



Study on factual aspects of access to justice in relation to EU Environmental law

BELGIUM

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A. Environmental legislation, administration and courts

Environmental legislation¹

Complex Federal State

Belgium is a complex Federal State, composed of 3 Communities (the Flemish, French and German Communities) on the one hand, and 3 Regions (the Flemish, Walloon and Brussels Capital Regions), on the other hand, with different forms of co-operation amongst them. Federal government has all the powers which are not allocated to the Regions or Communities. Federal competencies include justice (incl. courts and tribunals), civil law, penal law, taxation, some aspects of energy policy (nuclear power, power stations investment planning, heavy infrastructure for storing, distribution and production of energy, tariffs) and some aspects of environmental policy, such as product standards, protection against ionising radiation or the protection of the North Sea.

The main competences in environmental policy rest with the Walloon, Flemish and Brussels Capital Regions. The Regions have exclusive or partial jurisdiction over land use and planning, environmental and water policy, rural redevelopment and nature conservation.

Like in the other Member States of the European Union, most of Belgium's domestic environmental legislation is environmental legislation that implements European (or International) environmental legislation on the federal and the regional level. Where European Environmental Directives simply regulate the main principles of a given problem, federal or regional environmental law will of course go further in detail. There is also proper domestic legislation in fields where European Environmental legislation is lacking.

Constitution

In the Belgian Constitution there is now reference to environmental protection in two different provisions. Article 7b, the single provision of Title Ib "General Policy objectives of Federal Belgium, the Communities and the Regions" of the Belgian Constitution, introduced by the Constitutional Amendment of 25 April 2007, states: *"In the exercise of their respective competencies the Federal State, the Communities and the Regions foster the objectives of sustainable development in their social, economic and environmental aspects, taking into account the solidarity between generations"*. This provision is the only provision of the Constitution that sets policy objectives for the different authorities. It calls for integration of sustainable development concerns in the different policies of the authorities concerned. The fundamental rights of the Belgians are established in Title II of the Constitution. One of the provisions of that Title deals with the so-called social, economic and cultural rights. Article 23 of the Constitution, introduced by the Constitutional Amendment of 31 January 1994 provides: *"Everyone has the right to lead a life in conformity with human dignity. To this end, the laws, decrees [...] guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them. These rights include notably: [...] 4° the right to enjoy the protection of a healthy environment; [...]"*.

Federal environmental legislation

The main environmental legislation at the federal level is formed by the Act of 15 April 1994 on the protection of the population and of the environment against hazards arising from ionizing radiation and on the Federal Agency for Nuclear Control, the Act of 21 December 1998 on product standards to promote sustainable production and consumption patterns and to protect the environment,

¹ This Chapter is based on Lavrysen (2009a) 85-96, where you can find more details. See also: Moërynck & Nicolas (2002) 122-124; Pallemmaerts (2007) 7-8; Epstein (2011a) 14-15.

public health and workforce, the Act of 13 February 2006 on the environmental impact assessment of certain plans and programs and on the involvement of the general public in the elaboration of plans and programs in connection with the environment, and the Act of 20 January 1999 on the protection of the marine environment in maritime areas under the jurisdiction of Belgium. The majority of these acts are implemented by a whole series of Royal Decrees. The federal authorities also play a major part in the enforcement of not only the federal, but also the regional environmental legislation, since the police, the prosecuting authorities and the courts are the responsibility of the federal government. This means not only that the procedural rules of these judicial authorities are established at the federal level, but also that a series of general rules from the Penal Code, for instance, are applicable to environmental offences, even if those offences are defined in the regional legislation. In the area of enforcement, the federal government has given the various public authorities, environmental organizations and – indirectly – individuals the ability to take action in private law against environmental offences in pursuance of the Act of 12 January 1993 on a right of action for the protection of the environment.

Regional environmental legislation

As was mentioned earlier, the main responsibility for environmental policy and therefore for environmental legislation in Belgium lies with the three regions. This means not only that the bulk of environmental legislation in Belgium is of a regional nature, but also that this legislation differs across the three regions, although European environmental legislation ensures a necessary degree of harmonization. Although there are undeniably differences between the three regions, there is still a fair amount of common ground, either on account of the common European origin of the regulations, or because national legislation from the time when environmental policy had not yet been devolved to the regions is taken as a basis for further development.

Flemish Region

In the Flemish Region there is, first of all, the Decree² of 5 April 1995 on general provisions of environmental policy. This was conceived as a basic decree which in the long term is meant to develop into a kind of environmental code in which all basic environmental regulations are brought together. This codification work is still far from complete: there are still a large number of individual decrees which have not yet been incorporated in this Environmental Code under development. At this moment, the Decree of 5 April 1995, as repeatedly amended, contains regulations in connection with objectives and principles of environmental policy, environmental policy planning, environmental quality standards, corporate environmental management, environmental impact assessment and safety reporting, environmental conditions, strategic counselling, prevention and repair of environmental damage and enforcement. A second important decree is the Decree of 28 June 1985 on environmental licences, supplemented by a series of implementing orders, which regulates in detail the licensing and environmental conditions for environmentally harmful establishments. There are also a number of sector-specific legislations, such as the Act of 26 March 1971 on the protection of the surface waters against pollution, the Decree of 24 May 2002 on water intended for human use, the Decree of 18 July 2003 on integrated water management, the Decree of 27 October 2006 on soil remediation and soil protection, the Decree of 22 December 2006 on the protection of water against pollution from fertilizers, the Decree of 2 July 1981 on the prevention and management of waste and the Decree of 21 October 1997 on nature conservation and the natural environment, to name but the most important ones. Detailed implementing orders have been enacted for most of those decrees. Town and country planning and urban development are covered by the Flemish Town and Country Planning Code 2009 (*Vlaamse Codex Ruimtelijke Ordening*).

² A Decree is an Act of the Regional Parliament. In the Brussels Capital Region such an Act is called Ordinance.

Walloon Region

A similar process of codification of environmental law has started in the Walloon Region as well. Pursuant to the Decree of 27 May 2004, Volume I of the Walloon Environmental Code (*Livre 1e du Code de l'environnement*) was brought into effect which currently contains regulations in connection with the principles of environmental law, the central advisory body, environmental information and awareness, environmental policy planning in the context of sustainable development, environmental impact assessment and environmental covenants. By a Decree of the Walloon Government of 3 March 2005, this Code was supplemented with a Volume II containing the Water Code (*Livre II du code de l'environnement contenant le code de l'eau*). This contains regulations on principles and organizational structures, the integrated management of the natural water cycle, the management of water for human use and the financing thereof, and the enforcement of said regulations. The system of environmental licensing for environmentally harmful establishments is covered by the Decree of 11 March 1999 on environmental licences and its implementing orders. In addition, there is also a fair amount of sector-specific legislation. The main sector-specific laws include the Act of 12 July 1973 on nature conservation, the Decree of 27 June 1997 on wastes, the Decree of 1 April 2004 on the remediation of polluted soils and the rehabilitation of economic sites, and the Decree of 10 November 2004 establishing a system of negotiable emission rights for greenhouse gases, setting up a Walloon Kyoto Fund and on the flexible mechanisms of the Kyoto Fund. Town and country planning and the protection of architectural and natural heritage is regulated by the Walloon Code on town and country planning, urban development, architectural and natural heritage and energy (*Code wallon de l'aménagement du territoire, de l'urbanisme, du patrimoine et de l'énergie – CWATUPE*).

Brussels- Capital Region

In the Brussels-Capital Region, environmental licences are covered by the Ordinance of 5 June 1997 on environmental licences and its implementing orders. Other horizontal environmental measures are set out in the Ordinance of 25 March 1999 on the detection, reporting, prosecution and penalization of environmental offences, the Ordinance of 18 March 2004 on environmental impact assessment for plans and programs, the Ordinance of 18 March 2004 on access to environmental information in the Brussels-Capital Region, and the Ordinance of 29 April 2004 on environmental covenants. Sector-specific regulations are laid down in the Ordinance of 13 May 2004 on the management of polluted soils, the Ordinance of 25 March 1999 on the assessment and improvement of ambient air quality, the Ordinance of 17 July 1997 on combating noise pollution in urban areas, the Ordinance of 7 March 1991 on the prevention and management of wastes, the Ordinance of 29 August 1991 on the protection of wildlife and hunting, and the Ordinance of 27 April 1995 on nature conservation and protection. The Brussels-Capital Region also has a Brussels Code on Town and Country Planning (Ordinance of 13 May 2004).

Legislation through cooperation agreements

In a number of cases, the competent authorities chose to address certain environmental issues jointly through so-called cooperation agreements rather than set up separate arrangements. Once such agreements are approved by the respective parliaments, they acquire force of law. Examples of such agreements include the Cooperation Agreement of 5 April 1995 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on international environmental policy, the Cooperation Agreement of 30 May 1996 between the regions on the prevention and management of packaging waste, and the Cooperation Agreement of 21 June 1999 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the management of the risks of major accidents involving dangerous substances.

System for decision-making and administrative appeal³

Environmental and building permits

In Belgium environmental and building permits are delivered by political or administrative authorities in first instance on the local or provincial level, depending on the size of the project and the nature of the operator. Then there is an administrative appeal possible with a higher political authority (on the provincial or regional level). However, in the Brussels Capital Region there is a somewhat particular situation. In that region one can appeal against decisions taken in first instance by the Brussels Environmental Agency before the “*Milieucollege – Collège de l’environnement*” (Environmental Appeal Board) that is a kind of specialized Environmental Administrative Body that is presided by a professional judge and composed of 5 independent experts (environmental lawyers and scientists). They can review the decision of the Brussels Environmental Agency in all aspects and thus grant a permit when it was refused in first instance or refuse it when it was granted in first instance, modify the conditions of the permit etc. The Environmental Appeal Board can also review decisions to modify, withdraw, suspend or to prolong a permit. Against the decision of the Environmental Appeal Board one can appeal again before the Regional Government that can review on its turn the decision in all its aspects.

Flemish Region

In the Flemish Region the environment licensing system, which is in operation since 1 September 1991, makes a distinction between 3 categories of establishments that can harm the environment. For those with little harm (category 3) a prior notification before starting up the operations is required. For those with intermediate environmental impacts (category 2) a prior license (environmental permit) from the local government (municipality) is required. For those establishments that may have significant environmental impacts (category 1) the environmental permit is delivered by the provincial government. In the preparatory phase all relevant environmental authorities and agencies are consulted, including the Division on Environmental Permits of the Department of the Environment, Nature and Energy of the Flemish Region. When there is an administrative appeal, a similar procedure is followed on the regional level. The appeal will be advised by the Regional Environmental Permitting Commission and the final decision will be taken by the Regional Environment Minister. So the environmental permit is an integrated permit. However, till now, there has been no integration of the building permit (necessary for the construction activities) in the environmental permit (necessary for the operation of the installations). The building permit is delivered as a rule by the municipality, following a separate procedure. When both permits are needed (e.g. in case of a new plant or an extension of an existing plant) construction activities may only start if one has both permits. When one of the permits is delivered (e.g. the building permit) and the other is refused (e.g. the environmental permit), the first one will become also invalid. For some activities additional permits are required. That is e.g. the case for surface water abstraction (a permit of the authority that is managing the surface water) or for occupying public land (a permit or concession of the public authority concerned is needed).

Brussels Capital Region

In the Brussels Capital Region one distinguishes in the environmental permitting system, which is in operation since 1 December 1993, 4 (and in the future even 5) categories of establishments subject to the environmental permitting system (categories I A, I B, (in the future also I C), II en III) depending on their environmental impact. Establishments of category I A are subject to an EIA and an environmental permit. The environmental permit is delivered in first instance by the Brussels Environmental Agency. Establishments of category I B are subject to a simplified EIA and an environmental permit. The environmental permit is delivered in first instance by the Brussels

³ This Chapter is based on Lavrysen (2009b) 2-5, with some updates.

Environmental Agency. Establishments of category II (the intermediate ones) are subject to an environmental permit delivered by the municipality. The smallest establishments are listed in category III and are subject to prior notification. As indicated before one can appeal the permit decisions taken in first instance before the Brussels Environmental Appeal Board and further on to the Regional Government. As is the case in the Flanders Region, these environmental permits are integrated ones. As in Flanders a distinction has to be made between the environmental permit (necessary for operating the facility) and the building permit (necessary for the construction). The legislation however provides for special provisions for projects that need both permits, the so-called “mixed projects”. In such cases both applications must be introduced together and will be submitted to public participation and to the assessment and opinion of the competent advisory bodies together, but will finally result into distinct permit decisions. As in Flanders, one should dispose of both permits before construction can start.

Walloon Region

In the Walloon Region, the environmental permitting system, which is in operation since 1 October 2002, classifies the harmful establishments in 3 categories, as is the case in the Flanders region. Establishments of category 1 and 2 are submitted to a prior environmental permit delivered by the municipality, and those of category 3 to a prior notification. The environmental permit is an integrated permit. Compared with Flanders and the Brussels Capital Region the integration is pushed even further in that sense that for activities submitted both to an environmental permit (for operating the plant) and a building permit (for the construction) one has to apply for a combined permit (“*permis unique*”) that is delivered on the basis of one application and through an integrated procedure in which all relevant authorities are consulted and one public participation procedure is applied. This will result in one decision: a combined permit.

The role of the courts⁴

The Constitutional Court⁵

The Constitutional Court (it was called Court of Arbitration before 2007) is exclusively competent to review Acts of the federal and regional parliaments. All other regulations, such as Royal decrees, decrees of governments of communities and regions, ministerial decrees, regulations and decrees of provinces and municipalities, as well as court judgments fall outside the jurisdiction of the Court. Article 142 of the Constitution gives the Constitutional Court the exclusive authority to review those Acts for compliance with the rules that determine the respective powers of the State, the communities and the regions. The Constitutional Court also has jurisdiction to pronounce judgment on any violation of fundamental rights and freedoms guaranteed in Title II of the Constitution (Articles 8 to 32) and of Articles 170 (legality principle in tax-related matters), 172 (equality in tax-related matters) and 191 (protection of foreign nationals). Around 8% of the Court’s cases deal with environmental law and town and country planning.

The Ordinary Courts

Belgium is judicially organized on the basis of a territorial subdivision with 1 Court of Cassation (Supreme Court) for the whole country, 5 jurisdictions (Courts of Appeal and Labour Courts) 27 districts (Courts of First Instance, Labour Tribunals and Commercial Courts) and 225 sub-districts (Justices of the Peace and Police Courts). The public prosecution is largely organized on the basis of

⁴ This Chapter is based on Lavrysen (2009a) 96-102, where you can find more details. Some updates were needed. See also: Moërynck & Nicolas (2002) 124-138; Pallemaerts (2007) 7-8; Epstein (2011a) 15.

⁵ www.const-court.be

the same subdivision, although now there is also a Federal Prosecutor dealing with special types of organized crime.

The *Court of Cassation*⁶ is the highest court of law and oversees the correct enforcement of the laws by the courts and tribunals. The Court of Cassation does not deliver judgment on the facts but verifies whether the court deciding questions of fact has enforced the law correctly. A lawsuit can therefore only be brought before the Court of Cassation after it has already been adjudicated by the court hearing the main action and by the appeal court. When the Court of Cassation establishes that the court has infringed the law, it will quash the judgment and refer the case to a court of law of the same level as the court that passed the unlawful judgment. That court will have to hear the case all over again. The Court of Cassation has a department ("*ministère public*") composed of 13 judicial officers, who advise the Court of Cassation in the performance of its duties. This department is headed by the Attorney-General at the Court of Cassation.

Belgium is furthermore divided into 5 jurisdictions, each with a *Court of Appeal* and a *Labour Court* (Antwerp, Brussels, Ghent, Liège and Mons)⁷. They are the appeal bodies for the courts in the districts of their jurisdiction. A Court of Appeal has 3 types of divisions. There are the divisions for civil cases, which hear appeals against judgments delivered in the first instance by the civil divisions of the courts of first instance and the commercial courts. These divisions are composed of one or three justices, as the parties choose. Then there are the penal divisions, which decide in criminal cases on the appeal against sentences passed by the corresponding divisions of the courts of first instance. Finally, there are the juvenile divisions, which concern themselves with the judgments of the juvenile judges at the court of first instance. The divisions of the court of appeal are usually composed of a president and 2 justices. In order to reduce the backlog of cases, it is permitted to have only one justice sitting in the division (except in criminal cases). The Labour Courts have jurisdiction in matters of social and labour law. Each Court of Appeal and Labour Court has a prosecution department headed by an Attorney-General.

In Belgium there are 27 *Courts of First Instance*, one for each district⁸. A court of first instance has three types of divisions. Civil divisions have jurisdiction in all cases that have not been exclusively assigned to other courts of law. These divisions also rule on appeals against judgments delivered by the justices of the peace and the police courts in civil matters. Penal Divisions (also called criminal courts or '*tribunaux correctionnels*') decide on offences that have not been assigned to the police court or the court of assizes (criminal court for very serious crimes). They also rule on appeals against sentences passed by the police courts in criminal cases. The juvenile divisions (or juvenile courts) rule on protective measures towards minors or take repressive measures against juvenile offenders. The divisions may be composed of three judges or one judge, usually according to the parties' choice. The Court of First Instance is the ordinary court and has general jurisdiction. This means that it is authorized to rule on all matters that are not reserved for another court of law. It is especially the court of first instance that tries environmental cases, criminal as well as civil cases. The president of the court of first instance has his own special powers in urgent cases. He may decide in *interim* injunction proceedings on urgent matters, which would take too long for the full court to hear. Judgments delivered by the court of first instance (except for cases that are already an appeal against a decision of a justice of the peace or a police court) are open to appeal before a court of appeal. The Labour Tribunals and Commercial Courts have jurisdiction in cases of social and labour law and in commercial cases respectively.

Each sub-district has one *Justice of the Peace Court* and a *Police Court*. The Justice of the Peace Court stands closest to the legal subject. A justice of the peace hears all cases where the value of the petition does not exceed 1,860.00 Euros. In addition, the justice of the peace has extensive powers in

⁶ www.cassonline.be

⁷ www.juridat.be/beroep/index.htm.

⁸ www.juridat.be/eerste_aanleg/index.htm. There is a political agreement to merger in the near future the smaller districts. After the merger there will be 12 districts. The Courts will however keep their local implantations.

rent disputes, family matters, expropriations, easements, agricultural affairs and the mentally ill. The justice of the peace is known especially as a family judge. Judgments delivered by a justice of the peace are open to appeal before the court of first instance or the commercial court (in commercial cases), depending on the type of case. Each judicial sub-district also has a police court. They punish traffic offences and minor offences (night-time noise, intentional damage to property, etc).

The Administrative Courts

After exhaustion of the administrative appeals one can appeal against permit decisions taken in last instance by the administrative/political authorities before the Council of State (Supreme Administrative Court)⁹, which can review the legality of the decision, both from a procedural as from a substantive point of view, including the compliance of the challenged decisions with relevant European Directives. The Administrative Jurisdiction Division protects the citizen against unlawful government decisions (individual decisions, but also administrative regulations). Insofar as there are no other competent courts, all natural and legal persons can bring an action for annulment before the Council of State against unlawful administrative acts that have caused them detriment. As the highest administrative court, the Council of State acts as an appeal body against judgments of lower administrative courts deciding on certain matters. The rulings of the Council of State are not open to appeal. By an Act of 1989, the Council of State was empowered to suspend the implementation of a challenged administrative decision. An action for cessation may be brought along with the action for annulment. The Council of State may suspend the challenged decision if the grounds for annulment are found to be valid, if there is an urgent necessity and if the immediate implementation of the challenged act or regulation may cause detriment that is difficult to remedy. However, a petitioner who secures no cessation from the Council of State will often conduct a long and theoretical action, at the end of which the ruling will often have been overtaken by events. The suspension of implementation and the annulment of administrative acts (individual legal acts and regulations) that are contrary to the legal rules in force are the main duties of the Council of State. The Council of State boasts a certain degree of specialization because cases in the same sphere are dealt with by the same divisions (chambers). For instance, some chambers handle cases in the sphere of town and country planning, while other divisions handle environmental cases. In addition, the judge advocates (“*auditeurs*”) who advise the Council of State handle the same matters, so that they too have a certain degree of specialization. Environmental cases and town and country planning cases account for about 22% of the cases. This is quite a significant proportion.

Till recently, there were no administrative courts or judicial bodies of first instance dealing with environmental related issues, so that all these cases went directly to the Council of State. This situation has partially evolved. Two recently created regional administrative courts by the Flemish Region deserve special attention: the Flemish Council for Permit Disputes (“*Raad voor Vergunningsbetwistingen*”) ¹⁰ and the Environmental Enforcement Court of Flanders (“*Milieuhandhavingcollege*”) ¹¹. Since 1 September 2009, the regionally established Council for Permit Disputes has been responsible for dealing with disputes regarding building permits in the Flemish Region, instead of the (federal) Council of State, that continues to act as a cassation judge for those matters. The Council for Permit Disputes is authorised to deal with appeals against explicit or implicit administrative decisions that are final (decision taken on administrative appeal), on the granting or refusal of a building or allotment permit. More specifically, the Council for Permit Disputes deals with appeal procedures filed against decisions taken by the provincial governments (“*deputaties*”) in the course of the ‘regular’ procedure; and appeal procedures filed against decisions taken by the Flemish Government or the designated zoning law civil servant in the course of the ‘special procedure’, which is the procedure applicable for (semi-) public legal persons and acts of general interest. The

⁹ www.raadvst-consetat.be

¹⁰ www.rwo.be/Default.aspx?tabid=12706

¹¹ www.mhhc.be/

Environmental Enforcement Court of Flanders was created by the Flemish Decree of 21 December 2007, published in the Belgian Official Journal of 29 February 2008. It effectively started its work on the 1st of May 2009. This Court has a few specific tasks allocated to in this Decree, especially hearing appeals against administrative fines imposed for breaches of environmental law in the Flemish region. The judgments of both courts are subject to cassation appeal before the Council of State. In the other regions and in the areas not covered by those Courts¹² one has to appeal directly to the Council of State.

Environmental jurisdiction

It follows from the division of powers between the different courts and tribunals that they all to a greater or lesser extent have to try environmental disputes. Where such disputes concern questions of compatibility of federal and regional acts of parliament with the constitutional rights and freedoms or with the division of powers between the federal state and the regions and communities, they will have to be settled by the *Constitutional Court* in the context of an action for annulment or a question referred for a preliminary ruling. When such a question comes up in a dispute that is pending before another court of law, the latter court cannot settle this question but must instead refer it to the Constitutional Court for a preliminary ruling, unless the Constitutional Court has already settled this question on the occasion of a similar preliminary issue referred in another case. The courts are bound by the ruling given by the Constitutional Court on the preliminary issue. It is important to note that the Constitutional Court, in its review for compliance with the Constitution and the power-assigning rules, also verifies – albeit indirectly – conformity with treaty provisions that are binding on Belgium and secondary European law (directives and regulations). When the Constitutional Court comes to the conclusion that a statute, decree or ordinance infringes the constitutional rules, whether or not in combination with international or European law, the courts will have to refrain from applying that particular provision. In the context of an action for annulment, the Court can entirely or partially annul a statute or decree, whereupon the nullified provisions are removed from the legal system with retroactive effect, except where the Court decides to maintain the effects of a nullified provision for the past or for a specific period in the future, for instance in order to allow the relevant legislature to adopt new legislation that complies with the Constitution. The application of federal and regional environmental legislation leads to the establishment of, on the one hand, a whole series of administrative regulations, by means of which the federal and regional governments implement these statutes, decrees and ordinances, and, on the other hand, of a whole series of “individual administrative acts” adopted by various administrative authorities, including local and provincial authorities. The bulk of those individual administrative decisions consist of the granting or refusal of environmental licences, conservation licences, planning permissions and all sorts of approvals and authorizations. Actions for annulment can be brought before the Administrative Jurisdiction Section of the *Council of State* against such regulatory and administrative acts within 60 days after publication or after coming to the knowledge of an interested party, insofar as no further administrative appeal is possible to a higher administrative authority¹³. If there is a risk

¹² There are initial plans to merge both Courts and to expand its competences. The project aims mainly to find a solution for the already very important backlog of the Council for Permit Disputes and the limited number of cases the Environment Enforcement Court has, for different reasons, so far to deal with.

¹³ As building permits are concerned, the period to lodge an appeal with the Council for Permit Disputes in the Flemish Region was originally 30 days from the day of notification, post up or inscription in the permit registry (art. 4.8.16 Codex). The Constitutional Court, confronted with a demand for annulment of that provision, based on the alleged violation of the articles 10,11, 22 and 23 of the Constitution, in conjunction with art. 6 ECHR and art. 9 of the Aarhus Convention, held that this period (for third parties 30 days from the moment the decision was post up, compared with 60 days from the moment they became aware of the decision in the former system) reduced the right to access to justice of interested parties in a disproportionate manner. The provision was annulled by the Court with effect from 1 August 2011 (Constitutional Court, n° 8/2011, 27 January 2011,

that the judgment on the merits will not be delivered in time, an action for cessation can be brought as part of so-called administrative interim injunction proceedings¹⁴. The Council of State is empowered to review the legality of administrative acts, in other words, their compliance with higher legal standards, more particularly international and European law, the Constitution, statutes, decrees and ordinances, and with general legal principles, including the principles of good government and the formal obligation to justify individual administrative acts. When the Council of State finds an illegality, it will entirely or partially annul the challenged administrative decision, causing this decision to be removed from the legal order with retroactive effect, unless the Council decides to maintain all or part of the effects of the nullified regulation¹⁵. The Council of State may also suspend an administrative act in administrative interim injunction proceedings pending the hearing of the case on the merits, and may also order provisional measures. Under certain conditions it can also impose a penalty payment in order to enforce compliance with its rulings.

In Belgian law, breaches of environmental law are usually punished with penal sanctions. Those penal sanctions – which in the more recent environmental legislation tend to be more severe in comparison with earlier environmental legislation – are usually defined in such a way that they relate to offences that belong to the jurisdiction of the *tribunaux correctionnels* (criminal courts). Such offences can be brought before the criminal courts at the suit of the public prosecutor, following a complaint by a third party claiming damages before the Investigating Judge (“*juge d’instruction*” “*onderzoeksrechter*”) or by direct summons by the aggrieved party. The criminal court not only rules in the criminal law aspect of the case by investigating whether the offences are proven and the defendant is guilty, and by imposing the appropriate criminal sanctions and measures. When the aggrieved party brings an action for damages, the court will also have to rule on the compensation to

de Bats and Others). The Codex has been amended meanwhile and the period to lodge an appeal has been brought to 45 days.

¹⁴ The President of the Flemish Council for Permit Disputes can also suspend challenged decisions on request or on its own motion (art. 4.8.13 Codex).

¹⁵ The Council cannot maintain into force the legal effects of annulled individual administrative acts, such an annulment operates thus always with retroactive effect. Recently the question arose if the Council of State could temporarily keep into effect a regulation that violates European environmental law (Council of State, n° 210.483, 18 January 2011, *asbl Inter-Environnement Wallonnie and Terre Wallonne*). The ECJ held in this case: “Where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a ‘plan’ or ‘programme’ within the meaning of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and it finds that the ‘plan’ or ‘programme’ was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested ‘plan’ or ‘programme’. However, in view of the specific circumstances of the main proceedings, the referring court can exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure in so far as:

– that national measure is a measure which correctly transposes Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;

– the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;

– annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and

– the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied” (Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, Judgment of 28 February 2012, *nyr*)

be awarded to the aggrieved party. Judgments of the criminal courts are open to appeal before the Court of Appeal. Furthermore, an appeal limited to points of law can also be brought before the Supreme Court.

Civil law disputes belong to the jurisdiction of the *civil courts*. In the first instance they are heard by the Justice of the Peace or by the Civil Division of the Court of First Instance, depending on the monetary value involved in the dispute. Judgments delivered in the first instance are open to appeal before the Court of First Instance or the Court of Appeal respectively. After that, an appeal (restricted to points of law) can still be brought before the Supreme Court. In very urgent cases, the president of the court can order provisional measures in interim injunction proceedings.

The *President of the Court of First Instance* also has special powers for the protection of the environment on the basis of the Act of 12 January 1993 on a right of action for the protection of the environment. In accelerated proceedings, the public prosecutor, an administrative authority or an environmental organization with legal personality can ask the President to order the cessation of actions that constitute, or threaten to constitute, an obvious breach of environmental law. In a judgment of 8 November 1996¹⁶, the Supreme Court considered that the purpose of the Act was not only to prevent damage to the environment, but also to ensure a viable environment for the population, so that the protection of the environment also extends to a protection of town and country planning. According to the Court, the Act not only makes it possible to order the cessation of illegal works that impair the environment, but also that the works already completed be undone, if such an injunction is necessary to prevent further damage to the environment.

The Milieu Study 2007

The *Milieu Study 2007*¹⁷ gives an accurate description and assessment of the legal situation in Belgium in 2007. Since then, different developments occurred, that have some influence on the current situation, and that have been taken into consideration in the present study:

- The creation of two specialised administrative courts in the Flemish Region;
- Some relaxation of the standing requirements of environmental ngo's in the case-law of the Council of State;
- Considerable reduction of the backlog (with shorter procedures as a result) of the Council of State under the influence of the creation of specific administrative courts (immigration law on the federal level, building permits in the Flemish region), but building up of a new backlog within the Flemish Council for Permit Disputes;
- Introduction of the "loser pays principle" before the ordinary courts;
- The introduction of (contested) specific legislation on the regional level to avoid review by the Council of State of some permitting decisions for larger projects;
- Introduction of an administrative request for action under the influence of art. 12 of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

Furthermore there are two private bills pending in the House of Representatives¹⁸ providing an explicit recognition of the right to sue for the defence of collective interests by non-profit organisations. One concerns the ordinary courts and tribunals (proposal to amend art. 18 of the

¹⁶ Supreme Court, 8 November 1996, *TMR* 1997, 30 with note by J. Van den Berghe.

¹⁷ Pallemarts (2007).

¹⁸ www.lachambre.be

Judicial Code)¹⁹; the other the Council of State (proposal to amend art. 19 of the Organic Act on the Council of State)²⁰. The first one is now under discussion in the Justice Commission of the House, after having received the opinion of the Legislative Branch of the Council of State²¹.

B. Standing

Standing for the public concerned

General questions

Before judging on the merits, courts have to decide on the admissibility of the case. If there are doubts that the demanding party has standing in the light of the prevailing case law, the defending (or intervening) party will normally raise an *objection (exceptio) of inadmissibility*, but the Courts can do it also on their own motion. The Court has to consider the *exceptio* first, before judging on the merits. If the *exception* is accepted by the Court, the case will end there. If the exception is not accepted (and there are no other exceptions to deal with) the merits of the case will be examined in the same judgment. It can however happen that there is first a judgment on admissibility and that, when the case is judged to be admissible, the pleadings on the merits of the case are held only afterwards, resulting in a separate judgment. This is e.g. the case when the Council of State finds, in opposition with the opinion of the judge-advocate (*auditeur*), that the case is admissible. The Council will then reopen the case and charge the judge advocate to deliver an opinion on the merits²². After delivering that opinion, pleadings will be held on the merits and a separate judgment on that will follow. Also before ordinary courts it can happen that there is first a separate judgment on admissibility²³.

The standing rules (which are different before administrative courts and ordinary courts²⁴) do not vary according the area of law at stake. The only exception being the aforementioned Act of 12 January 1993 on a right of action for the protection of the environment, which allows environmental organizations that satisfy certain requirements (namely, being set up in the form of a non-profit association according the Act of 27 June 1921 on non profit organisations, having the protection of the environment as its purpose, having existed for at least 3 years and actually being active) to bring an action for cessation of acts that constitute a breach of the protection of the environment, without the need to prove a further interest in the case²⁵.

¹⁹ Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerken et consorts, 14 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1680/001.

²⁰ Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerken et consorts, 19 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1693/001.

²¹ *Chambre des Représentants de Belgique*, DOC 53 1680/003. The Council of State refers to its in-depth opinion of 9 March 2010 on similar proposals introduced in the previous legislature (*Chambre des Représentants de Belgique*, DOC 52 1939/002).

²² E.g. Council of State, n° 216.086, 27 October 2011, *De Smet and Henne* (intervening parties: *vzw Trage Wegen and Others*).

²³ E.g. President Court of First Instance, Ghent, 26 September 2011, *FM and Others v NMB Holding nv, Infrabel nv, Eurostation nv, Flemish Region, Vlaamse Vervoermaatschappij De Lijn, Stad Gent en D.T.*, TMR 2011, 711-718. This decision rejecting all exceptions against an environmental injunction action introduced by citizens on behalf of the city is appealed.

²⁴ Pallemarts (2007) 10-11, 12-14.

²⁵ Pallemarts (2007) 11; Moërynck & Nicolas (2002) 137.

Judicial review in Belgium includes normally both the substantial and procedural legality (including compatibility with International and European law) of administrative decisions that are directly (administrative courts) or indirectly (ordinary courts on the basis of art. 159 of the Constitution) challenged.

Although standing rules are for the moment uniform in Belgium, their interpretation, because they are rather vague, may vary between jurisdictions, between different chambers of the same jurisdiction and even within the same chamber over time.

The main variation of standing rules is between the rules applicable before ordinary courts (art. 17 and 18 of the Judicial Code)²⁶, that are *inter alia* competent for damages, and those before administrative Courts (mainly article 19 of the Organic Act on the Council of State)²⁷ which are competent to annul administrative decisions and regulations, and the Constitutional Court (Art. 2(2) of the Special Act on the Constitutional Court)²⁸, which is competent to annul Acts of Parliament.

Except in a very old Act, the Act of 12 August 1911 on the protection of the beauty of landscapes²⁹, that is still in force but to our knowledge never applied³⁰, the *actio popularis* is not accepted under Belgian law. Standing rules are the same in environmental cases that do or that do not concern EU law. For the moment³¹, procedural rules were not amended in view of transposing article 11 of Directive 2011/92/EU (article 10a of Directive 85/337/EC) or article 25 of Directive 2010/75/EU (article 16 Directive 2008/1/EC, art. 15a Directive 96/61/EC) because one believed that the existing rules were already in conformity with those provisions³². Although the principle of effective judicial protection, as developed by the European Court of Justice, is often raised in arguments by parties before the Council of State, there seems no cases in which the Council of State itself has interpreted the national standing rules explicitly in the light of that principle, in cases falling within the scope of the application of EU law. However, the Council of State referred to article 10a of Directive 85/337/EEC and article 9 (2) of the Aarhus Convention in its references for preliminary rulings concerning the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the general interest. The ECJ held that Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337/EEC must be interpreted as meaning that: “*when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law; if no review procedure of the nature and scope set out above were*

²⁶ Pallemmaerts (2007) 10; Moërynck & Nicolas (2002) 131-134 ; Lavrysen (2009a)106-107.

²⁷ Pallemmaerts (2007) 12-13; Moërynck & Nicolas (2002) 124-127 ; Lavrysen (2009a) 108-109.

²⁸ Moërynck & Nicolas (2002) 123; Lavrysen (2009a) 102-105.

²⁹ Loi du 12 août 1911 pour la conservation de la beauté des paysages, *Moniteur belge* 19 août 1911. It reads as follows :

« **Article 1.** *Tout exploitant de mines, minières ou carrières, tout concessionnaire de travaux publics, est tenu de restaurer, dans la mesure du possible, l'aspect du sol, en boisant ou en garnissant de végétation les excavations, déblais ou remblais destinés à subsister d'une manière permanente.*

Les plantations seront exécutées à mesure de l'achèvement partiel successif des travaux.

Art. 2. *A défaut de se conformer au précédent article, il pourra y être contraint par la justice. L'action sera poursuivie devant le tribunal de première instance du lieu dévasté, à la requête du procureur du Roi. Elle appartiendra également à tout citoyen belge.*

A défaut d'exécution dans le délai que fixera le tribunal, les travaux seront effectués d'office, aux frais de l'exploitant ou du concessionnaire, par les soins du ministère de l'agriculture et des travaux publics.

Art. 3. *La présente loi s'applique à l'Etat, aux provinces et aux communes, de même qu'aux entreprises privées. »*

³⁰ Bocken (1979) 408.

³¹ See however the private bills that are now under consideration in the House, mentioned earlier.

³² Pallemmaerts (2007).

available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.”³³. The Constitutional Court on its turn referred to art. 10a of Directive 85/337/EEC in its reference for a preliminary ruling concerning the same decree. The ECJ held in this case: “Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that: when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.”³⁴. The Constitutional Court has now to take up the case again, and has also to give an answer to the Council of State on its references for preliminary ruling to the Constitutional Court in the *Boxus and Others* cases. After having received the answer of the Constitutional Court, it can take up these cases again.

Standing for individuals

As has been pointed out in the *Milieu Study 2007* the conditions of access to justice in environmental matters in Belgium are essentially determined by the three following acts and their interpretation in the case-law:

- *Code judiciaire* (Judicial Code) which applies to ordinary civil actions and summary proceedings before the civil courts;
- *Loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement*, (Act of 12 January 1993 on a right of action for the protection of the environment) which applies only to the special environmental action for injunctive relief before the president of the court of first instance (*action en cessation*);
- *Lois coordonnées sur le Conseil d'Etat* (Organic Act on the Council of State) which apply to all actions before the Council of State³⁵.

A general condition which applies to all the above-mentioned actions is that the party bringing the action must have the legal capacity to act. For individuals this requirement normally poses no problems (except, e.g. in the case of minors or mentally ill who can only act through their legal representatives). The legal provisions governing the above-mentioned procedures contain no legal definitions of terms such as "general public" or "citizen"; neither are such terms used to determine legal standing. Normally the relevant terms are "party" or "person", which refer to any natural or legal person. There are no general conditions with respect to citizenship or domicile³⁶.

³³ Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others*, Judgment of 18 October 2011, *nyr*; Joined Cases C-177/09 and C-179/09 *Le Poumon vert de la Hulpe and Others*, Order of 17 November 2011, not published.

³⁴ Case C-182/10 *Solvay and Others*, Judgment of 16 February 2012, *nyr*.

³⁵ See the relevant excerpts of these Acts (in French) in the *Milieu Study 2007*: Pallemmaerts (2007) i-v.

³⁶ Pallemmaerts (2007) 9.

Legal standing for actions brought before the Civil Courts

The conditions of access to the civil courts are determined by the general provisions of Art. 17 and 18 of the *Code judiciaire*, which apply both to ordinary civil actions and summary proceedings. These provisions essentially require that the claimant be able to invoke a legally recognised interest as a basis for his or her action. The notion of "interest" (*intérêt*) is not further defined by law, beyond the requirement in Art. 18 that it should be an *existing* and *actual* interest, not a hypothetical one. However, further conditions result from the interpretation of these general provisions in the case-law, which requires a "personal" and "direct" interest. Actions brought by individual plaintiffs against acts or omissions with effects on their immediate environment would normally be declared admissible, to the extent that the environmental impact is affecting or likely to affect well-established individual subjective rights such as the right to (enjoyment of) property or the right to health and personal integrity. Preventing or halting violations of environmental law to uphold such rights qualify as a personal and direct interest. The individualistic nature of the civil law notion of interest may however be an obstacle to the admissibility of actions to prevent or stop harm to elements of the environment in which no individual can claim a proprietary interest, in the absence of any likely impact on human health.³⁷ It can however be expected that a person who is living in an area where there is a real risk that air quality limit values or alert thresholds may be exceeded, will be recognised to have standing to require from the competent authorities to draw up an action plan, especially when this person in arguing its interest in the case refers to the ECJ *Janecek* case as a precedent³⁸.

Standing in the injunctive relief procedure for manifest violations of environmental law

The special environmental action on the basis of the Act of 12 January 1993 is normally only available for the public prosecutor, the administrative authorities (including those of municipalities) or environmental organizations with legal personality meeting some requirements (being set up in the form of a non-profit association according the Act of 27 June 1921, having the protection of the environment as its purpose, having existed for at least 3 years and actually being active). However, article 271 of the Federal Municipal Act (and its regional successors like Art. 194 of the Flemish Municipality Decree) allows *one or several residents of a municipality* to act on behalf of the municipality if the mayor and aldermen fail to do so. It was soon accepted in the case law that this provision could be combined with the Act of 12 January 1993, so that individual citizens living in the municipality concerned are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action. This view was endorsed by the Supreme Court when it considered that it follows from the joint reading of the two aforementioned Acts that if the mayor and aldermen fail to take action under those circumstances, one or several residents can take legal action on behalf of the municipality in order to protect the environment.³⁹ No interest needs to be demonstrated because the municipality is presumed to have an interest.⁴⁰ The circumstance that residents can bring an action for cessation on behalf of the municipality if the latter fails to do so, actually gave rise to another problem. What if the municipality itself shares responsibility for the breach of environmental law by having issued an illegal licence? This matter needed to be settled by the Constitutional Court, which ruled that not allowing the action under such circumstances would constitute an infringement of the principle of equality and non-discrimination.⁴¹

³⁷ Pallemmaerts (2007) 10-11.

³⁸ Case C-237/07 *Janecek* [2008] ECR I-6221; see Civil Court, Leuven, 10 March 2010 (discussed p. 38)

³⁹ Supreme Court, 14 February 2002, *RW* 2001-2002, 1504; *Jadot* (1998) 27-28.

⁴⁰ Supreme Court, 5 March 1998, *TMR* 1998, 161.

⁴¹ Constitutional Court, n° 70/2007, 26 April 2007, *M. Lenaerts and others v. n.v. 's Heerenbosch*; see in the same sense: Constitutional Court, n° 121/2007, 19 September 2007, *A. Heytens and others v. nv Makro*

Legal standing in the procedure for judicial review by the Council of State

The procedure for judicial review of administrative decisions by the Council of State is laid down in the *Lois coordonnées sur le Conseil d'Etat*. This procedure can be used to challenge any unilateral, final, legally binding act of an administrative authority, whether of an individual or regulatory nature (i.e. administrative decisions in individual cases as well as executive orders and decrees laying down generally applicable rules). Omissions can also be challenged where an administrative authority is legally required to act in certain circumstances, but has failed to do so. A special procedure for such cases is laid down in Art. 14(3) of the *Lois coordonnées*: the interested party has to formally summon the defaulting authority and if it has still failed to act three months after the date of the summons this omission will be considered as a negative decision which is subject to review by the Council of State. Judicial review by the Council of State addresses only the objective legality of administrative decisions, i.e. whether the authority that took the decision had the power to do so, whether there was any abuse of power for illegitimate ends (*détournement de pouvoir*) and whether the *decision* violates any substantive or procedural legal requirements binding on the acting authority (*excès de pouvoir*), including, inter alia, those laid down by environmental law. A finding of illegality on any of those grounds will lead to annulment *erga omnes* of the challenged act. If the applicant specially requests so and is able to demonstrate that the immediate execution of the act at issue would cause "serious harm which would be difficult to repair" (*un préjudice grave difficilement réparable*), the Council of State may also decide to suspend execution of the act, pending a decision on the merits of the action for annulment, following a *prima facie* finding that there are serious grounds to question its legality⁴².

According to Art. 19 of the *Lois coordonnées*, an action for annulment of an administrative act can be brought by any party (any natural or legal person) which has been "harmed" or has an "interest" at stake. Meeting this requirement does not pose particular problems for individual claimants in environmental cases. Proof of actual harm is not required; a legitimate interest in the contested act is sufficient. This interest need not necessarily be based on a legally recognised subjective right. Whether a natural person has the interest required to seek judicial review of an administrative decision affecting his or her environment is essentially a factual matter, which will be judged by the Council of State based on the specific circumstances of the case. Although the notion "public concerned" within the meaning of the Aarhus Convention is not actually used, the case law on the criteria for standing for individual members of the public in substance comes very close to the definition of this notion in the Convention. The Council will examine whether the claimant will or may be affected by the environmental effects of the implementation of the decision. The nature and range of those effects will be taken into account. In the event of uncertainties, the decision on standing tends to be in favour of the claimant. The distance between the claimant's home and the activity that is the subject of the contested decision is an important consideration, but it is not necessarily decisive. In planning cases, e.g., the settled case-law is that any "inhabitant of the neighbourhood" has a legitimate interest to seek review of planning decisions affecting its aspect and development. There is also case-law in which the Council held that a person using a forest area for recreational purposes (e.g. walking) can challenge the legality of an administrative act which will result in the deterioration of that area.⁴³

Third party intervention

In civil cases third parties that have an interest in the case can intervene voluntary or on request of the original parties, provided that this do no delay the settlement of the case (Art. 811 -814 of the

Zelfbedieningsgroothandel; Constitutional Court, n° 29/2011, 24 February 2011, *stad Hasselt and J. Verhelst v. nv Alva Immo and nv Alva Verse Vruchten*.

⁴² See for an example: Epstein (2011b) 19-20.

⁴³ Pallemarts (2007) 12-13.

Judicial Code). In the proceedings for the Council of State, where always administrative decisions or regulations are at stake and thus the administrative authority that took the decision or regulation at stake will act as the defending party, third party intervention is also provided, on a voluntary basis, or on request of one of the parties. The third party has to show that it has an interest in the solution of the case. The *auditeur* is obliged to identify third parties that have an interest in the case as soon as the case has entered and they will be notified of the case, so that they can intervene if they wish so (within a period of 30 days) (Art. 21b of the Organic Act on the Council of State). In environmental matters in general the holder of a permit that is challenged, will be identified as an interested third party. Also in the administrative appeal procedure, when a permit delivered in first instance is challenged by a third party, the holder of that permit will be advised of that so that he can put forward his arguments in favour of the permit he received and why the arguments put forward in the appeal should be dismissed.

Standing for groups

Organizations that have legal personality can in principle only litigate in their own interest, and, under certain conditions (see p. 18)) in the collective interest, not in the individual interest of their members. An exception is however made for recognized professional organisations in the framework of the Act of 31 March 1898 on professional organisations. It can however be expected that such industrial organizations will normally challenge environmental measures instead of defending them⁴⁴.

Under Belgian law *class actions* are generally unavailable, because every interested party, as a matter of principle, need to be involved in the proceedings individually. A claimant must demonstrate an interest in the litigation. This means a direct, personal and legitimate interest. The requirement for a personal interest means that class actions are excluded under Belgian law because one claimant cannot file a claim on behalf of others (“*nul ne plaide par procureur*”)⁴⁵. However, where specific legislation sets out express exceptions, multi-party litigations are possible⁴⁶. The already discussed possibility of citizens of a municipality to bring an action in the framework of the Act of 12 January 1993 on behalf of the defaulting local government, is an example.⁴⁷ Private bills have been introduced different times to introduce a consistent approach to ‘class actions’, by amending art. 18 of the Judicial Code, till date without success⁴⁸. Also government proposals haven’t been finalized yet⁴⁹. There exist some deficient techniques in civil procedure law to partially overcome the lacuna (joinder of claims, claim in intervention, party representation)⁵⁰.

In the procedure before the Council of State, different persons can introduce a collective demand for annulment and suspension, each of them being required to pay the court fee.⁵¹ One has however to realise that the judgements of the Council of State have an “*erga omnes*” effect. So when an administrative act or regulation is annulled, everyone who would have been harmed by the act or

⁴⁴ E.g. Constitutional Court, n° 188/2011, 15 December 2011, *Belgische Petroleum Unie and Others*. In this case, that is pending now before the ECJ (Pending Case C-26/11 *Belgische Petroleum Unie and Others*), the organization of oil traders is opposing national rules requiring petroleum companies releasing petrol and diesel products for consumption also to make available for consumption in the same year a quantity of bio-ethanol, pure or in the form of bio-ETBE, and fatty acid methyl esters (FAME). Other professional organizations, the *Belgian Bioethanol Association* and the *Belgian Biodiesel Board*, intervened in the case to defend the measure.

⁴⁵ Taelman & Voet (2011), 318.

⁴⁶ Some exceptions exist in consumer protection and combating discrimination and racism.

⁴⁷ Taelman & Voet (2011), 319-322.

⁴⁸ Taelman & Voet (2011), 322-323.

⁴⁹ Taelman & Voet (2011), 322-323.

⁵⁰ Taelman & Voet (2011), 325-346.

⁵¹ E.g. Council of State, 12 August 2011, *Peleman and Others* (9 individuals from the same neighborhood asking the suspension of a local land use plan).

regulation, benefits from the annulment, also when he was not a party in the procedure. The same holds true as the Constitutional Court is concerned, with that difference that there are no court fees before the Constitutional Court⁵².

Standing for environmental NGO's

*Ordinary courts*⁵³

The general rule in Belgium is, as indicated above, that a party must prove an interest in order to gain access to the courts. The question arises as to what should be understood by 'interest' and whether environmental organizations can invoke a collective interest in order to take legal action to protect the environment. In the 1970s, a trend could be discerned whereby the civil courts and the criminal courts (as far as actions for damages are concerned) increasingly acknowledged that environmental groups could rely on such a collective interest.⁵⁴ This trend was stemmed by the Supreme Court in the so-called *Eikendael* judgment of 19 November 1982.⁵⁵ In this judgment the court considered that, in accordance with Article 17 of the Judicial Code, no legal action is admissible if the plaintiff has no interest in bringing such an action. According to the court, unless the law provides otherwise, legal proceedings instituted by a natural or legal person were not admissible if the plaintiff had no personal and direct interest, in other words, no interest of its own. The court left no doubt that public interest does not amount to 'own interest'. The own interest of a legal person is only that which affects its existence or its tangible and intangible assets, its property, honour and reputation. A corporate purpose, even if this be the protection of the environment, was in the court's view not an own interest. The implications of this judgment soon made themselves felt, and the majority of the lower courts concurred with this position, particularly in the first few years after the judgment.⁵⁶ Since then, the Supreme Court had no further opportunity to rule expressly on this issue, taking into account, for example, the potential implications of Article 23 of the Constitution (the right to the protection of a healthy environment). This precedent accordingly still stands for the moment, although it may be inferred from a judgment of 14 September 2004⁵⁷ that the court might be willing to reconsider its position.⁵⁸

The *Eikendael* judgment caused a great deal of controversy and eventually resulted in action being taken by the legislature in the form of the aforementioned Act of 12 January 1993, which allows environmental organizations that satisfy certain requirements to bring an action for cessation of acts that constitute a breach of the protection of the environment⁵⁹. It is unclear whether the circumstance that the legislature expressly saw this act as a response to the aforementioned judgment of the Supreme Court played a role. It is a fact, however, that the rulings of that same

⁵² E.g. Constitutional Court, n° 188/2011, 15 December 2011, *de Spoelberch and Others* (different persons asking the annulment of an Amendment to the Flemish Town and Country Planning Code).

⁵³ Lavrysen (2009a) 106-108; De Sadeleer (2005) 9 -11.

⁵⁴ See H. Bocken (1998) 232-248; Lemmens & Verlinden (1991); Van den Berghe (1991) , 225 et seq. and 267 et seq.; B. Jadot (1998) 16.

⁵⁵ Hof van Cassatie, *Nv S. v. Vzw Werkgroep voor Milieubeheer Brasschaat*, 19 November 1982, confirmed by Hof van Cassatie, 25 October 1985 *RW* 1985-1986, 2411 ('*Neerpede*' judgment).

⁵⁶ However, certain lower courts did not endorse this position which they felt was not in tune with the spirit of the times (see Jadot (1998), 19). In recent years we have seen a growing dissension: see the overview of 'dissident' case law in Lefranc (2005a) 106-107.

⁵⁷ Hof van Cassatie, *S v. Vzw KBVBV* SC 14 September 2004, *TMR* 2005, 105.

⁵⁸ Lefranc (2005a) 107.

⁵⁹ See for a complete overview of the case law in this field in the period 1993-2008: Lefranc (2009) 2-45. The author found around 250 judgments in 136 cases over a period of 15 years or around 17 judgments in 9 cases a year. 41 cases were introduced by environmental ngo's, 50 by administrative authorities, 35 by citizens on behalf of the defaulting municipality and 9 by public prosecutors.

court largely helped to make this act a particularly effective instrument for the protection of the environment. So far, the court has dismissed all interpretations that sought to construe the Act restrictively.⁶⁰ In a judgment of 8 November 1996,⁶¹ the Supreme Court considered that the purpose of the Act was not only to prevent damage to the environment, but also to ensure a viable environment for the population, so that the protection of the environment also extends to protection of town and country planning. According to the court, the Act not only makes it possible to order the cessation of illegal works that impair the environment, but also that the works already completed be undone, if such an injunction is necessary to prevent further damage to the environment. The compulsory reconciliation attempt is not required on pain of nullity.⁶² As indicated above, it was soon accepted in the case law that art. 271 of the Federal Municipal Act provision could be combined with the Act of 12 January 1993, so that individual citizens are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action.⁶³ No interest needs to be demonstrated because the municipality is presumed to have an interest. The court also considered that an action for cessation is not contingent on the condition of speed or urgency.⁶⁴

According to Art. 2 of the Act of 12 January 1993 the non-profit association has to indicate in its by-laws the geographical area of its activities. This condition is interpreted in that sense that the association can only challenge acts and activities that have a negative impact within that geographical area.⁶⁵

In principle “foreign” NGOs should be treated on equal footing, but case law that is illustrating this is lacking.

*Council of State*⁶⁶

The case law history of the Council of State has seen a somewhat different development on the matter of interest. In the case that gave rise to the *Eikendael* judgment, the same environmental group had also appealed to the Council of State to secure the annulment of a planning scheme and a license which, in its view, were illegal. The Council of State, unlike the Supreme Court, allowed the environmental group's action.⁶⁷ According to Article 19 of the Coordinated Laws on the Council of State, actions for suspension and actions for annulment of administrative acts can be brought by any party that can demonstrate a 'prejudice or interest'. According to the case law, this interest must be personal and direct. Actions brought by natural persons against licenses for the execution of construction works or the operation of industries are not only admissible if they are instituted by owners or tenants (i.e. holders of a subjective right) who live in the immediate vicinity of the site in question. Since the early 1980s, a wider circle of interested parties is taken into consideration.⁶⁸ It is not necessary to live in the immediate vicinity of an industrial establishment to contest the environmental license that was granted to that establishment if it can be proven that the company in question causes a 'significant nuisance' which can be experienced many miles away.⁶⁹ In the area of town and country planning, the view became increasingly accepted that all residents of a neighbourhood have an interest in a proper planning of that neighbourhood. Zoning plans and traffic

⁶⁰ Bogaerts (2003) 86-119; Lefranc (2009) 2-45.

⁶¹ Hof van Cassatie 8 November 1996, *TMR* 1997, 30 with note by J. Van den Berghe.

⁶² Hof van Cassatie 30 December 1993 *TMR* 2005, 192-193.

⁶³ Hof van Cassatie 14 February 2002 *RW* 2001-2002, 1504; Jadot (1998) 27-28.

⁶⁴ Hof van Cassatie 5 March 1998, *TMR* 1998, 161.

⁶⁵ Lefranc (2009) 10-11.

⁶⁶ See for a complete overview of the case-law since the creation of the Council of State in 1948 till mid 2010, discussing around 900 judgments relating to more than 600 cases: Lefranc (2010) 426-467.

⁶⁷ *Vzw Werkgroep voor Milieubeheer Brasschaat* CS 21.384, 11 September 1981.

⁶⁸ Lemmens & Verlinden (1991) n. 58, 251; Jadot (1998) 11; De Sadeleer (2005) 11-113.

⁶⁹ Council of State, *Vzw Bond Beter Leefmilieu Tessenderlo and Pals*, nr. 27.042, 21 October 1986.

plans can therefore be challenged by anyone living in the area for which the plan is drawn up.⁷⁰ Since the mid-1980s, the Council of State also acknowledged that environmental groups could take action against government acts in order to protect collective environmental interests. The Council of State does require, however, that the organization be 'representative' of the group of people whose collective interests are threatened or damaged, and it will verify whether:

the organization has such a level of support among the members of that group that it may be reasonably assumed that the positions adopted by the organization coincide with those of the interested parties themselves.⁷¹

This approach is or was not without its problems, in particular for umbrella organizations. In a number of cases the Council, for example, ruled that an environmental umbrella organization does not have the authority to defend the specific interests of the constituent organizations, or even that a national environmental organization has no specific interest in taking action with regard to a local environmental issue. Local environmental groups, for their part, sometimes have difficulty proving that they have sufficient local support.⁷²

All of this led to inconsistent case law, with at times widely divergent views between different chambers of the Council of State on the same issue. An example further illustrates this. Two licenses are required for the construction and operation of a silt processing plant and a dumping site for dredging spoil. Planning permission is required for the construction works and an environmental license for the operation of the plant. In connection with such a project on the territory of the City of Ghent bordering on the municipality of *Merelbeke*, a local environmental group from Merelbeke brought an action for annulment of both the environmental license and the planning permission. The Seventh Chamber of the Council of State, which had to rule on the action for annulment of the environmental license, accepted that the organization, whose purpose it is to '[a]chieve a genuine protection of the environment in all its forms' and to '[e]nsure that considerations of environmental protection are fully integrated in the town and country planning on the territory of the municipality of *Merelbeke*', has an interest in the annulment of a license for a large-scale silt dumping site just across the municipal boundary which is liable to have an impact on the territory of the municipality of Merelbeke.⁷³ The Tenth Chamber, however, which had to rule on the action for annulment of the planning permission, did not acknowledge this interest, saying that the town and country planning on the territory of the municipality of Merelbeke was not altered by the challenged planning permission⁷⁴. There was a distinct impression that the Council of State had gradually become more restrictive in the assessment of the interest requirement, probably in view of the growing number of cases that had to be considered. The Aarhus Compliance Committee, which was requested to rule on a complaint lodged by the Flemish environmental umbrella organization *Bond Beter Leefmilieu Vlaanderen* regarding the restrictive case law of the Council of State in town and country planning matters, was of the opinion that this case-law was not in line with the Aarhus Convention.⁷⁵

For the moment it seems that the jurisprudence of the Council of State is subject to evolution. In a recent judgment of the general assembly of the Council of State⁷⁶, the Council used the usual formula

⁷⁰ Lemmens & Verlinden (1991), 251.

⁷¹ See, for instance: Council of State, *Vzw Bond Beter Leefmilieu-Interenvironnement*, n°s 20.882-20.885, 20 January 1981.

⁷² Lemmens & Verlinden (1991) 254-255; Jadot (1998) 14-15.

⁷³ Council of State, *Vzw Aktiekomitee voor milieubescherming in Merelbeke*, n° 170.173, 19 April 2007.

⁷⁴ Council of State, *Vzw Aktiekomitee voor milieubescherming in Merelbeke*, n° 178.286, 7 January 2008.

⁷⁵ Aarhus Compliance Committee, *Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in the case of access to justice for Environmental organizations to challenge decisions in court (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))*, TMR 2007, 21-27.

⁷⁶ Council of State, n° 187.998, 17 November 2008, *Coomans et. al.*, TMR 2009, 64-94.

of the Constitutional Court concerning standing requirements for NGO's, in stating that a non profit organization that has legal personality (*association sans but lucrative*) has standing if its statutory objective is of a particular nature, and thus different from that of general interest, that she is defending a collective interest, that the statutory aim can be affected by the challenged act and that it is obvious that she is pursuing her statutory objective in an active way (para 28.2.3.2). A similar formula was used in later judgments⁷⁷. Since the creation of particular administrative courts dealing with immigration law (on the federal level) and building permits and alike in the Flemish region, the caseload is indeed becoming more manageable and the backlog is gradually disappearing. Together with pressures from the ECHR⁷⁸, the Constitutional Court⁷⁹ and the Aarhus Compliance Committee⁸⁰, it can be expected that the Council will become more lenient again. For the moment there is however no clear picture. Triggered by the Aarhus Convention, some judgments can be welcomed⁸¹, while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention⁸². In the latter case law the Council of State is of the opinion that although environmental NGO's are presumed to have an interest by virtue of Art. 9 (2) of the Aarhus Convention, they must also show "capacity" or "quality" ("*hoedanigheid*" "*capacité*"), a somewhat unclear concept in this context that is interpreted in that sense that there should be a clear match between the statutory objective of the NGO and the contested project⁸³. A regional organisation can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, or bigger projects that are of *supra* regional interest. Sometimes also "representativity" ("*representativité*" "*representativiteit*") is requested, meaning that the association should have sufficient support of the people living in the area that is affected by the contested decision.⁸⁴

In principle "foreign" NGOs should be treated on equal footing, but case law that is illustrating this is lacking.⁸⁵

⁷⁷ Council of State, n° 192.085, 31 March 2009, *vzw Natuurpunt e.a.*; Council of State, n° 211.533, 24 February 2011, *vzw Milieufrent Omer Wattez*.

⁷⁸ ECHR, 24 February 2009, *L'Erablière ASBL v. Belgium*.

⁷⁹ Constitutional Court, n° 109/210, 30 September 2010, *Christel Demerlier*.

⁸⁰ Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW*.

⁸¹ E.g. Council of State n°. 166.889, 15 February 2007, *VZW Milieufrent mer Wattez*. See in the same sense: Council of State, n° 193.593, 28 May 2009, *vzw Milieufrent Omer Wattez*; Council of State, n° 197.598, 3 November 2009, *vzw Stichting Omer Wattez*; Council of State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*; Lefranc (2010) 447.

⁸² E.g. Council of State, n° 197.509, 3 November 2009, *vzw Milieufrent Omer Wattez* and more than 20 other judgments in the same sense; Lefranc (2010), 446

⁸³ Lefranc(2010) 447-453; the Council is sometimes of the opinion that there is a sufficient proportional relationship between the material and territorial sphere of action of a (sub-)regional environmental NGO and a contested decision (e.g.: Council of State, n° 208.918, 10 November 2010, *vzw Natuur en Landschap Meetjesland* concerning a specific land use plan for an industrial facility), while on other occasions it believes that this not the case (e.g. Council of State, n° 208.116, 13 October 2010, *vzw Milieufrent Omer Wattez* (building permit for an individual house); Council of State, n° 208.473, 27 October 2010, *vzw Milieufrent Omer Wattez* (building permit for an individual house)). In the latter cases the NGO referred without success to Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, ECR [2009] I-9967. Two paragraphs of the opinion of AG Sharpston in that case are also quoted in Council of State, n° 205.742, 24 June 2010, *l'asbl L'Erablière* holding that conditions relating to national requirements as to the registration, constitution or recognition of associations, the purpose of which is to obtain a legal declaration of the existence of such bodies under national law, are valid. In that case the Council of State has meanwhile referred a question on the constitutionality of Art. 26 of the Act of 27 June 1921 for a preliminary ruling to the Constitutional Court, referring also to Art. 6(1) ECHR and Art. 1 and 10a of Directive 85/337/EEC (Council of State, n° 218.297, 1 March 2012 *l'asbl L'Erablière*).

⁸⁴ Lefranc(2010) 453-454.

⁸⁵ Cases in which foreign environmental NGOs were one of the parties (together with other Belgian natural or legal persons) were disposed of without the Council going into the issue: Council of State, n°193.903, 5 June

Constitutional Court

The Constitutional Court has a broad view on standing of NGO's, including environmental NGO's. NGO's have standing in the Court if they pursue effectively a collective interest that is sufficient specified and this collective interest can be jeopardized by the challenged provision. To our knowledge the Court has seldom declined an environmental NGO from challenging environmental law provisions.⁸⁶

In principle "foreign" NGOs should be treated on equal footing, but case law that is illustrating this is lacking.

Slovak Brown Bears

For the moment there is no national case law available in which a reference is made to the ECJ case *Lesoochránárske zoskupenie*⁸⁷. In that case the ECJ held:

"46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, **it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.**

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, **it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.**

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the

2009, *Van Herck and Others* (in this case 2 environmental NGOs from The Netherlands were parties: *Stichting Eijsden Gifvrij* and *Stichting Milieufederatie Limburg*; the challenged environmental permit was meanwhile replaced by another one; note that the judgment was passed more than 11 years after the introduction of the case!); Council of State, n° 211.898, 10 March 2011, *Stichting Reinwater* and *vzw Limburgse Milieukoepel* (*Stichting Reinwater* is an environmental NGO of The Netherlands; the case was judged manifestly not founded; the judgment was passed 1 year and 10 months after the introduction of the case).

⁸⁶ De Sadeleer (2005) 13-15.

⁸⁷ Case C-240/09, *Lesoochránárske zoskupenie*, Judgment of 8 March 2011, *nyr*. The same holds true for Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, Judgment of 12 May 2011.

rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I- 2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. **It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."**

Although there is no detailed discussion in the judgment on what type of criteria relating to standing for environmental NGOs are admissible or not in the light of Article 9 (3) of the Aarhus Convention, one can see in this judgment an endorsement of the view that the Aarhus Compliance Committee took in its Case 11(2005) *Belgium: Bond Beter Leefmilieu Vlaanderen VZW*:

"35. While referring to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action ("*actio popularis*") in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.

36. Accordingly, the phrase "the criteria, if any, laid down in national law" indicates a self restraint on the parties **not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.** One way for the Parties to avoid a popular action ("*actio popularis*") in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. **However, this presupposes that such criteria do not bar effective remedies for members of the public.** This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, "to take fully into account the objective of the Convention to guarantee access to justice."

37. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, namely to what extent national law effectively has such blocking consequences for environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. As mentioned, Belgian (Walloon) law does not provide for administrative appeals or remedies for third parties to challenge town planning permits or decisions on area planning. The question therefore is whether sufficient access is granted to the Council of State. This evaluation is not limited to the wordings in legislation, but also includes jurisprudence of the Council of State itself.

[...]

39. **The Convention does not explicitly refer to federations of environmental organizations. If, in the jurisdiction of a Party, standing is not granted to such federations, it is possible that, to the extent that member organizations of the federation are able to effectively challenge the act or omission in question, this may suffice for complying with article 9, paragraph 3. If, on the other hand, due to the criteria of a direct and subjective interest for the person, no member of the public may be in a position to challenge such acts or omissions, this is too strict to provide for access to justice in accordance with the Convention. This is also the case if, for the same reasons, no environmental organization is able to meet the criteria set by the Council of State.**

40. The Convention does not prevent a Party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of

compliance, the jurisprudence of the Belgian courts, as reflected in the cases submitted by the Communicant, implies **a too restrictive access to justice for environmental organizations**. In its response, the Party concerned contends that the Communicant “presents an unbalanced image by its ‘strategic use’ of jurisprudence,” and that “the difficulties that the BBL experiences by the Communicant to bring an action in court are not representative for environmental NGOs in general”. In the view of the Committee, however, the cases referred to show that the criteria applied by the Council of State so far seem to effectively bar most, if not all, environmental organizations from challenging town planning permits and area plans that they consider to contravene national law relating to the environment, as under article 9, paragraph 3. Accordingly, in these cases, too, the jurisprudence of the Council of State appears too strict. Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in article 9, paragraph 3, of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with article 9, paragraph 4.”⁸⁸

We are not aware of cases decided by ordinary courts after the judgment in Case C-240/09, *Lesoochranárske zoskupenie* that would contradict with what the ECJ has held in that case. As the Act of 12 January 1993 is concerned, the question was raised if the condition that the NGO must have acquired legal personality under the Act of 27 June 1921 on non-profit associations for at least 3 years, is in conformity or not with Article 9 (3) as well as the fact that the Act is applicable on (material) acts that violates environmental law, but not omissions that do so⁸⁹. As the Council of State is concerned, there is, as has been indicated earlier, some evolution in the case law. If the case law of the general assembly of the Council of State⁹⁰ would be followed by all the chambers, there would be no problem anymore as standing for NGO’s is concerned, but regrettable, that is not the case. The jurisprudence regarding standing for NGO’s seems indeed to become in some instances more lenient⁹¹, while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention⁹². In the latter case law the Council of State is of the opinion, as has been indicated already above, that although environmental ngo’s are presumed to have an interest by virtue of Art. 9 (2) of the Aarhus Convention, they must also show “capacity” or “quality” (“*hoedanigheid*”), a somewhat unclear concept that is interpreted in that sense that there should be a clear match between the statutory objective of the NGO and the contested project. A regional organization can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, are bigger projects that are of supra regional interest.

⁸⁸ ECE/MP.PP/C.1/2006/4/Add.2. See also Andrushevych, Alge & Konrad (2011), 71-81.

⁸⁹ A private bill was introduced a second time (the original proposal dates of 1 April 2007) to reduce *inter alia* this period to one year and to include explicitly omissions: B. Martens and Others, *Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d’action en matière de protection de l’environnement*, Sénat de Belgique (2007-2008) DOC 4-470/1, 6 December 2007.

⁹⁰ Council of State, n° 187.998, 17 November 2008, *Coomans and Others*

⁹¹ E.g. Council of State, n° 193.593, 28 May 2009, *vzw Milieufrent Omer Wattez*; Council of State, n° 197.598, 3 November 2009, *vzw Stichting Omer Wattez*; Council of State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*.

⁹² E.g. Council of State, n° 197.509, 3 November 2009, *vzw Milieufrent Omer Wattez* and more than 20 other judgments in the same sense.

Request for action

Under the influence of Articles 12 and 13⁹³ of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage a request for action was introduced in the various legislations. In the Flemish region e.g. this right was awarded to (a) natural or legal persons affected or likely to be affected by environmental damage, (b) natural or legal persons having an interest in environmental decision making relating to the damage and (c) environmental NGO's as defined in Article 2 of the Act of 12 January 1993. The decision of the competent administration can be appealed administratively with the Flemish government within 30 days after notification of the decision. The appeal has no suspensif effect. The decision taken on administrative appeal can furthermore be challenged before the Council of State (Articles 15.6.1-15.7.1 Decree General

⁹³ "Article 12. Request for action

1. Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

5. Member States may decide not to apply paragraphs 1 and 4 to cases of imminent threat of damage.

Article 13 Review procedures

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings."

Provisions Environmental Protection). A similar right to request for administrative measures on persons that commit environmental offences was also introduced (Article 16.4.18 of the same Decree). Comparable provisions to implement Articles 12 and 13 of Directive 2005/4/EC were introduced in the Walloon Region (Art. D. 131-D.134 of Book I of the Environmental Code), in the Brussels Capital Region (Art. 14 Ordinance of 13 November 2008) and on the federal level (various Royal Decrees).

The effectiveness of the judicial review

Procedural remedies

Suspensive effect

In the *administrative appeal procedures* for e.g. environmental or building permits, in general only appeals lodged by authorities have suspensory effect, not appeals lodged by the applicant or third parties. After exhaustion of the administrative appeals one can appeal against permit decisions taken in last instance by the administrative/political authorities before the Council of State (or, as building permits are concerned in the Flemish region before the Council for Permit Disputes), that can review the legality of the decision, both from a procedural as from a substantive point of view, including the compliance of the challenged decisions with relevant European Directives. This procedure is open to all interested parties (operator, neighbours, some authorities, and other interested parties) but has no suspensory effect. If the Council of State (or the Council for Permit Disputes) is of the opinion that the challenged decision is violating one or another rule of law, the decision will be annulled. In urgent cases the Council can also suspend the challenged decision in *interim* proceedings. After annulment the case will be taken over again by the administrative authorities and they can take another decision. They must of course in such case respect the judgment and avoid committing the same illegality.

Injunctive relief

By an Act of 1989 the Council of State was empowered to *suspend* the implementation of a challenged administrative decision or regulation (the Flemish Council for Permit Disputes has similar powers). An action for cessation ("*vordering tot schorsing*" "*demande de suspension*") may be brought along with the action for annulment. The Council of State *may* suspend the challenged decision if the grounds for annulment are found to be valid (a serious plea is invoked "*moyen sérieux*" "*ernstige middelen*"), if there is an urgent necessity and if the immediate implementation of the challenged act or regulation may cause detriment that is difficult to remedy. Even when the conditions for suspension are present, the Council is not obliged to suspend, taking into account the different interests at stake. However, a petitioner who obtains no *interim* relief from the Council of State will often conduct a long action, at the end of which the ruling will often have been overtaken by events.

According Article 584 of the Judicial Code, the President of the Court of First Instance is competent to give a provisional solution (*interim relief*) to any case in summary proceedings ("*kort geding*" "*procedure en référé*"). So the president can in urgent cases, after summary proceedings, order temporary measures with a view to avoid serious detriment⁹⁴.

The Act of 12 January 1993 on a Right of Action for the Protection of the Environment, allows environmental organizations that satisfy certain requirements, public prosecutors and administrative authorities such as municipal authorities, to bring a civil action for cessation of acts that constitute a

⁹⁴ See for applications of this procedure in environmental matters: De Pue, Lavrysen & Stryckers (2011) 998-1101.

(clear) breach of the legislation to protect the environment before the President of the Court of First Instance. Also individual citizens are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action⁹⁵.

Timely

According to the Organic Act on the Council of State (Art 17 (4)) the president or acting president of the competent Chamber of the Council of State should decide on the demand for suspension within a period of 45 days. If an administrative decision or regulation is suspended, a final decision on the demand for annulment should be delivered within the following six months. There is however no sanction for transgressing this time limits. In practice, these time limits were seldom observed in the past. It seems that decisions on demands of suspension are delivered in practice 4 to 9 months after the introduction of the case. When the act or regulation is not suspended, deciding on the merits of the cases takes a long time, till recently delays of five to ten years were not exceptional. Some of the cases were found at the end to have no subject anymore, because e.g. the period of validity of a challenged permit had expired meanwhile⁹⁶. Because de backlog of the Council of State is gradually disappearing in recent times, nowadays decisions on demands for suspension seems to be taken within a period of 5 months on average and on demands for annulment within a period of 2 to 2,5 years. There are no clear figures on the performance of the Flemish Council for Permit Disputes⁹⁷. It is however clear that this Council has already build up a serious backlog, so that the Council is not meeting the requirement of timely judgments for the moment⁹⁸.

The *Judicial Code* provides in its Articles 1035 to 1041 a fast track procedure (“summary proceedings”) for dealing with requests for *interim relief*. The cases can be handled on very short notice. That same procedure – but leading to a judgment on the merits of the case - is applicable in the framework of the Act of 12 January 1993 on a Right of Action for the Protection of the Environment (Art. 3(1)). We can quote an example of a case introduced on June 7th 2004, with a decision in first instance on June 24th 2004 and a decision on appeal on July 2th 2004.⁹⁹ However, such a diligent handling of cases seems to be exceptional. Especially when there is appeal it can happen that the case takes different years to be settled¹⁰⁰.

Effective remedies – Undue delays

In general one can say that the different courts dispose of sufficient remedies to provide for adequate and effective relief. However, in practice, there are a lot of cases that deliver unsatisfactory results, mainly because of the delays in handling the cases due to the historical backlog with the Council of State (and the newly build up backlog with the Flemish Council for Permit Disputes) and on the level of the Courts of Appeal, as civil (and penal) cases are concerned. When a plan or permit is challenged before the Council of State and one does not obtain the suspension of the challenged act within a short period, the risk is real that the developments or projects have been completely or largely realised¹⁰¹ on the ground the day the act is annulled some years later. It can

⁹⁵ For a nearly complete overview of the case law on the basis of this Act, see: Lefranc (2009) 2-45.

⁹⁶ Lefranc (2005b) 669-671.

⁹⁷ See for a random sampling of processing times: Raad voor Vergunningsbetwistingen, *Jaarverslag 2010-2011, Brussels*, 55-59.

⁹⁸ Raad voor Vergunningsbetwistingen, *Jaarverslag 2010-2011*, 59-65.

⁹⁹ Lefranc (2009), 25.

¹⁰⁰ Lefranc (2009), 25. Very exceptional is however a decision on the admissibility of a case only, that was taken more than 4 years after the introduction of it (and that is meanwhile appealed): President of the Court of First Instance, Ghent 26 September 2011, *TMR* 2011, 711-718.

¹⁰¹ E.g. Council of State, n° 212.825, 28 April 2011, *Lauwers*. The Council of State annuls a building permit – delivered on 29 March 2007 - for the construction of a tramway *Deurne-Wijnegem*, together with the decision to release the operator from the obligation to prepare an EIA, because that second decision was found to be

also happen that a project has to be stopped in the course of its realisation if it takes too much time to obtain a suspension of the permit. That is frustrating, not only for the third parties, but also for the developers and the authorities. That is especially so if the Council decide e.g. to annul with very much delay on (very) formal grounds, without going into the substantive issues. It can lead to delays in development, extra costs, repeated attempts to regularize the situation, followed by renewed disputes and judgments, claims for damages and, finally, loss of respect for and credibility of the court system. This situation partially explains also why regional authorities have tried to circumvent judicial review by the Council of State in providing ratification of some permits for larger projects by the regional parliament, which has as a result that those acts can only be challenged before the Constitutional Court, with a less extended review as a consequence (only review of constitutionality and conventionality (including compatibility with EU law) of the content of such acts, not review of the broader substantial and procedural legality).

Such a specific approach was first applied ones in the Flemish Region in the period before ratification of the Aarhus Treaty¹⁰²:

The Flemish Government Decision of 26 December 2000 to partially amend the regional zoning plan for *Sint-Niklaas-Lokeren* with a view to the construction of the so-called “*Deurganck-dock*” (Port of Antwerp) on the Left Bank of the Scheldt was suspended by the Council of State because it violated Article 6.4 of the Habitats Directive, due to the fact that the planned dockyard would diminish the special protection area “*Schorren en polders van de Beneden-Schelde*” (Salt Marshes and Polders of the Lower Scheldt), which reduction would in turn be compensated by an extension of the special protection area “*Durme en middenloop van de Schelde*” (*Durme* and Central Course of the Scheldt). Since the latter area had already been notified to the European Commission under the Habitats Directive, there was no question of a full compensation¹⁰³. The planning permission that had been granted for the construction of the dockyard had previously been suspended twice¹⁰⁴, so that the works that had already begun on the *Deurganck-dock* had to be stopped. Thereupon the Flemish Parliament decided to take the matter in hand. A special decree (Act of the Regional Parliament) was adopted (the so-called *Deurganckdock Decree* of 14 December 2001) in which it was set out that the construction of the *Deurganckdock* was a project of imperative and overriding strategic interest within the meaning of Article 6.4 of the Habitats Directive. The same went to the licences required for the (simultaneous) establishment of the nature compensation sites, which were considerably enlarged in relation to what had originally been provided for in the original regional zoning plan, after the environmental impact statement was revised, including the requisite appropriate assessment. The Flemish government may issue the licences without awaiting the amendment of the regional zoning plan. The licences are then ratified by decree, so that the Council of State no longer has jurisdiction to review the lawfulness thereof, but only the Constitutional Court has jurisdiction to review their constitutionality. The Constitutional Court has dismissed all actions for suspension and actions for annulment brought against this Decree and against the decrees whereby planning permission has been ratified by the Flemish Parliament¹⁰⁵. The Constitutional Court considered that the Flemish Parliament had not been wrong to characterize the construction of the *Deurganckdock* and the resumption of the construction works as a project of “imperative overriding public and strategic interest”. The Constitutional Court also held the view that the considerably extended nature compensations (in comparison with the plans annulled by the Council of

unlawful (the decision that there were no significant impacts to be expected was found inconsistent with the elements of a mobility study on cut-through traffic). In that respect the case-law of the Council of State seems in line with the case law of the ECJ (Case C-75/08 *Mellor* [2009] ECR-I-3799, paras 57-59). The demand for suspension had been rejected in 2008 (Council of State, n° 183.799, 4 June 2008). The construction was nearly completed the day the judgment on the merits was passed. The construction works have been delayed. Meanwhile the permit has been issued again with relative minor changes, but that seems to satisfy the requester and the tramway became operational in April 2012.

¹⁰² Lavrysen & Van den Berghe (2006) 11-13.

¹⁰³ Council of State, n° 109.563, 30 July 2002, *M. Apers and Others*

¹⁰⁴ Council of State, n° 87.739, 31 May 2000; Council of State, n° 93.767, 7 March 2001.

¹⁰⁵ Court of Arbitration, n° 16/2002, 26 June 2002; Court of Arbitration, n° 174/2002, 27 November 2002; Court of Arbitration, n° 94/2003, 2 July 2003; Court of Arbitration, n° 151/2003, 26 November 2003; Court of Arbitration, n° 562006, 19 April 2006.

State) now do meet the requirements of the Birds and Habitats Directives. Later on, the regional zoning plan has been amended accordingly. The European Commission has also discontinued the infringement proceedings it had instituted for lack of compensatory measures, being satisfied with the extra compensations, while the Council of State has dismissed the actions for annulment of the planning permission that had been granted.¹⁰⁶

Inspired by that precedent, the Walloon Region on its turn adopted the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the public interest (*“relatif à quelques permis pour lesquels il existe des motifs impérieux d’intérêt général”*). Meanwhile however, the Aarhus Convention had been ratified by Belgium (21 January 2003) and the EU (17 February 2005) and complemented by some Amendments to EU Directives (2003):

The Decree states that overriding reasons in the public interest have been established for the grant of town-planning consents, environmental consents and combined consents relating to different works (the improvement of the infrastructure and public buildings of the regional airports of *Liège-Bierset* and *Brussels South Charleroi*; the *RER* rail network; structural modes of public transport for Charleroi, *Liège*, Namur and Mons; missing road and waterway links in the Region of Wallonia of the trans-European transport network). Those consents shall be ratified by the Parliament after having followed first the normal administrative procedure. Furthermore a whole series of previous delivered permits, that were contested at that moment before the Council of State, were ratified too (including e.g. a permit for a wastewater treatment plant, a management and training centre...). The ratification by decree of the Walloon Parliament of building consents and consents for works gives those acts legislative status. The Council of State consequently ceases to have jurisdiction to hear actions for annulment brought against the acts thus ratified, which can now be challenged only before the Constitutional Court, before which, however, only certain grounds may be pleaded. The Council of State raised in the pending cases before it (challenging the permits that are ratified by the Decree) different preliminary questions to both the ECJ and the Constitutional Court. The Constitutional Court on its turn, confronted not only with those questions of the Council of State, but also with a whole series of demands for annulment of the Decree, made on its turn some references for a preliminary ruling to the ECJ. The ECJ has meanwhile answered those questions. The ECJ answered these questions with its judgment of 18 October 2011¹⁰⁷ as follows: “ (1). *Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive’s scope. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply ‘ratify’ a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337, as amended by Directive 2003/35. (2). Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that: – when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law; – if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act”.* The Council of State has still to wait the answers of the Constitutional Court on the parallel questions.

¹⁰⁶ Council of State, n° 154.603, 7 February 2006, *M. Apers and Others* and various similar judgments on other particular permits.

¹⁰⁷ Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and Others*; confirmed by Joined cases C-177/09 to C-179/09, *Le Poumon vert de la Hulpe ASBL and Others* (Order of the Court of 17 November 2011).

Meanwhile that Court itself received the answers of the ECJ on the questions it referred to it. The ECJ held in that case¹⁰⁸: “ (1). *For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention.* (2). *Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply ‘ratify’ a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.* (3). *Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that: – when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and – if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.* (4). *Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority’s decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.* (5). *Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.* (6.) *Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.”* The Constitutional Court has now reopened the written procedure, allowing the parties to present their statements on the consequences of this judgment for the pending cases. After expiration of the time allowed for that to the parties, the Constitutional Court will hear the case and decide.

Fivolous applications

Before the Council of State specific provisions apply to requests that are without purpose, obvious not admissible or obvious not founded. In these procedures, in general, the written procedure will be shortened and there will be, except request, no oral hearing (Art. 14b Rules of Procedure; Art. 15c Rules of Interim Procedure) or the written procedure will be shortened and a hearing presided by only one judge will be held on short notice (Art. 93 Rules of Procedure). The Council can also impose a penalty from 125 to 2500 EUR in cases of obvious unlawful demand (Art. 37 of the Organic Act). Ordinary Courts have a similar possibility, even *ex officio*, in cases that a procedure is used for

¹⁰⁸ Case C-182/10, *Solvay and Others* (Judgment of 16 February 2012, nyr)

obvious delaying or unlawful objectives (Art. 780b Judicial Code). One can claim also damages in cases of “frivolous and vexatious proceedings”.

ADR

ADR approaches are largely absent in Belgian administrative and environmental law. Although in the framework of the Act of 13 January 1993 an attempt at reconciliation is mandatory, when the action has already brought to the court, the absence of such an attempt do not affect the validity of the action. In practice no much effort is put in such attempts, and seldom can the case be solved in such a way.¹⁰⁹ In the literature there is some interest to develop mediation approaches in the environmental field¹¹⁰.

Considerable damage in absence of injunctive relief

A case that illustrates that the conditions under which the Council of State can suspend administrative decisions and regulations – the requester should invoke serious pleas (pleas that seems to be founded on first sight) and demonstrate a difficult to repair serious detriment when the contested acts are immediately applied –, the time it took in the past to handle such a case (a similar situation we have for the moment with the Flemish Council for Permit Disputes), together with the objective of the suspension (avoiding that the detriment can occur), are not always appropriate in environmental matters, is the *Fluxys Gas Pipeline* case. On 27 March 2008 a sub-regional environmental NGO introduced a demand for suspension of a land use plan assigning a “pipeline street” for the construction of a main pipeline in the area of *Brakel-Haaltert*, plan that has been approved by a decision of the Flemish government of 11 January 2008. The Council of State rejected the demand by a judgment of 9 October 2008 because in had becoming clear during the hearing of the case on 12 September 2008 that suspension had no sense anymore because meanwhile the pipeline had already been constructed (only the restoration works had still to be done), so that the contested environmental harm could not be avoided anymore.¹¹¹ The same day a similar decision was taken with regard to the building permit of 12 February 2008, against which a demand for suspension was introduced on 10 April 2008¹¹². More than 2, 5 years latter both the land use plan and the building permit were annulled¹¹³ for violation of Art. 6(3) and 6 (4) of the Habitats Directive and the corresponding provisions of regional law. The Council was – with reference to the relevant case law of the ECJ- of the opinion that a proper assessment was needed and that the assessment that was carried out in the context of the SEA was of a poor quality, not meeting the standards the ECJ sets in this respect. Some potential impacts were not taken into account in a sufficient way – especially the possible negative impacts on the habitats of the miller’s thumb (*Cottus Gobio*) and the brook prick or European brook lamprey (*Lampetra planeri*) - and the suggested mitigating measures had proven to be insufficient and wrongly interpreted (the works were actually carried out in the period that precisely should have been avoided to minimize their impact). Off course the factual situation cannot be undone. From a legal point of view, the procedure should now be taken over again with a correct proper assessment. But has this any sense at all?

¹⁰⁹ Lefranc (2009) 28-30.

¹¹⁰ Lanckswaerd (2011) 3-19.

¹¹¹ Council of State, n° 186.975, 9 October 2008, *vzw Milieufrent Omer Wattez*

¹¹² Council of State, n° 186.976, 9 October 2008, *vzw Milieufrent Omer Wattez*

¹¹³ Council of State, n° 211.533, 24 February 2011, *vzw Milieufrent Omer Wattez*; Council of State, n° 211.535, 24 February 2011, *vzw Milieufrent Omer Wattez*.

Costs in the environmental procedure

Loser pays principle

Recent changes in the legal context

Before the judgement of the Supreme Court of 2 September 2004¹¹⁴ it was settled case law that in civil procedures the losing party could only be condemned on the basis of art. 1017 and following of the Judicial Code to the “judicial costs” specified in art. 1018 of that Code. The honorarium and costs of the lawyer of the winning party could never be shifted to the losing party. The principle was that each party had to support the fees of its own lawyer. By the said judgment, the Supreme Court changed its case law radically in deciding that in liability cases, the honorarium and costs of the lawyer of the successful claimant, could be considered as an element of the damages suffered, if these costs were necessary to obtain compensation and in such cases the fees could thus be shifted to the losing defending party. This radical shift in the case law was heavily criticized and led to very diverging judgements on this issue and lower judges sometimes refusing to follow the case law of the Supreme Court. Furthermore some references for a preliminary ruling to the Constitutional Court were made on the basis of the art. 10 & 11 of the Constitution (equality and non-discrimination) because this case law, that was only applicable to liability cases, created a lot of differentiations in treatment, for which there was no clear justification. E.g. the defender who won a liability case, could not shift the honorarium and costs of his lawyer to the losing party (claimant), creating a difference in treatment between claimants and defenders. Also, in other than liability cases, the loser pays principle could not be applied. The Constitutional Court ruled that the absence of a general system for cost shifting was contrary to the articles 10 and 11 of the Constitution, in conjunction with article 6 of the ECHR¹¹⁵. The Court invited the legislator to come forward with a general system of cost shifting, referring to the existing systems in The Netherlands, France and Germany and indicating that the loser pays principle could be moderated and that the right to access to courts, equality of arms and fair trial, not necessary implies that the loser pays principle has to apply in all circumstances or that it should cover the integral honorarium or costs of the lawyer from the losing party, leaving room for a fixed tariffs system.

On 21 April 2007 the legislator introduced the new cost shifting system by amending art. 1022 of the Judicial Code. The legislator took up proposals made by the different Bar Associations and opted for a system of a fixed intervention of the losing party in the honorarium and costs of the lawyer of the winning party, instead of full compensation. Article 1022 of the Judicial Code, that is applicable in civil cases, states now that the King, after having received the opinions of the Bar Associations, will fix the basic, minimum and maximum “procedural allowance”, an intervention of the losing party in the lawyers costs of the winning party, in function of the nature of the case and the importance of the dispute. On request of one of the parties the judge can by a reasoned decision lower or increase the allowance, compared with the basic tariff, as far he respects the minimum and maximum tariffs. The judge has to take into consideration the financial situation of the losing party, the complexity of the case, the contractual arrangements in favour of the winning party and, as the case maybe, the manifest unreasonable nature of the situation. In principle, when the losing party is receiving legal aid, the minimum tariff will be applied, except when this would remain unreasonable, in which case the allowance can be set at a lower rate and even nearly completely waived away¹¹⁶. When there is more than one winning party, the allowance is maximum the double of the maximum tariff. When there are more than two winning parties, the allowance will be divided between these parties by the judge.

¹¹⁴ Cour de cassation, 2 September 2004, C.01.0186.F.

¹¹⁵ Constitutional Court, n° 57/2006, 19 April 2006, *OM and De Boel v. Waltherus, Walloon Region v. Malisse and Godefroid and De Keyser v. nv Crocodile and bvba Terclaes*.

¹¹⁶ Constitutional Court, n° 182/2008, 18 December 2008, *Brialmont and Others*.

In criminal cases the “procedural allowance” is in case of a conviction due to the civil party. On the other hand, in case of an acquittal, only the civil party that exercised the prosecution itself by direct summons before the criminal court can be condemned to the procedural allowance. When the case is brought by the public prosecutor, there will be no allowance (art. 162*bis* Criminal Procedure Code). The new system is not applicable in administrative cases before special administrative tribunals or the Supreme Administrative Court (Council of State)¹¹⁷. The Constitutional Court rejected an appeal for annulment of the new system¹¹⁸ and in subsequent judgements on preliminary rulings the new system was further upheld, except in so far the State could be condemned to pay a procedural allowance when the action of the *auditorat de travail* (public ministry with the labour courts and tribunals) has been rejected¹¹⁹, in contrast with cases brought by public prosecutors to the criminal courts and tribunals¹²⁰. The same was judged in relation to the Town and Country Planning Inspector when his claim for restoration brought before the civil court has been rejected. The Constitutional Court held that such a demand is formulated in the general interest and in view of the preservation of a proper land use planning and that the inspectors should be in the position to formulate their claims in fully independence, without incurring financial risks due to the procedure¹²¹.

*Actual situation*¹²²

Civil cases

In civil matters the principle is that the losing party has to pay the costs, except when there is an agreement in another sense between the parties that is ratified by the Court (art. 1017 Judicial Code). Are considered as costs (art. 1018):

- court fees;
- costs of judicial acts;
- costs for expedition of judgements;
- costs of experts and witnesses;
- travel expenses of the judges, the registrar and the parties made for the particular case, when the travel is ordered by the court;
- the judicial allowance;
- the honorarium and costs of the mediator appointed by the court.

The judgement will fix these costs, after the parties have had the opportunity to declare and prove them (art. 1021). Some of the costs are fixed by law or executive order.

The court fees vary according to the instance. The fee is 82 EUR before a court of first instance, 186 EUR before a court of appeal and 325 EUR before the Supreme Court. There are fixed tariffs for issuing a summons by a bailiff to introduce a new case (around 50 EUR) and for witnesses (5 EUR per appearance in court). Court fees as such do not vary according to “the value of the case”.

The basic, minimum, and maximum amounts of the procedural allowance (contribution to the honorarium and costs of the lawyer of the winning party) are determined by the Royal Decree of 26 October 2007 (*Moniteur belge*, 9 November 2007). These allowances apply per instance (first instance, appeal, cassation...). When the claim is or can be expressed in money the allowance will vary according to the value of the claim. E.g. for a claim of less than 250 EUR, the basic allowance is 150 EUR, with a minimum of 75 EUR and a maximum of 300 EUR. For a claim between 10.000 and 20.000

¹¹⁷ This was not considered violating the principle of equality and non-discrimination: Constitutional Court, n° 118/2009, 16 July 2009, *Bijvoet v. Walloon Region*.

¹¹⁸ Constitutional Court, n° 182/2008, 18 December 2008, *Brialmont and Others*.

¹¹⁹ Constitutional Court, n° 83/2011, 18 May 2011, *Auditeur de Travail v. Ingénierie et Maintenance SA*.

¹²⁰ Meanwhile art. 1022 of the Judicial Code has been amended.

¹²¹ Constitutional Court, n° 43/2012, 8 March 2012, *Gewestelijke Stedenbouwkundige Inspecteur v. Heyndrickx and Others*.

¹²² Sagaert & Samoy (2011) 279-303.

EUR, the basic allowance will be of 1.100 EUR, with a minimum of 625 EUR and a maximum of 2.500 EUR. For a claim of more than 1.000.000 EUR the basic allowance is 15.000 EUR, with a minimum of 1.000 EUR and a maximum of 30.000 EUR. For claims that cannot be expressed in money the basic amount is 1.200 EUR, with a minimum of 75 EUR and a maximum of 10.000 EUR.

There is also a fee on delivering an expedition or a copy of a judgement (between 0, 50 and 5 EUR per page, according to the instance).

Criminal cases

As indicated above, an intervention in the honorarium and costs of the losing party is only possible in case of an acquittal, when the civil party has exercised the prosecution itself by direct summons before the criminal court (art. 162*bis* Criminal Procedure Code). In the vast majority of the cases the civil party will only intervene in a prosecution launched by the public prosecutor, so that the award of a “procedural allowance” will be very exceptional. The person who is convicted will be condemned to the costs of the procedure (art. 162 Criminal Procedure Code). The costs are regulated by the Royal Decree of 27 April 2007. There are fixed tariffs for experts, translators and interpreters, bailiffs, witnesses, member of the jury and different technical interventions.

Administrative cases

As indicated earlier, the system of “judicial allowances” does not apply in the procedure before administrative tribunals or the Supreme Administrative Court, so the winning party must bear the costs and honorarium of its own lawyer. Before the Council of State a court fee has to be paid. The fee amounts to 175 EUR per requester. The same sum has to be paid separately if on demands also the suspension of the challenged act. If e.g. 10 persons are introducing together a request for suspension or for annulment the fee will be each time 175 EUR. At the end of the procedure this court fee has to be paid by the losing party. The same principles apply before the Flemish Council for Permit Disputes (being that the court fee is 175 EUR for a demand for annulment and 100 EUR for a demand for suspension).

Constitutional Court

There is neither a court fee nor a system of “judicial allowances” before the Constitutional Court.

Legal requirement

There is no legal requirement in the Belgian legal order – except Art. 9 (4) of the Aarhus Convention that is of course part of the legal order - that the costs related to environmental litigation should not be prohibitively expensive.

Bonds

The appellant in an environmental case has not to pay a bond in order to obtain an injunction of the appealed decision. However when an individual citizen or group of citizens act in the place of the defaulting municipality on the basis of Art. 271 Municipal Act (and its regional counterparts) there is an obligation to “offer” security that one should pay the costs of the proceedings and the condemnations if one loses. In general, a declaration that one shall bear the costs and that one has paid the initial court fee, is accepted as being sufficient in that regard. However, in some exceptional cases the court asked for important financial securities taking into account the expected costs of expertise or of the value of the counterclaim (4250 EUR, respectively 105.000 EUR)¹²³.

¹²³ Lefranc (2009) 19-22.

Protective Costs orders

Protective costs orders as such are not known. The need for such orders maybe felt less than in other legal orders, because most of the costs can be assessed more or less in an early stage or are fixed by law, with the notorious exemption of costs of experts.

Prohibitively expensive

The preparation of a case and the elaboration of the further pieces in the procedure and the pleadings are time consuming. With an hourly rate ranging from € 100 to € 300 (without material costs) the barristers cost of a case will easily reach € 3000 to € 9000. Environmental NGOs mention an average cost of € 5000 for a Council of State case, and € 2000 for a case before the ordinary courts. They try often to do themselves a maximum of preparatory work so that they can limit barrister's costs. In some instances, barristers agree with a preferential tariff for an NGO (e.g. hourly tariff of € 75). A case for less than € 2000 seems however impossible. In complex cases, and in cases where there is a need to appeal, the cost can be much higher. Together with the court fees, which as such are not so high, and the risk to have to pay in civil cases a "judicial allowance" as intervention in the lawyer's fees and cost of the winning party, if one loses the case, this is an important obstacle for access to justice by ordinary people and ngo's. If these costs are not covered by an insurance (that can be often the case when a private party is suffering damages that can be considered as environmental) one shall think often twice or more before launching procedures. If it is not a clear cut case, one shall often abandon the idea to go to court. Although one cannot speak of "prohibitively expensive" procedures in Belgium, lawyer's fees and the new system of "judicial allowances" have clearly a dissuasive effect.

Legal aid and other methods of public and private funding

Legal aid and exemption of court fees and other expenses

The Judicial Code (Book IIIb) organizes the system of primary and secondary legal aid. Primary legal aid is restricted to legal advice by lawyers. Secondary legal aid covers assistance by lawyers (barristers) in procedures before the different courts. In each district there is a commission for legal aid, composed of barristers and representatives of the social sector. This commission is in charge of organizing primary and secondary legal aid. The federal government is financing the system. In each district there is a Bureau for Legal Aid, operated by the local Bar Association, which is taking care of secondary legal aid. The Bureau for Legal Aid can award partially or complete free of charge secondary legal aid, depending on the income situation of the client. In that case the lawyer (*Pro Deo* Lawyer) will be paid by the government, after, as the case maybe, recuperation of the "judicial allowance". The same persons may also favour "free of charge" procedures by decision of the concerned court (art. 669–687 of the Judicial Code). In that case the court fees and other costs shall be waived completely or partially away. A Royal Decree of 18 December 2003 determines who can benefit from free of charge legal aid and procedures and who can benefit from partially free of charge legal aid and procedures. According to this Royal Decree natural persons who benefit minimum social security and persons in comparable situations or persons who have a monthly net family income of less than 907 EUR (person living alone) or 1.165 EUR (persons living together) (augmented with 10 % per person in charge) are entitled to free of charge legal aid and procedures. Persons with an income that is maximum 25 % higher than those limits are entitled to partially free of charge legal aid en procedures (they have to pay part of the lawyer's fee with a maximum of 125 EU per appointment). The Council of State can in the same conditions exempt court fees and expenses. There are no specific provisions concerning legal aid and exemption of court fees for legal

persons, nor for NGO's. There is only one case reported in which legal aid was awarded to an environmental NGO¹²⁴.

Public Funding NGOs

There is no specific public funding for environmental litigation by environmental NGO's. However, federal and regional governments (as well as local governments) are giving, apart from project related subsidies, some general subsidies to support the activities of some environmental NGO's. Such non earmarked subsidies can off course support to some extent litigation of those NGO's, but it is not seen as a very reliable source of funding litigation¹²⁵.

Pro bono assistance

Except the assistance provided for in the context of legal aid, by "Pro Deo" Lawyers – junior lawyers are obliged to participate in the system, senior lawyers can do it voluntarily - there is no tradition of organised *Pro bono* assistance.

Public interest litigation

Public Interest Litigation as an institution is not known in Belgium. However, there are within the group of specialised environmental lawyers, some lawyer that nearly exclusively work for environmental ngo's or citizens that like to protect the environment. Law School Clinics dealing with environmental law are inexistent.

Examples

1. Permit decision concerning an industrial activity not covered by the IED

The main elements of the decision-making procedure that is varying between the 3 regions and how the decision can be appealed within the administration have been outlined above (pp. 5-6). When a final decision by the authorities on administrative appeal has been taken, it can be challenged, within a period of 60 days before the Council of State under the conditions set out above (p. 8), and, as the Flemish region is concerned, but only in relation to the building permit (the environmental permit has to be challenged with the Council of State) within a period of 45 days before the Flemish Council for Permit Disputes under similar conditions (p. 8). These procedures will be, with the reservation of the questions on standing of environmental NGO's (see above, pp. 20-21) in conformity with the requirements of Art. 9 (3). The Council of State seems to be for the moment in a position to provide a timely and effective remedy and the procedure being not prohibitively expensive. Art. 9 (4) can thus be respected. That will not be the case with the Flemish Council for Permit Disputes, which is unable to provide a timely remedy, given the already important backlog.

2. Complaints concerning an on-going waste deposit (landfill) in breach of national legislation

Different avenues are available. In cases of potential environmental damages a request for action (p. 25-26) can be brought, and administratively appealed if one considers that the decision is not acceptable. In the Flemish region a similar request can be formulated to obtain administrative measures (including injunctions of all kind, Art. 16.4.7 Decree of 5 April 1995). In all regions the Environmental Inspectorate can be informed and invited to take action. In the 3 regions the breach

¹²⁴ Pallemarts (2007) 16

¹²⁵ BBL-BRAL-IEB-IEW (2010) 14-15.

will probably be considered as an environmental crime. In that case one can fill in a complaint with the Public Prosecutor (and in case one suffers damages, with the Investigating Judge). That can lead to criminal prosecution (or an alternative administrative punishment if the public prosecutor decides not to prosecute before the criminal court). If one suffers damages, one can claim compensation in the criminal case. Finally one can introduce an environmental action before the President of the Court of First Instance on the basis of the Act of 12 January 1993. Citizens, after having invited the municipality to act, can also bring such an action on behalf of the defaulting municipality (pp. 18-19). A concrete example illustrates how that Act can be used. A quarry was filled up with inert wastes without the necessary building and environmental permits, but under an order of the local mayor that the operator should carry out some fill-up activities (with materials not further specified) to combat the risk of collapse. When an action on the basis of the Act of 12 January 1993 was brought, the first judge was of the opinion that there was no manifest breach of environmental law, because the operator was under an order of the local mayor. On appeal the Court of Appeal of Mons took another view and was of the opinion that the order of the mayor did not authorise the operator to fill up the quarry with wastes, without having obtained the necessary permits. The Court ordered to stop the illegal activities¹²⁶. It can be argued that in this situation there is compliance with Arts 9 (3) and 9 (4) of the Aarhus Convention.

3. Decision to undertake an infrastructural construction project which might have an effect on a Natura 2000 area

In the first place, land use planning should make it possible to realise such a project. If the existing land use plans do prevent such a project, they should first be modified or a specific plan should be adopted. If the plan or the amendment of an existing plan likely to have significant environmental effects, a SEA should be drafted. Once the plan is adopted by the competent authority on the local or regional level, it can be challenged with the Council of State (p. 8). The project itself will require a building permit (only in exceptional cases also an environmental permit is necessary for an “infrastructural construction project”), may be subject to EIA and need an appropriate assessment according (the regional legislation transposing) Art. 6 (4) of the Habitats Directive. The permit, once delivered in first instance, can be appealed with the higher administrative authority. A final decision on appeal, can be challenged before the Council of State and, as the Flemish region is concerned, the Flemish Council for Permit Disputes. The situation is thus similar with example (1) and one can refer to it.

4. A clear cutting operation (forestry) which threatens a protected nature reserve or protected species

In the Flemish region deforestation (that means that the land use is changed and there will be no forest anymore afterwards) requires a building permit, while clear cutting without change of land use (the area keeps its forest destination) requires a consent of the Agency for Nature and Forest¹²⁷. The administrative authorities should assess the impact of such activities on nature, in the form of appropriate assessment in the sense of Art. 6(4) Habitats Directive, in the case of a potential impact on Natura 2000 site, or a similar “nature check” for other types of protected areas and species (“nature duty of care”). Sometimes an EIA will be necessary (> 3 ha). In the case of deforestation, compensation (in kind or through payments towards a reforestation fund) is a prerequisite to obtain the permit. As judicial procedures are concerned, the situation seems to be the same as in example (3), the only difference being that there is no administrative appeal against the consents of the Agency for Nature and Forest. So there is an immediate appeal before the Council of State. The situation is similar, though not identical, in the other regions.

¹²⁶ Court of Appeal, Mons, 10 December 2004, 2002/RG/982, not reported, quoted by Lefranc (2009) 3.

¹²⁷ De Pue, Lavrysen & Stryckers (2011), 801-808.

5. Failing to establish an air quality action plan or adopting a plan that will not sufficiently reduce the risk of exceeding air quality limits

That obligation has been transposed in domestic law¹²⁸. The only available avenue to bring such a case to court seems to be to start an ordinary procedure before a civil court (in urgent cases summary proceedings before the president of the court of first instance) asking for an injunction (p. 11), coupled with a penalty payment. If that failure could be considered as an “obvious violation” or “a serious threat for a violation” of environmental law in the sense of Art. 2 of the Act of 12 January 1993, that procedure (p. 11) would be available too. For NGO’s there is a standing problem in the ordinary procedure (pp. 18-19), not in the environmental procedure (p. 19). There seems to be room for a treatment in conformity with Arts. 9 (3) and 9 (4) of the Aarhus Convention. Recently such a case was brought by two individuals of a busy street against the city of Leuven and the Flemish Region, to oblige the city and the region to do PM measurements, to draw up an action plan to improve the air quality (within a period of 6 months) and to take the necessary measures to implement such a plan in the following 6 months and to condemn them to penalty payments of € 1000 per day of delay. The First judge declared himself without jurisdiction, being of the opinion that such an order, would violate the separation of powers because not respecting the discretionary powers of the administrative authorities. On appeal, the Court of First Instance of Leuven rejected this view and found the action admissible and within the courts’ jurisdiction. The Court however found that according to domestic law, monitoring was a duty of the Flemish Environment Agency, that the Flemish Government had already approved a reduction plan for the non-attainment areas, that this plan has offered to local authorities “a calculation of air pollution from road traffic-model” (CAR Model), that, although their might on the basis of that model question of exceeding limit values in the street concerned, the model is only a simulation with some approximation. In the courts view it was not proven that the air quality limits were exceeded in reality, taking also into consideration that the CAR model was showing a gradual improvement of the situation under the influence of the regional plan, so that it was not proven that the authority was not complying with its obligations as set out in the *Janecek* case¹²⁹. The claims were thus dismissed.

6. In an area with highly permeable soil, the competent authority has issued building permits for a number of holiday homes, all of which rely on individual systems to dispose of their waste-water. Following the discovery of E-coli or cryptosporidium in a local groundwater, some citizens/NGOs are concerned that the competent authority (1) has not attached sufficiently strict conditions with regard to individual waste-water systems to comply with EU water and/or waste legislation; (2) is not ensuring that individual systems are maintained so as to avoid contamination of the drinking water source; (3) has either no or no adequate remedial action plan or (4) has failed to recognise the vulnerability of the drinking water catchment.

If the building permits are still disputable before the Council of State (60 days after one comes across the existence of the permit) or the Flemish Council for Permit Disputes (45 days after posting the permit) one can challenge the permit before those administrative courts. In that case we have a situation as in example (3) and we can refer to it. Otherwise, only a civil procedure seems possible in which one has to ask the judge to check the legality of the permits on the basis of Art. 159 of the Constitution. Such a case seems to be very similar to what has been said on example (5) and we can refer to it.

¹²⁸ E.g. Flemish Region: Art. 2.5.3.7. VLAREM II.

¹²⁹ Civil Court, Leuven, 10 March 2010, *Van Eygen and Viane*, nyr (summary in *Tijdschrift voor Omgevingsrecht en Omgevingsbeleid*, 2012/1, 50-52).

7. The competent authority makes a derogation allowing the killing of individuals of a species of wild bird protected under the Wild Birds Directive (EC Directive 79/409/EEC) or of a species of large carnivore protected by the Habitats Directive (EC Directive 92/43/EC). There are allegations that the derogations in the Nature Directives are unlawful in the light of the case law of the CJEU.

Such (regulatory) acts can be challenged before the Council of State. In the past the Council of State has annulled various times such derogations. The Council of State has e.g. judged that a Ministerial Order of 27 May 1999 concerning the capture of Finch and the promotion of Finch breeding in the Flemish region violated Article 9 of the Birds Directive and should therefore be annulled.¹³⁰ There are similar cases involving Walloon regional regulations.¹³¹ The Council of State also annulled an Amendment to a Regional Land Use Plan for violation of Art. 4 of the Birds Directive.¹³² The main problem in this area is the time it took each time to the Council of State to handle the cases. Now that is backlog is fading away, one can expect that in the future timely judgments will be intervening.

Concluding remarks¹³³

As has been pointed out in the *Milieu Study 2007* Belgian law provides for a number of judicial procedures which are available to individuals and NGOs to challenge acts and omissions of public authorities which contravene provisions of national and EU law relating to the environment within the meaning of Art. 9(3). The main relevant procedures are:

- summary proceedings before the president of the court of first instance, in case of urgency (*référé de droit commun*);
- special action before the president of the court of first instance to seek injunction against manifest violations of environmental law (*action en cessation*);
- action for annulment or suspension of an administrative decision before the Council of State (or the Flemish Council for Permit Disputes) (*recours en annulation/suspension*).

The criteria for standing and other requirements to be met for legal action to be successful vary according to the procedure used. In ordinary summary proceedings before the president of the court of first instance, the claimant will have to demonstrate that he or she is likely to suffer some form of personal harm if the challenged act is allowed to proceed or the defendant authority refrains from taking some action it is legally bound to take, and that the case is urgent because of the imminent threat of such harm. The general rules of standing applicable to civil actions require that the claimant be able to rely on a "personal" and "direct" interest in the case. Actions brought by NGOs acting for the defence of a collective environmental interest were judged in the past by the Supreme Court to be inadmissible because such an interest does not qualify as "personal" and "direct". There is however no recent case law in which the Supreme Court had to take position on its jurisprudence in

¹³⁰ Council of State, n° 113.105, 2 December 2002, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*, TMR 2003, 292-297 (with reference to Case C-10/96); see for similar cases: Council of State, n° 63.395, 4 November 1997, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*; Council of State, n° 104.550, 11 March 2001, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*; Council of State, n° 179.054, 28 January 2008, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*; Council of State, n° 182.188, 21 April 2008, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*; Council of State, n° 182.189, 21 April 2008, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*.

¹³¹ Council of State, n° 100.777, 13 November 2001, *Ligue Royale belge pour la protection des oiseaux*; Council of State, n° 85.699, 29 February 2000 *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels and Others*

¹³² Council of State, n° 96.198, 7 June 2001, *Wellens and others, Amén*. 2002, 74-76.

¹³³ The first part of this Chapter is based on Pallemmaerts (2007) 19. The conclusions have been updated in the light of recent developments.

the light of Art. 9 (3) of the Aarhus Convention and some lower judges have taken a broader view on standing by environmental NGOs. The first form of action is however effectively accessible to individuals.

In the special environmental procedure, which was instituted primarily for the benefit of NGOs, different criteria for standing apply. These relate to the formal incorporation of the organization and the duration of its existence as a legal entity, and to the effective pursuit of environmental protection objectives within a particular geographical area. Apart from meeting these conditions of admissibility, to succeed in its action, the claimant NGO must demonstrate that the act it is asking the judge to enjoin constitutes either a "manifest violation" or a "serious threat of violation" of one or several provisions of national law relating to environmental protection. This form of action can be used to challenge unlawful material behaviour on the part of a public authority or private persons.

If the act that violates environmental law is an administrative act and the purpose of the action is to have this act declared unlawful and annulled and its execution suspended pending a decision on the merits, then the only review procedure available is an action for annulment and suspension before the Council of State (or as building permits are concerned the Flemish Council for Permit Disputes). In such proceedings, apart from demonstrating the illegality of the contested administrative act, the claimant has to show that he or she could be "harmed" by it or otherwise has an "interest" at stake. Meeting this requirement does not pose particular problems for individual claimants in environmental cases. However, the interpretation of the notion of "interest" in the case-law of the Council of State as it relates to environmental NGOs has tended to seriously restrict access to judicial review for such organizations. According to that case-law, only NGOs whose aim is environmental protection in a specific, geographically circumscribed area in which the effects of the challenged act are likely to be localized, or NGOs specialized in a very specific aspect of environmental protection, have any chance of meeting the criteria for standing. As a result, NGOs that wish to challenge acts or omissions of public authorities which contravene environmental law faced serious obstacles in Belgium. They have, as long that there is no clear shift in the case law of the Supreme Court, no certainty that their standing to bring an ordinary action before the civil courts will be accepted or not. The special environmental action for injunctive relief which was introduced primarily for their benefit is only useful to challenge material acts of public authorities; it is unclear whether it applies also to omissions. The main procedure available to review the legality of administrative acts of public authorities, action for annulment and suspension before the Council of State, was accessible to NGOs only under very restrictive conditions, which have been criticized by the Aarhus Convention Compliance Committee as "effectively blocking most, if not all, environmental organizations from access to justice". The findings and recommendations of the Compliance Committee have led, on the one hand, to some evolution in the case law of the Council of State, which seems not have been stabilised yet (pp. 21-22), and, on the other hand to a new political debate in Belgium on the need to broaden access to justice for NGOs. A bill to amend Art. 19 of the *Lois coordonnées sur le Conseil d'Etat* in order to explicitly allow for actions to be brought by NGOs with legal personality for the defence of collective interests was introduced in the Belgian Senate on 22 December 2006 and adopted (in modified form) on 15 March 2007. In order to become law, however, this bill still has to be adopted by the House of Representatives. For the moment such a private bill is pending in the House¹³⁴. A similar private bill to amend article 18 of the Judicial Code has already received the

¹³⁴ Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerkens et consorts, 19 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1693/001 ; a similar proposal has been introduced in the Senate: Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mmes Z. Khattabi and Freya Piryns, 16 November 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1330/1.

opinion of the Council of State, and is under discussion in the Justice Committee of the House¹³⁵. Although, strictly speaking, these initiatives are not necessary, because judges can interpret the standing rules without any problem in accordance with Art. 9 (3) of the Aarhus Convention, those bills, if adopted, would of course speed up the solution and bring more uniformity and thus certainty in the case law.

Another bill to amend the Law of 12 January 1993 to strengthen the existing action for injunctive relief and facilitate access to it for NGOs was introduced in the Senate on 1 April 2007¹³⁶. It was re-introduced after the 2007 general elections¹³⁷, but not discussed. It has not been reintroduced again after the 2010 general elections. In the 2010 Implementation Report of Belgium it has been stated that this bill must also be reintroduced either by the government or by the parliament, in order to improve access to justice for environmental NGOs, especially in view to amend Article 2 which currently lays down “extremely restrictive conditions”¹³⁸. Such an Amendment would increase considerably the efficiency of the Act of 12 January 1993.

A further important issue that should be solved is the fastness of procedures. In the past the Council of State decided cases with considerably delay, taking away almost every real effect to its judgments. The situation has changed in recent times, but can still be improved. The term in which one has to decide on demands for suspension (45 days) should be observed, the main criterion to decide to suspend or not should be the question if on first sight the plea is founded or not and final judgments should be delivered in a time laps of maximum one year. The Flemish Council for Permit Disputes should be restructured and, if it is confirmed in its competencies, it should perform in the same way.

Regarding the question how Belgium would have to change its national system in order to conform with the requirements of the proposed Access to Justice Directive of 2003 (COM(2003)624*final* of 24 October 2003) we can refer to what has been written in relation to Articles 9(3) and 9(4) of the Aarhus Convention. In so far the proposed Directive contains more details than those Articles of the Aarhus Convention, it seems that some legal intervention is necessary:

- Given the definition of environmental law in Art.2.1 (g), it seems necessary to amend the Act of 12 January 1993 in so far only domestic environmental law would be in the scope of that Act. That is a question of interpretation that is still open. The Proposed private bill of 6 December 2007 explicitly solves the problem.
- On the federal and regional level additional legislation to comply with Articles 6 and 7 – request for internal review- seems necessary. The different existing systems of requests for actions (p.25-26) do only cover very partially this requirement.
- As the qualified entities are concerned – Article 8- the requirement of Article 8 (d) is new in comparison with existing legislation; if one understand the provision that such a condition has to be imposed on the national level, the existing legislation has to be amended.
- It seems necessary to introduce a provision that states (Article 5 (2)) that a qualified entity recognised in accordance with Article 9 in one Member State shall be entitled to submit a request for internal review under de conditions of Article 5 (1).

¹³⁵ Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerkens et consorts, 14 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1680/001; the private bill has also been introduced to the Senate: Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Z. Khattabi, 3 Novembre 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1293/1.

¹³⁶ Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, *Sénat de Belgique* (2006-2007), DOC 3-2442/1

¹³⁷ Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, déposé par B. Martens, 6 December 2007, *Sénat de Belgique*, (2007-2008), DOC 4-470/1

¹³⁸ Istasse (2010) 4.

- The question can arise if Article 10 (1) should “only” be applied in practice, or that it should also be “transposed” in domestic law. In the latter case – and one can find some arguments for that view in the case law of the ECJ¹³⁹ - new legislation is required.

¹³⁹ See in particular Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paras 92-94.

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