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Recent Developments in Environmental Law in Belgium

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Legislation

State Reform and Environmental Protection/Climate Change Policies

Belgium went during the legislature that comes to an end with the different elections (European, federal & regional) of 25 May 2014 through an important state reform exercise ("the 6th State Reform"), transferring additional competencies from the federal to the regional and community level, revising the financing system of the regions and communities and reshaping the Senate. As environmental competencies are concerned, the transfer of environmental competencies from the federal level to the regions, that are exercising the main environmental competencies already since 1989, is limited: the transit of waste (competence to be exercised by the regions in concert), the regulation of transport of dangerous substances (except radioactive and explosive substances), the compensation for natural disasters and animal welfare.

The occasion was seized[1] to introduce *two instruments to strengthen the climate responsibilities of the regions and communities*. The first one is the introduction of a *specific substitution mechanism for climate related matters*. In general, the federal government can only take substitute measures in the place of regions and communities when Belgium is already *condemned by an international Court* for violation of international obligations due to acts or omissions of a community or a region. Now this will be possible in an earlier stage *for international and European climate change related obligations,* namely when non-compliance has been established by the Enforcement Branch of the Compliance Committee of the UNFCC or of its Protocols or a non-satisfactory response has been given to a reasoned opinion of the European Commission (Art. 16, § 4, of the Special Act of 8 August 1980 on State Reform, as Amended by the Special Act of 6 January 2014). The second mechanism is a *financial* one (the so called *climate accountability mechanism*) and its scope is limited to the regions and GHG emissions from (non-industrial) buildings. Every region will be assigned (in consensus within the National Climate commission or by default according to the figures mentioned in an Annex to the Special Act of 6 January 2014) reduction targets in this area for the period 2015-2030. If the regions do better, they will receive (from 2016 onwards) additional money from the Climate Fund, to which a part[2] of the proceeds stemming from auctioning of allowances under the EU ETS, is assigned. If they

[1] The support of both green parties was necessary for obtaining a 2/3 majority in Parliament and a majority in each linguistic group of it.

[2] The repartition of the proceeds of auctioning between the federal government and the regions is still under discussion.

do not meet their reduction targets, they have to pay to the fund, by way of cutting in the financial means thy normally receive through the general financing mechanism.

Federal legislation

- Act of 17 July 2013 concerning the minimum volumes of sustainable biofuels to blend with fossil fuels[3] .

- Royal Decree of 18 July 2013 establishing the long term vision on sustainable development [4].

- Act of 15 December 2013 on Administrative Simplification[5], integrating the sustainable impact assessment in the regulatory impact assessment + Royal Decree of 21 December 2013.

- Cooperation Agreement of 24 October 2013 between the Federal State and the Region concerning ETS for aviation[6].

- Act of 18 December 2013 amending the Act of 31 January 2013 on the Nuclear Phase-Out[7] postponing the closure of nuclear power plants to 2015 (2), 2022 (1), 2023 (1), 2025 (3) and increasing the tax on the "nuclear interest" .

Flemish Region

(a) *Integrated SEA Reparation Decree*

The Flemish Parliament, in a second attempt[8] to repair the situation that results from the application of the integrated SEA track for the elaboration of land use plans, adopted a Decree on the restoration of land use plans elaborated on the basis of that track[9] that was declared unlawful by the Council of State. For land use plans that have not been adopted in a definite way, the procedure has to be done over again from the announcement of the public inquiry over het scoping/screening of the SEA. If that has no influence on the elaboration of the SEA and/or the plan itself, a fast track approval procedure can be followed; otherwise the regular procedure should be followed. Similar provisions apply for those land use plans that have been approved in a definitive way. Additionally, the land use plans that have been adopted in a definitive way are validated during that process with a maximum of 2 years. This means that the illegality of the SEAs and the land use plans because of the application of the integrated SEA track, cannot be invoked, in Court procedures regarding such plans or project (building permits). Finally, there is also procedure for those plans that were annulled by the Council

[3] *BS* 26 July 2013.
[4] *BS* 8 October 2013.
[5] *BS* 30 December 2013.
[6] *BS* 30 April 2014.
[7] *BS* 24 December 2013.
[8] See below on the case law concerning the integrated SEA track validation for the first attempt.
[9] Decree of 25 April 2014 "houdende het rechtsherstel van ruimtelijke uitvoeringsplannen waarvan de planmilieueffectrapportage werd opgesteld met toepassing van het besluit van de Vlaamse Regering van 18 april 2008 betreffende het integratiespoor voor de milieueffectrapportage over een ruimtelijk uitvoeringsplan", *BS* 12 May 2014

of State because of the flaw in the integrated SEA procedure. In Parliament it was argued that this Decree was necessary to save provisionally around 70 land use plans and much more projects of which some were considered being of strategic importance for the region (e.g. the High tension line from Zeebrugge to Zomergem (the so called Stevin-Project[10])).

(b) *Adaptation of EIA legislation to ECJ case law*

With an Executive Order of 19 July 2013 the EIA regulations were adapted to the judgment of the ECJ (C-435/09, 24 March 2011, European Commission v. Belgium). Hence, also screening for projects below the thresholds set, is needed. This screening is however applied in a (too) late stage (together with the permit application).

(c) *Integrated Water Management*

The decree of 19 July 2013 amending the Decree of 18 July 2003 concerning integrated water management[11] is strengthening some of the instruments (water check, water opinion, prior information in case of real estate transactions) , while simplifying the planning provisions.

(d) *Climate Change*

A Title on Climate Change (Title VIII) has been inserted in the Decree of 5 April 1995 containing general provisions on environmental policy, by a Decree of 14 February 2014[12]

(e) *Integration of environmental and building permit*

Towards the end of the legislature the Decree that integrates the environmental permit and the building permit to an integrated permit ("*Omgevingsvergunning*") and the Decree on the enforcement of that integrated permit, have been approved by the Parliament. In the next legislature the necessary executive orders are to be adopted. The system can enter into force at the earliest in 2015.

(f) *Complex projects*

Similarly a Decree on complex projects has been adopted combining SEA and EIA and planning and project procedures to speed up decision making processes.

Walloon Region

- Decree of 10 July 2013 concerning the geological storage of carbon dioxide[13] and the Executive Order of 24 October 2013.

- Decree of 10 July 2013 establishing a framework for the sustainable use of pesticides[14] and Executive Order of 11 July 2013.

[10] http://www.elia.be/en/projects/grid-projects/stevin
[11] *BS* 1 October 2013.
[12] *BS* 5 May 2014.
[13] *BS* 3 September 2013.

- Decree of 24 October 2013 adapting various decrees to the IED[15].

- Climate Decree of 20 February 2014[16].

-Multiple Executive Orders designating Natura 2000 sites.

- A complete overhaul of the Walloon Code on Town and Country Planning, Heritage and Energy has been approved by the Parliament at the end of the legislature.

Brussels Capital Region

- Executive Order of 5 September 2013 easing some standards, based on the precautionary principle and being the most stringent in Europe, concerning electro-magnetic waves from some type of antennas[17], the Ordinance of 3 April 2014 and the Executive Order of 3 April 2014[18]. This set of legislations paved the way for an approach that has ended the long standing conflict with the telecom-operators and that prevented that 4G technologies was introduced in the Brussels Capital Region[19].

- Executive Order of 21 November 2013 adapting regulations to the IED[20].

Case Law

Shift in jurisprudence of the Supreme Court with regard to standing of ENGOs

In the 1970s, a trend could be discerned in Belgium whereby the civil courts and the criminal courts (as far as actions for damages are concerned) increasingly acknowledged that environmental groups could rely on a collective interest to have standing. This trend was stemmed by the Supreme Court in the so-called *Eikendael* judgment of 19 November 1982 (Hof van Cassatie, *Nv S. v. Vzw Werkgroep voor Milieubeheer Brasschaat*, 19 November 1982). In this judgment the Supreme Court considered that, in accordance with Article 17 of the Judicial Code, no legal action is admissible if the plaintiff has no interest in bringing such an action. According to the Court, unless the law provides otherwise, legal proceedings instituted by a natural or legal person were not admissible if the plaintiff had no personal and direct interest, in other words, no interest of its own. The court left no doubt that public interest does not amount to 'own interest'. The own interest of a legal person is only that which affects its existence or its tangible and intangible assets, its property, honour and reputation. A

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[14] *BS* 5 September 2013.
[15] *BS* 6 November 2013.
[16] BS 10 March 2014.
[17] *BS* 30 September 2013.
[18] *BS* 30 April 2014.
[19] Commissioner Neelie Kroes, Vice-President of the European Commission, and competent for the Digital Agenda remarked in August 2013: "even she can only get 3G in Brussels, and it's a source of endless frustration as her smartphone stops working frequently" - See more at: http://www.expatsblog.com/news/3107135729/europe-lags-far-behind-us-in-4g-coverage#sthash.B8jld8O8.dpuf
[20] *BS* 9 december 2013.

corporate purpose, even if this be the protection of the environment, was in the Court's view not an own interest. The Supreme Court had till recently not the opportunity to reconsider this case law in the light of the Aarhus Convention. The first occasion to do so, the judgment of 11 June 2013, brought a radical change in the Court's approach towards standing of environmental NGO's.

In this case[21], the Supreme Court held that Art. 3 (4) of the Aarhus Convention stipulates that Each Party "*shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation*". Art. 9 (3) of the Convention stipulate that: "*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*." Art. 2(4) define "*the public*" as "*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*".

Therefore, says the Court, it follows from these provisions that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention.

According Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belong to the victims. They shall demonstrate a direct and personal interest. When such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so. The Supreme Court approves the challenged judgment of the Court of Appeal of Brussels that accepted the action in reparation of an environmental NGO in a criminal case dealing with violations of the Flemish Code on Town and Country Planning (illegal construction of horse stables and an outdoor arena).

Unconstitutionality of the limitation of the right of inhabitants to exercise substitute action on behalf of local government

The Federal Act of 12 January 1993 on a right of action for the protection of the environment, allows environmental organizations that satisfy certain requirements – being set up in the form of a non-profit association, having the protection of the environment as its purpose, having existed for at least 3 years and actually being active - to bring an action for cessation of acts that constitute a breach of the law to protect the environment. Not only environmental organizations, but also administrative authorities such as municipal authorities can bring actions for cessation. This led to an interesting development on the basis of Article 271 of the former Municipal Act. This provision allows one or

[21] Hof van Cassatie, 11 June 2013, *TMR* 2013, 392-393 and annotation: P. Lefranc, "De Eikendael-doctrine moet wijken voor de Aarhusdoctrine".

several residents of a municipality to act on behalf of the municipality if the mayor and aldermen fail to do so. It was soon accepted in the case law that this provision could be combined with the Act of 12 January 1993, so that individual citizens are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action. The circumstance that residents can bring an action for cessation on behalf of the municipality if the latter fails to do so actually gave rise to another problem. What if the municipality itself shares responsibility for the breach of environmental law by having issued an illegal licence? The Constitutional Court ruled that not allowing the action under such circumstances would constitute an infringement of the principle of equality and non-discrimination.

As several mayors were confronted with such actions they succeed to have this provision amended by the Flemish Parliament. With a Decree of 29 June 2012, amending the Provincial Decree and the Municipal Decree, the substitute action was considerably restricted. Such an action would only be possible anymore in case of a serious environmental damage or a risk for such a damage as a consequence of the inaction of the province or the municipality, excluding other negative impacts on the environment, and what is more important, in case of violation of land use planning which is not environmental protection *sensu stricto*[22] and in other areas of municipal policy. Furthermore, procedural requirements were added, including the obligation to notice the municipality and to observe a waiting period of 10 days in which the municipality still could act.

The Constitutional Court annulled the restriction to environmental cases *sensu stricto* that caused serious environmental damage or contain a risk for such damage for violation of the articles 10 and 11 of the Constitution, but upheld the additional procedural requirements[23].

SEA integration track validation

In the Flemish Region an integration track procedure for SEAs for land use plans had been introduced by an Executive Order of 8 April 2008. The procedure to follow was different from the main SEA procedure, because integrated in the planning procedure. The Council of State judged on 12 August 2011 in interim proceedings concerning a particular land use plan (Council of State, n° 214.791, *Peleman and Others v. Province of East Flanders and Flemish Region*[24]) that this procedure was violating the equality principle by giving too limited publicity to the public inquiry concerning the screening/scoping phase (only publication on the website of the EIA Service and the planning authority, while in the ordinary procedure there is also publication in the press and on the notice boards of the concerned municipalities). Instead of modifying its regulation and practice, the Flemish Government opted for a validation by the Flemish Parliament of all the land use plans adopted on the basis of the Executive Order of 8 April 2008. To that end a specific provision was introduced in the Flemish Town and Country Planning Code (art. 7.4.1/2) by an Act of Parliament. This provision was on its turn challenged before the Constitutional Court. That annulled that provision for violation

[22] In practice the substitute action was relatively often used in this field and in particular in cases of illegal permits delivered by the municipality.
[23] Constitutional Court, N° 9/20214, 23 January 2014*, F. Lauwers and Others, vzw Ademloos and Others*.
[24] Confirmed by Council of State, N° 220.536 , 10 September 2012, *Peleman and Others v. Province of East Flanders and Flemish Region*

of art. 10 and 11 of the Constitution[25], being of the opinion that there was not a mere formal flaw at stake as has been argued by the Government. Public Participation in environmental matters, as *inter alea* guaranteed by the Aarhus Convention, contributes to the protection of a healthy environment (art. 23 of the Constitution) and sustainable development (art. 7b of the Constitution). Only overriding reasons of public interest can justify the restriction of the rights of the interested parties. The Court is of the opinion that the reasons put forward by the government (loss of time and high costs for the renewed approval of the concerned land use plans) are not overriding reasons of public interest and that re-enacting those plans, subject to proper public consultation and SEA, is not impossible or extremely difficult.

Boxus, Solvay, Le Poumon Vert de La Hulpe

The Constitutional Court (Judgement N° 144/2012, 22 November 2012) had in the previous period already annulled or declared unconstitutional the main part of the Decree of the Walloon Region of 17 July 2008 « *relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général*" (DAR), and different parliamentary ratifications of specific permits, as a follow-up of ECJ cases *Boxus* c.s., *Solvay* c.s. and *Le Poumon Vert de La Hulpe*. This judgment was followed by some judgments in which the parliamentary ratification of some permits delivered later on in application of that Decree or which were not challenged before, were annulled too (Judgment N° 11/20123, 21 February 2013 – *Light Metro Parc Sud Charleroi*; Judgment N° 29/2014, 13 February 2014 – *Charleroi Brussels South Airport*).

[25] Constitutional Court, N° 114/2013, 31 July 2013, *nv Recover Energy and commune of Lebbeke v. Flemish Govenment*