Recent Developments in Environmental Law – Belgium

(April 2015- April 2016)

I. Main developments in legislation

a. Belgium

- New Cooperation Agreement of 5 June 2015 between the Federal State and the Regions transposing the Seveso III Directive

- New Cooperation Agreement of 2 April 2015 between the Regions updating the Cooperation Agreement on Packaging Waste

- Cooperation Agreement of 24 April 2015 between the Regions introducing road-charges (per km) for lorries with effect on April 1st 2016

b. Federal

- Act of 28 June 2015 – Prolongation (or restart) of Nuclear Power Plants till 2022-2025 (with 10 years, from 40 to 50 years compared with original phase out Act of 31 January 2003) – Demand for Annulment pending before Constitutional Court – Various court cases concerning prolongation of permits pending

c. Flemish Region

- The legislation on the production and use of Manure has been strengthened again by Decree of 12 June 2015

- Executive Order of 27 November 2015 executing the Integrated Permit Decree (see report on the questionnaire)

II. Jurisprudence

Constitutional Court, N° 7/2016, 21 January 2016 – Moral damages for ENGOs

In a criminal case pending before the Criminal Court of East Flanders, Ghent Division, concerning illegal hunting practices, a bird protection organisation (*Vogelbescherming Vlaanderen*) is acting as a civil party on the basis of the case law of the Supreme Court of 11 June 2013 and is claiming 1.900 euro for material and moral damages. That Court has established case law according which it is impossible to award the bird protection organisation a sum per bird killed as they belong to no-one. In the absence of statutory law, the moral damage of an environmental NGO can according that Court only be compensated symbolically by awarding 1 euro compensation. The Bird Protection Organisation argued that in doing so, it was discriminated in comparison with other legal and natural persons that are entitled to receive full

compensation of their moral damages. The Court referred that constitutional issue to the Constitutional Court for a preliminary ruling.
The Constitutional Court comes indeed to the conclusion that the provision of the Civil Code (Art. 1382) concerning fault based liability is violating the Arts. 10 and 11 of the Constitution if it is interpreted in such a way that Environmental NGO's can only claim one symbolic euro as compensation for moral damages. The Court argues that the moral disadvantage an environmental NGO may suffer due to the degradation of the collective interest in the defence, of which it is established, is in several respects special. In the first place that disadvantage does not coincide with the ecological damage caused, since ecological damage constitutes damage to nature, so that the whole of society is harmed. The damage concern indeed goods such as wildlife, water and air, belonging to the category of *res nullius* or *res communes*. Furthermore, the damage to non-appropriated environmental components can as a rule not be estimated with mathematical precision, because it involves non-economic losses. Under civil liability judges must assess the damage *in concreto* and they may base it on equity if there are no other means to determine it. The compensation must as much as possible reflect reality, even in case of moral damage. It should be possible that in case of moral damage of an environmental NGO the judge estimate the damage *in concreto*. He should take into consideration the statutory objectives of the NGO, the extend of its activities, its efforts in view of realising its objectives and the seriousness of the environmental damage at stake. Limiting the moral damage to one symbolic euro is in that respect not justified. It would harm in a disproportionate manner the interests of environmental NGOs that play an important role in guaranteeing the constitutional right of the protection of a healthy environment. So the Court is promoting another interpretation. And the Court to conclude that "*Article 1382 of the Civil Code does not infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 23 and 27 of the Constitution and Article 1 of the First Additional Protocol of the European Human Rights Convention in the interpretation that it does not preclude to grant to a legal entity pursuing a collective interest, such as the protection of the environment or specific components of it, a compensation for moral damages to that collective interest, that goes beyond the symbolic sum of one euro.*" That interpretation, that is consistent with the Constitution, is binding for the referring judge and in fact also for other judges confronted with similar cases. The judgement should put an end to diverging approaches in the case law. Some Courts have awarded in the past already full compensation for moral damages of environmental NGOs.

Constitutional Court, N° 12/2016, 27 January 2016 – Relaxation of standards concerning non-ionizing radiation

The Ordinance of the Brussels Capital Region of 3 April 2014 is lowering down the very strict standards for non-ionizing radiation contained in the Ordinance of 1 March 2007. The main reason was that with the very strict standards the 4G Network could not be operated in Brussels in a viable economic way and would also cause visual harm by multiplying the number of needed antenna's to ensure sufficient coverage. The original standards, based on the precautionary principle, used to be 200 times stricter than those recommended by the International Commission on Non- Ionizing Radiation Protection (ICNIRP) » (Guidelines for limiting exposure to time -varying electric, magnetic, and electromagnetic fields (up to 300 GHz), 1998, http://www.icnirp.org/), and would still be 50 times stricter, after the lowering down. Given the great number of studies reviewed by the legislator that did not show any harm when that standard would be respected, the installation of a scientific commission to follow up the development of science and the evaluation of the legislation, the Court was of the opinion that those new standards were not in breach of the precautionary principle, nor the stand still principle derived from art. 23 of the Constitution or the right to respect private and family life. The Court however ruled that the exclusion of balconies of any protection was violating art. 10 and 11 of the Constitution.

The simplification of the procedure to get permission to install antennas was not found in violation of the transparency provision of art. 32 of the Constitution, nor art. 6 of the Aarhus Convention.

Constitutional Court, N° 57/2016, 28 April 2016 – Decree of the Flemish Region Amending Nature and Forest Law – Art. 7 Aarhus Convention

The Decree introduces the Flemish Natura 2000 Programme that is intended to realise the conservation objectives for the Natura 2000 sites. It provides also for a Programmatic Approach to reduce deposits of Nitrogen and for Natura 2000 Managements Plans. Those plans may contain measures that are binding for citizens and e.g. provide for far reaching restrictions for certain agricultural practices in certain areas. The resulting restrictions for property rights, without compensation, were found *in abstracto* justified, provided that in individual and exceptional cases of hardship, ordinary judges can provide for fair compensation. The Court found also a lacuna in the legislation, in cases the aforementioned plans and programmes would not be subject to SEA, they would not be subject to public participation and as a consequence art. 7 of the Aarhus Convention would be violated, because it do not concerns only plans that can have a negative effect on the environment, but also those with positive effects.

Court of Appeal, Ghent, 7 May 2015 / Court of Appeal, Ghent, 18 March 2016 – Organised CITES Crime

On 27 June 2014, the Criminal Court of First Instance of East Flanders (Ghent division) in Belgium pronounced judgement in an important case of illegal trade in protected and endangered birds. The case is the result of a long and extensive judicial inquiry, including international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and The Netherlands. Four defendants have been found guilty of forgery of breeder's declarations and CITES-certificates regarding birds (of prey) listed in Annex A of the EU CITES-regulation 338/97 (which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora within the European Union). Eggs and chicks of the birds, mainly birds of prey, were stolen from the wild among others in the south of France or Spain, and handed over to collaborators responsible for hatching out. The young birds were then hand-reared and ringed. Through forging of rings and breeder's declarations, the defendants obtained CITES-certificates for captive-born and bred species, which allowed them to commercialize the birds in spite of the general prohibition with respect to Annex A species. The birds species included among others Egyptian Vulture (*Neophron percopterus*), African Fish Eagle (*Halliaeetus vocifer*), Imperial Eagle (*Aquila heliaca*), Bald eagle (*Halliaeetus leucocephalus),* Bonelli's Eagle (*Aquila fasciata*), Golden Eagle (*Aquila chrysaetos*), Booted Eagle (*Hieraaetus pennatus*), several falcon species such as Peregrine (*Falco peregrines*), Merlin (*Falco columbarius*), Hobby (*Falco subbuteo*), Red-footed Falcon (*Falco vespertinus*), Lesser Kestrel (*Falco naumanni*), Black-winged Kite (*Elanus caeruleus*), Red Kite (*Milvus milvus*), Black Kite (*Milvus migrans*) but also Spoonbill (*Platalea leucorodia*), Great Bustard (*Otis tarda*), Great Grey Owl (*Strix laponica*), Snowy Owl (*Nyctea scandiaca*), Short-eared Owl (*Asio flammeus*).
The four defendants were also found guilty of participating in a criminal organisation with international branches in Spain, the United Kingdom, Austria, Germany, France and The Netherlands. The purpose of this criminal organisation was the withdrawal of protected bird species from their habitats, obtaining forged CITES-certificates and finally, marketing the birds. Typical of the criminal organisation was a clear hierarchy and division of tasks, the use of (police) officials and the creation of an animal zoo to obtain credibility and access to the market. The defendants were also convicted of fraud regarding CITES export permits, the failure to keep a CITES-register and the use of illegal traps and nets.
The birds of prey commerce was extremely profitable. Bonelli's Eagles (*Aquila fasciata*) were sold for 10.000 euro, Bald Eagle (*Haliaeetus leucocephalus*) for 5.000 euro, African Fish Eagle (*Haliaeetus vocifer*)

for 6.000 euro and Booted Eagle (*Hieraaetus pennatus*) for 5.000 euro.
The leading defendant and his wife were convicted of the laundering of the profits through a contractors company. The court underlined that international trade in endangered plant- and animal species has approached a scale and lucrativity comparable to international drugs and arms trafficking. The defendants took advantage of the lack of political priority and thus enforcement of the CITES-regulations. In the decision the courts stresses that the defendants committed a direct and irreversible assault on biodiversity. For profit, the defendants seriously undermined national and international efforts to preserve and protect these already vulnerable bird species.
The four defendants were sentenced to 4 years (1 year suspended), 2 years (1 year suspended), 18 months (suspended) and 1 year (suspended). The court also imposed fines of 90.000 euro, 30.000 euro and 12.000 euro. The court confiscated 835.800 euro of illegal gains of the trade (including real estate). All seized birds were confiscated and entrusted to the Belgian CITES-authority.
The Bird Protection Organisation was recognised as civil party, but as its main claimed damages were considered as pure moral, only a symbolic 1 euro compensation for moral damages was awarded.

The Court of Appeal of Ghent has in its judgement of 7 May 2015, given *in absentia* of the main defendants, confirmed the judgment of the Court of First Instance, except on one aspect. The Court found that het Bird Protection Organisation was entitled to the full compensation of its moral damages. The Court judged that those moral damages could be assessed *ex aequo et bono* to be € 15.000. So the total damages to pay to the Bird Protection Organisation have been increased from € 251 to € 15.250. In its final judgment of 18 March 2016 this has been confirmed.

III. **Other**

The Belgian Climate Case will take much time. A first judgement on the language to be used in the procedure, has been appealed by Flemish Government.[1]

With some 5 years delay the various governments in Belgium reached during COP 21 an agreement on the intra Belgian burden sharing for the 2020 objectives.

[1] http://klimaatzaak.eu/nl/