

# AIR QUALITY LAW IN BELGIUM

Avosetta Meeting London 24-25 May 2019

Prof. Dr. L. Lavrysen<sup>1</sup>

Centre for Environmental & Energy Law, Ghent University

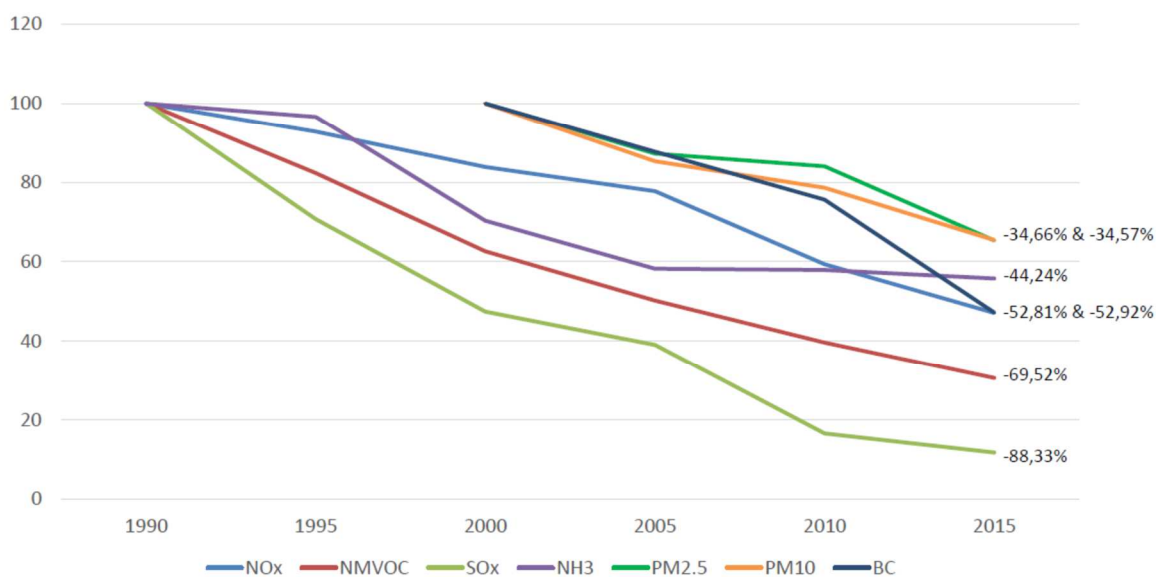
## Air Quality: National Context

- Most concentrations of air pollutants in Belgium are below EU limits. WHO targets, however, are generally not met in Belgium.

Averaging time	1-hour		Max 8-hour		24-hour		Year	
	EU	WHO	EU	WHO	EU	WHO	EU	WHO
SO <sub>2</sub>	😊	😊			😊	😞		
NO <sub>2</sub>	😊						😞	😞
PM <sub>10</sub>					😊	😞	😊	😞
PM <sub>2.5</sub>						😞	😊	😞
O <sub>3</sub>			😞	😞		😞		

1

Evolution of the emissions of air pollutants in Belgium (from 1990, in % - Source: NEC 2017)



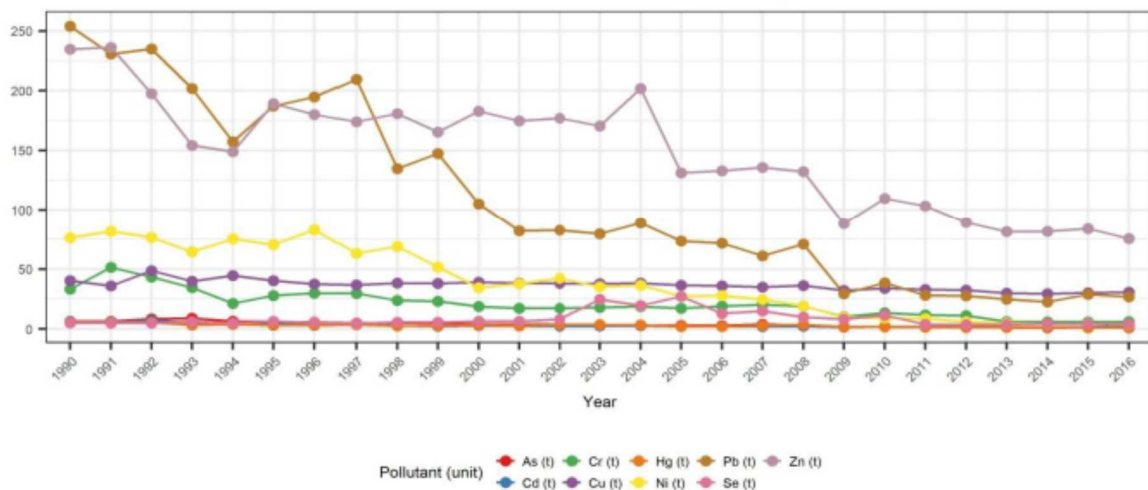
<sup>1</sup> Thanks to Delphine Misonne for her valuable remarks on an earlier draft and to Sofie Vereycken for editing.

Even though air quality has improved over the past years, air pollution still has a significant health and economic impact in Belgium. A large share of the air pollutants originates from non-ETS sectors. Put together, transport and domestic heating represent more than half of the emissions for most air pollutants.<sup>2</sup> (See also the Appendix)

Emissions from *energy production* and from *the most important industrial sectors* (petroleum, iron and steel, chemicals, food processing, beverages and tobacco...) all went down for the majority of pollutants. *Cement production* is the key source for NO<sub>x</sub>, SO<sub>x</sub>, Hg, Se and PCB. It becomes the most important source for PCB emissions due to the large decrease of PCB emissions in the iron and steel sector. The absolute SO<sub>2</sub> and Hg emissions remained stable between 1990 and 2016, but the emissions of other sectors have decreased. *Road transport* remains the largest source of NO<sub>x</sub> emissions. The *residential sector* becomes the principal key source of dioxins due to the huge emission decline in the electricity sector and the sector of waste incineration. This sector is the most important key source for particulate matter, dioxins and PAH's due to the high contribution of wood for residential heating. It furthermore becomes a key source for heavy metals. As the absolute heavy metal emissions remain rather stable, this is mainly due to emission changes in other sectors. *Manure management* becomes the second most important key sector for NMVOC because absolute emissions from the chemical and coating sector decreased strongly since 1990. It is one of the most important key sources for NH<sub>3</sub> emissions. Emissions of animal manure applied to soils decreased in 2016 compared to 1990, but this sector remains the most important key sector for NH<sub>3</sub> emissions.<sup>3</sup>

2

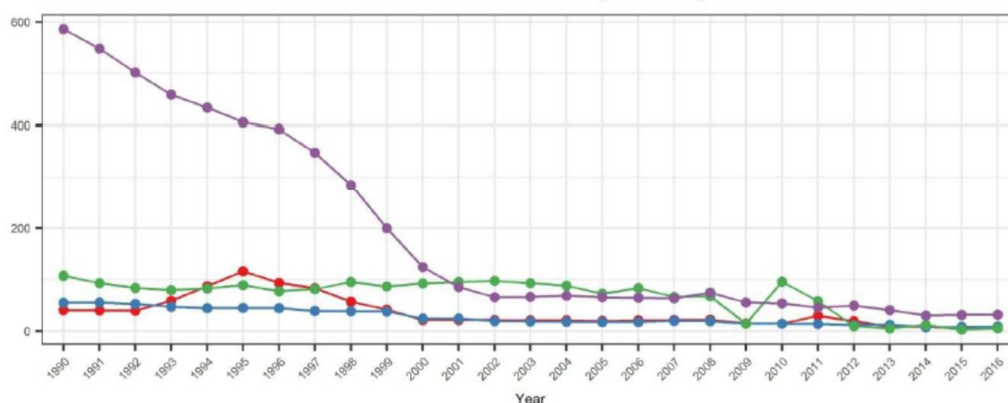
**Total emission trend of (heavy) metals**



<sup>2</sup> Charlotte VANPOUCKE, *Air Quality In Belgium. Road transport sector*, Belgian National Debate on Carbon Pricing, Brussels, 2017, [https://www.climat.be/files/8515/3111/9866/14\\_Air\\_quality\\_CV.pdf](https://www.climat.be/files/8515/3111/9866/14_Air_quality_CV.pdf).

<sup>3</sup> *Informative Inventory Report about Belgium's air emissions submitted under the Convention on Long Range Transboundary Air Pollution CLRTAP and National Emission Ceiling Directive NECD*, March 2018, p. 18-19; [http://www.ircel.be/nl/luchtkwaliteit/emissies/IIR\\_BE.pdf](http://www.ircel.be/nl/luchtkwaliteit/emissies/IIR_BE.pdf).

### Total emission trend of Dioxins, PAHs, HCB and PCB



2. On the website of the *Belgian Interregional Environment Agency (IRCEL - CELINE)*<sup>4</sup> the results of the measurements of the main pollutants covered by the EU Ambient Air Quality Directive through the automatic measurements stations can be found in nearly real-time. The website also informs on exceedances of the EU limit values. They show that, in recent years, there were no exceedances of the limit values of *particular matter*. For *nitrogen dioxide* in recent years there are exceedances in 3 to 4 measurements stations in the Brussels and Antwerp region. According to the provisional data of last year (very dry with a hot summer) for *ozone*, several measurements stations recorded exceedances of the target value for the protection of human health.

The other pollutants are monitored and reported separately by the regions. In *Flanders*, there were no exceedances of *sulphur dioxide*, *carbon monoxide*, *lead* or *benzene* limit values measured, but the *long term O<sub>3</sub> objectives for the protection of health and for the protection of vegetation* were not met in (nearly) every measurement station. Where *arsenic*, *cadmium* and *nickel* are concerned, the target values of Directive 2004/107/EC were not respected in respective 3, 1 and 1 out of 12 measurement stations, while in all 8 stations the values for *polycyclic aromatic hydrocarbons* were met.<sup>5</sup>

3

Yet, it appears that those results of the official measurements stations do not tell the whole story. The main question is whether the sites where the measurement stations are located are fully representative and respecting of the criteria laid down in Annex III of the AQD, in particular where it prescribes that sampling points directed at the protection of human health shall be sited in such a way as to provide data on the areas within zones and agglomerations where *the highest concentrations occur to which the population is likely to be directly or indirectly exposed for a period which is significant in relation to the averaging period of the limit value(s)* and levels in other areas within the zones and agglomerations *which are representative of the exposure of the general population*. In May 2018 a citizen science project called "*CurieuzeNeuzen Vlaanderen*" (Curious Noses Flanders) was conducted in which 20.000 citizens measured the NO<sub>2</sub> air quality near their own house

<sup>4</sup> <http://www.ircel.be/en>.

<sup>5</sup> VLAAMSE MILIEUMAATSCHAPPIJ, *Jaarrapport Lucht. Emissies 2000-2016 en 2017 luchtkwaliteit in Vlaanderen*, p. 6; [http://www.vmm.be/bestanden/VMM-2017-LKT\\_TW.pdf](http://www.vmm.be/bestanden/VMM-2017-LKT_TW.pdf).

Brussels Capital Region: <https://environnement.brussels/thematiques/air-climat/qualite-de-lair/reseau-de-mesure-de-la-qualite-de-lair>.

Walloon Region: <http://193.190.182.213/WebAirQuality/Accueil.aspx>.

during one month. In 2,3 % of the cases – mainly in street canyons – an exceedance of the limit value was measured (that would mean that around 150.000 people are concerned)<sup>6</sup>.

On 10 October 2018, the President of the Dutch-speaking Court of First Instance of Brussels issued an order in the case of *Greenpeace Belgium v Flemish Region*<sup>7</sup>. According to the applicant, the Flemish Region violated its obligations under the Air Quality Directive due to its failure to communicate the information obtained through modelling techniques and detailed studies to the European Commission. While the directive holds that measurements shall be used to assess the ambient air quality as a minimum requirement, those techniques may be supplemented by modelling techniques and/or indicative measurements to provide adequate information on the spatial distribution of the ambient air quality. Although not an absolute requirement, it is self-evident for the Court President that when data are collected through other (trustworthy and in accordance with the conditions laid down in the Directive) techniques, that information must be taken into consideration when drawing up policy, implementing the Directive 2008/50/EC and during the actual assessment of the air quality. A finding to the contrary would run counter to the Directive's objective as well as undermine the basic assumption that a fixed measurement is the optimal, most stringent technique for assessing the ambient air quality. Therefore, if the facultative methods indicate that the limit values were not respected, this amounts to a violation of the AQD. Similarly, a violation is established when a Member State has applied indicative measurements and modelling techniques but has not passed this information onto the European Commission. Given the lack of reporting to the European Commission of any data obtained outside of the fixed monitoring stations, the Flemish Region was ordered to provide all information to the European Commission within a time frame of 3 months.<sup>8</sup>

4

3. On 23 November 2009, the European Commission sent a letter of formal notice to Belgium for failing to fully transpose the AQD, followed by reasoned opinions on the same subject on 28 October 2010 and 16 February 2011. An additional letter of formal notice for exceeding PM<sub>10</sub> limits has been sent in 2013, followed by a reasoned opinion on 20 February 2014. As the 3 regions had meanwhile correctly transposed the AQD and no exceedances had been reported, the case did not go further and was eventually closed. On 8 November 2018, the EC again sent formal notice of failure to implement the AQD. According to that letter, Belgium has persistently failed to meet binding limit values for NO<sub>2</sub> in the Brussels region since they came into force in 2010. The Antwerp agglomeration also exceeds permitted values, despite already having been accorded the later deadline of 2015 for entry into force. Although some measures, such as low emission zones, were put in place to combat air pollution, the Commission is concerned that the current measures do not suffice to achieve compliance as soon as possible. Additionally, the Commission questions the way air quality is monitored in Belgium, including the location of measuring points for NO<sub>2</sub> in Brussels.

---

<sup>6</sup> <https://curieuzeneuzen.be/in-english/>.

<sup>7</sup> Nederlandstalige Rechtbank van eerste aanleg Brussel, 10 oktober 2018, noot A. CARETTE, *TMR* 2018, 706-729.

<sup>8</sup> Sofie VEREYCKEN, A partial win for Greenpeace Belgium in air pollution case against the Flemish Region. World Commission on Environmental Law (WCEL) - International Union for Conservation of Nature (IUCN), 2018, <https://www.iucn.org/news/world-commission-environmental-law/201811/a-partial-win-greenpeace-belgium-air-pollution-case-against-flemish-region>.

## Air Quality Standards

4. Prior to the first Directives with Air Quality Standards (Directive 80/779/EEC, Directive 82/884/EEC; Directive 85/203/EEC; Directive 92/72/EEC), there was only one domestic local air quality standard, namely for lead in a suburb of Antwerp (Hoboken) to combat pollution of the local non-ferro industry (introduced in 1978).

5. De AQD air quality standards are nearly literally transposed in the respective regional regulations. In the Flemish Region, they are laid down in Chapter 2.5 (and Annexes) of VLAREM II<sup>9</sup>, in application of the Decree of 5 April 1995 on general provisions concerning environmental policy. In the Brussels Capital Region, the air quality standards are laid down in various Regulations of the Regional Government in application of the Ordinance of 2 May 2013 containing the Brussels Code for Air, Climate and Energy. In the Walloon Region, they can also be found in a regulation of the Walloon Government.<sup>10</sup>

6. There are no standards that are more stringent compared to those of the AQD. In the Flemish region, however, there are a few air quality standards for pollutants not covered by EU legislation. That is the case for *chlorine, hydrogen chloride, monovinyl chloride, hydrogen fluoride, asbestos* and *dust deposits*. They are inspired by the German TA Luft 1986.

5

## Air Quality Monitoring and Modelling

7. The automatic air quality monitoring network for NO<sub>2</sub>, PM<sub>10</sub>, PM<sub>2,5</sub> and O<sub>3</sub> is run by the *Belgian Interregional Environment Agency (IRCEL - CELINE)* and is complemented by regional networks run by the regional administrations for measuring other pollutants. The number of measurement stations has over time gone up to 72 for PM and to 41 for O<sub>3</sub> and NO<sub>2</sub>. The number of SO<sub>2</sub> monitoring stations has dropped from 81 in 1990 to 54 nowadays.<sup>11</sup> As mentioned before, the European Commission is questioning the location of measuring points for NO<sub>2</sub> in Brussels. That issue is also at the core of a reference for a preliminary ruling from the Court of First Instance of Brussels of 29 December 2017 in the case *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer* (Case C-723/17): “Should Article 4(3) and the second subparagraph of Article 19(1) of the Treaty on European Union, read in conjunction with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union and Articles 6 and 7 of Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe, be interpreted as meaning that, when it is alleged that a Member State has not sited the sampling points

---

<sup>9</sup> B.VI.Reg. van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne.

<sup>10</sup> A.G.w. du 15 juillet 2010 relatif à l'évaluation et la gestion de la qualité de l'air ambiant.

<sup>11</sup> <http://www.ircel.be/en/air-quality/measurements/monitoring-stations/history>.

*in a zone in accordance with the criteria set out in point B.1.(a) of Annex III to Directive 2008/50, it is for the national courts, on application by individuals who are directly affected by the exceedance of the limit values referred to in Article 13(1) of that directive, to examine whether the sampling points were sited in accordance with those criteria and, if they were not, to take all necessary measures against the national authority, such as an order, with a view to ensuring that the sampling points are sited in accordance with those criteria?”. In her Opinion AG Kokott suggest to answer that question as follows: “The national courts must, on application by affected individuals, examine whether sampling points were sited in accordance with the criteria set out in point B.1.(a) of Annex III to Directive 2008/50/EC on ambient air quality and cleaner air for Europe and, if they were not, must take all necessary measures within the scope of their judicial powers against the national authority with a view to ensuring that the sampling points are sited in accordance with those criteria. Such a judicial decision may give rise to the obligation to site sampling points at certain locations if it is clear from the available information that sampling points must be sited there. Otherwise the competent authorities may be obliged to undertake investigations in order to identify the correct locations.”<sup>12</sup>*

8. As indicated, there is a lot of discussion on the proper siting of the measurement equipment.

9. It has been reported that “Diesel gate” played a role in some miscalculations. There was an important decrease of particulate matter (and BC) emissions due to the introduction of highly efficient diesel particulate filters (since EURO-5/6), yet NO<sub>x</sub> emissions did not decrease as expected due to “Diesel gate”<sup>13</sup>. Recently, the Flemish Environmental Agency has introduced a new “Operational Street Pollution Model” that takes into account street canyons and diesel gate and is believed to collide better with reality than the former model. One can zoom in to street level.<sup>14</sup>

6

## **National Air Quality Plans and Governance**

10. As air quality policy is a regional competence, there is no National Air Quality Plan as such. In the context of the NEC directive, a reduction program had to be drawn up in both 2002 and 2006, which describes how the emission ceilings would be met. On 9 March 2007 the Flemish Government approved the Flemish contribution to the *Belgian Reduction Program in the context of the NEC directive*<sup>15</sup>. This contribution was compiled with contributions from the other regions and the federal government into a National Program.<sup>16</sup>

---

<sup>12</sup> See also: Jeroen DE CONINCK & Tinneke HUYGHE, “Het recht op ‘schone lucht’. Luchtkwaliteitsplannen en lage-emissiezones als passende maatregelen: voldoen ze aan het (Europees) recht en het EVRM ? – Vlaanderen en Brussel doorgelicht”, *MER* 2018, p. 119.

<sup>13</sup> Charlotte VANPOUCKE, *o.c.*, p. 16; Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, p. 106-107.

<sup>14</sup> <http://www.vmm.be/data/stikstofdioxide-no2-jaargemiddelde>.

<sup>15</sup> [https://www.lne.be/sites/default/files/atoms/files/1nec-programma\\_vlaanderen\\_2006.pdf](https://www.lne.be/sites/default/files/atoms/files/1nec-programma_vlaanderen_2006.pdf).

<sup>16</sup> [https://www.lne.be/sites/default/files/atoms/files/6nec-programma\\_belgie\\_2006.pdf](https://www.lne.be/sites/default/files/atoms/files/6nec-programma_belgie_2006.pdf).



Furthermore, a *Flemish Air Quality Plan 2012–2015* was adopted in the context of the application of the postponement of the deadline of meeting the standards of NO<sub>2</sub>. That plan was said to contain measures to achieve the air quality standards for NO<sub>2</sub> as quickly as possible and was approved by the Flemish Government on 30 March 2012. The European Commission granted Belgium on 6 July 2012 a deferment for the standards to 2015 (instead of 2010). The additional measures to meet the standards include measures for the whole Flemish Region, on the one hand, and additional measures approved by the city of Antwerp and the Antwerp Port Authority (the 2 zones where according to measurement network the standards were not respected) on the other hand. In 2016 it became clear that, although the air quality in both zones had improved, limit values for 2015 had not been met in several places in Flanders – not solely in those two zones in Antwerp.<sup>17</sup>

The Judgment of 10 October 2018 of the President of the Dutch-speaking Court of First Instance of Brussels in the case of *Greenpeace Belgium v Flemish Region* ordered the Flemish Region to reassess the existing air quality plan for the Antwerp agglomeration, to expand its scope to the entire territory of the Flemish Region and to formulate measures taking into account all the data obtained, not solely those of the fixed measurements. The government must do so within a period of one year, subject to a penalty payment of 1.000 EUR per day of delay, with a maximum of 5.000.000 EUR.<sup>18</sup> The European Commission has, as mentioned before, started an infringement procedure on 8 November 2018.<sup>19</sup>

On 20 July 2018, the Flemish Government approved the *draft Air Policy Plan 2030*.<sup>20</sup> That marks one route to significantly improve air quality in Flanders by 2030. This draft plan includes objectives in the short term (as quickly as possible), in the medium term (by 2030) and in the long term (by 2050). In short, it means that the Flemish Government is committed to achieving the emission ceilings and the European air quality objectives. Flanders want also to meet the (stricter) WHO recommended exposure limits, which has a positive impact on health of the population. The final version after public consultation is still to be approved.

The Brussels-Capital Region has a *Regional Air-Climate-Energy Plan (2016)*<sup>21</sup>, which, however, is not intended as such for the implementation of the AQD. The Walloon Region has drafted an *Air-Climate-Energy Plan 2030* that shall be submitted to public consultation.<sup>22</sup> The “Air” part has been added to the Walloon Contribution to the draft National Energy Climate Plan in the framework of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

---

<sup>17</sup> [https://www.lne.be/sites/default/files/atoms/files/VR\\_2017\\_1301\\_MED.0004-2BISLuchtkwaliteitsplan.pdf](https://www.lne.be/sites/default/files/atoms/files/VR_2017_1301_MED.0004-2BISLuchtkwaliteitsplan.pdf);

Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 128-134.

<sup>18</sup> Sofie VEREYCKEN, *o.c.*

<sup>19</sup> See par. 3 above.

<sup>20</sup> [https://www.lne.be/sites/default/files/atoms/files/20180720\\_luchtbeleidsplan.pdf](https://www.lne.be/sites/default/files/atoms/files/20180720_luchtbeleidsplan.pdf).

<sup>21</sup> [http://document.environnement.brussels/opac\\_css/elecfile/PLAN\\_AIR\\_CLIMAT\\_ENERGIE\\_FR\\_DEF.pdf](http://document.environnement.brussels/opac_css/elecfile/PLAN_AIR_CLIMAT_ENERGIE_FR_DEF.pdf);

Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 134-136.

<sup>22</sup> <https://energie.wallonie.be/fr/pace-2030.html?IDC=6238&IDD=127763>.

11. The main federal and regional regulatory measures that contribute towards compliance of the EU AQS and the Belgian NEC Ceiling<sup>23</sup> under Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants<sup>24</sup> consists of general, sectorial and specific emission standards for industries, product standards for combustibles, product standards for heating equipment and periodic control and maintenance obligations, tax differentiation for combustibles and the use of cars, emission standards for cars, trucks and other mobile machines, tax incentives for electric cars, the possibility to restrict activities in periods of smog, etc.. Recently, *low emission zones* have been introduced in Antwerp and Brussels<sup>25</sup> and a new one will start in Ghent in 2020. The Walloon Region has now also its legal framework for introducing such zones<sup>26</sup> For plans and projects with possible impact on air quality, SEA and EIA will have to direct particular attention to the possible impacts on AQDs and measures for minimizing that impact<sup>27</sup>. An important part of those measures consists of implementation or application of EU Environmental Law.

12. On 2 September 2008, the ministers of Environment of the three regions have adopted the protocol that determines the coordination during pollution episodes. The protocol is activated in occurrence of pollution peaks of PM<sub>10</sub> or NO<sub>2</sub>. The task of IRCEL is "to monitor phases of increasing pollution and to warn the agencies responsible appointed by the Regions". More specifically, IRCEL distributes an information bulletin in case increased concentrations of PM<sub>10</sub> and/or NO<sub>2</sub> are forecasted or measured. When the alarm phase is in effect, each Region has to activate the measures as foreseen by the emergency plans for peak concentrations of particulate matter.<sup>28</sup> For example, in

23

Member State	SO <sub>2</sub> reduction compared with 2005		NO <sub>x</sub> reduction compared with 2005		NMVOC reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	43 %	66 %	41 %	59 %	21 %	35 %

Member State	NH <sub>3</sub> reduction compared with 2005		PM <sub>2.5</sub> reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	2 %	13 %	20 %	39 %

<sup>24</sup> See also *The Environmental Implementation Review 2019*, COUNTRY REPORT BELGIUM, p. 21-22;

[http://ec.europa.eu/environment/eir/pdf/report\\_be\\_en.pdf](http://ec.europa.eu/environment/eir/pdf/report_be_en.pdf)

<sup>25</sup> The Constitutional Court found the Brussels Capital Region legislation not breaching the rules that distribute the competencies between federal and regional government, nor property rights, the equality principle and the free movement of persons, goods and services: Constitutional Court, nr.37/2019, 28 February 2019, *Goukens v. Brussels Capital Government*. [https://lez.brussels/sites/default/files/lez\\_note\\_fr\\_vdef.pdf](https://lez.brussels/sites/default/files/lez_note_fr_vdef.pdf); Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 138-144.

<sup>26</sup> Décret du 17 janvier 2019 relatif à la lutte contre la pollution atmosphérique liée à la circulation des véhicules

<sup>27</sup> Erwin DE PUE, Luc LAVRYSEN & Paul STRYCKERS, *Milieuzakboekje 2018*, Kluwer Belgium, p. 611-632.

<sup>28</sup> Brussels Capital Region: <https://qualitedelair.brussels/content/seuils-dalerte>

Walloon Region: <https://www.wallonie.be/fr/dossier/pollution-de-lair-que-faire-en-cas-de-pic-de-pollution>

Flemish Region: <https://www.vlaanderen.be/mobiliteit-en-openbare-werken/duurzame-mobiliteit/smogalarm-maximaal-90-km-per-uur-op-autosnelwegen>.



case of intervention level 1 in the Brussels Capital Region<sup>29</sup>, public transport will be free and speed limits for cars and trucks will be imposed. In case of intervention level 2, there is a ban of road traffic in the whole region. Similar measures as level 1 measures in Brussels can be taken in the Walloon Region. For the Flemish Region, only speed limitations have been foreseen.

13. Regional governments and their administrations are responsible for meeting air quality standards.

14. Requirements for coordinating efforts of different concerned public bodies may be contained in the plans mentioned in par. 10, although it is not clear whether or not they are somehow legally binding for the public bodies concerned. In general there is a lack of coordination in Belgium between the federal and regional authorities in this matter.<sup>30</sup>

### Enforcement of Air Quality Law

15. Every region has its basic enforcement legislation for environmental law that is also applicable on air quality law. It's a combination of administrative and criminal sanctions, a model we find also on the federal level. Supervision is mainly done by environmental inspectorates. Environmental crimes can also be established by the regular federal and local police. The choice of the sanctioning track is generally a prerogative of the public prosecutor<sup>31</sup>.

16. There have been some court cases on air quality law. Apart from the cases already discussed of *Greenpeace Belgium v. Flemish Region*<sup>32</sup> and *Goukens v. Government of the Brussels Capital Region*<sup>33</sup>, the following cases too deserve some attention.

In the case of *Angenon v. Flemish Region*, a case concerning a demand for suspension and annulment of a land use plan and planning permission for the redevelopment of Ghent Railway Station and related projects (including an underground car park for 2.800 cars and a new road-connection

---

<sup>29</sup> See Executive Order of the Brussels Capital Region of 27 November 2008, Amended by Executive Order of 31 May 2018.

<sup>30</sup> See FEDERAL COUNCIL FOR SUSTAINABLE DEVELOPMENT, *Opinion concerning air quality governance in Belgium*, May 2018 ; <https://www.frdo-cfdd.be/sites/default/files/content/download/files/2018a05f.pdf> ; SENATE, *Information Report concerning the necessary cooperation between the federal government, the Communities and the Regions on improvement of air quality, with a view to the promotion of public health*, 2017-2018, doc 6-391/3.

<sup>31</sup> Luc LAVRYSEN, Carole BILLIET & Jan VAN DEN BERGHE, EUFJE Conference 2015. *Protection of the Environment through Criminal Law: the Implementation and Application of the Eco-crime Directive in the EU Member States. BELGIAN REPORT*, <https://biblio.ugent.be/publication/6957798/file/6957799.pdf>.

<sup>32</sup> See paras 2 and 10.

<sup>33</sup> See note 24.

through anature protection area), it was argued that such a plan cannot be approved and such a permit cannot be delivered because that would lead to lasting violation of PM<sub>10</sub>, NO<sub>x</sub> and NO<sub>2</sub> limit values in the vicinity. The Council of State did not accept the argument. The Council held that an urban development permit only grants permission to perform certain construction works and operations and that this, in itself, is not the cause of the emissions. Furthermore, according to the regulations, it is the Flemish Minister for the Environment who must take the necessary measures to ensure that the limit values are not exceeded, to be done via planning and remediation measures at international, Flemish or local level. There is no direct link between the environmental quality standards and permits for concrete projects.<sup>34</sup>

In a similar case *Melen v. Walloon Region*, the Council of State held that the AQD and the transposing Order of the Walloon Government of 15 July 2010 aim to organize air quality assessment and management by developing integrated action plans by area or by agglomeration. Compliance with the limit values and the target values prescribed by these regulations is assessed in relation to a given area or agglomeration, but not in relation to a specific urban development project. They do not imply a general prohibition on granting any permit that could cause additional air pollution, nor that they would impose a compensation obligation between the additional pollution resulting from a licensed project and the additional pollution that results from an existing project.<sup>35</sup>

In the case *Craeynest and Others and ClientEarth v. Brussels Capital Region*, the Dutch-speaking Court of First Instance of Brussels held with reference to the jurisprudence of the CJEU that when limit values are exceeded, the Member State has a clear and unconditional obligation to draw up a plan as referred to in art. 23 (1) of Directive 2008/50/EC. The fact that the competent authorities have a certain freedom of policy in determining the content of that plan does not prevent the judge from issuing an order to the competent authority to draw up that plan. After all, if the limit values are exceeded, the government does not have the policy freedom to refrain from drawing up the plan. However, compared to the obligation to draw up an air quality plan, the rules on the placement of sampling points in the "areas where the highest concentrations occur" do not seem to imply unconditional obligations, compliance with which can be easily enforced by the court or the claim of individuals be checked. Those questions have been referred to the Court of Justice for a preliminary ruling.<sup>36</sup> Apart from the question already mentioned<sup>37</sup>, a second question has been put forward: "*Is a limit value within the meaning of Article 13(1) and Article 23(1) of [Directive 2008/50/EC] exceeded in the case where an exceedance of a limit value with an averaging period of one calendar year, as laid down in Annex XI to that directive, has been established on the basis of the measurement results from one single sampling point within the meaning of Article 7 of that directive, or does such an exceedance occur only when this becomes apparent from the average of the measurement results from all sampling points in a particular zone within the meaning of Directive 2008/50?*". In her Opinion, AG Kokott suggests answering that question as follows: "*A limit value under Annex XI to Directive 2008/50 is exceeded within the meaning of Article 13(1) and Article 23(1) of the directive where the measurement result exceeds one single sampling point within the meaning of Article 7 of that directive.*"

---

<sup>34</sup> RvS nr. 183.359, 26 mei 2008, *Angenon c.s.*, TROS 2008, 316, noot BOUCKAERT, J., ROGGEN, J..

<sup>35</sup> CdE n° 236.809, 15 decembre 2016, *Melen c.s.*, Amén. 2017, 218; APT 2017, 260; CDPK 2017, 531, 532, 553 en 554.

<sup>36</sup> Nederlandstalige Rechtbank van eerste aanleg 15 december 2017, TMR 2018, 228.

<sup>37</sup> See para 7.

17. The absence of a clear link between the limit values of the AQD and project development as illustrated in the case law of the Council of State, as well as the experience that Air Quality Plans seem to be unable to bring conformity within the timeframe set forward, are weakening the enforcement of the AQD. That is probably also because those Plans have no precise legal status in Belgian law, so that it is unclear how they could be enforced against the relevant authorities.

### Regulation of Vehicle Emissions Systems

18. Based on the Federal Act of 21 June 1985 concerning the technical requirements that every land transport vehicle, its components, and the safety accessories must comply with, two Royal Decrees of 26 February 1981, both regularly updated, are implementing the EU vehicle type approval rules. The Appendix of the second Royal Decree simply lists the Directives that are applicable, without transposing the content in domestic law. The Act of 21 June 1985, as amended, deals with supervision, administrative and criminal sanctions. The latter includes imprisonment of ten days to ten years and a fine of eight thousand euros to fifty-six million euros. The specific infringements mentioned in Article 13 (2) of Regulation (EC) No 715/2007, including the use of defeat devices, are not mentioned *as such*, but covered by the general sanction provision. Furthermore, the general principles of the Penal Code apply, including the possibility of forfeiture of illegal benefits, are applicable.

19. The Consumer Organization *Test Aankoop-Test Achats* introduced a class action for damages before the Court of First Instance in Brussels against VW and D'leteren on 30 June 2016. The action was declared admissible on 18 December 2017 and will be treated as an opt-out case. The Consumer Organization is thus entitled to represent all Belgian VW car owners in which the defeat devices have been fitted. In the period July 2018-June 2019, negotiations may be held to come to an agreement on compensation between the parties. Only if no settlement is reached within that time-frame, the Court will go into the substance of the case.<sup>38</sup> Some lawyers have started their own liability cases.<sup>39</sup> There is also a criminal investigation ongoing, centralized in Brussels.<sup>40</sup>

On 16 September 2016, a group of Belgian investors, advised and assisted by *Deminor Recovery Services*, issued proceedings against Volkswagen AG with the Court of Braunschweig. The investors are seeking compensation (1,4 billion euro) for losses suffered on their purchases of Volkswagen securities due to the company's failure to timely and correctly inform them about the use of defeat devices in various car models and the final consequences thereof on the company's earnings, outlook and financial situation.

---

<sup>38</sup> <https://www.test-aankoop.be/mobiliteit/auto-s/dossier/dieselgate-wij-zijn-allemaal-bedrogen/onze-acties-en-eisen>.

<sup>39</sup> <https://mijnadvocaten.be/aansprakelijkheid/volkswagenfraude-schadevergoeding/>.

<sup>40</sup> <https://mijnadvocaten.be/aansprakelijkheid/centralisatie-strafdossier-volkswagen/>.

## Case Study

She could bring an action before the civil court (Court of First Instance) as Lies Craeynest and Others have done (see above). That action should be brought against the concerned Region as drawing up air quality plans is considered to be a responsibility of the regional environmental minister and his administration (e.g. art. 2.5.2.1.3 VLAREM II as the Flemish Region is concerned). In case the road is managed by the local authority, one should also call that authority into the procedure. The summons of two parties will cost around 200 EUR. Additionally, a court fee of 165 EUR is applicable. In case of appeal, an additional court fee of 400 EUR is due. One should hire a lawyer, whereby it is fair to say that his honorarium will most likely exceed 5000 EUR. If the case is lost, a contribution in the attorney fee of the opposing party or parties is due and is fixed by the Court. A basic sum (per winning party) of € 1.440 is mentioned, but it will be fixed by the Court *in concreto* (minimum € 90 /maximum € 12.000). In case of appeal, one has to double both the lawyer fee and the contribution for the fees of the winning parties.

She could also count on a very active citizen movement on these issues at the moment, with new types of actions: school streets blockades, citizen science, demonstrations. She would not be alone in her fight. There is a very active citizen stand on that issue, with myriads of associations, be they formally organized or not (*filter café filtré*<sup>41</sup>, *curieuse neuzen*, *Ademloos*<sup>42</sup>, *Clean Air BXL*<sup>43</sup>), etc.

---

<sup>41</sup> <http://www.filter-cafe.org/>

<sup>42</sup> <http://www.ademloos.be/>

<sup>43</sup> <http://www.cleanairbxl.be/>

Appendix (The Environmental Implementation Review 2019)

Figure: PM<sub>2.5</sub> and NO<sub>x</sub> emissions by sector in Belgium

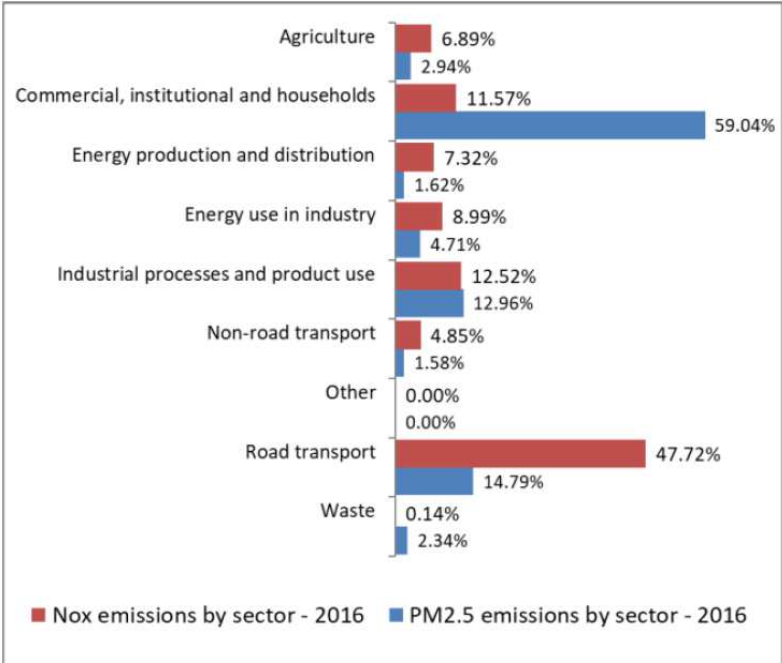


Figure: Air quality zones exceeding EU air quality standards in 2017

