions are fulfilled and it doesn’t guarantee a better decision making on access to documents.

Also the minister of the Interior has the intention to reform the Law of 11 April 1994. She has already asked an advice to the Commission for her reform plans. In that advice the Commission goes further in on the subject of the attribution of decision power to the Commission. She stresses that it is not necessary a good solution. The expertise on the content of the documents is located with the administrative bodies and not in the Commission. The Commission has only expertise in freedom of information. Therefore the legislator chose for the solution that the Commission advises the administrative body when the citizen introduces an administrative appeal procedure to have a sound decision. That advice is not without obligation. If the administrative body doesn’t respect the advice of the Commission, it must give reasons why it doesn’t respect that advice. Also on the European level with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission there is also a somewhat similar approach with the confirmatory application. Also in that case it is the same institution that decides on the administrative appeal. A change of the model would have big consequences: the responsibility moves from the administrative body to the Commission, the Commission needs to be strengthened, the Commission has to deal also with procedures before the Court without always assuring that the decision making is better. The Minister has the intention to reform the freedom information act in two phases: in the first phase she addresses some issues: broadening the personal scope of the law of 11 April 1994 and expanding active open government. The government will decide in a second phase what the other adjustments would be appropriate. The discussion is still going on within government.

The Minister of the Interior is also preparing a reform of the Council of State towards a more solution-oriented approach. That could be also beneficial for the jurisdictional appeals in the cases of freedom of information.

The procedure is not lengthy. Compatible terms can be found in the freedom of information legislation of the Communities and of the Regions and when the period is shorter, the way of calculate of the term is different. In practice there is not real difference. The basic principle is as a matter of fact that the decision of the handover of the documents should be done as soon as possible.
c) Also regarding the Federal level, we have received information that due to the temporary vacancy of the CTB no opinions would have been issued regarding requests made between 1 September 2021 and 29 June 2022. Could you confirm whether this is accurate and elaborate on this situation? Have you taken any measures to make sure such a situation does not happen again?

Indeed, the mandate of the members of the former Commission was ended in June 2022. The Commission has worked temporary on base of the principle of continuity of public services till end of August 2022. Because the members of the Commission have a different main job and, moreover, do not receive any remuneration for their contribution as a member, their commitment is limited until the period to which they have agreed when they accepted their mandate. It takes always some time for finding members for the Commission because the expertise on freedom of information demands for a specialised knowledge that is hard to find. The fact there was no Commission doesn’t take away the possibility for the citizens to introduce an administrative appeal and when they don’t agree with the new decision to go to the Council of State (Conseil d’Etat).

A solution is not easily to find and finding members is always difficult.

d) How is the situation related to public access to documents in Wallonia?

En région wallonne, le principal texte applicable en matière d’accès aux documentspublics est le décret wallon du 30 mars 1995 ‘relatif à la publicité de l’Administration’. Ce texte contient des dispositions en matière de publicité active et de publicité passive.

Ce même décret du 30 mars 1995 prévoit la création d’une Commission d’accès aux documents administratifs (CADA wallonne). Outre une compétence d’avis, la CADA wallonne peut être saisie sur recours dans le cas où une autorité administrative régionale, provinciale ou locale wallonne refuse l’accès à des documents administratifs ; elle dispose en ce cas d’une compétence décisionnelle. Ses décisions peuvent être contestées devant le Conseil d’Etat.

En communauté française, il y a également une CADA. Il s’agit d’une autorité administrative, présidée par un magistrat.

Elle reçoit le recours de toute personne qui rencontre des difficultés à consulter ou à obtenir copie d'un document administratif. Elle juge, à la lumière du décret du 22 décembre 1994 relatif à la publicité de l'administration, de la pertinence de l'éventuel motif de refus opposé par l'autorité administrative. Notez qu’une absence de réponse dans les 30 jours equivaut à un refus.

Avant sa révision par le décret du 14 mars 2019, le décret ne confiait qu'une mission d'avis à la CADA. Ses pouvoirs sont donc aujourd'hui renforcés et l'autorité administrative est liée par la décision de la CADA.

La CADA est aussi l’instance de recours en matière de réutilisation des informations du secteur public.
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Pillar IV – Other Institutional Issues related to Checks and Balances

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