Cases relating to compensation under Belgian administrative law

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Section 1 – Introduction.

1. Under Belgian law, the provision of compensation for loss or damage caused by public-law bodies falls in theory within the jurisdiction of ordinary courts of law, under article 144, paragraph 1 (current) of the Constitution, under the terms of which “cases relating to civil rights are exclusively within the jurisdiction of the courts”. Under article 145 of the Constitution, cases relating to political rights fall within the jurisdiction of the courts “other than in the exceptional cases laid down by the relevant law”. As far as civil rights are concerned, judicial jurisdiction is exclusive while in the case of political rights, exceptions may be made by legislative means.

In its well-known La Flandria judgment issued on the 5th November 1920, the Cour de Cassation (Procedural Appeals Court) in fact deemed that all issues relating to state liability are matters of civil law. This decision gave rise, firstly, to exclusive jurisdiction being held by the courts when ruling on state liability in accordance with the provisions of article 144 of the Constitution and, secondly, to application of the common law contained in articles 1382 et seq of the civil code. The basis for this is contained principally in article 1382 of the civil code setting out a system governing fault-based liability.

Alongside provisions for fault-based liability are systems for compensation with no question of fault, which also falls within the jurisdiction of ordinary courts of law; examples of this include neighbourhood disruption, serious interference with highway access and services, planning easements, etc.

Among these special provisions for liability without fault is article 24 of the law passed on the 15th June 2006 that, in the area of public procurement contracts, stipulates that any party who submitted the lowest legitimate bid in a tendering procedure but was nevertheless unsuccessful shall be allocated fixed damages of ten per cent of the value of the bid concerned\(^1\). This matter falls within the remit of the administrative tribunals. One may however wonder whether the Council of State could nevertheless allocate a compensatory payment in cases in the area of public procurement contracts if said cases are subject to a specific legal structure\(^2\).

The law passed on the 23rd December 1946 creating a Council of State did not remove the entitlement of ordinary judges to rule on the compensation payable for loss or damage caused by an administrative act; the Council of State does not have any jurisdiction in this area, except in the case of selected justice tasked with the allocation of compensation for exceptional loss or damage in cases for which no other court holds jurisdiction (article 7).

Over the years, the Council of State has had two cases relating to compensation referred to it; the first concerned compensation for exceptional loss or damage for which the law passed on 3rd June 1971 provides for a transfer from selected justice to delegated justice; the second, which is very recent, concerns reparative compensation that may be allocated in the event of illegal action noted by the Council of State’s administrative litigation section.

\(^1\) There may be full reparation in cases of corruption.
Section 2 – Case relating to compensation for exceptional loss or damage

2. The first of these cases was settled by article 11 of the coordinated laws of the Council of State, which stipulates that:

“If there is no other court with jurisdiction, the administrative litigation section adjudicates in equity by means of a judgment, taking account of all circumstances of public and private interest, on claims for compensation sought in reparation for exceptional loss or damage, non-material or material, caused by an administrative authority.

The claim for compensation shall only be admissible after the administrative authority has totally or partially rejected an application for compensation, or failed to issue a ruling on it within sixty days.”

This relates to a matter of liability without fault and the compensation is assessed with a view to equity, applying the principle set out in article 10 of the Constitution and seeking to ensure equality among Belgians in the face of state-imposed burdens, rather than protecting subjective rights.

The law stipulates that the Council of State is responsible for adjudication taking account “of all circumstances of public and private interest “without the influence of these circumstances being clearly revealed”; L. DONNAY and M. PÂQUES write in this connection that in principle there is nothing to prevent such circumstances from affecting each element of the case, as they influence both the conclusion as to the origin of the loss or damage and the amount to be awarded. In its judgment Gustin & Jorssen, no. 233.545, dated 20th January 2016, the Council of State explained that with its invitation to the administrative litigation section to take account of all circumstances of public and private interest when adjudicating on the compensation to be awarded for the exceptional loss or damage ‘caused’ by an administrative authority, the provision requires account to be taken of all the factors that contributed to causing the loss or damage”. When it comes to assessing the amount of compensation payable, the two authors quoted above note that while the Council of State declares that the obligation to take account of public and private interests may lead it to only award an amount partially compensating the harm, the judges frequently choose to compensate said harm in full.

3. For the Council of State to adjudicate on a claim for compensation for exceptional loss or damage, three conditions must be met:

1 - the claim must be intended to obtain compensation for a fault-free disruption of equality in the face of state-imposed burdens rather than for the infringement of a subjective right. Article 11 of the coordinated laws stands apart from the common law on civil liability; its application requires that the source of the loss or damage is not a fault-based action on the part of the administration. Likewise it is distinct from cases relating to neighbourhood disruption, dealt with on the basis of article 544 of the civil code;

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2 - the claimant does not have a case that would, if brought before another court (whether judicial or administrative), enable him or her to obtain compensation for the loss or damage allegedly inflicted upon him or her. In this way, the jurisdiction of the Council of State is suppletive or residual;

3 - the loss or damage was caused by an administrative authority, which rules out loss or damage caused by legislative or jurisdictional action. However any action, of a material or legal nature, or any failure to act, may constitute the origin of the loss or damage; all that is required is for the cause of said loss or damage to originate with an administrative authority of some sort.

The compensation claim must be intended to provide reparation for loss or damage that the law classifies as exceptional, whether material or non-material in nature.

Thus the loss or damage for which reparation may be provided must have the following characteristics: it must be serious, consisting of a burden that exceeds the normal encumbrances encountered when living in society and so appear ‘abnormal’; it must be definite, which assumes that its existence and extent have been established and rules out purely potential loss or damage; it is special in the sense of ‘rare’ - exceptional loss or damage only affects a limited number of individuals.

This loss or damage must be attributable to an administrative authority: as in the case of civil liability, the provision of reparation for exceptional loss or damage depends upon the existence of a causal link between the harm suffered and the incident that gave rise to it. In this case, the Council of State requires the loss or damage to have been caused directly by an administrative authority; thus it applies the theory of direct causality, rather than that of equivalence of conditions or that of adequate causality or efficient cause.

Thus in the judgment Gustin & Jorssen, no. 233.545, dated 20th January 2016, the Council of State ruled that article 11 of the coordinated laws stipulated “that the loss or damage must have been caused directly and principally by an administrative authority; that it is therefore necessary in principle for the loss or damage to have been caused directly by the administrative authority, and this rules out the provision of reparation for harm arising directly from a law or for harm attributable exclusively to the actions of the claimant; that in the latter case, a comparison could be made with a situation in which the harm results from the actions of an individual and the claimants are the parties that acquire said individual’s rights”.

This judgment was pronounced on a claim for compensation arising from the exceptional loss suffered by the owners of an area of land located within an ‘area of rural habitat’ in the local district plan, as a result of the classification in 1975 of their property as a monument and a site, due to the presence of a feudal-era tumulus, and of the rejection of their application for a subdivision development permit as a result of this classification.

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7 M. LEROY, op.cit., page 794.

8 Under the terms of the above judgment Krack et consorts, n° 195.045 dated 2nd July 2009: “In view of the fact that the loss or damage that may give rise to compensation on the basis of the provisions of article 11 of the coordinated laws on the Council of State must not merely be exceptional but must also be created, current and definite; that the certainty of responsibility for this loss or damage, as well as its foreseeability and its exceptional nature, must be verified, and finally it must if applicable be quantified.”


10 Cf. the note by F. HAUMONT in Aménagement-Environnement, 2016, n° 3, pages 216 & 217.
The judgment rejected the claim on the grounds that the classification was not the direct and principal cause of the loss, as the causal link between the action of the administrative authority (classification) and the loss (uncompensated loss of a development opportunity) had in this case been removed due to an action on the part of the owner him- or herself and a change to the legislation that took place after the classification and subsequent to a decree issued on the 17th July 1987. The action on the part of the owner consisted of a failure to implement a previously-obtained subdivision development permit in time, said permit having then expired. The change to legislation related to the conditions laid down for the obtaining of compensation from an ordinary judge for the detriment arising from classification (current article 230 of the CWATUP) : no compensation was now payable if the owner acquired, even through inheritance, real estate that had already been classified. The judgment then examined one by one the various possible causes of a weakening of the causal link, concluding that none of them were applicable.

It may be observed that in declaring that the loss or damage has to have been caused directly and principally by an administrative authority, the judgment displays a certain flexibility compared to previous case law, which sometimes required the loss or damage to have been caused not just directly but also ‘ exclusively ’ by an administrative authority.11

To end this very brief overview, it may be noted that an example of one of the areas in which compensation for exceptional harm was awarded was loss or damage suffered as a result of obligatory vaccinations. Thus the judgment Paasch & Jetzen, no. 41.396, dated 16th December 1992, awarded substantial compensation to a child who became paraplegic after receiving a polio vaccination that was incorrectly administered, and was required under regulations created by an authority that was not at fault in the matter.

**Section 3 – Cases regarding compensation as reparation for loss or damage caused by an illegal action**

**Part 1 – the 2014 reform**

4. The fact that the Council of State could not rule on claims for compensation as reparation for loss or damage caused by an illegal action had the disadvantage of requiring litigants whose actions for cancellation had been deemed justified by the administrative court - leading to cancellation of the administrative decision being challenged - to instigate further proceedings before an ordinary judge to obtain reparation for the harm caused by the illegal action.

In 2014, a reform was implemented that, without contradicting the case law that situated liability of the administration within the domain of civil law, and so within the judicial sphere, empowered the Council of State, in the wake of a cancellation, to draw the appropriate consequences thereof through the provision of reparation for loss or damage caused by the administrative action. The objective was to achieve procedural economy by preventing the claimant who had obtained a ruling that the decision to which he or she objected was illegal then having to instigate further proceedings before another judge to obtain reparation.

To this end, the constitutional revision of 6th January 2014 saw a second paragraph added to article 144 of the Constitution, reading as follows: “The law may however, by the procedures it establishes,

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empower the Council of State or the federal administrative courts to rule on the civil-law effects of their decisions.” Thus the case concerned was not an objective one but rather related to civil rights. Furthermore, the constitutional text only covered the Council of State and the federal administrative courts, excluding the administrative courts that municipalities or regions had created or may have intended to create.

Thus the law passed on 6th January 2014 relating to the sixth reform of the State concerning the issues covered in article 77 of the Constitution (article 6) inserted an article 11bis into the coordinated laws on the Council of State; under the terms of this new provision, the Council is now authorized to award, under certain conditions, reparative compensation to be paid by the party responsible for the illegal action in response to an application by the victim. “This new article 11bis creates an original mechanism, without however upending the system, given that the law only provides an opportunity for the litigant, who retains the option of following the procedure laid down in the La Flandria judgment” and applying for a ruling from the judicial institutions to obtain the provision of full reparation for the fault on the part of the administrative authority responsible for the illegal action. The law came into force on the 1st July 2014; article 40 of it contains a transitional provision. A royal
decree issued on the 25th April 2014 provides for execution thereof and lays down the rules of procedure.

Reparative compensation has two characteristics that should be emphasized from the outset. In the first place it is a concept independent both of compensation for exceptional loss or damage and of the provision of reparation for loss or damage on the basis of articles 1382 - 1386 of the Civil code even if it is in part related thereto.

In the second place, the law entrusts the administrative litigation section with the tasks of adjudicating on the claim for reparative compensation, taking account - as was the case with compensation for exceptional harm - of the public and private interests in the case. Reference could be made to the solutions adopted in the case relating to compensation for exceptional harm in order to establish the part played by these circumstances in cases relating to reparative compensation (see above, no. 2).

**Part 2 – Conditions for the awarding of compensation**

5. Three categories of conditions must be met in order to enable the awarding of reparative compensation; the first relate to the identity of the applicant, the second to the party from whom compensation is being sought, while the third set involve the substantive conditions for compensation.

**A. The applicant**

6. The only parties entitled to make a claim for compensation are claimants seeking cancellation of an action, a regulation or an implied decision of rejection, as well as the intervening parties, supporting the claimant and requesting cancellation.

This first of all rules out cases other than those seeking cancellation, such as actions with full jurisdiction, administrative actions to overtake on points of law, or actions seeking suspension; claims for compensation must in fact be grafted onto actions for cancellation, to which they are incidental.

Also excluded from making claims are the opposing party and the party that intervened in proceedings to assert the legality of the decision being challenged: a holder of planning permission that is cancelled following a mistake on the part of the administrative authority cannot go to the Council of State to obtain reparation for the harm caused to him or her by the illegal nature thereof, but instead must apply for this purpose to the judicial authorities.

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20 The reparative compensation is incidental to the action for cancellation, cons. A. PIRSON & M. VRANCKEN, loc. cit., n° 8, pages 34 - 36.

21 This limitation is a crucial part of the objective of the reform; cf. A. PIRSON & M. VRANCKEN, loc. cit., pages 37 and 37 and footnote n° 41.
**B. The party required to pay compensation**

7. Article 11bis of the coordinated laws on the Council of State stipulates that reparative compensation is to be paid by ‘the author of the deed’. This has given rise to a number of queries on occasions when the deed being challenged was the work of more than one administrative authority or when the opposing party was not the authority that carried out the illegal action.

If the deed being challenged was illegal due to the actions of several authorities, and these bodies are involved in the case in the capacity of opposing parties, it would appear that they must be ordered *in solidum* to pay the reparative compensation.\(^{22}\)

If the deed being challenged is illegal due to the illegality of a preparatory deed that is not the work of the opposing party, the compensation shall nevertheless be payable by the opposing party, which shall retain the option of taking further action before an ordinary judge against the party responsible for the preparatory deed on the basis of articles 1382 et seq of the civil code.\(^{23}\)

The same solution is applicable if the deed being challenged applied an illegal standard practice that did not originate with the opposing party, if the deed being challenged has to be cancelled through a plea of illegality (article 159 of the Constitution); the compensation shall be payable by the opposing party, unless said party itself takes action against the party responsible for the illegal standard practice.

**C. The substantive conditions for compensation**

8. It is generally accepted that there are three substantive conditions for compensation: the formally-noted illegality of the deed being challenged, the loss or damage, and the causal link between the illegality and the loss or damage.

\[a/\text{ Formally affirming illegality}\]

9. To create an entitlement to compensation, the Council of State affirms that the deed whose cancellation is being sought is in fact illegal.

This process may take various forms, and does not necessarily stem from a cancellation ruling. Thus the first reparative compensation awarded, in the judgment *Legrand*, no. 232.416, dated 2nd October 2015, for a failure to issue a security agent identity card, occurred in a case that did not conclude with a cancellation ruling: in that case, illegality had been formally noted in a suspension ruling, which was pronounced before the law passed on 6th January 2014 came into force, said ruling being followed by withdrawal of the decision being challenged; in judgment no. 228.108 dated 24th July 2014, the Council of State formally noted that there was no call for further adjudication; the judgment dated 2nd October 2015 awarded reparative compensation of €8739.29.\(^{24}\) An appeal on a point of law was lodged against it.

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23 Ibid, page 376.

24 For more on the awarding of compensation in the event of a withdrawal, see also, judgment *x*, no. 235.162 dated 21st June 2016.
Formally noting illegality is not synonymous with demonstrating fault; it follows from this that the grounds for exoneration from liability do not in theory exclude the provision of compensation, and that furthermore compensation could also be awarded if the effects of the deed are sustained by application of article 14ter of the coordinated laws²⁵.

**b/ Loss or damage**

10. Compensation may be provided for loss or damage that constitutes residual harm, i.e. harm that has not been compensated by any other means when adjudication on the reparative compensation takes place. A varying contribution may be made to the provision of reparation for the loss or damage by the cancellation itself, which may play its part in providing reparation for a non-material loss or damage, or renewal of the deed after cancellation. At the same time, I cannot see any reason why the loss or damage that may give rise to compensation cannot be a non-material harm if this has not been compensated by other means, or future harm if this is not hypothetical²⁶. In order to establish whether or not adequate reparation has been provided for non-material harm by the cancellation ruling, it should in particular be noted whether or not the deed being challenged was carried out during the cancellation procedure²⁷.

The loss or damage must furthermore be definite and personal²⁸.

Firstly, the onus is on the applicant to demonstrate harm²⁹ although for a claim to be admissible it does not have to be accompanied by supporting documentation if it includes an explanation of the harm suffered as a result of the illegality of the deed being challenged and indicates the amount of compensation being sought³⁰. The judgment *Kaissoun*, no. 234.652, dated 9th May 2016, approves loss or damage that may, even without documentary evidence, be deemed plausible. The loss or damage may consist of a missed opportunity, such as the opportunity to be selected for an appointment³¹.

In its judgment *Dubrecq & Dochy*, no. 237.495, dated 27th February 2017, the administrative litigation section concluded that the Council of State can take account, by request or automatically, of the public and private interests in the case and that article 11bis thus allows it in particular to take account of uncertainties as to the extent of the loss or damage, concluding the process equitably and rapidly avoiding a long and costly expert assessment that would otherwise have been arranged in order to establish the precise extent of the loss or damage suffered, particularly when the precise evaluation of this loss or damage would appear problematic. In the judgment it is declared that the fact that the claimants shared the burden of establishing was not sufficient and so, under the circumstances described, their application for an expert to be designated had to be rejected.

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²⁸ Judgment *A.S.B.L. L’Erablière*, n° 237.118, dated 24th January 2017, which adds - more problematically - that it must be direct (infra).
³¹ Ibid.
Secondly, the fact that the loss or damage ‘suffered’ by the applicant must be personal in nature raises the interesting question of ecological harm\textsuperscript{32}, in particular when this is alleged by environmental associations seeking compensation for non-material loss or damage arising from harm to the collective interests that they are defending under the terms of their statutory purpose\textsuperscript{33}. The component elements of the environment - as \textit{res nullius} or \textit{res communes} - do not in fact belong to anyone\textsuperscript{34}. In this brief overview I shall merely mention recent important decisions.

In its judgment no. 7/2016 dated 21st January 2016, the Cour Constitutionnelle (Constitutional Court), responding to an interlocutory question from the East Flanders Tribunal Correctionnel (Criminal Court), ruled that article 1382 of the civil code contravened the provisions of articles 10 and 11 of the Constitution, laying down the principle of equality, if it was interpreted as preventing an organization incorporated and operating to defend a collective interest, such as protection of the environment or of certain elements thereof, from receiving reparation of non-material loss or damage, for harm to the collective interest for which it was incorporated, in excess of the symbolic damages of one euro. Emphasizing the unusual nature of the action taken by environmental associations with regard to citizens, the judgment thus recognized the right of said associations to obtain, in cases involving civil liability, effective - and not purely symbolic - compensation\textsuperscript{35} ; the judgment stipulates that the judge may take account of the association’s statutory objectives, of the scale of its activities and of the efforts it has made in order to achieve its objectives, that he or she may moreover take into consideration the seriousness of the damage to the environment when evaluating the reparation for non-material loss or damage that should be awarded to the association. The conclusions to be drawn from the judgment are transposable to cases brought to obtain reparative compensation.

The judgment VZW Milieusteunpunkt Huldenberg, no. 236.697, dated 8th December 2016, declares that the claim made by an environmental association for reparative compensation for non-material loss or damage that it suffered as the result of the exploitation of a sand pit without the necessary environmental permit was in principle justified, given that the continued existence of, and the accomplishment of the statutory objectives of, the association had been fundamentally compromised. However, in this case the judgment only awarded damages of a symbolic euro to the association, which had failed to provide a figure for the concrete loss or damage it had suffered, as an environmental association, as a result of the damage to its statutory objectives.

\textsuperscript{32} “Ecological harm is harm to collective interests, arising from the misappropriation or excessive appropriation of a common-use right” (P.-A. DEETGEN, La traduction juridique d’un dommage: le préjudice écologique, R.J.E., 1/2009, page 43, quoted in judgment no. 237.118, mentioned above).

\textsuperscript{33} With regard to the admissibility of legal action by environmental associations, cf. Cass. 11 June 2013, Pas. 2013, 361.

\textsuperscript{34} Thus under the terms of the abovementioned judgment no. 237.118: “ In view of the fact that collective harm of an ecological nature has been described in the established doctrine as ‘pure ecological harm’: “in it, environmental damage is considered ‘per se’, independently of its impact on mankind, as direct harm to the natural environment”, “ignoring any other personal damage or loss” (P. JOURDAIN, “Le dommage écologique et sa réparation - rapport français”, in “Les responsabilités environnementales dans l’espace européen - point de vue franco-belge”, Brussels, Bruylant, 2006, pp. 92-93); that the “pure ecological harm” may thus be distinguished from ecological harm that directly harms the interests of many people, with economic or moral consequences, that are in reality merely a set of individual losses ; that, in the concept of “ pure ecological harm ”, it is not one or more individuals who are affected, but rather nature, which has no legal personality, even though ‘humanity’ may then face repercussions ; that this form of harm does not therefore have any personal nature. ”

\textsuperscript{35} Which would not rule out judges considering in specific cases that moral damages of one euro are adequate.
In its judgment A.S.B.L. l’Érablière, no. 237.118, dated 24th January 2017, referred to above, the administrative litigation section recognizes that the cancelled decision authorizing the creation and operation of an engineered landfill site (for waste) could have given rise to ecological harm that contravened the values defended by the environmental association that made the claim, and could have caused it non-material loss or damage for which reparative compensation could be paid. The decision was cancelled, in particular, on the grounds of a lack of impact assessment.

The judgment did however add that acceptance of the principle of ecological harm as personal loss or damage did not however exempt the association making the claim from a clear demonstration of the reality of the collective harm it was alleging, and of the connection between the ecological harm or certain aspects thereof, and the illegality being punished by the Council of State. Noting that while it had been adequately established that the procedural errors in the assessment of environmental impact had compromised the claimant’s statutory objectives, the extent of this harm had not been established and so the claimant could only hope to obtain, in addition to cancellation of the single permit, the symbolic awarding of one euro.

It is to be hoped that in future the Council of State shall at times display more generosity in the damages it awards for pure ecological harm in line with the criteria that the Constitutional Court set out in its judgment dated 21st January 2016.

c/ The causal link

11. The alleged harm must be connected to the illegality committed. Established doctrine has advocated application of the theory of equivalence of conditions generally used for the laws on civil liability, based on the concept of fault. The judgment Kempgens, no. 235.196, dated 23rd June 2016, seems to adopt this approach when declaring that the claimant is required to demonstrate a causal link between the illegal deed noted and the harm alleged, “this demonstration being required to establish that the damage or loss would not have been suffered if the illegal act had not been committed by the authority.”

This is not a definitive solution, with certain authors declaring that the preference for direct causality was expressed in the course of preparatory work in order to prevent rulings being issued against administrations who were not actually responsible for the illegal deed. In its declaration L. 53.933/AG dated 27th August 2013, the legislation section of the Council of State stipulated that administrative judges must verify whether the harm is indeed directly attributable to the illegal action. Likewise, the judgment A.S.B.L. l’Érablière, no. 237.118, dated 24th January 2017, referred to above, states that the loss or damage must not only be definite and personal but also ‘direct’.

36 “According to which, in order to conclude that there is not causal link, it must be declared that the loss or damage would have taken place in the same manner in the absence of a fault” (F. GLANSDORFF, L’indemnité réparatrice: une nouvelle compétence du Conseil d’Etat vue par un civiliste, J.T., 2014, page 476, n° 14.
38 With the same approach, the judgment Van Den Broeck, n° 233.506, dated 19th January 2016 and the judgment Glaudot, n° 235.884, dated 27th September 2016.
Also discussed was the establishment of a causal link between the loss or damage and purely formal illegality. However, as A. Pirson and M. Vrancken correctly note, if the procedural error gives rise to cancellation it has overcome the obstacle relating to interest as set out by new article 14, part 1, paragraph 1, 3, of the coordinated laws of the Council of State, which requires that the illegitimacy was liable to impact the decision taken or to deprive the interested parties of a guarantee.

In its judgment Dubrecq & Dochy, no. 237.495, dated 27th February 2017, the administrative litigation section ruled that the illegality of the deed being penalized was not purely formal in nature as it related to an error in the factual reasoning, consisting of an inaccurate perception of the impact of the project and that furthermore this error in reasoning enabled the Council of State to consider that the formal grounds presented were inadequate.

There remains the issue of the impact of the actions of the victim or of a third party.

If the loss or damage was caused both by the illegal deed attributable to the public authority and by fault on the part of the victim, the Council of State can be expected to decide liability is to be shared, assessing the extent to which each party’s fault or illegal actions contributed to causing this loss or damage.

The issue is considerably more problematic if the loss or damage is caused by both the illegality of an administrative act and the fault or actions of a citizen. An example would be loss or damage caused by the operation of a classified facility whose environmental permit is cancelled due to a defect in legality, which could hypothetically arise from an error or neglect on the part of the operator, relating for example to assessment of the project’s environmental impact. Should all the blame for loss or damage be attributed to the party responsible for the illegal administrative act, with said party opting whether or not to take action against the operator at fault, in full or in part? Or should the loss or damage that may give rise to compensation be evaluated taking account of the action of the third party on the basis of the obligation to take into account the public and private interests in the case? And if so, to what extent? How to distinguish the loss or damage arising from the illegality from that originating in the operation?

In declaration L. 53.933/AG, which it issued on the 27th August 2013, the legislation section commented that:

“*If the illegal action noted by the Council of State arises from a fault or error on the part of the beneficiary of the deed (inaccurate information supplied to the administrative authority, for example), the fact that the authority acted in good faith, displaying the necessary prudence, but was misled by inaccurate information, resembles the scenario of liability without fault.*

The Council of State will be required to assess, on a case by case basis, whether a causal link can be established between the illegal action and the harm, in other words if the latter is directly attributable to the illegal action, with the administration retaining the option of taking action in court against the beneficiary of the deed that misled it.”

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41 Cons. on this subject L. DONNAY & M. PÂQUES, R.F.D.A., loc. cit, page 1061, n° 24.
42 GLANSDORFF, loc. cit., page 476.
43 Doc. parl. Sénat, 2012-2013, n° 5-2233/2, pages 6 and 7.
With regard to planning permission, the judgment *Dubrecq & Dochy*, no. 237.495, dated 27th February 2017, rules that loss or damage cannot be considered to have been caused exclusively by the beneficiaries of said permission, who had provided information to the authority that partially determined the error being punished, if the authority had been duly notified of the problem and there is no suggestion that the structure built after the receipt of the subsequently-cancelled permission failed to comply with said cancelled permission.

The judgment declares that the illegal action is the cause of the loss or damage: if account had been taken of the actual impact of the planned building this could have led to planning permission for this project being refused or to any authorization given being conditional.

It does however add that the harm caused by the illegal action does not correspond to the entire impact on the claimant’s property of the construction authorized if the claimants cannot assert that no construction is authorized on the neighbouring plot of land.

**Part 3. The provision of reparation**

12. The reparation provided is inevitably financial in nature⁴⁴, rather than ‘in kind’. The level of reparation provided must, as prescribed by article 11bis of the coordinated laws, take account of the public and private interests in the case concerned, but if these interests are not in opposition⁴⁵ there is nothing to stop the Council of State from ordering a provision of reparation in full⁴⁶; however this provision of reparation in full only covers the loss or damage for which reparation was not achieved by the cancellation in itself or by the consequences thereof for the administration⁴⁷-⁴⁸.

The loss or damage to be compensated may be evaluated *ex aequo et bono* if it is not possible to calculate it otherwise⁴⁹. It may moreover be noted that the amount of compensation awarded may not exceed the amount stipulated by the claimant in his or her application⁵⁰, and that this figure may include interest on arrears and default interest⁵¹ as well as any legal costs that are not already covered by the allowance for procedural expenses⁵².

**Part 4. *Electa una via***

13. A civil liability action before an ordinary judge and a claim for reparative compensation may coexist, but they may not be pursued concurrently. The applicant must choose to pursue one or other approach, and the choice thus made is irrevocable; the administration shall accept this choice. Under the terms of article 11bis of the coordinated laws, any party that has instigated a claim for compensation before the Council of State shall no longer be entitled to commence civil liability proceedings before an ordinary judge to obtain the provision of reparation for the ‘same harm’;

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⁴⁴ *Ais* of the abovementioned legislation section, doc. parl. Sénat, 2012-2013, n° 5-2233, page 8, n° 8.
⁴⁷ L. DONNAY & M. PÂQUES, R.F.D.A., loc. cit., page 1061, n°s 26 et seq.
⁴⁸ Regarding the causal link between the loss or damage and the authority’s failure to draw conclusions from a cancellation judgment, see judgment *Glaudot*, n° 235.884, dated 27th September 2016.
⁵² Judgment *Kaissoun*, n° 234.652, dated 9th May 2016. See also judgment *VZW Milieusteunpunt Huldenberg*, n° 236.697, dated 8th December 2016, for a legal bailiff’s report.
conversely any party that instigates or has instigated a civil liability action before an ordinary judge shall no longer have the option of applying to the administrative litigation section for compensation for the ‘same harm’.

Case law has tempered the rigour of that rule: the instigation of a claim for compensation before the administrative litigation section only rules out the possibility of subsequently referring the matter to an ordinary judge if the Council of State considers that it has discerned an illegal action53,54.

At the same time, the ban on the concurrent pursuit of forms of reparation only legally applies to the ‘same harm’, which would appear to enable a claimant to apply to the Council of State for reparative compensation for one aspect of the harm while asking an ordinary judge to rule on another aspect of it55. Thus the judgment VZW Milieusteuinpunt Huldenberg, no. 236.697, dated 8th December 2016, to which we have already referred, notes that the claimant may if applicable be awarded compensation, to be paid by the operator, for loss or damage he or she has suffered due to abnormal neighbourhood disruption or as a result of fault or negligence on the part of the operator; in fact, as the judgment states, there are no legislative provisions releasing the operator, even if he or she has administrative authorization, from the obligation to avoid causing disturbance in excess of normal neighbourhood inconvenience. The judgment adds that this factor must be taken into consideration in evaluations of loss or damage (giving rise to compensation under the terms of article 11bis).

**Part 5. Procedural elements**

**A. Introduction of the claim**

14. The claim for reparative compensation may be brought either at the same time as the action for cancellation, or in the course of the cancellation proceedings, or within sixty days at most56 of announcement of the judgment formally noting the illegal action or the rectification thereof by application of the ‘boucle administrative’ urgent corrective process57.

Articles 25/2 and 25/3 of the Regent’s decree dated 23rd August 194858, inserted by the royal decree dated 25th April 2014 sets out the details that must be included in the claim for compensation as well as the formalities to be carried out.

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54 Although in the course of parliamentary proceedings it was declared that: “With regard to note 11 from the Council of State, the Secretary of State’s response is to declare that as soon as a party has introduced a claim for reparative compensation at the Council of State or a liability action in a court, the ‘una via electa’ principle shall apply, even if the party discontinues proceedings or withdraws his or her action. “Thus the element triggering application of the ‘una via electa’ principle is either filing the claim for reparative compensation with the Council of State or the instigation of a liability action in a court, depending on the circumstances.” (doc. parl. Sénat, 2013/2014, n° 5-2235/5, page 360).”
55 D. RENDERS, B. GORS & A. PERCY, loc. cit., page 383, n° 89.
56 With regard to the problems that may arise from the shortness of this sixty-day period, cons. D. RENDERS, B. GORS & A. PERCY, loc. cit., pages 376 - 379, n°s 68 - 76.
57 Judgment n° 103/2015 dated 16 July 2015 by the Constitutional Court nevertheless cancelled article 13 of the law dated 20 January 2014 (article 38 of the coordinated laws), which had introduced the ‘boucle administrative’ urgent corrective process into proceedings before the Council of State.
58 Laying down the procedure applicable to the administrative litigation section.
Reference should be made to the wording of the decree - please note that the claim must indicate the amount of compensation being sought and explain the harm suffered as a result of the illegal action.

Non-compliance with one or other of these formalities would not tend in itself to automatically give rise to inadmissibility of the claim\(^{59}\). However, in the event of the omission of certain of them, the claim for compensation presented in a document separate from the action for cancellation shall not be formally registered until it has been brought into compliance\(^{60}\).

The Council of State would however appear to require all aspects of the harm to be explained in the initial claim, with no possibility of adding details of other forms of harm to it once proceedings are underway\(^{61}\).

The introduction of a claim for compensation shall give rise to the payment of a registration charge of 200 euros.

**B. Processing of the claim**

15. The objective of the law passed on 6th January 2014 was to provide citizens with the benefits of procedural economy and time savings\(^ {62}\); it follows from this that the procedure must be rapid, as that is its main advantage\(^ {63}\).

If a compensation claim is not ruled upon at the same time as an action for cancellation, the various stages of its processing comprise the successive exchange of a statement in response from the opposing party, a statement in reply from the applicant, the presentation within one month of a report by the auditor handling the case and transmission of the final statements; the procedure applied for the compensation claim does not include a requirement to request continuation of the procedure, as is the case in cancellation proceedings, although if the final statement is received late, it is automatically excluded from proceedings.

**C. Ruling on the claim**

16. Article 11bis of the coordinated laws stipulates that a ruling is pronounced on claims for compensation that are introduced through a separate application within twelve months of notification of the judgment formally noting the illegal action. This time limit shall not prevent the Council of State from suspending its ruling on certain aspects of harm that have not yet been consolidated and so cannot yet be definitively evaluated\(^ {64}\).

The judgment is not subject to appeal. It may only be challenged through exceptional procedures: opposition, third-party opposition proceedings and application for review, as well as an application to the Procedural Appeals Court for a ruling settling a dispute on jurisdiction.

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\(^{60}\) Article 25/2, part 4 of Regents decree dated 23 August 1948.


\(^{63}\) L. DONNAY & M. PÂQUES, loc. cit., page 1060.

If the ruling relates to an element incidental to the action for cancellation, it shall have absolute res judicata authority; less clear is the question of the res judicata authority of a rejection ruling on the grounds of the inadmissibility of the application for compensation.

Part 6 – Conclusion

17. The first cases in which reparative compensation was awarded, other than the provision of reparation for ecological harm referred to above, were as follows:

- 8,739.29 euros in compensation was awarded as reparation for temporary loss of earnings following an illegitimate refusal on the part of an administration to issue the claimant with a security agent identity card; 66

- 5,000 euros in compensation was awarded ex aequo et bono as reparation for the non-material loss suffered by an agent whose professional reputation was damaged by an illegitimate ‘fail’ result in an examination to determine promotion, when there was no appropriate and speedy response to the declaration of illegality. The same claimant was then awarded compensation of 5,000 euros ex aequo et bono for her material loss, which took the form of a loss of opportunity to be selected for an appointment. In a subsequent case, the claimant received 5,000 euros in compensation for her material and non-material loss or damage after a further judgment overturning another ‘fail’ decision.

- 700 euros in one-off compensation was awarded to the owner of an expropriated property to cover his / her legal costs in proceedings that resulted in the cancellation of the expropriation decree; 70

- 1,300 euros in compensation was awarded to cover the legal costs of a claimant to whom the municipality had refused to issue a parking permit; 71

- 1,200 euros in compensation was awarded to a neighbour who suffered noise and bad smells from a pig farm that had been authorized by a single permit that was cancelled by the Council of State; 72

- 9,920 euros in compensation was awarded to neighbours following cancellation of planning permission that had authorized the construction of a family dwelling that caused them in particular an obstruction of sunlight; 73

- Following the cancellation of a ministerial decree approving the partial repeal of a district development plan, 1,200 euros in reparative compensation was awarded to a claimant who was unable at that time to receive procedural indemnity as reimbursement for his / her legal costs; this amount

65 D. RENDERS, B. GORS & A. PERCY, loc. cit., pages 388 and 389, n°s 105 and 106.
66 Judgment Legrand, n° 232.416, dated 2 October 2015; this judgment was the subject of an appeal on a point of law.
70 Judgment BVBA Hippo Shop, n° 235.393, dated 7th July 2016 (the other aspects of harm were rejected one by one).
was calculated using the table of procedural compensation\textsuperscript{74}. The judgment also declared that the time spent on the cancellation proceedings was adequately compensated by the cancellation ruling.

Clearly these are the early stages of the brand new procedure for reparative compensation before Belgium’s Council of State, and it may be hoped that after a period of uncertainty and hesitation, the new arrival can gain in confidence and momentum.

Michel Quintin,
First Auditor - Head of Section,
6\textsuperscript{th} March 2017

\textsuperscript{74} Judgment \textit{Fourman}, n° 237.537, dated 2\textsuperscript{nd} March 2017.