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Environmental Law and the Property Guarantee

Report on Belgium

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1. What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc.)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?

Both movable and immovable goods, material and non-material things, personal rights and rights *in rem* may be the object of property rights. So this may include shares in corporations, clientele, goodwill, operating licences, licences to deliver telecom services, etc… [1]. Also most natural resources may be the object of property rights. An exception has to be made for the *res communes* (art. 714 Civil Code) (the sea, the atmosphere, the air space…) which cannot be the object of property rights, only of public law provisions regulating their use[2]. A further exception has to do with minerals. According public Mining Law, which dates back to the 19th century, the property rights of the owner of a land are restricted to the upper layers of the subsoil (without indicating a clear underground distance). So, e.g. according to the Decree of the Flemish Region of 8 May 2009 concerning the deep subsoil[3], the Flemish Region is the owner of the hydrocarbons which are naturally present in the deep subsoil. The property of the hydrocarbons which are extracted from the deep subsoil on the basis of an extraction license will pass over to the holder of the license, provided that compensation is paid to the Flemish Government (Art. 3). The owner of the land or the buildings thereon, have to tolerate that a holder of a license explores or extract hydrocarbons, prospects for potential storage complexes for carbon dioxide or is effectively storing carbon dioxide, when those activities are taking place at least 100 meter below the surface. The holder of the license must compensate for damages to the surface and the buildings thereon, as well as for the loss of productivity of the land (Art. 4). Similar provisions can be found in the Mining Decree of the Walloon Region of 7 July 1988[4] which has a broader scope, as it is applicable on a broad range of minerals and fossils (Art. 2).

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[1] M. Pâques & C. Vercheval, 'Le droit de propriété' in M. Verdussen & N. Bonbled (eds.), *Les droits constitutionnels en Belgique*, Vol. 2, Bruylant, Brussels, 2011, p. 791-793; M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', in CEDRE (ed.), *Le zonage écologique*, Bruylant, Brussels, 2002, p. 248.

[2] A. Lebrun, 'Le droit civil d'usage sur les 'res', éléments vitaux de l'environnment', in L. Lavrysen (ed.), *Milieurecht. Recente Ontwikkelingen. Deel II – Droit de l'environnement. Développements récents. Volume II,* Brussels, E. Story-Scientia, 1989, p. 389-431.

[3] *BS* 6 July 2009.

[4] *MB* 27 January 1989.

2. How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?

Article 16 of the Belgian Constitution that has stayed unchanged since 1831, reads as follows: "*No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law and in return for fair compensation paid beforehand*". According Article 17: "*Assets may not be confiscated as a means of punishment*". The National Congress, that has prepared the 1831 Constitution, explicitly provided five guarantees for protecting against an arbitrary deprivation of property by the public authorities: 1. Deprivation of property is only possible *in the public interest*, with a view to enlarging or to improving the public domain of the public authorities; an explicit legal authorisation required for expropriation of private persons; judges examine whether a compulsory purchase decision meets the requirements of public interest; 2. Deprivation of property is only possible *in the cases laid down by law*; the legislature has authorised the Executive Branch, on the federal level and on the level of the Regions and Communities to decide on expropriations under certain conditions; they may empower subordinate authorities, such as municipalities and provinces, to proceed with an expropriation; 3. Deprivation of property should take place *in the manner prescribed by law*; unless there is an amicable settlement, there is always a prior intervention by a judge; most expropriations proceed along the lines of the 'urgency procedure', in order for the public authorities to take possessions of property very rapidly; 4. There must be a *fair compensation* indemnifying the owner completely, allowing him at least to acquire an immovable of the same value; 5. The *compensation* must be paid *in advance*; only after payment of the compensation by the public authorities, the latter may require the courts to take possession of the property[5].

Traditionally, the field of application of Art. 16 of the Constitution has been restricted to expropriations for a public purpose. To be applicable, there should be a complete dispossession of the private owner, together with a transfer of the property to a public authority[6]. More recently the Constitutional Court has however - in a case concerning legislation that gives the right to tenants of social housing (housing provided by virtue of government intervention and rented out on favourable terms to less-well-off sections of the population) to purchase the dwelling they rent, subject to compliance with a number of conditions - widened the scope of Art. 16 of the Constitution, by observing that that Article 16 provides *a general safeguard against loss of enjoyment of property, regardless of the legal status of the party deprived of the property*. In this case there was – in certain cases compulsory - transfer of property from public bodies to private persons. With regard to the question of fair compensation within the meaning of Article 16 of the Constitution, the Court considered that compensation equal to the market value was justified on the grounds that social housing associations, by virtue of their specific features, were in a different situation with regard to their property from a private owner, with the result that certain forms of harm or loss of amenity, such as inconvenience, harm stemming from the existence of a sentimental attachment and removal expenses, could be considered irrelevant in their case. The Court further took account of the fact that the decree also provided for a special compensation system, with housing associations taking part in a government investment programme. With regard to the question of prior compensation, the Court considered that the seller enjoyed safeguards similar to those attached to compensation in the event of expropriation, given the particular nature of the forced sale and the fact that the transfer of

[5] A. Alen (ed.) *Treatise on Belgian Constututional Law*, Kluwer Law and Taxaion Publishers, Deventer-Boston, 1992, p. 207-208; M. Pâques & C. Vercheval, *loc. cit.*, p. 800-806.

[6] M. Pâques & C. Vercheval, *loc. cit.*, 794; M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 248-249; E. Orban de Xivry, 'Droit de propriété et établnlissement du réseau Natura 2000 (Région wallonne)' in M. Pâques (ed.), *Le droit de propriété et Natura 2000 – Natura 2000 and Property Rights,* Bruylant, Brussels, 2005, p. 65.

ownership took place only once the tenant was prepared to pay, to that end, a price equal to the market value of the dwelling, as defined in the decree[7]. The applicants also contended that the proportionality requirement laid down in Article 16 of the Constitution and Article 1 Protocol 1 ECHR had been violated. The Court held that any interference in the right of ownership must strike a fair balance between public-interest requirements and the need to protect the right to respect for property. The means used had to be proportionate to the end. In the case of housing policy, which was a central plank of the social and economic policies of modern societies, the Court, when checking that the right to decent housing (Article 23 (3) 3 of the Constitution) had been observed, was bound to respect the assessment of the public interest made by those who drafted regional laws, unless that assessment was manifestly unreasonable. After establishing the circumstances in which the measure had been taken and the conditions attached to the social housing tenant's right to buy, and taking account of the guarantee of fair compensation afforded to the social housing association, the Court concluded that the contested provision did not disproportionately undermined the right of ownership of the applicants and dismissed the application to have it set aside.

The question if there is a *transfer of property* or not seems crucial to distinguish the expropriation from the *limitation of property*[8]. So the obligation to rent its land for maximum 1 year against compensation to allow the military to renew a NATO pipeline[9] or the obligation to accept the construction/replacement of a pipeline by a third party over its land[10] is not to be considered as an expropriation. In principle, according to the traditional Belgian case law, *limitations of the use of property in the general interest,* when they are not to be considered as a *de facto* expropriation, must be accepted without compensation, except when the legislator decides otherwise[11]. However, the legislator has also to respect the equality principle[12]. If he decides to compensate wholly or partially some restrictions, he cannot refuse to do it in situations which are in all aspects similar, without a reasonable and pertinent justification[13]. So, the Court found a violation of Art. 16 of the Constitution in combination with Art. 1 of Protocol No 1 to the ECHR in so far the Brussels Town Planning Code provided not for a compensation in case of an interdiction to build as a result of a decision to protect an area as landscape for which previously an allotment permit was delivered, while the same code provide for compensation[14] if the interdiction to build is the result of the adoption or the review of a land use plan. The Court found also no justification for the fact that the owner of land in the dunes alongside the North Sea coast is compensated[15] when he loses the possibility to build on the land, while someone who is not the owner, but had a valid building permit and made some costs to prepare the terrain for building, will not be compensated when he loses the right to use this permit[16].

[7] Constitutional Court, n° 33/2007, 7 Mach 2007, *vzw Vereniging van Vlaamse Huisvestingsmaatschappijen and Others* v. *Flemish Government*.
[8] M. Pâques & C. Vercheval, *loc. cit.*, p. 794 -796; E. Orban de Xivry, *loc.cit.*, p. 65.
[9] Constitutional Court, n° 97/2001, 12 July 2001*, M.-L. Dubois* v. *Belgian State;* M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 253-254.
[10] Constitutional Court, n° 62/2006, 26 April 2006, *N.V. Aquafin* v. *c.v.b.a. Pligas.*
[11] Cass., 16 March 1990, Arr. Cass., 1989-1990, 922; Constitutional Court, n° 50/93, 24 June 1993, *B. Vander Voordt and Others* v. *Belgian State, Flemish Region and Flemish Community* (restrictions on the basis of the legislation on landscape protection); M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 249.
[12] M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 258-259
[13] Constitutional Court, n° 12/2014, 23 January 2014, *nv Immobiliën Vennootschap Verkavelingen and Others* v. *Brussels Capital Region and Commune of Sint-Agatha Berchem.*
[14] The compensation is limited to 80 % of the differene in value of the land before and after the interdiction to build.
[15] The same restriction applies.
[16] Constitutional Court, n° 55/2012, 19 April 2012, *Vlaamse Gewest* v. *nv MAFAR.*

Furthermore, since the legislative amendment of 9 March 2003, the Constitutional Court has been competent to review the constitutionality of federal and regional laws directly with reference to all provisions of Title II of the Constitution, containing the Belgian Fundamental Rights Catalogue[17]. The Court took the view that it is also competent to take into account those provisions of international law which secure analogous rights or freedoms[18]. Article 1 of Protocol No.1 to the ECHR is believed to have a scope which is analogue to that of Art. 16 of the Constitution, so that the guaranties it contains are forming an inseparable whole with those contained in the Constitution, and that the Constitutional Court has to take into consideration all those guarantees.

Article 1 of Protocol No. 1, reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

According to the ECtHR, Article 1 of Protocol No.1 in substance guarantees the right of property[19]. In its judgment of 23 September 1982 in the case *of Sporrong and Lönnroth*, the Court analysed Article 1 as comprising "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates *the principle of the peaceful enjoyment of property*; the second rule, contained in the second sentence of the first paragraph, covers *deprivation of possessions and subjects it to certain conditions*; the third rule, stated in the second paragraph, is concerned, amongst other things, with *the right of a State to control the use of property*. However, the Court made it clear in its *James and Others* judgment of 21 February 1986 that the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a *reasonable relationship of proportionality* between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the above-mentioned *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden". Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance is ... reflected in the structure of Article 1 (P1-1)" as a whole. Clearly, compensation terms are material to the assessment whether *a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions*[20].

[17] Before its competence was restricted to some Articles of that Title, but with a (very) broad scope, such as the equality and non-dicrimination clauses.

[18] Constitutional Court, n° 136/2004, 22 July 2004, *O.M.* v. *R. Vergauwen and Others*; L. Lavrysen & J. Theunis, 'The Belgian constitutional court: a satellite of the ECtHR ?' in A. Alen, V. Joosten, R. Leysen & W. Verrijdt (eds.), *Liberae cogitationes : Liber Amicorum Marc Bossuyt,* Cambridge, Intersentia, 2013, p. 332.

[19] ECtHR, 13 June 1979, *Marckx* v. Belgium, *Series A* no. 31, para. 63.

[20] ECtHR, 8 July 1986, *Lithgow and Others* v. United Kingdom, para 120; M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 259-262.

The Constitutional Court has fully endorsed this case-law[21].

3. Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation? What are the criteria of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?

The Belgian Constitutional Court is in general following up very closely the case law of the ECtHR[22]. In its Grand Chamber Judgement in the case of *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* [23] the ECtHR has summarised its approach in this respect as follows:

"54. The taking of property under the second sentence of the first paragraph of Article 1 without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1. The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see *Papachelas* v. Greece [GC], no. 31423/96, § 48, ECHR 1999‑II, again with further references).

55. In respect of interferences which fall under the second paragraph of Article 1 of Protocol No. 1, with its specific reference to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...", there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, *States enjoy a wide margin of appreciation* with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *AGOSI* v. the United Kingdom, 24 October 1986, § 52, Series A no. 108).
[…]

71. As to the existence, over and above the general interest in the limitation period, of a specific general interest in the extinguishment of title and the attribution of new title at the end of the limitation period, the Court notes that in discussing the public interest present in *Jahn and Others* v. Germany, in the context of a deprivation of property, it stated that, "*finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one [the Court] will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation*" ([GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI, with reference back to *James and Others*, cited above, and *The former King of Greece and Others* v. Greece [GC], no. 25701/94, ECHR 2000‑XII, and to *Zvolský and Zvolská* v. the Czech Republic, no. 46129/99, § 67, ECHR 2002‑IX). This is particularly true in cases such as the present one where what is at stake is a long-standing and complex area of law which regulates private-law matters between individuals.
(…)

[21] E. Orban de Xivry, *loc.cit.*, p. 66; M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 267.
[22] L. Lavrysen & J. Theunis, *loc. cit.*, p. 349-353.
[23] ECtHR, 30 August 2007, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* v. United Kingdom.

75. The second paragraph of Article 1 is to be construed in the light of the general principle enunciated in the opening sentence. There must, in respect of a "control of use", also exist a *reasonable relationship of proportionality between the means employed and the aim sought to be realised*. In other words, the Court must determine whether *a fair balance* has been struck between the demands of the general interest and the interest of the individuals concerned. In determining whether a fair balance exists, the Court recognises *that the State enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question* (see *AGOSI*, cited above, § 52, and, for a more recent authority concerning a deprivation of possessions, *Jahn and Others*, cited above, § 93). In spheres such as housing, the Court will respect the legislature's judgment as to what is in the general interest unless that judgment *is manifestly without reasonable foundation* (see *Immobiliare Saffi* v. Italy [GC], no. 22774/93, § 49, ECHR 1999-V). In other contexts, the Court has underlined that it is not in theory required to settle disputes of a private nature. It can nevertheless not remain passive, in exercising the European supervision incumbent on it, where a domestic court's interpretation of a legal act appeared "*unreasonable, arbitrary or ... inconsistent ... with the principles underlying the Convention*" (see *Pla and Puncernau* v. Andorra, no. 69498/01, § 59, *ECHR* 2004-VIII). When discussing the proportionality of a refusal of a private television company to broadcast a television commercial, the Court considered that a margin of appreciation was particularly essential in commercial matters (see *VgT Verein gegen Tierfabriken* v. Switzerland, no. 24699/94, § 69, *ECHR* 2001-VI). In a case concerning a dispute over the interpretation of patent law, and at the same time as noting that even in cases involving litigation between individuals and companies the State has obligations under Article 1 of Protocol No. 1 to take measures necessary to protect the right of property, the Court reiterated that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, and not to deal with errors of fact or law allegedly committed by a national court unless Convention rights and freedoms may have been infringed (see *Anheuser-Busch Inc.*, cited above, § 83)".

The Belgian Constitutional Court will allow the federal and regional legislators the same wide margin of appreciation, especially in socio-economic matters[24], without making distinctions according to the type of legislation at stake or the policy area concerned. The cases in which the Court found a disproportionate restriction are seldom[25]. The *fair balance* test includes a proportionality test, the more stringent the restriction is, the more there will be a need to compensate[26].

[24] Constitutional Court, n° 173/2008, 3 December 2008, *nv Linopan* v. *cvba West-Vlaamse Intercommunale* and *nv Imver* v. *Intercommunale Ontwikkelingsmaatschappij voor de Kempen*; L. Lavrysen & J. Theunis, *loc. cit.*, p. 350; M. Pâques & C. Vercheval, *loc. cit.*, p. 810-811.

[25] E.g. Constitutional Court, n° 107/2005, 22 June 2005, *P. Renkin* v. *Walloon Government* (an inheritance tax of more than 80 %; see on this judgment: L. Lavrysen & J. Theunis, *loc. cit.*, p. 350- 351); Constitutional Court, n° 145/2013, *nv All Projects & Development* v. Flemish Government (the obligation to provide a certain quantity of social housing in each private housing development project and to transfer these houses to the public sector without proper compensation, after the ECJ had held that the compensation provided for was state aid that was not notified for approval to the Commission: Cases C-197/11 and C-203/11, *Libert and Others* and *All Projects & Developments NV and Others).*

[26] M. Pâques & C. Vercheval, *loc. cit.*, p. 811; M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 272-285.

4. What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:

- *to prevent environmental damage;*
- *to prevent traditional damage;*
- *to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
- *to limit activities/property due to the special protected area, like* Natura *2000*
- *of public health/safety reasons.*

To what extent can private individual invoke these sorts of powers – eg actio popularis*?*
In which above cases compensation is foreseen by law?

According to the Belgian Constitutional case law, all these interests are in principle considered to legitimate – subject to the fair balance criterion (see above) – restricting property rights.

Land use planning, and the restrictions for the use of land that follow from zoning plans, is largely seen as such an interest[27]. One has to notice that in the different legislations a compensation of 80 % of the loss of value is provided in case the changes in zoning result in an interdiction to build. The same is truth for the legislation to *protect landscapes*[28]. A Decree classifying some slag heaps as non-exploitable, without compensation, was however believed not to violate property rights[29]. The same was held with regard to a provisional and rather soft protection of historical landscapes[30]

Waste water treatment, more particularly the obligation to let pass through private land public sewage collecting systems against compensation, is also considered as such an interest[31]. The same is truth for the obligation for public drinking water companies to provide a minimum quantity of *tapped water* for free to the inhabitants, compensated with an increase of the price of the water provide above that quantum[32], the obligation of landowners to accept some restrictions (on the shores of water courses and in the designed flooding areas) in the context of *integrated water management* without compensation[33].

Nature protection measures that restrict property rights and which do not forbid absolutely activities which are in conformity with the zoning plans, but are only compensated in some cases considered to cause "serious" loss of value (by obliging the authorities to buy the land against its market value

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[27] Constitutional Court, n° 40/95, 6 June 1995, *L. Lumen* v. *Flemish Government*; n° 56/95, 12 July 1995, *G. De Mey and Others* v. *Flemish Government*; n° 24/96, 27 March 1996, *G. De Mey and Others* v. *Flemish Government*; n° 94/2003, 2 July 2003, *J. Creve and Others* v. *Flemish Government*; n° 151/2003, *Commune of Beveren* v. *Flemish Government*; n° 87/2004, 19 May 2004, *M.J. Geerts and Others* v. *Flemish Government*; n° 71/2012, 31 May 2012, *A. De Meester c.s.* v. *City of Hoogstraten and Flemish Region;* n° 29/2008, 28 February 2008, *M. Duyvejonk c.s.* v. *Flemish Region*.

[28] Constitutional Court, n° 50/93, 24 June 1993, *B. Vander Voordt and Others* v. *Belgian State, Flemish Region and Flemish Community.*

[29] Constitutional Court, n° 34/2001, 13 March 2001, *nv Charbonnage du Bonnier c.s.* v. *Walloon Region ;* M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 254-256.

[30] Constitutional Court, n° 120/2005, 6 July 2005, *vzw Vlaams Overleg voor Ruimtelijke Ordening en Huisvesting c.s.* v. Flemish Government.

[31] Constitutional Court, n° 63/96, 7 November 1996, *nv Matico* v. *nv Aquafin.*

[32] Constitutional Court, n° 36/98, 1 April 1998, *Commune of Wemmel* v. *Flemish Government.*

[33] Constitutional Court, n° 32/2005, 9 February 2005, *vzw Vlaams Overleg voor Ruimtelijke Ordening en Huisvesting c.s.* v. Flemish Government. The Decree of the Flemish Region of 18 July 2003 on integrated water management provides for different types of compensation for measures wich have farreaching consequences on the use of property or the viability of agricultural operations, including the obligation for the authorities to buy the land aganinst full compensation (Art. 17 and 17b).

before the entering into force of the restricting measures) or, to compensate the loss of income of farmers due to the interdiction to use pesticides[34] are in conformity with the right to property. The same was held with regard to the loss or restriction of hunting rights without compensation in nature protection areas[35].

The compulsory *sanitation of abandoned factories* is considered as a public interest that can justify expropriation[36], as far as the owner receives a fair compensation[37]. The obligation of the actual owner of historical polluted industrial land, that occurred after becoming the owner, to pre-finance the mandatory soil sanitation, subject to the possibility to have recourse to the polluter if he is not the polluter is justified[38].

The prevention and abatement of *environmental pollution* is also a public interest. So, the aim to reduce the pollution of groundwater and soils by nitrates can justify measures that restrict property rights, e.g. limitations (and interdictions in some sensible areas) in time and quantity on the use of manure as a fertilizer, measures to reduce the livestock, restrictions in transfer of cattle farms to third parties when the farmer like to step-out the business, the obligation to process slurry that cannot be used as a fertilizer according to the manuring limitations[39]. The choice the owners have in one of the noise abatements zones around *Liège Airport* between selling their home to the Airport Authority or to ask for compensation for noise insolation measures has also be found to be justified[40]. The submission of the steel industry to the CO_2 emission trading scheme, as well as the provision that an operator will lose his initial allowances for the coming year after definite close down of the plant, is not violating property rights[41].

The obligation to dispose of an attestation of conformity, certifying that the *dwelling meets the basic safety and hygiene standards for housing*, before such a dwelling can be rented, is justified[42]. The same is truth for the introduction of administrative penalties to *reduce the number of unoccupied dwellings*[43] or for the possibility of public authorities to *take over the management of houses declared unfit for human habitation or which are abandoned* in view of renovating them and making them fit to bring them on the renting market[44].

[34] Constitutional Court, n° 18/99, 6 July 1999, *vzw De Vlaamse Landeigendom and Others* v. Flemish Government. See on the Walloon legislation: E. Orban de Xivry, *loc.cit.*, p. 70-72.

[35] Constitutional Court, n° 31/2004, *vzw Hubertusvereniging Vlaanderen and Others* v. *Flemish Government*; M. Pâques, "Natura 2000 and Property Rights. International Report", in M. Pâques (ed.), *Le droit de propriété et Natura 2000 – Natura 2000 and Property Rights,* Bruylant, Brussels, 2005, p. 41-42 and p. 55

[36] Constitutional Court, n° 9/97, 5 March 1997, *Walloon Region* v. *A. Lowie c.s.;* n° 131/2002, 18 December 2002, *Walloon Region* v. *nv Hermans c.s;* M. Pâques, 'Propriété et zonage écologique, compensation et indeminsation', *loc. cit.*, p. 252-253.

[37] Constitutional Court, n° 65/2001, 17 May 2001, *Walloon Region* v. *cvba Société immobilière régionale.*

[38] Constitutional Court, n° 31/2009, 14 May 2009, *nv Société de recherche immobilière* v. *Flemish Region.*

[39] Constitutional Court, n° 42/97, 14 July 1997*, A. Goetschalcks* v. *Flemish Government*; n° 70/2001, 30 May 2001, *vzw De Vlaamse Landeigendom and Others* v. *Flemish Government*; n° 31/2006, 1 March 2006, *E. De Maeght* v. *Vlaamse Landmaatschappij (Mestbank) and Flemish Region.*

[40] Constitutional Court, n° 189/2005, 14 Decembr 2005, *vzw Net Sky and Others* v. *Walloon Government.*

[41] Constitutional Court, n° 92/2006, 7 June 2006*, nv Cockerill Sambre c.s.* v. *Walloon Government.*

[42] Constitutional Court, n° 40/99, 30 March 1999, *nv Turnhoutse Maatschappij voor de Huisvesting* v. *Flemish Governrnent.*

[43] Constitutional Court, n° 91/2010, 29 July 2010, *vzw Algemeen Eigenaars- en Mede-eigenaarssyndicaat* v. *Government of the Brussels Capital Region.*

[44] Constitutional Court, n° 105/2000, 25 oktober 2000, *vzw Algemeen Eigenaarssyndicaat* v. *Walloon Government;* n° 69/2005, 20 April 2005, *vzw Algemeen Eigenaarssyndicaat* v. *Government of the Brussels Capital Region.*

The cases in which the Constitutional Court found in the (broad) area of environmental protection, a violation of the right to property, are very rare. This was only the case with a provision of the Walloon Town and Planning Code on the calculation of the compensation for the introduction of a prohibition to build due to a change in the zoning plan, that took not sufficiently into account the situation of land owners that for reasons beyond their control were unable to realise the initial destination of the land[45], and in the earlier mentioned case of the Brussels Town Planning Code that provided not for a compensation in case of an interdiction to build as a result of a decision to protect an area as landscape for which previously an allotment permit was delivered, while the same code provide for a compensation when the interdiction to build is the result of the adoption or the review of a land use plan[46].

5. Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?

The only relevant example for the moment is the case of the high tax on nuclear energy production. Article 65 of the Programme-Act of 22 December 2008 required nuclear power producers to pay a single "distribution contribution" of 250 million euros for 2008. The aim of this contribution was to "finance the country's energy policy and government measures to cover expenditure on promoting investments in electrical power generation, to meet expenses and investments relating to nuclear power, to reinforce security of supply, to combat energy price rises and, lastly, to enhance competition in the power market in the interests of consumers and industry." The company Electrabel SA, asserting that it had to pay 89 % of the total contribution and that this tax represented about one quarter of its total net profit, sought the annulment of this legislation. Other companies required to contribute also lodged appeals seeking the Programme-Act's annulment. After dismissing a number of objections on grounds of inadmissibility, the Court firstly examined whether there was discrimination (Articles 10 and 11 of the Constitution) between, on the one hand, nuclear power operators and other companies having a share in power generation through fission of nuclear fuel, who were required to pay this contribution, and, on the other hand, non-nuclear power producers and "other Belgian electricity market operators" such as importers, transporters, distributors and suppliers of electricity and other intermediaries in the Belgian power market, who were not required to pay the contribution. The Court cited at length the preparatory documents justifying this measure. It considered that when, in such matters, the legislature decided to impose a contribution on certain categories of entities, this approach was part and parcel of its overall economic, tax and energy policy and the Court could censure differences in treatment resulting from such decisions only if there was clearly no reasonable justification for them. The Court concluded that Parliament could consider that nuclear power operators and other companies having a share in power generation through fission of nuclear fuel were in a situation different from that of the entities with which the appellants compared themselves. The Court then ruled on a limb of the ground of appeal complaining that "small nuclear power producers" which were required to pay the distribution contribution and the "dominant nuclear power operator" were treated in the same way. It replied that the situations of the nuclear power operator and of the other two companies having a share in power generation through fission of nuclear fuel, who were affected by the two grounds of appeal in question, were not fundamentally different from the standpoint of the challenged legislation, since these three taxpayers had in common the fact that they controlled part of the nuclear power

[45] Constitutional Court, n° 26/2004, 11 February 2004, *J. Boesmans c.s.* v. *Walloon Government.*
[46] Constitutional Court, n° 12/2014, 23 January 2014, *nv Immobiliën Vennootschap Verkavelingen and Others* v. *Brussels Capital Region and Commune of Sint-Agatha Berchem.*

generation industry. The parties also complained of discrimination between the entities concerned by this legislation and all other taxpayers liable for corporate income tax. In this connection, the Court recalled the scope of the constitutional principle of equality and non-discrimination. In the light of the aim laid down in the impugned legislation, the Court considered that "ordinary" taxpayers liable for corporate income tax were not in a comparable situation from the standpoint of a measure of this kind. The Court also rejected the arguments concerning the principle of lawfulness in tax matters, the non-retrospective effect of legislation and the right of ownership and dismissed the appeal. Concerning the right of ownership, the Court observed that Article 1 Protocol 1 ECHR was similar in scope to Article 16 of the Constitution and that the safeguards laid down therein were indistinguishable from those secured by the constitutional provision. The Court pointed out that a tax in principle constituted an interference with the right to peaceful enjoyment of one's property. The Court referred to the aim of the contribution and held that, in the light of the profits engendered by nuclear power generation on account of the accelerated depreciation of nuclear power plants, parliament could consider that this contribution was not "exorbitant" and that the fair balance between the demands of the general interest and the requirements of the right to peaceful enjoyment of one's property was not upset[47].

It should be noted that meanwhile the Nuclear Power Phase out Act of 31 January 2003 has been amended by an Act of 18 December 2013, postponing the phased closure of Nuclear Power Plants to the period 2015-2025. This Amendment was coupled with an increase (more than doubling) the nuclear power production tax. That increase is challenged before the Constitutional Court by the *nv EDF Luminus* and the *nv Electrabel*.

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6. How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?

As has been indicated above, in case of expropriation, there is always the intervention of a judge who will verify if the legal conditions are met and who will decide on the compensation to be paid. In cases that sectoral legislation provides for some form of compensation for restrictions of property rights, and when no amicable settlement can be reached, the case can be brought before the civil courts.

In other cases it is up to the civil judge, on the basis of Art. 159 of the Constitution, or the administrative judge, to decide if acts of the executive branch are lawful, respecting higher norms, including Art. 1 of Protocol n° 1 ECHR and Art. 16 of the Constitution. As the problem resides in an Act of the federal or regional Parliament there is a monopoly for the Constitutional Court to check the compatibility of such norms with Art. 16 of the Constitution combined as the case may be with other international, European or constitutional norms.

A case may be brought before the Constitutional Court in two ways[48]. Firstly, a case may be brought before the Court in the form of an action for annulment that may be instituted by any authority designated by the Special Act on the Court or *any person who has a justifiable interest*. Natural or legal persons, both in private law and public law, Belgian as well as foreign nationals, must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be personally, directly and unfavourably affected by the challenged act. Non-governmental organizations can also institute actions for annulment if a legislative act is liable to prejudice their social purpose. This facility is used fairly intensively. Around 25% of all actions for

[47] Constitutional Court, n° 32/2010, *nv Electrabel and Others* v. *Council of Ministers*.
[48] L. Lavrysen, 'The Constitutional Court of Belgium and Europe', to be published in the *Hofstra Law Review*.

annulment are instituted by such organizations. As a general rule, with certain exceptions, actions must be brought within six months of the publication of the challenged federal ac, decree or ordinance in the *Moniteur belge* (the Belgian Official Journal). If a question comes up in a particular court of law about the correspondence of federal acts, decrees and ordinances with the Constitution, that court must refer this question for a preliminary ruling to the Constitutional Court. If the Constitutional Court decides that the legal norm in question conflicts with the rules mentioned above, the referring judge may no longer take this norm into consideration in the further adjudication of the case. Courts delivering judgment in proceedings with the same litigants (including courts of appeal of the Supreme Court) must comply with the ruling given by the Constitutional Court.

Judges may and or, when it comes to the highest courts of the country, even obliged to refer questions of interpretation and validity of EU law to the Court of Justice of the European Union. It can happen that in one and the same case references to both the Constitutional Court and the Court of Justice of the EU or possible or even compulsory. To avoid conflicts between the different courts an ingenious priority rule of references to the Constitutional Court was introduced in 2009, slightly reviewed in 2014, to make it fully compatible with the case law of the Court of Justice of the European Union[49].

The criteria used in the case law to check the compatibility with the right to property have been explained above.

7. Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?

This depends on the legislation at stake. As mentioned earlier in case of expropriation, there is always a prior intervention of a judge and prior compensation (at least the judge has decided on a provisional compensation in case of the most used urgency procedure). For other restrictions of property, when one or another form of compensation is regulated, one has off course not to exhaust primary legal protection. In most of the legislations inspired by the land use legislation ("*planschade*" or "damage caused by planning"), the 80 % compensation of the loss of value as a result of an interdiction to build, can only be claimed when the loss becomes obvious following e.g. the selling of the land or the refusal of a building permit.

[49] CJEU (Grand Chamber), 22 June 2010, Joined cases C-188/10 and C-189/10 *Melki and Abdeli* (C-189/10); A. Alen, "Kanttekeningen bij de samenwerking tussen de hogere rechtscolleges inzake mensenrechten" in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds.), *Liberae Cogitationes. Liber amicorum Marc Bossuyt, Intersentia, Cambridge-Antwerp-Portland,* 2013, p. 9-10; M. Bossuyt and W. Verijdt, « The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment", *European Constitutional Law Review*, 2011 (7), p. 355-391; R. Lauwaars, "The Priority Consitutional Review and its Relationship to the Preliminary Reference Procedure", M. van Roosmalen, B. Vermeulen, F. van Hoof, M. Oosting (eds.), *Fundamental rights and principles : liber amicorum Pieter van Dijk*, Cambridge, UK, Intersentia, 2013, p. 527-542; T. Bombois, "Réflexions sur la question prioritaire de constitutionnalité et sa conformité au droit de l'union européenne", *Revue belge de droit international*, 2012 (2), p. 486-500

8. Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?

Recently the Constitutional Court had to decide over such a case. The Court held that Articles 12 and 37 of the Decree of the Flemish Region of 2 July 1981 concerning the prevention and management of waste, would violate the Articles 10 and 11 of the Constitution in the case that those articles would be construed in such a way that the Public Waste Company may recover the costs incurred for *ex officio* removal of the waste from the owner of the land that has been contaminated by the waste, when that owner didn't knew and should not have known that the property was polluted by the waste the day he became owner. In the interpretation however that the owner could only be made liable for those costs when he knew or should have known that the land was polluted by those waste the day he acquired the land[50], there is no violation of the equality principle. The solution found by the Constitutional Court comes close to the solution that is used in the Flemish Soil Sanitation Legislation. It is up to the operator, when there is an installation subject to environmental permit on the land, or to the landowner, when there is no operator or another user on the land, to take remedial actions in case of historical or new soil pollution. In case of historical pollution there is an exemption for the so called "innocent owner", that is the person who can show that he has not caused the pollution himself and at the time when he became the proprietor or user of the piece of land, het was not or could not be assumed to have been aware of the pollution[51].

The situation is however different for waste that is disposed of by third parties while someone else is the owner of the land, with or without its consent. According Art. 12 of the Decree of the Flemish Region of 23 December 2011 concerning sustainable management of material cycles and waste[52] it is forbidden to dump waste or to manage waste in a manner contrary to the Decree and its Executive Orders. Such a conduct can be punished with criminal sanctions[53] and with a court order to restore the place[54]. In the Belgian case law it is assumed that one is not only criminal liable if one is dumping oneself the waste, but also when the necessary measures are not taken to end the violation[55], even when the waste was dumped by another person[56].

9. Does the state permit (like IPPC permit, operation permit etc.) exclude the holder from the liability towards third persons (in case of damage caused by undertakings)?

No. In the different legislations on environmental permits there is an explicit provision that the permit has no influence on the rights of third parties[57]. So, civil liability can occur, even when an

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[50] Constitutional Court, n° 15/2014, 29 January 2014, *cvba Haras* v. *Openbare Vlaamse Afvalstoffenmaatschappij*.

[51] L. Lavrysen, 'Legislation on soil remediation in Belgium (Flemish Region)' in G. Cordini & A. Postiglione (eds.), *Prevention and Remedying of Environmental Damage*, Brussels, Bruylant, 2005, p; 76-77.

[52] A similar provision could be found in the former Decree of 2 July 1981.

[53] Penal sanctions from 600 to 3.000.000 € and/or imprisonment of 1 month till 5 years (Art. 16.6.3. Decree of 5 April 1995) or an alternative administrative fine of max. 1.500.000 € (Art. 16.4.27).

[54] Art. 16.6.6 Decree of 5 April 1995.

[55] Cass., 22 February 2005, *Arr. Cass.* 2005, N° 109; Cass. 11 January 2011, *Arr. Cass.,* 2011, n° 26; Council of State, n° 168.992, 15 March 2007, *cvba Haras* v. *OVAM.*

[56] Court of Appeal, Ghent, 26 April 2013, *TMR* 2013, p. 534.

[57] E.g. Art. 8 Decree of the Flemish Region of 28 June 1985 concerning the environmental permit; Art. 49 of the Decree of the Walloon Region of 11 March 1999 concerning the environmental permit.

operator is acting completely in conformity with the conditions of its environmental permit[58], e.g. when the general duty of care obligation would be more strict in a given case than the conditions of the environmental permit. Although, in the past the idea was predominant that the judiciary could in such a case not order measures by way of reparation of the damage that would run counter the activities of the operator concerned. They could only condemn the operator to compensate financially the damage. Since a judgment of the Supreme Court of 26 June 1980, in which the Court held that ordering the reparation *in natura* was not incompatible with the separation of powers, this approach was however gradually abandoned to a certain extend[59].

10. Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?

As has been illustrated above, the Constitutional Court takes Art. 1, Protocol n° 1 ECHR fully into account, as well as the relevant case-law of the ECtHR. Art. 8 ECHR is however seldom at stake in environmental cases, probably because there is a constitutional provision on the right to the protection of a healthy environment (Art. 23 of the Constitution) which is much more invoked. Nevertheless we should mention one interesting case. Several residents alongside *Liège Bierset airport*, living in the zone B of the noise-exposure plan, complained with the Constitutional Court of undue noise from night flights out of the airport. They requested that the house-purchase procedure applied to residents of zone A of the noise-exposure plan be applied to them also on the ground that both sets of residents were subjected to identical noise levels and therefore there could not be a difference in their legal treatment. The Court noted that the legislator's objective was to protect residents living alongside airports from the noise of airport operations. It had accordingly exercised environment-protection and anti-noise powers and powers with regard to airport and airfield facilities and operation, and was required to guarantee respect for private life under Article 22 (2) of the Constitution. In its statement of reasons concerning Article 22 of the Constitution, the Constitutional Court noted that the constitution had sought to make that article consistent with Article 8 ECHR, and it referred to the ECtHR judgments of 21 February 1990 in *Powell and Rayner* v. United Kingdom and 2 October 2001 in *Hatton* v. United Kingdom. The appellants challenged the relevance of the 70 dB (A) maximum set for distinguishing zone A from zone B in the noise-exposure plan, given that specialist scientific studies described as unbearable any noise exceeding 66 dB (A) when "L_{dn}" was used as the indicator. The Court noted that none of the reports by the different experts established that residents living alongside *Bierset* airport could occupy their houses without unreasonable disturbance to their private lives. Soundproofing could reduce the noise levels sufficiently to remove the danger to residents' health but they would still be unable to leave doors or windows open. Consequently, in the Court's view, residents in zone B, in terms of their right to respect for private and family life, were essentially in the same predicament as those in zone A, with the result that the difference in treatment which the appellants had complained of could not reasonably be justified. The Court consequently upheld the ground of appeal[60].

[58] A. Van Oevelen, 'Civielrechtelijke aansprakelijkheid voor milieuschade', in Centrum voor Beroepsvervolmaking in de Rechten – UIA, *Rechtspraktijk en milieubescherming. Antwerps Juristencongres 1991*, Kluwer rechtswetenschappen, Antwerpen, p. 139.

[59] A. Van Oevelen, *loc.cit.*, p. 151-154; H. Bocken, 'Aansprakelijkheid voor schade veroorzaakt door milieuverontreiniging naar Belgisch recht' in H. Bocken & D. Ryckbost, *Verzekering van Milieuschade/ L'assurance des dommages causés par la pollution/Insurance of Environmental Damage*, E. Story-Scientia, 1991, p. 63.

[60] Constitutional Court, n° 51/2003, 30 April 2003, *vzw Net Sky and Others* v. *Walloon Government.*

11. How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?

In such a case in which the validity of an EU legal act would be directly (e.g. Regulation) or indirectly (domestic legislation transposing directives) challenged, the Constitutional Court would refer most probably the case to the ECJ, asking the ECJ to check the validity of the EU legal act against Art. 17 of the Charter of Fundamental Rights of the EU.

In contrast with most of the Constitutional Courts of the Member States who seems to be more than reluctant to start a dialogue with the ECJ[61], the Belgian Constitutional Court has shown very large openness to EU law and the case law of the ECJ. In the period 2009-2010 15,6 % of the cases of the Belgian Constitutional Court were EU related cases[62]. Till the beginning of 2014 the Constitutional Court has referred 23 cases for a preliminary ruling to the ECJ and adjudicated 18 of them after having received the answer of the ECJ. This is a very high number compared with other Constitutional Courts, most of them never referred a case[63]. The Court is applying the answers received from the ECJ, without reservation, although utilizing the room for manoeuvre left to the fullest extent possible. Also in cases where on the basis of the *CILFIT*-criteria the Court feels no need to refer interpretation or validity questions to the ECJ, the case-law of the ECJ is quoted and applied frequently. In the period 2009-2010 the Constitutional Court referred in 20,75 % of the EU law related cases to the case law of the ECJ[64].

12. Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?

For the moment no property right cases have been referred to the ECJ.

Two cases:

1) A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.

What could be the obligation of the state?
Could the inhabitants rely on the public remedies procedure?

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[61] P. Popelier, "Judicial conversations in multilevel constitutionalism. The Belgian case", in M. Claes, M. de Visser, P. Popelier, e.a., (eds.*), Constitutional Conversations in Europe. Actors, Topics and Procedures*, (Ius Commune Europeaum; 107), Cambridge, Intersentia, 2012, p. 82-83.

[62] *Ibid.,* p. 81-82.

[63] Only the Constitutional Courts of Austria (4 cases), and recently also the Courts of Italy (1 case), Lithuania (1 case), Spain (1 case) and, very recently, Germany (1 case) have referred cases to the ECJ. Some Courts are even displaying an aggressive resistance to the ECJ: J. Komárek, "The Place of Constitutional Courts in the EU", *European Constitutional Law Review,* 2013, p. 420-450.

[64] P. Popelier, "Judicial conversations in multilevel constitutionalism. The Belgian case", *loc. cit.,* p. 85-86.

If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

Soil pollution sanitation is regulated by specific legislation in the three regions of Belgium. As the Flemish Region is concerned, according to the applicable legislation[65], a distinction is made between historical (occurred before29 October 1995), new (occurred after 28 October 1995) and mixed soil pollution. New soil pollution must be remediated if the soil pollution exceeds the soil remediation standards, while historical pollution must be remediated as the government decides that it poses a 'serious hazard'. In case of mixed pollution, one has to determine if the largest part is historical or new. Let's assume in this case that it is historical and that the government decides on the basis of a risk analysis that there is a serious hazard, so that the whole pollution has to be treated as historical under the Decree. The remediation obligation lies in the first place with the *operator*, if on the land where the pollution *originated*[66] an establishment is located for which an environmental licence or notification is required. So in this case the operator of the factory has the obligation to remediate the soil pollution (not only of its own properties) on his own expense, provided off course that it can be proven that the soil is contaminated by its emissions. For other forms of damages civil fault based liability will play a role, and the question will arise if a fault can be proven, as well as the causal link between that fault and he damage[67].

When the license would be withdrawn by the authorities and this is clearly motived by e.g. the violation of environmental standards or the general duty of (environmental) care there would not be a case for liability of the authorities, provided that this measure is not found disproportionate, in other words if it is obvious that another measure could solve the problem in a less burdensome way.

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2) How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.

Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)? Do they have to annul the operation permit first?

The operator of the waste disposal site would most probably violate applicable standards. According to Art.5.2.1.6. VLAREM II (Order of the Flemish Government of 1 June 1995 concerning General and Sectoral provisions relating to Environmental Safety), a provision applicable to the operator of any waste management facility: "*Using appropriate means particular to the responsible operation of the establishment, the operator* ***prevents and controls*** *dust, gas, aerosols, smoke* ***or unpleasant odours****. The operator takes all possible measures to minimise polluting emissions.* ***Any nuisance caused may not exceed acceptable limits nor should it go beyond the normal nuisance caused by neighbours****."* Violating a legal provision is considered to be a fault in the sense of Art. 1382 Civil Code concerning

[65] Decree of 27 October 2006 on soil remediation and soil protection, replacing the initial decree of 22 February 1995 on Soil Remediation. See on the initial legislation: L. Lavrysen, "Legislation on soil remediation in Belgium (Flemish Region)", in G. Cordini & A. Postiglione (eds.), *Prevention and Remedying of Environmental Damage, Bruylant, Brussels,* 2005, p. 71- 87. See on the new legislation: E. De Pue, L. Lavrysen & P. Stryckers, *Milieuzakboekje 2013*, Wolters Kluwer Belgium, p. 593-647.

[66] According to the definitions of the Decree that it the land where the emissions took place that directly or indirectly caused the soil pollution.

[67] See for a case in which the operator of an asbestos plant was held liable for health damages caused in the period 1960-2000 and a compensation of € 250.000 was awarded to the children of couple that died from asbestos related cancer: District Court of Brussels, 28 November 2011, *Consorts J. v. nv E*, *TMR* 2012, p. 167-184.

fault based liability. So if the victims can prove their damage and the causal link between the damage and the fault of the operator, the operator has to restore the situation. Given that causing such an odour is illegal, a civil judge can impose to refrain from doing so, under the threat of a penalty per day of non-observance of the court order and to financial compensate the damage for the past (given the fact that reaching a final judgment will take much time). Because the environmental permit cannot authorise such smell, there is no need to challenge the permit itself. Off course the situation can also be addressed by administrative measures and sanctions, going to the withdrawal of the permit for violating applicable operating conditions, and to criminal sanctions.