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LEGITIMATE EXPECTATIONS ON BOTH SIDES OF THE CHANNEL OR WHEN MISS COUGHLAN VISITS BELGIAN PUBLIC LAW

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1. INTRODUCTION

Among all the litigious situations that the Belgian observer learns while examining the doctrine of legitimate expectations in English Law, the most controversial case seems to be that between *Miss Coughlan* and the *North and East Devon Health Authority*.

There is no need to remind that *Miss Coughlan* has been the victim of a traffic accident in 1971, whereby she has notably become tetraplegic. Then, she has been continuously cared in a hospital — *Newcourt* — that the administration decided, at some point, to close. Later, she was relocated at *Mardon House*, while promising her she would not have to move as long as she would want to remain there.

It does not even need to remind that, following a public health policy change, the administration has backtracked on this promise, without proposing, at the same time, to *Miss Coughlan* a concrete alternative comparable to the situation she enjoyed at *Mardon House*.

The judge in charge of the case ruled that the measure of *Mardon*'s closure had to be quashed since *Miss Coughlan* could legitimately expect that she would remain at *Mardon House* as long as she would want and, consequently, that *Mardon* could not be closed as it was. According to the judge, no motive of general interest justified otherwise in this case, the reasons of *Miss Coughlan*'s relocation being of a financial order and representing a tiny amount of money as compared to the annual budget of *National Health Service*.

Here are the most important terms of the judgement issued:

"*89. We have no hesitation in concluding that the decision to move* Miss Coughlan *against her will and in breach of the health authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in* Mardon House. *There was no overriding public interest which justified it. In drawing the balance of conflicting interests, the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public*

body itself. Here, however, as we have already indicated, the health authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan. *We cannot prejudge what would be the result if there was an offer accommodation which could be said to be reasonably equivalent to* Mardon House *and the health authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the health authority*"[2].

For a Belgian lawyer, the situation so described and so solved by the English judge in English law suggests considering whether legitimate expectations are envisaged in the same way as in Belgian law (I) and, beyond, how the Belgian administrative judge (II) and the Belgian judicial judge (III) might have ruled on the Coughlan case if they would have had to settle it.

2. LEGITIMATE EXPECTATIONS FROM LONDON TO BRUSSELS

How legitimate expectations are legally perceived in English (2.1) and Belgian (2.2) laws?

2.1. Legitimate expectations in English law

The Belgian observer who discovers the limits within which the doctrine of legitimate expectations is received in English Public Law points out that the general interest must guarantee that the administration has the latitude indispensable to lead any action aimed at satisfying this interest.

He sees, in the doctrine of legitimate expectations, the legal notion allowing to compensate either the severest effects of an administrative change in policy or guideline, or

[2] C.A. (Civ. Div.), *R. v North and East Devon Health Authority, Ex. p. Coughlan,* 2001, 16 July 1999, 2001, QB, p. 213, par. 89.

a promise made by the administration and that the administration intends to negate subsequently.

While pursuing his readings, the Belgian observer also notes that, in presence of a situation worthy of protection, legitimate expectations can, in English Law, give to the citizen the right to be heard or to present views about the new treatment that the administration plans to apply to him.

Only in very rare occasions, legitimate expectations go so far as to recognise to the citizen the right to enjoy the policy, the guideline or the promise which was that that the citizen would have continued to benefit from, if the administration would not have changed its mind.

While the precise scope of the concept of legitimate expectations is, according to the literature, still not perfectly fixed in English Law, one can summarize the trend of judgements issued so far in this field, by pointing out that:

- The administration is in charge of satisfying the general interest — which is its rationale — and, so, is entitled to change its views at any time, according to the needs of this interest;

- If the change effected by the administration for the purpose of satisfying the general interest has far-reaching consequences for the addressee of the administrative measure, the judge can, in the name of legitimate expectations, quash this measure in case of the addressee's views have not been collected before.

  In this case, the judgement so issued may lead the administration to take a new measure — the previous one having been annulled — and, beforehand, to hear or to seek views of the addressee, while making clear that the administration is not required to share or to follow these views;

- Only in certain circumstances, when particularly far-reaching consequences are to deplore for the administrative measure's addressee in question, the judge has

quashed this measure since the administration negated too sharply the treatment of which its beneficiary enjoyed under the application of the previous administrative measure and which he could legitimately expect the maintenance of.

In this case, the judgement so issued must lead the administration to take a new measure — the previous one having been annulled — and, in order to observe the *res judicata* of this judgement, to ensure that the content of the new measure does not depart — at least too much — from that of which his addressee enjoyed under the application of the previous administrative measure and which he could legitimately expect the maintenance of[3].

[3] On the subject of legitimate expectations in English law, see, among many sources, S. SCHOENBERG, *Legal Certainty and Revocation of Administrative Decisions: A Comparative Study of English, French, and EC Law*, in *Yearbook of European Law*, 1999-2000, p. 257-298; M. ELLIOTT, *Coughlan: Substantive Protection of Legitimate Expectations Revisited* in *Judicial Review*, 2000, p. 27-32; R. THOMAS, *Legitimate Expectations and Proportionality in Administrative Law*, London, Hart Publishing, 2000, p. 129; D. BLUNDELL, *Ultra Vires legitimate expectations* in *Judicial Review*, 2005, p. 147-155; P. CRAIG, *EU Administrative Law*, Oxford, Oxford University Press, 2012, p. 549-589; R. WILLIAMS, *The multiple doctrines of Legitimate Expectations* in *Law Quarterly Review*, 2016, p. 639-663; P. CRAIG, *Administrative law*, London, Sweet & Maxwell, 2016, p. 669-708; R. THOMAS, *Legitimate expectations and the separation of powers* in *English and Welsh Administrative law*, *in* M. GROVES and G. WEEKS (eds.), *Legitimate expectations in the Common law World*, Oxford, Hart Publishing, 2017, p. 53-77; P. DALY, *A pluralist account of Deference and Legitimate Expectations*, *in* M. Groves and G. Weeks (eds.), *Legitimate expectations in the Common law World*, Oxford, Hart Publishing, 2017, p. 101-120; K. HUGHES, *R v. North and East Devon Health Authority [2001]: Coughlan and the Development of Public Law*, *in* S. Juss and M. Suskin (ed.), *Landmark Cases in Public Law*, Oxford, Hart Publishing, 2017, p. 181-210; M. ELLIOTT, R. THOMAS, *Public Law*, Oxford, Oxford University Press, 2017, p. 531-536.

2.2 Legitimate expectations in Belgian law

In Belgian law as in English law, legitimate expectations do not coincide with a precept recognized by a normative text, whether constitutional, legislative or regulatory.

Yet, legitimate expectations are legally binding for both the administration and the citizen. This is because legitimate expectations correspond to a "general principle of law", that is an unwritten rule revealed or, if one prefers, created by the judges through their lines of cases in order to plug a legal loophole. In other words, a "general principle of law" is a complementary normative exigence considered by the judges as necessary to supplement the legal arsenal and add to the latter a new legal requirement[4]. As the French scholar Franck MODERNE writes:

"*It can be simply induction from particular provisions of texts in force, references to the spirit of an institution or a text in order to reflect the presumed intention of the legislator, recourse to the nature of things or to the essence of an institution out of any linkage to a text, or interpretation of the national community's latent or diffuse aspirations*"[5].

[4] See not. J. JAUMOTTE, *Les principes généraux du droit administratif à travers la jurisprudence administrative in* B. BLERO (ed.), *Le Conseil d'État de Belgique cinquante ans après sa création (1946-1996)*, Brussels, Bruylant, p. 600; F. LEURQUIN-DE VISSCHER, *Existe-t-il un principe de subsidiarité ?*, in F. DELPEREE (dir.), *Le principe de subsidiarité*, Brussels, Bruylant, 2002, p. 29. On the general principle of law, see, more generally, P. MARCHAL, *Principes généraux du droit*, *Répertoire pratique du droit belge*, Brussels, Bruylant, 2014, p. 317.

[5] F. MODERNE, *Légitimité des principes généraux et théorie du droit*, *Revue française de droit administratif*, 1999, p. 733-734, free translation from French. See also C. PARMENTIER, *La sécurité juridique, un principe général de droit?, in La sécurité juridique. Actes du colloque organisé par la Conférence libre du Jeune Barreau de Liège le 14 mai 1993*, Liège, Ed. du Jeune Barreau de Liège, 1993, p. 23.

In the hierarchy of legal norms, the general principles of law are given a certain legal force: they are either constitutional, or legislative or even regulatory, as the written norms are[6].

But a general principle of law shall bow down before a written norm having the same legal force[7]. For instance, a general principle of law having legislative force is considered as lower in the hierarchy of norms than a written legislative act is, and so forth[8].

Among the "general principles of law", legitimate expectations are usually seen by the Belgian judges as one of the "general principles of good administration"[9]. They are recognized as having legislative value, unlike the general principle of legal certainty[10], a

[6] See not. I. MATHY, *Les principes généraux : genèse et consécration d'une source majeure du droit administratif*, *in* S. BEN MESSAOUD AND F. VISEUR (ed.), *Les principes généraux de droit administratif*, Collection de la Conférence du Jeune Barreau, Brussels, Larcier, 2017, p. 45-57.

[7] *Ibid.*

[8] See P. MARCHAL, *op. cit.*, p. 44-45.

[9] See not. J. JAUMOTTE, *Les principes généraux du droit administratif à travers la jurisprudence administrative*, in B. BLERO (ed.), *Le Conseil d'État de Belgique cinquante ans après sa création (1946-1996)*, *op. cit.*, p. 686; S. SEYS, D. DE JONGHE AND F. TULKENS, *Les principes généraux du droit*, *in* I. Hachez and consorts (dir.), *Les sources du droit revisitées*, vol. 2, *Normes internes infraconstitutionnelles*, Limal, Anthemis, 2012, p. 532; P. GOFFAUX, *Dictionnaire de droit administratif*, 2nd ed., Brussels, Bruylant, 2016, p. 357-358; M. MORIS and F. BELLEFLAMME, *Les principes de bonne administration en droit administrative et en droit fiscal*, *in* P.-O. DE BROUX, B. LOMBAERT, F. TULKENS (ed.), *Actualité des principes généraux en droit administratif, social et fiscal*, Coll. Recyclages en droit, p. 157.

[10] See not. J. SALMON, J. JAUMOTTE, E. THIBAUT, *Le Conseil d'État de Belgique*, vol. 1, Brussels, Bruylant, 2012, p. 858.

principle which it is sometimes said that legitimate expectations are the "subjective component" of and which has constitutional force[11].

In order to be regularly used, the principle of legitimate expectations requires, in Belgian law, the meeting of three conditions: a situation caused by the administration; which raises a legitimate expectation on the part of another person; without that any "serious motive" or "objective and reasonable justification" can be argued by the administration which would justify that the latter can go back on legitimate expectations it has aroused[12].

Among the situations that the administration can cause under the scheme in question, error can certainly raise legitimate expectations.

It is notably the case when the administration made a mistake in a date and that this error has repercussions on the calculation of the time limit concerning a remedy open to challenge one of its acts[13].

Beyond errors, other situations led the judge to find that the administration had raised legitimate expectations on the part of a person.

[11] See not. D. RENDERS B. GORS, *Origine et contours des principes généraux de bonne administration*, *Les dialogues de la fiscalité*, 2012, p. 415.

[12] See not., in more or less variable terms, Council of State (Bel.), L'associaton de droit public Association hospitalière de Bruxelles — Hôpital universitaire des enfants Reine Fabiola, 18 December 2020, n° 249.292; Council of State (Bel.), L'association de droit public Association hospitalière de Bruxelles — Centre hospitalier universitaire Saint-Pierre, n° 250.285, 31 March 2021 ; Council of State (Bel.), Vanlandeghem, 5 août 2021, n° 251.345; Council of State (Bel.), s.a. Bluetail Flight School, 14 September 2021, n° 251.492.

[13] See not. Council of State (Bel.), s.a. Electrabel and consorts, 1st February 2016, n° 233.675.

On the basis of what other scholars have listed[14], we can cite: a course of action clear and well established[15]; promises[16]; concessions[17]; precise assurances given without reserve[18]; a memorandum[19]; a circular[20]; a memorandum of understanding concluded between the

[14] See R. SIMAR P. ABBA, Sécurité juridique, légitime confiance, *patere legem quam ipse fecisti*. Transparence administrative ou principes transparents ?", *in* S. BEN MESSAOUD, F. VISEUR (ed.), *Les principes généraux de droit administratif*, Collection de la Conférence du Jeune Barreau, Brussels, Larcier, 2017, p. 109.

[15] The fact that the administration, once in the past, consulted the representatives of the pharmaceutical sector before the adoption of a regulation cannot be considered as constituting a "constant practice" which would have given rise to an obligation of repeating this consultation, so that the principle of legitimate expectations does not impose to the administration to proceed to a new consultation before adopting an agreement or a measure (see Council of State, *a.s.b.l. Association Générale de l'industrie du médicament and consorts*, n° 205.919, 28 June 2010).

[16] It cannot be deduced from the circumstances of the case that the administration would have promised anything (see Council of State (Bel.), *Havelange*, 28 April 2016 n° 234.572).

[17] See Council of State (Bel., Gen. Ass.), *Missorten*, n° 93.104, 6 February 2001; Council of State (Bel.), *Antoine*, 5 November 2015, n° 232.822.

[18] The administration does not provide any precise assurances susceptible to give rise to justified expectations, if all it does is to indicate, in a letter, "carefully and in the conditional tense", that the training certificate "could be accepted, subject to providing further information" (see Council of State (Bel.), *Depersonalized*, 24 September 2001 n° 99.052).

[19] The public authority cannot allege that the time limit for lodging an appeal was ten "calendar" days if it had been specified in a memorandum that this time limit was ten "working" days, by explicitly excluding Saturdays, Sundays and public holidays, so that the civil servants concerned in the case at issue could legitimately believe in this information (see Council of State (Bel.), *Goyaerts*, 30 December 1998, n° 77.889).

[20] The administration is at risk of violating the legitimate expectations of the citizen if it does not follow the indications enshrined in a circular which would amount to courses of action aimed at guiding the administration in the exercise of its discretionary power (see Council of State (Bel.), *Depersonalised*, 10 November 2006, n° 164.627).

administration and the union representatives[21]; displayed assessment criteria[22]; an abstention[23]; or even the obviousness[24].

The situation which allegedly generates legitimate expectations on the part of a person must be in a causal link with the expectations allegedly aroused[25]

Among other things, the element which is allegedly at the basis of the principle of legitimate expectations application's triggering, must, thus, be the fact of the administration which the principle is opposed to[26]. To put it another way, the principle in question cannot

[21] There is a violation of the principle of legitimate expectations in the circumstances where the administration had announced it would respect the content of memorandum of understanding concluded with the union representatives and that it does not respect the latter, even exceptionally (See Council of State (Bel.), *Jonckers*, n° 136.032, 14 October 2004).

[22] If the assessment criteria defined by an examination board have been displayed, the board imposes to itself to follow rules of conduct which, even if they do not amount to a regulation, oblige the board to specifically justify the reasons why it should depart from them (see Council of State (Bel.), *Giet*, n° 185.703, 14 August 2008).

[23] The administration frustrates the legitimate expectations of one of its civil servants when: (1) it had initiated, three years earlier, a procedure aimed at deciding his retirement in the interest of the service; (2) then, it has suspended this procedure during the sick-leave of the person concerned; then it does not have pursued the procedure just after his return from sick-leave; (3) while, at the same time, closing the service in which the civil servant in question worked and hearing him in the frame of a selection procedure for other positions within other services of the same administration (see Council of State (Bel.), *Sacré*, n° 239.253, 28 September 2017).

[24] The candidate who participates to a recruitment competition can legitimately expect that the tests relating to it are held regularly, so that his legitimate confidence is misled if it is not the case (see Council of State (Bel.), *Van Nypelser*, n° 68.626, 3 October 1997).

[25] See R. SIMAR P. ABBA, *op. cit.*, pp. 109-111.

be argued vis-à-vis an administration on the basis of an act stemmed from another administration[27]

The confidence which is aroused must, moreover, be legitimate. For example, a person cannot allege legitimate expectations if he is in bad faith or - at least in principle - if its claim violates a statutory or regulatory rule[28].

Even if legitimate expectations have been aroused through a situation caused by the administration, the principle at stake does not necessarily imply that the citizen is entitled to enjoy his expectations.

A "serious motive" or, sometimes, simply an "objective and reasonable justification" can allow the administration to override the aroused legitimate expectations[29]. The analysis of the jurisprudence reveals that the judge admits diverse justifications invoked by the administration to depart from its course of action or to renege on its commitments or promises.

Generally speaking, the jurisprudence is established in the sense that the principle of legitimate expectations cannot serve to justify the adoption of an illegal decision[30].

[26] See Council of State (Bel.), *s.a. Mercedes-Benz Belgium Luxembourg*, 16 June 2017, n° 238.545; Council of State (Bel.), *Vannieuwenhuize and De Smet*, n° 238.695, 27 June 2017; Council of State (Bel.), *s.a. Mineralz es treatment*, 22 October 2020, n° 248.699; Council of State (Bel.), *Spits and Spons* 12 May 2021, n° 250.594.

[27] *Ibid.*

[28] See. not. Council of State (Bel.), *Detimmerman*, 1st August 2019 n° 245.271; Council of State (Bel.), *Crespin*, 24 October 2019, n° 245.893.

[29] See not. Council of State (Bel.), *s.a. Mercedes-Benz Belgium Luxembourg*, 16 June 2017, n° 238.545.

[30] See not. P. GOFFAUX, *Dictionnaire de droit administratif, op. cit.*, pp. 359-362. See also Council of State (Bel.), *s.a. Entreprises Jacques Pirlot*, n° 241.123, 27 March 2018; Council of State (Bel.), *s.c.r.l. Intermédiance and*

However, this is not always the case[31], even though the prevalence of the legitimate expectations' principle *contra legem* is very rare.

Furthermore, the administration must always be in measure to change its policy and, consequently, to amend the legal acts which are necessary to conclude this policy, so that the general interest is satisfied[32]. It is however established that, by doing that, caution is called[33]. Moreover, guidelines in the appreciation of certain concepts can evolve. This is notably the case about the notion of « bon aménagement des lieux » in matters of urban planning law[34].

Partners, 25 June 2018, n° 241.890,; Council of State (Bel.), *Detimmerman*, 1st August 2019, n° 245.271; Council of State (Bel.), *Crespin*, 24 October 2019, n° 245.893.

[31] The Council of State has notably admitted that: "*[...] in the case of the indication, in a display notice prescribed by the law to the municipal authority, of an administrative appeal time limit to lodge to the Government which is longer than the legal one, while the mention of this time limit is legally compulsory, the judge can decide, after having weighed the requirements of the law and those of the legitimate expectations, that the Rule of Law is better served by the maintenance of the erroneous administrative indication effects which have aroused the confidence at stake than by the strict application of the literal terms of the law; that the judge must regard the interests of each party and cannot tolerate any disproportionate breach of formal law in any circumstances*" (see Council of State (Bel.), *s.a. Electrabel and consorts*, n° 233.675, 1st February 2016).

[32] See not. Council of State (Bel.), *Lemaire*, 26 May 2016, n° 234.864.

[33] See not. D. DE JONGHE, P.-F. HENRARD, *L'actualité des principes généraux de droit administratif et de bonne administration en droit administratif: questions choisies*, *in* P.-O. DE BROUX, B. LOMBAERT Et F. TULKENS (ed.), *Actualité des principes généraux en droit administratif, social et fiscal*, *op. cit.*, p. 10.

[34] See Council of State (Bel.), *Brancart and Cullus*, n° 221.487, 22 November 2012.

3. THE MISS COUGHLAN'S EXPECTATIONS AND THE BELGIAN ADMINISTRATIVE JUDGE

We believe that the Miss Coughlan's legitimate expectations might have been apprehended by the Belgian Administrative Judge into two different channels: judicial review, on the one hand (A); the exceptional damage litigation, on the other (B).

3.1 Judicial Review

Similarly to English Law, a unilateral administrative act can be annulled in Belgian Law, via the channel of judicial review.

An annulment can be pronounced if the challenged act breaches a legal rule or general principle of law that its author had to observe at the moment of its adoption[35].

Moreover, this annulment can only be decided by the Council of State, regardless the unilateral administrative act challenged and regardless the author of the act in question[36].

[35] See not. D. RENDERS, *La consolidation législative de l'acte administratif unilatéral*, Brussels, Bruylant, Paris, L.G.D.J., 2003, p. 59, and the references cited. For an illustration, see not. Council of State (Bel.), *Commune de Montigny-le-Tilleul*, n° 226.903 du 27 mars 2014.

[36] Art. 14 of the Acts on the Belgian Council of State, coordinated on 12 January 1973, *Moniteur belge*, 21 March 1973. On Judicial Review, see not. P. LEWALLE, with the collaboration of L. Donnay, *Contentieux administratif*, 3rd ed., Brussels, Larcier, p. 629-873; D. RENDERS, TH. BOMBOIS, B. GORS, CH. THIEBAUT, L. VANSNICK, *Droit administratif*, t. III, *Le contrôle de l'administration*, Brussels, Larcier, 2010, p. 206-307; M. LEROY, *Contentieux administratif*, 5th ed., Limal, Anthemis, 2011, pp. 161-686; J. SALMON, J. JAUMOTTE, E. THIBAUT, *Le Conseil d'État de Belgique*, vol. 1, *op. cit.*, p. 393-1085; S. LUST, *Rechtsbescherming tegen de (administratieve) overheid. Een inleiding*, Brugge, die Keure, 2014, p. 100-159; J. SOHIER, *Manuel des procédures devant le Conseil d'État*, Waterloo, Kluwer, 2014, p. 17-119; M. PÂQUES, *Principes de contentieux administratif*, Brussels, Larcier, 2017, p.

There is one exception: when a specific Act has entrusted another judge — either administrative or judicial — to settle the annulment litigation of the category of acts which the act at issue is part of[37]. As an example, the litigation concerning the measures taken by the independent administrative authority established to regulate the gas and electricity markets has been entrusted to the Court of Markets, which has become the name of one of the Brussels Court of Appeal's chambers — a judicial jurisdiction —[38].

It is worth specifying that Belgium experiences an administrative jurisdictional order which is not organized in the form of a pyramid, with first instance courts at its base, courts of appeal in the middle and a supreme court at its top.

With regard to administrative courts, there is a Council of State and a myriad of administrative courts which are specialised in a variety of areas and of which judgements are subjected to cassation proceedings, generally lodged before the Council of State[39].

225-400; L. DONNAY, P. LEWALLE, *Manuel de l'exécution des arrêts du Conseil d'État*, Brussels, Larcier, 2017, p. 502; R. STEVENS, K. DIDDEN, *Raad van State/I. Afdeling bestuursrechtspraak/2. Het procesverloop*, Brugge, die Keure, 2018, p. 9-580; I. OPDEBEEK, S. DE SOMER, *Algemeen bestuursrecht, Grondslagen en beginselen*, 2nd ed., Antwerpen-Cambridge, Intersentia, 2019, p. 577-631; D. RENDERS, *Droit administratif général*, Brussels, Larcier, 2019, p. 632-646; D. RENDERS B. GORS, *Le Conseil d'État,* Brussels, Larcier, 2020, p. 33-356; A. MAST, J. DUJARDIN, M. VAN DAMME, J. VANDE LANOTTE, *Overzicht van het Belgisch Administratief Recht*, 22nd ed., Mechelen, Kluwer, 2021, p. 1247-1392.

[37] Art. 14, 1st par., of the Acts on the Belgian Council of State, *id.*

[38] See Act of 25 December 2016 "modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice" (*Moniteur belge*, 30 December 2016), art. 51, 56, 59, 60, 64, 75, 77, 107, 109, 111 to 114, 157, 158 and 160 to 166.

[39] See not. D. RENDERS, *Droit administratif général*, *op. cit.*, 2019, p. 630-631 and 655-658.

As an example of specialised administrative courts, we can give the Competition Council, the Council for Alien Law Litigation or even the Commission for aid to victims of intentional acts of violence, and so forth[40].

Beyond the administrative courts evoked above, which have all been established at the federal level, one must now mention the existence of Flemish administrative courts which have been created in several areas, whereas the organisation of the judiciary is still a federal matter[41]. This is notably the case in Urban Planning law, in Environmental law or in Educational law[42].

The legal basis on which the Flemish Region and Community were entitled to create these administrative courts lies in what we call, in Belgian law, the implied powers' theory[43].

[40] *Id.*, p. 630.

[41] See not., on this subject, J. VANPRAET (ED.), *Administratieve rechtscolleges*, Brugge, die Keure, 2014, p. 121; A. Maes, "Het nieuwe DBRC-decreet: een eerste blik op de procedurele wijzigingen voor de Raad voor vergunningsbetwistingen", *Chroniques de Droit public-Publiekrechtelijke Kronieken*, 2015, p. 363-386; T. VANDENPUT, P. DE MAYER, M. BERTRAND, "Les nouvelles juridictions administratives régionales en matière d'urbanisme et d'environnement", *In* F. Viseur Et J. Philippart (Ed.), *La Justice Administrative*, Brussels, Larcier, 2015, P. 609; I. OPDEBEEK, S. DE SOMER, *Algemeen bestuursrecht, Grondslagen en beginselen*, *op. cit.*, 2017, p. 642-653, and the references cited; D. RENDERS, D. DE VALKENEER, "Où peut aller la justice administrative flamande, en particulier si la coupole n'est pas encore pleine?", observations on Const. Court, n° 152/2015, *Administration publique*, 2016, p. 557-570; D. RENDERS, "Belgian administrative justice organisation: when Federalism or devolution brings justice with it, or when regionalism is invading Europe?", *Ius Publicum*, 2018/1.

[42] *Ibid.*

[43] On the subject of the implied powers' theory in matters of justice specifically, see not. D. DE BRUYN, Les compétences implicites en matière d'organisation de juridictions, observations on Const. Court, 14 February 2001, n° 19/2001 et Const. Court, 13 March 2001, n° 33/2001, *Journal des Tribunaux*, 2002, pp. 4-8 ; X. DELGRANGE ET N. LAGASSE, La création de juridictions administratives par les communautés et les régions, *in* H. DUMONT, P.

This theory is based on a special legislative provision[44] which, as interpreted by the Constitutional Court, entitles a constituent entity of the Belgian Federation to encroach on the competences of other constituent entities of the Federation, under the conditions that this encroachment be necessary to the exercise of one of its own competences; be marginal; and cannot make impossible for the other constituent entities of the Federation to rule the same policy or question in another way[45].

If it had to be settled in Belgian law as a judicial review, the *Coughlan* case would have led the protagonists to cross swords before the Council of State, in first and last instances. As a matter of fact, it is the Council of State which, in Belgian law, is in charge of ruling on the legality of a closure measure such as that applied to *Mardon House*, unless a specialised court has been established to settle the category of measures which the closure at issue is part of, which is not the case to this day.

Moreover, in the light of all the considerations related to how legitimate expectations are recognized in Belgian law, it is absolutely conceivable that the Council of State, in the frame of its judicial review, could have allowed the argument of *Miss Coughlan* based on the principle of legitimate expectations. Firstly, the promise had been made by the administration. Secondly, *Miss Coughlan* could legitimately believe in this promise. Thirdly, and lastly, the Council of State could, in the circumstances of the case, consider that the alleged motives, financial in nature, without being accompanied by any relocation measure which would offer an equivalent comfort to that of which *Miss Coughlan* enjoyed in *Mardon House*, did not justify that the administration can go back on the promise it had made.

JADOUL ET S. VAN DROOGHENBOROECK (ed.), *La protection juridictionnelle du citoyen face à l'administration*, Brussels, La Charte, 2007, pp. 487-524; A.-S. BOUVY, "La place des juridictions administratives régionales et communautaires dans la Belgique fédérale", *Revue belge de droit constitutionnel*, 2015, pp. 215-264.

[44] Art. 10 of the Special Act of 8 August 1980 "of institutional reforms", *Moniteur belge*, 15 August 1980.

[45] See, in matters of justice specifically, Const. Court, n° 8/2011, 27 January 2011.

3.2 The litigation of exceptional damage

Apart from judicial review, the Belgian Council of State is in charge of different other jurisdictional competences. One of them is known as "the exceptional damage litigation"[46].

[46] On the subject of the exceptional damage litigation, see not. A. MAST, *Le Conseil D'état Et Le Contentieux De L'indemnité*, *In Mélanges Jean Dabin*, Brussels, Bruylant, 1963, p. 777-794; CH. HUBERLANT, E*ssai De Délimitation De La Compétence Du Conseil D'état D'avec Celle Des Cours Et Tribunaux Au Contentieux De L'indemnité*, *In Miscellanea W.-J. Ganshof Van Der Meersch*, T. Iii, Brussels, Bruylant, Paris, L.G.D.J., 1972, p. 509-532; M. LEROY, *Le Contentieux De L'indemnité Avant Et Après La Loi Du 3 Juillet 1971*, *Recueil De Jurisprudence Du Droit Administratif Et Du Conseil D'état*, 1974, p. 225-262; M. VAN DAMME, *De Aansprakelijkheid Van Wet- En Decreetgever In Het Licht Van Artikel 11 Van De Gecoördineerde Wetten Op De Raad Van State*", *Tijdschrift Voor Bestuurswetenschappen En Publiekrecht*, 1982, p. 296-307; P. LEWALLE, *La Réparation Du Dommage Exceptionnel Par Le Conseil D'état: Mythe Ou Réalité* ?, *Annales De Droit De Liège*, 1980, p. 183-214; M. LEROY, *Indemnité Pour Préjudice Exceptionnel — Évaluation*, *Administration Publique*, 1988, p. 73-76; J. SOHIER, *La Responsabilité De L'état Du Fait Des Vaccinations Obligatoires: De La Responsabilité Pour Faute Dans L'exercice De La Fonction Réglementaire Au Contentieux De L'indemnité Pour Rupture De L'égalité Des Citoyens Devant Les Charges Publiques, Observations On Council Of State (Bel.), Paasch-Jetzen*, N° 41.396, 16 December 1992, *Journal Des Tribunaux*, 1993, p. 334-338; A. VAN OEVELEN, *Het Rediduaire Karakter Van De Bevoegdheid Van De Raad Van State Om Uitspraak Te Doen Over De Eisen Tot Herstelvergoeding Voor Buitengewone Schade*, *Rechtskundige Weekblad*, 1998-1999, p. 1416-1418; R. ANDERSEN, B. LOMBAERT ET S. DEPRÉ, "LES CONTENTIEUX MÉCONNUS", *IN* B. BLERO (Ed.), *Le Conseil D'état De Belgique Cinquante Ans Après Sa Création (1946-1996)*, Brussels, Bruylant, 1999, p. 269-308; J. SOHIER, *Des Vaccinations Obligatoires Et Des Contours De La Compétence 'Résiduaire' Du Conseil D'état Au Contentieux De L'indemnité*, *Revue Critique De Jurisprudence Belge*, 2000, p. 9-19; P. LEWALLE, With The Collaboration Of L. Donnay, *Contentieux Administratif*, 3rd Ed., Brussels, Larcier, 2008, p. 499-525; D. RENDERS, TH. BOMBOIS, B. GORS, CH. THIEBAUT, L. VANSNICK, *Droit Administratif*, T. Iii, *Op. Cit.*, p. 381-396; M. LEROY, *Contentieux Administratif*, *Op. Cit*., p. 849-898; J. SALMON, J. JAUMOTTE, E. THIBAUT, *Le Conseil D'état De Belgique*, Vol. 1, *Op. Cit.*, p. 333-386; J. SOHIER, *Manuel Des Procédures Devant Le Conseil D'état*, Waterloo, Kluwer, 2014, p. 147-155; M. QUINTIN, "Contentieux De L'indemnité En Droit Administratif Belge", *Administration Publique*, 2017, p. 157-169 ; I. OPDEBEEK ET S. DE SOMER, *Algemeen Bestuursrecht, Grondslagen En Beginselen*, 2nd Ed., *Op. Cit.*, p. 600-604; D. RENDERS ET B. GORS, *Le Conseil D'état, Op. Cit.*, p. 507-536 ; A. MAST, J. DUJARDIN, M. VAN DAMME AND J. VANDE LANOTTE, *Overzicht Van Het Belgisch Administratief Recht*, *Op. Cit.*, p. 1423-1436.

In the situation where the administration has, by its fact, caused an exceptional damage, without committing any fault, the Belgian Council of State can, on the basis of a specific ground of jurisdiction, grant the compensation of this damage[47].

A prerequisite is required: the compensation of the damage allegedly suffered must be claimed by the applicant to the administration concerned, prior to regularly solicit the Council of State if the prerequisite has not been entirely successful[48].

The reason why this ground of jurisdiction does exist — which is the matter of the Council of State only if "another court has not been entitled to settle it"[49] — lies in the idea that one cannot tolerate that the citizen suffers, without any compensation, heavy sacrifices for the benefit of the society[50].

In this perspective, the exceptional damage litigation aims to allow the compensation of persons that the legal action of public powers seriously injured in an abnormal way, in defiance of the principle of equality with regard to public burdens[51].

[47] Art. 11 of the Acts on the Belgian Council of State, coordinated on 12 January 1973, *Moniteur belge*, 21 March 1973.

[48] Art. 11, 1st par., of the Acts on the Belgian Council of State, *id.*

[49] See not. Council of State (Bel.), *De Vriese*, n° 160.163, 15 June 2006.

[50] See not. J. SOHIER, *Manuel des procédures devant le Conseil d'État*, *op. cit.*, p. 147.

[51] See not. Council of State (Bel.), *De Boeck*, n° 2.658, 9 July 1953.

The triggering factor of the exceptional damage must be the act, omission or act of the administration[52].

As a result, if the triggering factor stems from the legislator[53], an organ of the judicial power[54] or even a citizen[55], one cannot conceive a compensation under the legal scheme in question.

Furthermore, the triggering factor must have been directly caused and, if not exclusively, at least principally by the administration[56]. Even if it is partial, the interference in the causal link between the triggering factor and the damage is sufficient to justify the rejection of the request which, to be allowed, imposes that the prejudice is directly and solely imputable to the administration[57].

[52] See not. M. LEROY, *Contentieux administratif, op. cit.*, p. 878; D. BATSELE AND M. SCARCEZ, *Abrégé de droit administratif*, Brussels, Larcier, 2015, p. 677; M. QUINTIN, *Contentieux de l'indemnité en droit administratif belge*, *op. cit.*, p. 158.

[53] See not. Council of State (Bel.), *De Vriese*, n° 160.163, 15 June 2006; Council of State, *Krack and consorts*, 2 July 2009, n° 195.045.

[54] See not. Council of State (Bel.), *Lambert*, n° 111.028, 4 October 2002; Council of State (Bel.), *Kurtulus*, , 24 June 200, n° 120.8753.

[55] See not. Council of State (Bel.), *Meunier*, 24 April 1997, n° 66.067.

[56] See not. Council of State (Bel.), *Mennicken and consorts*, n° 208.354, 21 October 2010, Council of State (Bel.), *Grégoire*, 24 May 2011, n° 213.439.

[57] *Ibid.*

The legislative provision which sets up the exceptional damage provides for that the compensation finds its basis in the equity[58].

As a consequence, the applicant must invoke an unfair or abnormal treatment, without referring to a rule allegedly violated, which would induce the existence of a fault and, consequently, which would exclude the competence of the Council of State, any condemnation on the grounds of a fault being the exclusive prerogative of the judicial judge in the frame of the extracontractual civil liability litigation[59].

To succeed before the Council of State, an exceptional damage must be proved[60].

The exceptional damage is "the abnormal prejudice, exceptional, exceeding by its nature or its importance the common inconveniences and the sacrifices that social life imposes […]"[61]. The assessment of the "exceptional" character of the prejudice depends, thus, on the circumstances of the case.

[58] Art. 11, 1st par., of the Acts on the Belgian Council of State, *op. cit.* See not. Council of State (Bel.), *Hanot*, n° 243.671, 12 février 2019.

[59] See. not. Council of State (Bel.), *NV Henvro and consorts*, n° 209.606, 9 December 2010; Council of State (Bel.), *Demoulin*, 8 November 2013, n° 225.411. Cf. *infra*: n° 25-30.

[60] See not. D. RENDERS, TH. BOMBOIS, B. GORS, CH. THIEBAUT, L. VANSNICK, *Droit administratif*, t. III, *op. cit.*, pp. 383-387 and the references cited.

[61] Parliamentary Documents, Sénat, extraordinary session 1939, n° 80, cited by P. LEWALLE, with the collaboration of L. Donnay, *Contentieux administratif, op. cit.*, p. 518.

The exceptional damage — which can be both material and moral[62] — must, moreover, be innate, current and certain, so that the hypothetical prejudice and the loss of uncertain benefits are excluded[63].

Among the damages considered as exceptional by the Council of State, one can notably point out: an early retirement[64]; the abnormal delay for an appointment or a promotion[65]; a compulsory polio vaccination[66]; a broken promise of appointment[67]; the slaughtering of pigs requested by the administration following the triggering of the swine fever[68]; and so forth[69]. Conversely, there is no exceptional damage when the administration terminates a domain concession, this contract being, by nature, precarious and revocable[70].

[62] Art. 11, 1st par., of the Acts on the Belgian Council of State, *op. cit.*

[63] Council of State (Bel.), *Delatte*, n° 177.496, 30 November 2007; Council of State (Bel.), *Krack and consorts*, n° 195.045, 2 July 2009; Council of State (Bel.), *Mennicken and consorts*, n° 208.354, 21 October 2010.

[64] See Council of State (Bel.), *Leynen*, n° 3.385, 13 May 1954.

[65] See Council of State (Bel.), *Bossart*, n° 43.717, 5 July 1993.

[66] See Council of State (Bel.), *Paasch-Jetzen*, n° 41.396, 16 December 1992, *Journal des Tribunaux*, 1993, p. 332 and observations J. Sohier, "La responsabilité de l'État du fait des vaccinations obligatoires : de la responsabilité pour faute dans l'exercice de la fonction réglementaire au contentieux de l'indemnité pour rupture de l'égalité des citoyens devant les charges publiques"; Council of State (Bel.), *Silay ans consorts*, n° 60.362, 21 June 1996.

[67] See Council of State (Bel.), *Gilman*, n° 943, 16 June 1951.

[68] See Council of State (Bel.), *NV Henvro and consorts*, n° 215.736, 13 October 2011.

[69] See, on this subject, D. RENDERS, TH. BOMBOIS, B. GORS, CH. THIEBAUT, L. VANSNICK, *Droit Administratif*, T. Iii, *Op. Cit.*, Pp. 383-387 And The References Cited. See Also A. MAST, J. DUJARDIN, M. VAN DAMME AND J. VANDE LANOTTE, *Overzicht Van Het Belgisch Administratief Recht*, *Op. Cit.*, Pp. 1428-1430.

Having to treat a request which would fulfil all the prerequisites, the Council of State orders the compensation of the prejudice suffered, not by ordering positive or negative injunctions, but by condemning the administration to pay "compensatory damages"[71].

The Council of State, which rules by a judgement, must, when it makes its decision, take "into account every circumstances of public and private interest"[72].

In these conditions, the Council of State has a large margin of appreciation to measure the prejudice[73]. In order to quantify the latter, the Council may resort to an expert[74]. It also can allocate only a partial reparation of the prejudice — where appropriate, the part of it which coincide with what exceeds the normal burden imposed by social life —[75]. However, it cannot order the compensation of the prejudice up to an amount superior to the amount asked for to the administration, before lodging an appeal to the Council of State[76].

[70] See Council of State (Bel.), *Mennicken and consorts*, 21 October 2010, n° 208.354.

[71] Art. 11, 1st par., of the Acts on the Belgian Council of State, *op. cit.* The provision uses the terms of "demande d'indemnité", which gives rise to compensatory damages and only that (see J. SALMON, J. JAUMOTTE ET E. THIBAUT, *Le Conseil d'État de Belgique*, vol. 1, *op. cit.*, p. 384. See, for example, Council of State (Bel.), *Jaumotte*, n° 17.138, 15 July 1975. In this case, the applicant gained an amount of 300.000 Belgian Francs.

[72] Art. 11, 1st par., of the Acts on the Belgian Council of State, *op. cit.* See, for example, Council of State (Bel.), *Silay and consorts*, n° 133.634, 7 July 2004.

[73] See not. D. BATSELÉ, M. SCARCEZ, *Abrégé de droit administrative*, *op. cit.*, p. 678.

[74] See not. Council of State (Bel.), *Silay and Yarali*, 21 June 1996, n. 60.362; Council of State (Bel.), *Deblaere*, 9 May 2008, n° 182.842.

[75] See not. J.-CL. GEUS AND CH. LAMBOTTE, "Le Conseil d'État", *in Répertoire notarial*, t. XV, Livre VII, Brussels, Larcier, 1985, p. 43.

[76] Council of State (Bel.), *Silay and consorts*, 7 July 2004, n° 133.634.

In the *Coughlan* case, it seems to be undeniable that the triggering factor was the fact of the administration, without interference from the part of *Miss Coughlan* or from anyone other.

The situation seems to be very special and could have given rise, in this context, to an exceptional damage, in comparison with other situations which have been above mentioned.

In the frame of the exceptional damage litigation, the compensation could not have been other than a financial indemnity. As a result, *Miss Coughlan* could not have been repatriated to *Mardon House*. Furthermore, this indemnity could, where appropriate, be limited to the part of the damage which would exceed the normal burden imposed by social life.

4. THE MISS COUGHLAN'S EXPECTATIONS AND THE BELGIAN JUDICIAL JUDGE

It must be pointed out that, in Belgian law, it is also possible to ask the judicial judge for controlling the unilateral action of the administration, or its omission.

It is, then, for soliciting the protection of a subjective right — in other words a prerogative — that the administration, through the act that it took — or the omission that it made —, threatens, frustrates or flouts.

In order to do so, the act's addressee may notably invoke the illegality of the unilateral administrative act or omission which violates the right which he claims protection of. On the basis of the illegality of the act, the applicant seeks most often to prove that an extracontractual civil fault has been committed (A). Even if it is very seldom, he can also try to obtain the forced execution of the unilateral commitment of the administration (B).

4.1 The extracontractual civil liability

For a long time, Belgian law has had a narrow conception of the separation of powers. On behalf of this conception, the Belgian judge having in charge the extracontractual civil liability litigation — the judicial judge — had created a distinction between the administration as a private person and the administration as a public power[77].

By a judgement *La Flandria* issued on 5 November 1920, the Court of cassation has however admitted that the liability of the public power could be questioned for having damaged a civil right and that this liability was ruled by articles 1382 and following of the Civil Code[78].

In order to challenge the extracontractual civil liability of the administration, the applicant has to prove that the administration has committed a fault, namely either has failed to comply with its obligation of respecting all rules and principles hierarchically superior which are binding – and which, if they are international or European, must have a direct effect –, or has failed to comply with the "general duty of care" which imposes upon all, pursuant to articles 1382 and 1383 of the Civil Code[79].

If the action or the omission of the administration is inconsistent with one of its obligations, an illegality has been committed which, according to the jurisprudence of the

[77] See not. C. CAMBIER, *Droit administratif*, Brussels, Larcier, 1968, p. 561 and follow., spec. p. 562 and the references cited.

[78] Cassation (Bel.), 5 November 1920, *Pasicrisie*, 1920, I, p. 193, concl. First Advocate-General P. Leclercq. See, on this subject, P. VAN OMMESLAGHE, La responsabilité des pouvoirs publics pour la fonction juridictionnelle et la fonction législative, *in* P. Van Ommeslaghe (ed.), *Actualités en droit de la responsabilité*, Collection "UB3", Brussels, Bruylant, 2010, p. 110-112.

[79] See not. D. RENDERS, *Droit administratif général*, Brussels, Bruylant, 2019, pp. 621-622, and the references cited.

Court of cassation, amounts to a fault in the civil sense of the term — subject to certain reservations —[80].

If the civil fault has been proven and that this fault has caused a damage, the person who has committed the fault is liable to compensate the damage so caused.

In principle, any type of damage generated by any type of extracontractual civil fault can be compensated.

The way to compensate differ. It can be either by a positive or a negative injunction addressed to the administration in order to fulfil its "primary" or "very" obligation ("réparation en nature"), or by an order to pay "compensatory damages" — in other words an amount of money estimated by the judge as equivalent to all the prejudices suffered due to the unfulfillment of the "primary" or the "very" obligation ("réparation par équivalent").

If the applicant claims for a positive or negative injunction aimed at fulfilling the "primary" — or the "very" — obligation, the judge can order this injunction if this injunction is compatible with the factual situation and if this injunction has not been banned by the

[80] See not. D. DE ROY, D. RENDERS, "*La responsabilité extracontractuelle du fait d'administrer, vue d'ensemble*", *in* D. Renders (ed.), *La responsabilité des pouvoirs publics, Actes des XXIIe Journées d'études juridiques Jean Dabin*, Brussels, Bruylant, 2016, p. 31-92, and the references cited.

law[81]. If the applicant claims "compensatory damages", the judge can allocate them in any circumstances, whether an injunction is factually and legally workable — or not —[82].

It is worth specifying that, if a positive or a negative injunction is claimed under the conditions above mentioned, it is usually believed that the judge does not breach the principle of separation of powers as far as the injunction that the judge orders to the administration does not infringe the margin of appreciation that the administration has in the frame of its discretionary competence[83].

As an example, the judge may order the administration to rule on an authorisation request, by no longer committing the illegality previously committed. As a matter of right and of fact, the obligation made to the administration to rule one direction or the other does not depend on the injunction of the judge, but on the circumstance that the administration is legally bound to exercise its competence — to put it simply, the administration has the legal obligation of ruling on an authorisation request: it does not have any choice —. As for the injunction which consists in being banned from recommitting the illegality sanctioned in the judgement, it does not infringe the principle of separation of powers, since the discretionary

[81] See not. See not. D. RENDERS, "Dans quelle mesure le principe de la séparation des pouvoirs fait-il interdiction au juge de condamner l'administration à réparer en nature le dommage cause par sa faute extracontractuelle?", obs. on Cass., 4 September 2014, *Revue Générale de Droit Civil*, 2015, pp. 571-579, and the references cited. See also M. JOASSART, "Le juge civil et la séparation des pouvoirs", commentaire des arrêts de la Cour d'appel de Bruxelles du 21 février 2014 et du 12 septembre 2014, *Administration publique*, 2016, pp. 435-447; A. LEBRUN, "Jusqu'où le juge peut-il forcer l'Exécutif à agir? — Petit rappel", observations on J.P. Herstal, 20 December 2013, *Jurisprudence Liège, Mons et Bruxelles*, 2016, p. 1682.

[82] See not. D. RENDERS, *Droit administratif général*, *op. cit.*, p. 629.

[83] See not. D. RENDERS, "Dans quelle mesure le principe de la séparation des pouvoirs fait-il interdiction au juge de condamner l'administration à réparer en nature le dommage causé par sa faute extracontractuelle?", observations on Cass., 4 September 2014, *op. cit.*, p. 578, and the references cited. See, for a recent illustration, Cass., 12 March 2020, C.18.0383.N.

competence is entirely preserved, this competence having to be exercised in line with the law.

In case of binding competence — in other words, if the administration is required to adopt the decisional content that the law prescribes —, the injunction made to the administration is, by nature, respectful of the principle of separation of powers. The reason of this lies in the fact that the administration does not have any margin of appreciation and, so, could not, by hypothesis, encroach upon this[84].

As an example, if the law establishes that in the event that three conditions are met, a subvention must be granted to the applicant, the administration has no choice but to grant the subvention if these three conditions are met. If the administration did not do so, then that a judge observes that the conditions were met, though, and that the administration had a binding competence, the judge does not breach the separation of powers principle by ordering to the administration to allocate the subvention. As a matter of fact, the judge limits himself to observe that the administration was required to do so.

In the *Coughlan* case, it might be argued that the administration has violated the general principle of legitimate expectations — first form of civil fault — and/or the general duty of care which imposes upon all, on the basis of articles 1382 and 1383 of the Civil Code, since the administration would not have behaved as any administration normally careful and diligent placed in the same situation — second form of civil fault —.

In either case, the judicial judge could condemn the administration to compensate the damage suffered by *Miss Coughlan*. Could he condemn the administration to pay compensatory damages? The answer is undoubtedly affirmative, the judge having the possibility to do so in any circumstances. Could he condemn the administration to observe an injunction? The answer is not necessarily affirmative. In presence of a discretionary

[84] *Ibid.*

competence, the judge could only order the administration to act in compliance with legitimate expectations or in compliance with the general duty of care which — regarding the circumstances of the case and the grounds indissolubly linked to the judgement's conclusions — would probably give rise to one of the following measures: either repatriating *Miss Coughlan* to *Mardon House* if there were no other serious motives or objective and reasonable justifications than the insignificant financial gain achieved by the public health administration; or relocating *Miss Coughlan* in premises presenting a standard of comfort equivalent to *Mardon House*, if serious motives or objective and reasonable justifications could be duly argued.

4.2 The unilateral commitment of the administration

One case has been recorded in which, in Belgian Public Law, the unilateral commitment of the administration has been considered, by the judicial judge, as source of obligation for the administration and for the benefit of the citizen. The case in question has a drug name: *Softenon*[85].

In Belgium as in other countries in the world — sometimes under another name –, the drug in question caused severe deformities to children conceived between 1958 and 1963 by mothers having resorted to this drug as sleeping pill and/or cure nausea, while being pregnant.

[85] Brussels (ch. 18th), 22 February 2018, *Administration publique*, 2019/4, p. 418-434. On this judgement, see not. E. DE SAINT MOULIN, "L'engagement unilateral de volonté à la rescousse des victimes du Softenon. Commentaire de l'arrêt de la Cour d'appel de Bruxelles du 22 février 2018", *Administration publique*, 2019/4, pp. 434-453; A. CATALDO, F. GEORGE, "L'engagement par déclaration unilatérale de volonté dans le chef des pouvoirs publics à la lumière de l'arrêt Softenon", *in* D. RENDERS (dir.), *Actualités du contentieux administratif*, CUP, vol. 197, Limal, Anthemis, 2020, p. 153-212.

On 21 April 2010, the Federal Minister for Public Health at the time wrote to various Belgian victims of the drug as follows:

"*I am pleased to let you know that, on my initiative, the Council of Ministers has decided, as an outcome of the negotiations intervened in the frame of the recent budgetary control relating to the thalidomide victims: a one-off amount of 5.000.000 EUR is foreseen for the benefit of the thalidomide victims, amount which will be taken in charge on the budget of the administrative costs of the National Sickness and Invalidity Insurance Institution [in abbreviated form: INAMI] and compensated within the global budgetary objective of health care.*

This amount will be allocated to a Private Interest Foundation of which the corporate object will be the grant of a lump-sum to each victim born in Belgium between 1st January 1958 and 1st April 1963 who will prove that he or she suffers from birth defects linked to the intake, by their mothers during the pregnancy, of one of the medicines distributed by R. COLES *firm, containing thalidomide.*

This is the mandate which has been assigned to me by the Government, and I of course intend to fulfil it, first and foremost by creating very soon the legislative basis requested to allow the payment by the INAMI of the amount of 5.000.000 EUR to the Foundation to create. This decision was unhoped in view of the current budgetary context which is particularly difficult, and I am pleased to have obtained it in these circumstances"[86].

By a judgment of 22 February 2018, the Brussels Court of Appeal holds that, according to what appellants argue […], "it is without a doubt a unilateral commitment,

[86] *Id.*, free translation from French, point 15.

moreover confirmed by an official press release of 22 March 2010"[87], which reads as followed:

"*At the behest of [the Minister for Public Health], the Government has accepted to set aside an amount of 5 million euros for the benefit of the thalidomide victims, more commonly referred to as* Softenon.

This amount will be paid to a Foundation, still to create, which will be assigned to distribute this sum between the concerned persons.

This measure, brought with the conviction of the Minister, represents an important gesture of support towards persons with birth defects particularly disabling"[88].

The Brussels Court of Appeal stresses that:

"*This commitment by unilateral statement of will, externalised in that way, has been made without being accompanied by any reservation and, being accepted by the appellants, it is binding for the Belgian State not only towards appellants who demand the respect for it, but towards — following its own terms — anyone able to prove to be suffering from birth defects caused by the intake, by his or her mother during the pregnancy, of medicines distributed in Belgium by the* R. COLES *firm, containing thalidomide […]*"[89].

The Brussels Court of Appeal further highlights that:

"*As regards its validity, it does not matter that this unilateral commitment does not contain any recognition of liability from the Belgian State in the* Softenon *drama. As a matter*

[87] *Id.*, par. 53.

[88] *Id.*, par. 15 and 53.

[89] *Id.*, par. 54.

of fact, it is not requested to seek the cause of such a commitment in the moral duty or conscience to repair the damage; the will of a State to support the victims of a social drama, such as the Softenon *one, is enough (in this way, a State ensures to come to the assistance of victims of certain natural disasters)*"[90].

The Court further notes that:

"*[…] if it is true that, neither the Minister on its own, nor the Council of Ministers could decide to allocate any amount to the Foundation still to create, the grant of a budget coming within the remit of the House of representatives, the Belgian State took, as early as April 2010, the commitments of (i) creating a Foundation aimed at assisting the victims of the thalidomide and (ii) of submitting to the House of representatives a draft bill in order to allocate to this foundation an amount of 5.000.000 euros in the following terms: [draft bill]*"[91].

The Court lastly holds that:

"*[…] as soon as the Government has agreed […] to create a Foundation for the benefit of the thalidomide victims who were born in Belgium, and to submit to the House of representatives a draft bill aimed at attributing to this Foundation an amount of 5.000.000 EUR, this commitment has conserved and conserves, since the appellants have been informed of this commitment and accepted it, its binding force; […]*"[92].

For these reasons, the Brussels Court of Appeal:

[90] *Id.*, par. 55.

[91] *Id.*, par. 58.

[92] *Id.*, par. 62.

"*Orders the Belgian State, represented by Madam Minister for Social Affairs and Public Health to submit to the House of representatives a draft bill in order to include in the next budgetary law, such as that reproduced under point 58 of this judgement for the purpose of the creation of the private utility foundation referred to in the draft bill*"[93].

It follows from the above considerations that the unilateral commitment of the administration can, in some instances, be used against the latter and impose to it to do what it was committed to do — no more and no less —, without being allowed to weigh the fulfilment of this commitment with "serious motives" or other "objective and reasonable justifications" giving it a right to backtrack.

Even though the cases of unilateral commitment of the administration are very rare in Belgian law — it is the only one we know for the time being —, it should not be excluded that the judicial judge would have ruled similarly in a case equivalent to the *Coughlan* one, since the Belgian State would have been bound by an unconditional commitment and given the factual circumstances in question and the tragic nature of the situation.

Thereupon, the terms in which the British Court of Appeal reports the promise made to *Miss Coughlan* by the English Public Health Administration can usefully be recalled:

"86. […]. *This was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the health authority's predecessor's premises at* Newcourt. *It specifically related to identified premises which it was represented would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to reassure the residents. It was made by the health authority's predecessor for its own purposes, namely to encourage* Miss Coughlan *and her fellow residents to move out of* Newcourt *and into* Mardon House*, a specially built substitute home*

[93] *Id.*, operative provisions of the judgment.

in which they would continue to receive nursing care. The promise was relied on by Miss Coughlan. *[…]"*[94].

If the Belgian judicial judge had considered that, as in the *Softenon* case, it was also question of a unilateral commitment — "without being accompanied by any reservation and accepted by [*Miss Coughlan*]" —, it is to *Mardon House* that *Miss Coughlan* would have been repatriated, without any other possible alternative.

Even then, it should not be seen a violation to the separation of powers, the commitment of the administration being, by hypothesis, its own decision, in other words the exercise, by itself, of its discretionary competence only revealed — or reminded — by the judge.

5. CONCLUSION

It is striking to observe that Belgian law seeks, via different channels, to apprehend situations generated by the administration which display different features unacceptable, disloyal, unjustified or even unfair.

Whether through legitimate expectations as a ground for judicial review, extracontractual civil liability, unilateral commitment or even exceptional damage, the legislator and the judge endeavour to provide opportunities for helping the battered citizen to restore his rights.

[94] C.A. (Civ. Div.), *R. v North and East Devon Health Authority, Ex. p. Coughlan*, 16 July 1999, 2001, QB, p. 213, par. 86.

However, it is worth noting that, through all the channels pointed out, the role played by the circumstances of the case is decisive and, beyond it, the role of the judge which, in the final analysis, has the sensitive task to assess them.

The way in which the situation will be solved may, for its part, significantly vary between the obligation of putting back the citizen into his previous position, the obligation of putting back the citizen into a position equivalent to that in which he was placed, and the obligation to pay a financial indemnity, full or partial.

Undoubtedly, pleading the unilateral commitment of the administration would have constituted, on the Belgian side of the Channel, the best way to obtain a true comeback to *Mardon House*…

Abstract. *In English law, the case between Miss Coughlan and the North and East Devon Health Authority is central to the doctrine of legitimate expectations raised by the administration. The question arises as to how the Belgian courts would have decided, or at least could have decided, such a case. In order to answer this question, one examines the extent to which, in Belgian law, the legitimate expectations raised by the administration require it to honour them. It then asks how the administrative and ordinary courts could have been seized of the Coughlan case and how they could have decided it. From this overview, it is concluded that pleading the existence of a unilateral commitment of the administration before the ordinary judge would have been the surest way to obtain Miss Coughlan's comeback to the health care institution in which the administration had promised her that she would be able to finish her days before dislodging her.*