The Integration Principle – Belgian Report

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1. Policy framework

Constitution, federal and regional legislation

1. Article 7*b*, the recently by the Constitutional Amendment of 25 April 2007 introduced single provision of Title I *b* "General Policy objectives of Federal Belgium, the Communities and the Regions" of the Belgian Constitution, states: "*In the exercise of their respective competencies the Federal State, the Communities and the Regions foster the objectives of sustainable development in their social, economic and environmental aspects, taking into account the solidarity between generations*". This provision is the only provision of the Constitution that sets policy objectives for the different authorities. It calls for integration of sustainable development concerns in the different policies of the authorities concerned[1]. Environmental Policy on the Federal level is since 1997 part of a broader sustainable development policy that is subject to the *Act of 5 May 1997 concerning the co-ordination of federal policy on sustainable development*[2]. This Act provides different elements of planning and integration of sustainable development policies: a 4-yearly Federal Plan on Sustainable Development[3], prepared by the Interdepartmental Commission for Sustainable Development[4] and approved by the Council of Ministers, a 2-yearly Federal Report on Sustainable Development, prepared by the Task Force for Sustainable Development of the Federal Planning Bureau, a multi stakeholder advisory council (the Federal Council for Sustainable Development[5]) and a specialised supporting agency (Federal Agency for Sustainable Development[6]). Each Federal Department must have a "Sustainable Development Cell". This Cell is responsible for carrying out Sustainability Impact Assessments (SIA's) for important new federal policies[7]. In principle such a SIA must be available before such a new policy is

[1] B. Jadot, "Pour une meilleure prise en compte de l'environnement et les enjeux environnementaux dans la Constitution », *En hommage à Françis Delpérée. Itinéraires d'un constitutionnaliste* (Bruylant, Brussels – LGFJ Paris, 2007) p. 668 ; C.H. Born, D. Jans, Ch. Thiebault, « Le développement durable entre dans la Constitution », *En hommage à Françis Delpérée. Itinéraires d'un constitutionnaliste* (Bruylant, Brussels – LGFJ Paris, 2007), p. 212 and p. 227.

[2] A similar regional Act for the Flemish region is under discussion in the Flemish Parliament.

[3] http://www.plan2004.be/

[4] http://www.icdo.be/

[5] http://www.frdo-cfdd.be/

[6] http://www.poddo.be/

[7] See on this subject: E. Paredis, T. Bauler, P. Boulanger, A. Heyerick, L. Lavrysen, F. Varone, E. Zaccaï, M. Waktare, A. Bonfazi, B. Lussis, P. Thomaes, *Methodology and feasibility of sustainable impact assessment. Case: federal policy-making processes*, Brussels, Belgian Science Policy, 2006, 111 p. See: http://www.belspo.be/belspo/home/publ/rappCPgen_nl.stm

put on the agenda of the Federal Council of Ministers for approval. A Screening and Scoping Manual is available[8]. Recently, the Flemish government has sent a similar draft Decree to the Flemish Parliament[9].

As the environmental dimension of sustainable development is concerned, we can find the integration principle in Regional Acts of the Flemish and Walloon Region. In the *Flemish Region*, art. 1.2.1, § 3, of the Decree of 2 April 1995 containing general provisions on environmental policy states that the objectives and principles of environmental policy (i.e. precautionary principle, prevention principle, polluter pays principle…) laid down in art. 1.2.1., §§ 1 en 2, "*shall be integrated in the definition and execution of the policies of the Flemish region in other policy areas"*. We can find a similar provision in art. D.2 of the First Book of the *Walloon Environmental Code* (*Livre 1er du Code wallon de l'environnement*) (Decree of 27 May 2004): "The Region and the other public authorities are, each within their competencies and in coordination with the Region, managers ("gestionnaires") of the environment and trustees ("garants") of its conservation and, when necessary, its restoration. Each person guards ("veille") at its conservation and contributes to the protection of the environment. *These requirements are integrated in the definition and execution of the other policies of the Region*".

Policy papers and plans

2. The Running Federal Plan for Sustainable Development 2004-2008 states (§ 1203) "*The 27 principles of the Rio Declaration can also be considered a good definition of sustainable development. Five particularly comprehensive principles were selected in order to steer the actions of the first Federal Plan for Sustainable Development in the Right direction and in a continuous and coherent manner. They are also applied in the second Federal Plan and are listed below as reminder. The other principles of the Rio Declaration will be referred to whenever they are particularly relevant for a given part of the second Plan".* These five principles are the Principle of Common but Differentiated Responsibilities, the Principle of Double Equity, the Integration Principle, the Precautionary Principle and the Participation Principle. On the Integration Principle the Plan mentions: "*An integrated analysis of policy decisions is required, even in the preparatory phase, in order to know their social, economic and ecological effects"* (§ 1206). The Plan is construed along 6 themes: combating poverty and social exclusion, dealing with the implications of an ageing society, addressing threats to public health, managing natural resources more responsibly, limiting climate change and increasing the use of clean energy and improving the transport system. For each theme a whole range (31) of federal actions is put forward, including ethically sound investments, restricting the use of natural resources, a strategy for sustainable products, protecting biodiversity, sustainable forest management, integrated management of the North Sea, a sustainable energy policy, energy-conserving buildings, steering the demand for mobility, alternative ways of travelling, improving the supply of public transport, less polluting vehicles. In total nearly 400 measures are designed to implement the different actions, besides the more than 600 measures that were mentioned in the 2000-2004 plan.

The *Environmental Policy Plan 2003-2007* of the Flemish Region[10] sees environmental policy also as a part of the broader sustainable development policies (pp. 17-

[8] http://www.poddo.be/NL/thema_s_/doeb_duurzaamheidstest/formulieren

[9] Draft Decree concerning the promotion of Sustainable Development, adopted by the Flemish Government on 14 March 2008 (Press Release Flemish Government of 14 March 2008).

[10] http://www.lne.be/themas/beleid/beleidsplanning/publicaties

30). It contains a chapter on "integrated public policy" in which one can find ideas about the internal organisation of the Flemish Authority, the co-operation between different policy domains within the Flemish administration, co-operation with the federal authorities and co-operation with local authorities. There is question of 3 dimensions of integration (content of policies in terms of concepts, objectives and measures, instruments and administration) and of 2 directions: horizontal (integration of different policy areas within the same level of government) en vertical (integration between different levels of government). A distinction is made between internal (within one policy area of one level of government) and external (integration between different policy areas) integration. As external integration is concerned 5 priority areas for integration of environmental concerns are highlighted: health care, land use planning, agriculture, mobility, economy and energy.

Jurisprudence concerning the integration principle

3. There are a very limited number of court cases in which it was argued that the integration principle was violated, but so far this argument was not accepted by the courts. In a case concerning a land use plan that has as a consequence that an natural area will be converted into an area for business and small enterprises, the Council of State held that, although the parliamentary preparations of the Decree of the Flemish Region of 5 April 1995, revealed that the integration principle was meant "to make clear that environmental concerns should occupy an important place in other policy areas", the discussions in parliament revealed at the same time "that the Decree gives no indication on which place environmental concerns should exactly occupy in the scale of policy priorities" and that "environmental concerns should in certain cases be sacrificed to other more essential priorities of public policy". And the Council to conclude that *prima facie* – it is a judgement on the demand for suspension in which there is no final decision on the grounds - the integration principle (together with the stand-still principle laid down in the same decree and in the Nature Protection Decree) leaves *a wide margin of discretion* to the authority in charge of land use planning and do not have as a consequence that the land use of a green or nature area can never been changed[11]. In another case, concerning an environmental permit for a silt processing plant and a dumping site for dredging spoil, the Council of State held that art. 1.2.1. of the Decree of the Flemish Region of 5 April 1995 contains general policy objectives applicable in the Flemish Region. They do not impose concrete obligations and prohibitions, applicable to each and every individual and local environmental permit. This article can only be violated if a permit-decision is obviously ("kennelijk") contrary to this general policy principles in a way that there or more then temporary or local impacts[12]. In a case concerning an environmental permit, the Council held: "A first lecture of the article in question brings us to the conclusion that it contains no enforceable rules, *but only general principles of environmental law that must be translated in more concrete enforceable rules*; in the actual state of the case, it seems that a breach of this provision cannot lead to the annulment of the challenged environmental permit"[13].

[11] Council of State, n° 130.211, 9 April 2004, *v.z.w. Red de Erpe- en Siesegemkouter v. Flemish region*, in the same sense: Council of State, n° 141.217, 24 February 2005, *J. Van Keymeulen* v. Flemish region, www.raadvst-consetat.be

[12] Council of State, n° 170.173, 19 April 2007, *v.z.w. Aktiekomitee voor Milieubescherming te Merelbeke v. Flemish Region*

[13] Council of State, n° 154.217, 27 January 2006, *F. Musschoot e.a. v. Flemish Region*

Watchdog-role of governmental institutions

4. The only formal watchdog-role is under Federal legislation assigned to the aforementioned "Sustainable Development Cells" that are in charge of preparing Sustainability Impact Assessments (see above § 1). Draft legislation must before it is send to Federal or Regional Parliament be approved by the Federal Council of Ministers or the Regional Government, in which the Federal or Regional Environment Ministers take part, but this do not guarantee that draft legislation of other Departments/Ministers is beforehand screened by their administrations on their environmental impact. All draft legislation must obtain the legal advice of the legislative section of the Council of State. The Council of State has to check if the proposed legislation is in conformity with higher legal norms (international law, Constitution, laws and decrees in the case of draft regulations), but there is no focus on higher environmental norms, although in environment related matters the French speaking Legislative Chamber of the Council of State has a good track record on this issue, due to the presence of a well known environmental lawyer as judge-advocate.

Comments on rule-making and individual administrative action by Environmentally Remote Agencies

5. There are no general requirements as to inviting environmental agencies to comment on or cooperate in the rule-making by environmentally remote agencies. Some of the individual administrative actions of such agencies will fall under the obligations of strategic environmental impact assessment or environmental impact assessment of projects. In such cases the involvement of environmental agencies will be secured.

Advisory Boards or Scientific Groups

6. On the Federal level there is the Federal Council for Sustainable Development, a multi-stakeholder advisory council, composed of representatives of different interest-groups (trade and industry, labour unions, consumer organizations, environmental ngo's, development ngo's), science (universities) and government (as observers). This Council must be consulted on the draft Federal Plan on Sustainable Development, that covers some – but not all - environmental remote policies (see above § 2). The Council gives also its opinion on "all draft measures concerning federal policies on sustainable development, especially those designed to implement the international obligations of Belgium". The Council can deliver opinions on its own initiative, or at request of the competent Ministers or Secretaries of State. In some cases Ministers or Secretaries of States are obliged to seek the opinion of the Council on draft measures. That is e.g. the case for general, sectoral and geographic policy papers in the framework of the Act of 25 May 1999 concerning the Belgian Cooperation (Development Cooperation) or for draft regulations to implement the Act of 21 December 1998 on product standards, with the aim of promoting sustainable production and consumption patterns and of

protecting the environment and public health[14]. If the Government likes to depart from the opinion of the Council, it is obliged to give the reasons for doing so.

On the Regional Level there are also different Advisory Councils, like for the Flemish Region the MiNa-Raad (Environment and Nature Council of Flanders)[15]. This, also multi-stakeholder Council, has a general competence to study, recommend and deliver opinions on its own initiative or at the request of the Flemish Parliament or the Flemish Government concerning the environment and nature protection. The Flemish Government is obliged to seek the advice of the Council for all draft decrees concerning the environment and nature protection and for budgetary and general policies relating to it. The same goes for "draft decrees and regulations concerning *mobility, transport infrastructure and 'strongly mobility impacts generating' activities*". Although the Flemish Government is obliged to seek the advice of the Council on the main options of mobility policies, this does not include policies concerning ports and airports. This is the competence of the "Mobility Council of Flanders" (MORA)[16] in which also environmental ngo's are represented. Similar arrangements exist in the other regions. In the Walloon Region there is the Walloon Environmental Council for Sustainable Development[17]. In the Brussels Capital Region there is an Environmental Council of the Brussels Capital Region[18].

2. The implementation of Directive 2001/42/EC

Transposition

7. The transposition of Directive 2001/42/EC in Belgian law necessitated measures to be taken on the federal level and on the level of the regions[19]. As the implementation process was not completed on 21 July 2004, at the federal and Flemish region levels, Belgium was condemned by the ECJ for failure to implement the Directive on time[20] as the Flemish Region was concerned[21].

On the Federal level the *Act of 13 February 2006 concerning the assessment of environmental impacts of certain plans en programmes and concerning public participation in the implementation of plans and programmes concerning the environment* is transposing the Directive for those plans and programmes that are of federal competence. It contains a list of plans and programmes that are subject to SEA. This plans and programmes includes plans and programmes concerning the production and the transportation of electricity, the supply of natural gas, the management of radioactive waste, the exploration and exploitation of living and non-living natural resources on the continental shelf and other federal plans and programmes that could have an adverse effect on Natura-2000 sites or that could form a framework for the permitting of projects that can have a significant environmental impact.

[14] D. Misonne e.a., *Legal constraints on national measures to promote environment-friendly products*, Belgian Science Policy, Brussels, 2004, p. 75.
[15] www.minaraad.be
[16] http://www.serv.be/dispatcher.aspx?page_ID=13-00-00-00-101
[17] www.cwedd.be
[18] http://www.cerbc.be/NL/frame_tt_nl.htm
[19] See the Belgian reports for previous Avosetta meetings on the division of competencies between federal and regional government in environmental matters.
[20] ECJ, 7 December 2006, *Commission v. Belgium* (C-54/06).
[21] As the federal implementation process was completed before the ECJ past judgement, the Commission dropped the case concerning the federal government.

There is an Advisory Committee that decides in a case-by-case approach, taking into account the criteria of Annex I to the Act, if a particular plan of programme is likely to have significant environmental effects and should therefore be subject to SEA.

In the Flemish Region SEA is regulated by Title IV of the Decree of 5 April 1995 containing general provisions on environmental policy. This Title, dealing with environmental impact assessment and safety reporting for both plans and programmes and projects, was introduced by Decree of 18 December 2002 and entered into force on 21 July 2004, without that the necessary implementation regulations were adopted by the Flemish Government, so that there was legal uncertainty about which precise plans and programmes were subject to SEA[22]. The chapter on SEA is meanwhile replaced again by a Decree of 27 April 2007. An Executive Order of the Flemish Government of 22 October 2007 contains the necessary implementation measures and further guidance is provided by a Ministerial Circular of 1 December 2007. Both the Decree and the Executive Order were put into force on 1 December 2007. The new Chapter follows very closely the wording of the Directive and that in the light of the so-called "no gold plating"- policy of the actual Flemish government.

In the Brussels Capital Region the implementation of the Directive was realised by an Amendment (by Ordinance of 19 February 2004) of the Ordinance of 29 August 1991 concerning land use planning and by an Ordinance of 18 March 2004 concerning the environmental impact assessment of certain plans and programmes.

In the Walloon Region SEA was introduced by a Decree of 18 June 2002 amending the Walloon Code on Town and Country Planning and Patrimony and by the Executive Order of the Walloon Government of 17 March 2005 concerning the First Book of the Walloon Environmental Code.

Definition of plans and programmes

8. The Federal Act of 13 February 2006 contains no definition as such of a plan or programme. The Act is applicable to plans and programmes which are elaborated or adopted by the federal government or prepared by such an authority in view of its adoption by the Federal Parliament or the King, provided that they are prescribed by legislative, regulatory or administrative provisions (art. 3,1°). The Act contains however a list of plans and programmes that are subject to SEA by reference to other acts in which they are prescribed (art. 6, § 1, 1°), but the Act is also applicable to other plans and programmes that can have a negative effect on Natura 2000 sites or that could form a framework for the permitting of projects that can have a significant environmental impact (art. 6, § 1, 2° en 3°). As this last category is concerned, the Advisory Committee established by the Act, shall on the basis of the criteria of Annex I to the Act give an opinion if a particular plan of programme is likely to have significant environmental effects. The initiators of such plans and programmes are obliged to notify their intention to develop such a plan or programme to that Committee so that it can assess if an SEA is needed or not.

[22] E. De Pue, L. Lavrysen, P. Stryckers, *Milieuzakboekje 2007* (Mechelen, Wolters Kluwer Belgium), p. 74.

The situation in the Flemish region is similar[23], but in the Decree of 5 April 1995 there is no list of plans and programmes that are in any circumstance subject to SEA. The Decree is applicable to plans and programmes that are developed or approved by a regional, provincial or local authority or that is developed by such an authority in view of its adoption by the Flemish Parliament or the Flemish government and that is prescribed by provisions of a decree or by administrative provisions (art. 4.1.1., § 1, 4°). Art. 4.2.3. § 2, 1°, is a copy of art. 3.2 (a) of the Directive. Art. 4.2.3., § 2, 2°, contains a reversal of the burden of prove. Is also subject to SEA "each other plan or programme….for which the initiator is unable to show on the basis of the criteria of Annex I to the Decree, that it has no significant environmental effects". The Ordinance of 18 March 2004 of the Brussels Capital Region follow a similar approach and reproduces very closely the wording of the Directive.

The concept of authority

9. As the Federal Act is concerned, it contains no definition of "public authority". Plans and programmes prepared or adopted by the "federal authority" are subject to SEA under the conditions set out by the Act. As the Flemish Region is concerned, the Decree of 5 April 1995 is applicable to plans and programmes that are "developed or approved by a regional, provincial or local authority or that is developed by such an authority in view of its adoption by the Flemish Parliament or the Flemish government". The Brussels Ordinance is also applicable to plans and programmes that are "developed or approved by a regional or local authority or that is developed by such an authority in view of its adoption by the Brussels Capital Region or the Brussels Captal Government" (art. 3,1°). Till now, there has been no discussion, if this could include private (legal) persons that carry on public interest task on behalf of the authorities. The Walloon Region is the only region in which it is explicitly stated that an "authority" should be understood as "*a natural or legal person, private or public, that carry out a duty of public service*" on the regional or the local level (art. D.49, 6°, a, of the Walloon Environmental Code).

Scope of SEA

10. In the Federal Act one can find a list of 6 plans and programmes, that are regulated in other Acts and that are in principle[24] in all circumstances subject to SEA (art. 6, § 1, 1°). As indicated earlier this concerns plans and programmes concerning the *production and the transportation of electricity*, *the supply of natural gas*, the *management of radioactive waste*, the *exploration and exploitation of living and non-living natural resources on the continental shelf*. In the Federal Act one cannot find the limitation that the aforementioned plans and

[23] Before the "goldplating"-Amendment of 27 April 2007 there was a definition of "plan or programme": "*a document in which policy intentions, policy development or large-scale public, private or mixed activities are announced and that is drawn up and established, changed or revised on the initiative or under the supervision of the Flemish Region, the provinces, the inter-municipal authorities and/or the municipalities, and/or of the federal government or for which co-financing is provided by the European Community or by the Flemish Region or the Flemish Community within the framework of international cooperation, to the extent the proposed plan or programme can have considerable environment or safety effects on the territory of the Flemish Region*." (art. 4.1.1., § 1, 4°).

[24] These plans and programmes can however be exempted from the obligation under circumstances similar to those indicated in art. 3.3 of the Directive (small areas at local level and minor modifications).

programmes are only subject to SEA when they "set the framework for future development consent of projects listed in Annexes I and II of Directive 85/337/EEC". There was no debate at all in the Federal Parliament if this list is appropriate or not.

In the Flemish Region one has copied now literally the list of art. 3.2 (a) in art. 4.2.3., § 2, 1°, of the Decree of 5 April 1995 (including the limitation that only such plans and programmes fall under the scope of SEA if they set the framework for future development consent for projects listed in the equivalent annexes I of II of Directive 85/337/EEC under regional law) and one can find the plans and programmes of art. 3.2. (b) in art. 4.2.1. As there was only a copy and past exercise, there was no debate neither on this issue in the Flemish Parliament. The same is truth for the Walloon Region and the Brussels Capital Region, except that there is a special regime for land use plans for which SEA is integrated in the Brussels Code on Town and Country Planning of 9 April 2004.

Impact on final decision

11. In the Federal Act (art. 15 and 16) one can find a nearly literal transcription of the arts. 8 and 9 of the Directive. The same is truth for the Flemish Decree of 5 April 1995 (art. 4.2.11, §§ 3 and 4), for the Brussels Ordinance (art. 14 and 15) an for the Walloon Environmental Code (art. D 58 and D 59).

Assessment

12. For the moment there are no studies available on the practical experiences with SEA. There seem also no plans to extend the scope of it. As mentioned earlier, on the federal level there is also the SIA, which has a broader scope and can also be applied to law-making and sub-legal rule-making in general (see above § 1). Also this instrument is fairly new and no evaluation studies are available. One has also to note that due to the political crisis Belgium went trough, legislative activity on the federal level was very limited the last 10 months.

Similar requirements

13. There were no similar requirements in force before the implementation of the Directive. SIA was introduced on the Federal level by a decision of the former government of 19 January 2007, which took effect on the 1st of March 2007. There is no formal relationship between SIA and SEA. Since the entry into force of both requirements, there was no case were both instruments had to be applied. We can suppose that in such a case the SEA will be a part of SIA.

Jurisprudence

14. Taking into account the important backlog with the Council of State, the jurisprudence relating to SEA is for the moment scarce. There are only some judgements by which the Council of State (mostly) rejected a demand for suspension of the plan in question.

- In a case concerning the land-use-plan "*Oosterweelverbinding*", a land use plan that is needed for the completion of the Motorway around the City of Antwerp, it was argued that the SEA has not studied all the reasonable alternatives, in particular it was argued that the alternative of a bridge in combination with a tunnel (instead of the proposed mega-bridge) should have been studied, because this has to be considered as a reasonable and environmental friendlier alternative. The Council of State found in interim proceedings that the reasons given by the authority to exclude this alternative from the SEA (security risks, high costs, and marginal environmental benefits) were not ill-founded. The Council rejected the demand for a referral to the ECJ for a preliminary ruling on the notion of "reasonable alternatives' (art. 9.1, b) of the Directive), with reference to ECJ, 23 May 1977, *Hoffmann-Laroche,* C-107/76, saying that this question could be raised during the ordinary procedures in annulment[25].
- In a case concerning the land-use-plan "*Waaslandhaven fase 1 en omgeving*", a land use plan needed for the further extension of the Port of Antwerp on the Left Bank of the River Scheldt, it was argued that in violation of the Directive, no SEA was made before the approval of the plan. The Council of State found that the preparatory process of the land-use plan was started on 3 May 2004, thus before 21 July 2004, and was completed on 16 December 2005, thus before 21 July 2006, so there was no legal obligation to prepare an SEA for this plan[26].
- In a series of cases concerning the land-use-plan "*Plinius*", a land use plan that was needed for the construction of a thematic park ("*Land van Ooit*', meanwhile already bankrupt) it was argued that it was not only necessary to carry out a SEA for the land-use-plan, but also a EIA for the project itself. The Council of State held that both regional and European legislation provides that a combined EIA/SEA can be made, provided that the Environmental Impact Statement combines the information that is necessary for both assessments. The Council found that the SEA contained the necessary information so that it could be used also as a EIA for the project and that sufficient alternatives were studied in depth[27].
- In a case concerning the land-use-plan "*Eilandje: delen Cadixwijk, Montevideo en Oude Dokken*" it was argued that an SEA was needed before the plan could be approved; the plan was approved on 15 December 2005, in a period that there were already provisions in the Decree of 5 April 1995, but an Executive Order to list the plans and programme that were subject to these provisions, was still lacking. The Council of State held that the applicants were unable to show that the contested plan had "significant environmental effects" and that it

[25] Council of State, 6 July 2007, n° 173.287, *b.v.b.a. Pomphuis v. Flemish Government and Beheersmaatschappij Antwerpen Mobil*

[26] Council of State, 9 January 2007, n° 166.439, *M. Apers e.a. v. Flemish Government e.a.*

[27] Council of State, 10 January 2007, n° 166.511, *M. de Briey e.a. v. B.D. Limburg and Flemish Region* (concerning the land use plan); Council of State, 9 February 2007, n° 167.649, *T. de Briey e.a. v. B.D. Limburg* (concerning the environmental permit); Council of State, 9 February 2007, n° 167.648, *M. de Briey v. B.D. Limburg* (concerning the environmental permit); Council of State, 9 February 2007, *vzw Landelijk Vlaanderen* (concerning the environmental permit); Council of State, 9 February 2007, n° 167.645, *M. de Braey v. B.D. Limburg* (concerning the environmental permit)

was doubtful that this plan could be considered as a "framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC"[28] .
- The Council of State suspended the land use plan "*Waterloos*" that was intended to provide space for the construction of motocross facilities in an area that had before the status of a natural area, because the land use plan was approved before the EIA for the project was carried out and the land use plan didn't contain any measure to protect the environment and the neighbourhood[29].
- The Council of State rejected a demand for suspension of an Executive Order of the Walloon Government of 7 May 2007 amending *Book II of the Walloon Environmental Code, containing the Water Code,* dealing with the management of nitrates in agriculture. It was argued that Directives 2003/5/EC and 2001/42/EC were violated. Although issued in the form of a Regulation, the attacked provisions concerning " the action programme for the management of nitrates in vulnerable zones" should be considered as a plan or programme according to both Directives. In its opinion the judge advocate followed this approach, but the Council of State rejected the demand for suspension for lack of serious prejudice[30].

As the Constitutional Court is concerned we can mention 2 cases in which the Directive played a role.
- The First case[31] is about the so-called "*deferred development zones of an industrial nature*". In many regional land use plans of the Walloon Region such zones were introduced over time. The development of such zones was, before the contested Amendments, conditional upon the existence of a *municipal planning scheme for the whole area*. Failing that, the zone could not be developed. As a result of the Amendments such a zone could since then be developed without such a prior municipal planning scheme for the whole area and permits could be granted for all economic activities with the exception of "agro-economic neighbourhood activities" and 'wholesale distribution". *Inter-Environnement Wallonie* criticized the challenged decree provision for abolishing the municipal planning scheme as an instrument for the development of these zones, and for failing to put an equivalent document in its place. This abolition and this failure was thought to constitute a deterioration of the procedural guarantees and thus a violation of the standstill obligation in terms of the right to the protection of a healthy environment, as guaranteed by Article 23 of the Belgian Constitution. Furthermore, Articles 10 and 11 of the Constitution were also thought to have been infringed, insofar as the local residents of such zone would not see this area being developed in accordance with the relevant standards and regulations, nor obtain an environmental impact assessment of the programming measures for the area in question, nor have any say in the way in which the area would be developed. The Court followed *Inter-Environnement Wallonie* in this reasoning. The Court found a violation of article 23 of the Constitution, taking into account Articles 3 to 6 of Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effect of certain plans and programmes on the environment, and Articles 7 and 8 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and ratified by Belgium on 21 January 2003. The Court held:
"*B.7.2. […] Directive 2001/42/EC concerns the environmental assessment of plans and programmes that are likely to have significant effects on the environment. According to Article 3(2)(a) of that Directive, all plans and programmes which are prepared for town and*

[28] Council of State, 6 October 2006, n° 163.267, *A. Van Linden c.s. v. Flemish Region and City of Antwerp.*
[29] Council of State, 7 May 2007, n° 170.824, *G. Nijs e.a. v. Flemish Region and B.D. Limburg*
[30] Council of State, 7 August 2007, n° 173.912, *Terre Wallonne v. Walloon Region*, *Amén.*, 2008, 33-34 with the dissenting opinion of judge-advocate Quintin.
[31] Constitutional Court, no. 137/2006, 14 September 2006, *Inter-Environnement Wallonie*, www.const-court.be

country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment are subject to an environmental assessment in accordance with the requirements of the first Directive. Considering the economic designation of the areas in question, it cannot be ruled out that in those areas projects will be realized of the types referred to in Annexes I or II of Directive 85/337/EEC and that consequently the development of such areas is subject to compliance with the provisions of Directive 2001/42/EC.
Directive 2001/42/EC lays down a minimum framework for such environmental assessment. The environmental assessment must be carried out during the preparation and before the adoption of a plan or programme (Article 4, paragraph 1). The assessment involves the preparation of an environmental report that must satisfy the requirements of Article 5, consultation of the relevant environmental authorities and the public on the draft plan or programme and the environmental report (Article 6), and the obligation to take into account the environmental report and the results of the consultations during the preparation of the plan or programme (Article 8).
Article 7 of the Aarhus Convention imposes the obligation to provide opportunities for public participation in the "preparation of plans and programmes relating to the environment". More particularly, appropriate practical and/or other provisions must be made for the public to participate, within a transparent and fair framework, having provided the necessary information to the public.

B.7.3. Under the previous legislation, the development of a deferred development zone of an industrial nature was subject to a municipal planning scheme for the whole area. Such a municipal planning scheme, even if it took the form of a simplified municipal planning scheme (Article 49, second paragraph, of the Walloon Town and Country Planning Code), was subject to environmental impact assessment in accordance with the requirements of Articles 50 to 53 of the Walloon Town and Country Planning Code, including the necessity of calling upon an approved project author, the obligation to seek the opinion of specialized authorities, the intervention of the municipal council and the obligation to organize a public inquiry. In the absence of such a municipal planning scheme, elaborated in accordance with the aforementioned guarantees, a deferred development zone of an industrial nature could not be developed.

The guarantees which the challenged provision puts in their place, more particularly the obligation of justification in the light of the elements referred to in the fourth paragraph of the challenged provision, cannot make up for the loss of the substantive and procedural guarantees that are linked to the preparation of a municipal planning scheme.

Consequently, local residents of such areas are confronted with a significant deterioration in the level of protection that was offered by the previous legislation, a deterioration that on the basis of the aforementioned provisions of European and international law cannot be justified by the reasons of public interest underlying the challenged provision.

B.8. The ground is well-founded insofar as the challenged Article 55 does not provide for an environmental impact assessment procedure that satisfies the requirements of the aforementioned Directive 2001/42/EC and of Article 7 of the aforementioned Aarhus convention."

- The second case [32]is about a highway junction in the region of Liège. In the regional land use plan two alternatives were provided for realizing a junction between two highways in the form of two relative broad "reservation and easements zones". Before realizing one of the two alternatives it was necessary according to the initial legislation to review the regional land use plan in view to transform one of the two reservation zones into a more precise projected path for the highway junction. A revision of the regional land use plan is subject to environmental impact assessment and public participation. By the challenged Amendment of the Walloon Town and Country Planning Code it was decided that such a revision of the regional land use plan was no longer necessary because this broader reservation zones are since then to be considered as equivalent to a projected path of a line infrastructure like a highway junction.
As the merits of the case are concerned, the Court found that although the level of protection of the environment of the plaintiffs was diminishing, the amendment of the Walloon Town and Country Planning Code could be, in this particular case, justified by reasons of public interest.
The Court held:

"*B.11 [...] Article 3(3) of Directive 2001/42/EC, however, provides that an environmental assessment is required for "minor modifications" to said plans only where the Member States determine that they are likely to have significant environmental effects, taking into account the relevant criteria set out in Annex II to the Directive (Article 3(5)).*
Article 7 of the Aarhus Convention imposes the obligation to provide opportunities for public participation in the "preparation of plans and programmes relating to the environment". More particularly, appropriate practical and/or other provisions must be made for the public to participate, within a transparent and fair framework, having provided the necessary information to the public.

B.12. The Walloon decree-giver, without exceeding its power of assessment, was able to decide that the conversion of a reservation and easement zone of a regional plan into a reservation perimeter coinciding with a path concerns a "minor modification" within the meaning of Article 3(3) of Directive 2001/42/EC, with which no significant environmental effects are associated. It was also able to decide that the conversion, pursuant to the decree, of reservation and easement zones into reservation perimeters coinciding with paths does not as such constitute a plan or programme within the meaning of Article 7 of the Aarhus Convention. Consequently, Article 10 of the EC Treaty cannot be considered to have been infringed."

Although it is henceforth possible to obtain planning permission for the construction of a motorway in such a zone without a prior revision of the regional plan with a view to the incorporation of the path of such an infrastructural project, this does not mean that the parties concerned are deprived of any form of preventive and curative legal protection. The Court described in its judgement all relevant provisions of environmental and planning law that are still applicable before a permit can be granted for the construction of the motorway junction, namely the obligation to prepare an environmental impact assessment for the projected motorway-junction, including public consultation, the proper assessment of significant effects on Natura 2000 sites, the possibility to challenge the permit before the Council of State (see B.13.2- B.13.5) and concluded: "*Having regard to the remaining level of preventive and curative protection, the challenged provision does not constitute a significant deterioration which cannot be justified by the underlying reasons of public interest.*"

[32] Constitutional Court, n° 135/2006, 14 September 2006, *P. d'Arripe and others*

3. Deficiencies and other useful instruments

Deficiencies

15. We can on the point of deficiencies in taking account of environmental concerns in "environmental remote legislation" refer to the latest *OECD Environmental Performances Review of Belgium*[33]. In its Conclusions and Recommendations OECD states:

"Integration of environmental concerns into economic decisions

Belgium made progress over the review period in decoupling environmental pressures from economic growth for some conventional pollutants (e.g. SOx and NOx emissions) and for water abstractions. Growth in household waste for final disposal was also decoupled from economic growth due to high rates of recycling. Sustainable development institutions were developed at the federal level (Sustainable Development Law, establishment of a governmental committee and of a council for sustainable development, creation of a Secretary of State position for sustainable development). Two federal plans were adopted along the three pillars of sustainable development, together with evaluation and consultation procedures. Principles of sustainable development were also embodied in the regional environmental plans. The regional governments made some progress in integrating environmental concerns into agriculture (by augmenting support for agri-environmental measures). Climate change policy is moving ahead with the regional climate change plans and national burden-sharing agreement, and through a range of domestic measures, participation in the EU emission trading scheme and the Kyoto Protocol flexibility mechanisms. *However, there is still a need to decouple road freight transport from economic growth, as the increase in road freight transport is of high concern. Energy intensity (total primary energy supply per unit of GDP) is still considerably higher than in neighbouring countries. Integration of environmental concerns into energy policy is lagging. Energy prices should internalise environmental external costs. Pressures on water and soil resources (from water abstractions, nitrate and pesticides) are among the highest in the OECD. The targets to expand organic agriculture have not been met. A number of tax concessions lead to perverse effects on the environment. No action has started on a green tax reform as recommended in the last OECD environmental performance review. The effectiveness and economic efficiency of the country's subsidy schemes for rewarding environmental behaviour may need to be reviewed. Quantitative targets are needed and cost-benefit analysis should be used more systematically for setting priorities.*

Recommendations:
• establish a green tax commission and review, and if necessary revise, the relevant taxes and other economic instruments to improve their effectiveness and economic efficiency; review systematically the environmental effectiveness and economic efficiency of the country's financial assistance schemes;
• further implement the federal plan for sustainable development (2004-08); develop and implement a national strategy for sustainable development, in line with UN commitments;

[33] *OECD ENVIRONMENTAL PERFORMANCE REVIEW OF BELGIUM*, 2007.

• set quantitative targets for the environment in relevant planning (e.g. economic and sectoral); make further use of economic analysis for setting environmental and sustainable development priorities;
• further integrate environmental concerns into sectoral policies (e.g. energy, transport, agriculture) through strategic environmental assessment and development of market-based mechanisms; further implement policy and measures to improve energy efficiency;
• strengthen institutional co-operation between departments and between federal and regional governments, in particular as regards the environment-energy interface;
• conduct a comprehensive review of climate mitigation measures beyond the EU emission trading scheme.

Integration of environmental and social decisions

Innovative pricing and financing instruments now help ensure access for all to essential environmental services such as water services. Water pricing differentiates between (low-priced) essential uses and (high-priced) luxury uses. Belgium can be considered to be fully implementing the right to water in its internal legislation. People in need will not be disconnected and the price of water will be affordable to poor households. Wallonia will introduce a tax on billed public water supply to finance development assistance in the water sector. Concerning environmental information, environmental data collection and publication improved substantially at regional and federal levels, leading to high quality environmental reporting, to more evidence-based and outcome-oriented environmental governance, and to performance oriented planning. Concerning environmental awareness and related action, much has been done at federal, regional, community and local levels, including: communication campaigns, financial transfers to local authorities, voluntary regional-municipal covenants, and support for innovative waste prevention and eco-consumption projects. The voluntary regional-municipal covenants are particularly innovative. Several partnerships with private enterprises, trade unions, local authorities and environmental NGOs have succeeded in improving environmental management. Environmental work by NGOs has often receivedgovernment financial support. Directly or indirectly, the environmental sector contributes to employment in Belgium, and related jobs increased by about 10% over the review period.
However, access to environmental information is hindered by being so widely dispersed among a multiplicity of sources in the federal, regional and provincial administrations. Citizens also need to be better informed about their rights concerning access to information and to courts in environmental matters. Public consultation could be improved by allowing more time to take comments into account. Environmental education could be further improved, especially at higher education levels (e.g. university level), to increase eco-consumption. Energy efficiency and use of public transportation could be increased. Available information on the impact of environmental policy on employment in Belgium is not sufficient to support a better integration of environmental and employment policies.

Recommendations:
• continue to improve access for all to environmental information, and improve the comparability of information among regions;
• increase citizens' access to justice in environmental matters;
• implement the user-pays principle for environmental services (water, waste) while continuing to give access to these services to the poor; consider extending fiscal incentives for energy-saving building insulation;
• continue to develop environmental education, particularly at higher education levels;

• continue to develop partnerships with NGOs and further involve local volunteers in managing protected areas, including in densely populated areas;
• further analyse the impacts of environmental policy on employment in Belgium.

Health and environment

Belgium has vigorously taken up the challenge posed by the growing concerns about health and environment (e.g. growing numbers of respiratory diseases, asthma, allergies, cancers and obesity). The federal government, regions and communities closely collaborate on environmental health issues and have signed a co-operation agreement with the force of law. At all levels, the governments give importance to science-based assessments, providing information to the population, the precautionary principle, planning and action. During the review period they adopted the National Environment and Health Action Plan (NEHAP), which will soon include measures on children's environmental health (CEHAP), and established a permanent management structure to carry out joint research and monitoring. The federal government now includes environmental health in its responsibilities for product standards. Brussels- Capital is implementing a noise abatement plan and participates in an international project on air pollution and health. Flanders included environmental health outcomes in its most recent environmental policy plan and has since 2002 been implementing an environmental health action plan; it has also initiated an extensive, ongoing human biomonitoring survey. Wallonia is developing a regional environmental health action plan with a series of indicators and plans to adopt a regional noise abatement plan, as well as a nutrition and health plan. All three regions have established services to provide diagnostic assistance in cases where the indoor environment is suspected of causing health problems. Good work is also being done in public awareness-raising and education about health and environmental issues, including the health benefits of access to nature.
Still, Belgium has yet to marshal all the elements needed to set priorities in this field efficiently. Environmental risk factors are implicated in the main causes of mortality (e.g. cardiovascular diseases, cancer, respiratory diseases). The economic aspects of the environment-health interface, essential to identifying the cost of diseases and the benefits of action, is still largely absent in the research and monitoring now taking place, although public health expenditure represents 9.6% of GDP and is growing. In particular, work is needed on fine and very fine particles in ambient air. The number of annual ozone episodes will need to be brought down substantially if Belgium is to stay within the 25-day maximum set for 2010 by the EU Ozone Directive. Progress is also needed in reducing noise, including that from road transport, railways and airports. Regarding water quality, nitrates in groundwater are a widespread problem as many aquifers show a nitrate content close to the limit of 50 mg per litre. High pesticide concentrations in some aquifers also pose problems for the drinking water supply. Pesticide use per unit of agricultural area remains the highest in OECD-Europe.

Recommendations:
• further develop and firmly implement the NEHAP and CEHAP; specify appropriate environmental health outcomes and incorporate these in the plans of all governments;
• build on the current co-operation among federal, regional and community entities to address environmental health issues; in particular, strengthen research on and monitoring of the link between exposure to environmental conditions and human health, including multi-factorial effects;
• analyse the costs and benefits of environmental health policies;

• ensure that data collection efforts focus on policy-relevant information and establish mechanisms to transfer policy-relevant research to policy makers; consider extending the Flemish biomonitoring programme to cover the whole country;
• continue to strengthen the possibility for the public to make balanced decisions on health and environment, e.g. through education, product labelling and information campaigns;
• place greater emphasis on public access to green urban areas in land-use planning policies."

Other useful instruments of integration

16. SEA and EIA are useful instruments for integrating environmental concerns in plans and programmes and projects. Both instruments are however limited to plans and programmes and projects of a larger scale. A lot of smaller activities can off course also have very negative effects on the environment. In the Flemish Region of Belgium overtime some instruments were introduced in the legislation that can further the taking into account of environmental requirements in the decision process concerning this smaller activities. This is done trough the so called "environmental checks" (*milieutoetsen*) we can find now in different sectoral legislation. In the first place there is the so called "nature check" (*natuurtoets*) of the *Decree op 21 October 1997 concerning nature protection and the natural environment*. Art. 16 of this Decree states that in case of an activity that requires a permit – all kind of permits are concerned, including building permits – the competent authority is required to assure that no avoidable damage to the environment shall occur, by refusing or by imposing reasonable conditions as to avoid such a damage and, when this is not possible, to oblige the permit holder to restore the damage. A stricter "nature check" is applicable in the nature protection areas (art. 26b). When there is no alternative for the activity concerned, there is an obligation to compensate. similar to the rules that apply in Natura-2000 areas. A similar instrument was introduced by the *Decree of 18 July 2003 concerning integrated water management*. Art. 8 of this Decree introduced the "water check" (*watertoets*). This "water check" is not only applicable to all kind of permits but also to all type of plans and programmes that can have harmful effects on water systems. The authority must secure that such harmful effects are avoided or reduced as much as possible and when this is not possible, the harmful effects are restored or compensated. To assist the authorities with this check, they can ask a "water opinion" (*wateradvies*) to the competent authorities. Each permit or plan or programme must be checked against the basic principles of integrated water management and the relevant water management plans. The decisions must be especially reasoned on this point and contain a "water paragraph" (*waterparagraaf).* For activities that require an EIA or SEA, the "water assessment" must be a part of the EIS. These "environmental checks" are seen as an effective instrument for integration of environmental concerns, especially in town and country planning, although some further improvements are possible[34].

[34] I. DE SOMERE, "Het enge sectorale beoordelingskader in de ruimtelijke ordening doorbroken ? Onderzoek naar de zin en onzin van watertoetsen, natuurtoetsen, habitattoetsen, enz.", *T.M.R.*, 2008/2.