CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Ghent University Academic Bibliography

REPORT TO THE EUROPEAN FORUM OF JUDGES FOR THE ENVIRONMENT (EUFJE) ON THE BELGIAN SITUATION CONCERNING CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAW

Prof. Dr. Luc Lavrysen,
Director of the Centre for environmental law, University of Ghent, and judge in the Constitutional Court[1]

Jan Van den Berghe,
Vice-President of the Court of First Instance of Ghent

Kristoff Van den Berghe
Scientific researcher, Centre for environmental law, University of Ghent

INTRODUCTION

This report is divided into five chapters. In a first chapter, concerning the choice between administrative or criminal enforcement, we will discuss some characteristics of Belgian criminal law, like the administrative dependency of the criminal law and the principle of legality. In a second chapter the emphasis lays on the Belgian courts, the role of judges and (the training and powers of) judicial officers. In the third chapter we focus on the moral element of the crime, the emergency condition and the invincible error. In the fourth chapter we focus mainly on the problems with the enforcement of sentences, the criminal liability of legal persons and special penalties in cases of environmental law. In the fifth chapter some conclusions are formulated. In an appendix we will give a brief overview of the most important Belgian and Flemish environmental laws.

I. ADMINISTRATIVE OR CRIMINAL ENFORCEMENT

I.1. THE BELGIAN LEGAL SYSTEM

Belgian law is codified. Environmental law is therefore to be found in statutes and administrative regulations.

Belgium evolved from a unitary state to a federal state consisting of 3 communities (the Flemish Community, the French-speaking Community and the German-speaking Community), 3 regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region), 10 provinces and 589 municipalities.

[1] The original name of this Court was the *Court of Arbitration* . The name was changed to *Constitutional Court* by a review of the Constitution, May 7 2007, *Moniteur belge*, May 8 2007.

Both the federal state and the constituent states have their own parliamentary assembly and their own government. The federal parliament passes laws, the regional parliaments pass decrees or ordinances (Brussels-Capital Region).

(Belgium has a surface area of 30,528 km² and has a population of 10,355,000. Of this number, 5,973,000 live in the Flemish Region within an area of 13,522 km². 3,358,000 people live in the Walloon Region within an area of 16,844 km² and 992,000 people in the Brussels-Capital Region within an area of 161 km².)

The communities were set up in order to protect the cultural identity of the Dutch-speaking, French-speaking and German-speaking populations of Belgium.

The regions were set up mainly to regulate economic and local matters. **It is therefore the regions that have wide powers in environmental affairs.** For instance, the regions have authority in town and country planning, environmental protection with respect to soil, water, air, noise, supervision of industries and nuisance establishments, waste management, water management, land use and conservation, agriculture and environment, scientific research, European and international environmental policy with respect to their powers.

The division of powers between the federal state and the regions is very important, since it determines who can take which measures in the area of environmental law.

The **federal government** is responsible for protection against ionizing radiation and radioactive waste, the transit of waste, the establishment of product standards, the protection of the North Sea, European environmental policy, and the conclusion of treaties with respect to its powers. The federal state also retained its powers in all matters that have not been devolved to the regions or communities. In environmental affairs, however, the constituent states generally have authority.

Like defence, **justice** is essentially a **federal matter**, although there is now a growing body of opinion in favour of granting powers in the area of justice to the constituent states, particularly as a difference in enforcement policy can clearly be discerned between the French-speaking and the Dutch-speaking part of Belgium. This is especially the case in the area of environmental law enforcement, where a big difference exists.

I.2. THE CONSTITUTION, SUSTAINABLE DEVELOPMENT AND THE PROTECTION OF THE ENVIRONMENT

The new **artikel 7*bis*** of the Belgian Constitution, as introduced by the Constitutional Amendment of 25 April 2007[2] – the single provision of Title I*bis* "General Policy objectives of Federal Belgium, the Communities and the Regions" - states:

[2] *Moniteur belge*, 26 April 2007. The text is a compromise text elaborated by the Senate. Although the Chamber of Representatives adopted also the text, it decided some days later to include the new Article in the list of constitutional provisions that can be amended again in the new legislature. The Chamber found the language not strong enough.

"In the exercice of their respective competencies the Federal State, the Communities and the Regions foster the objectives of sustainable development in their social, economisch and environmental aspects, taking into account the solidarity between generations."

The fundamental rights of the Belgians are established in Title II of the Constitution.

Article 23 of the Constitution 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;***

[…]".

There is some discussion about the implications of this constitutional provision.

The influence of this provision can also be considered from two perspectives. On the one hand, there are its intended effects in terms of access to the courts and on the other hand the case law relating to Article 23 of the Constitution.

The right to enjoy the protection of a healthy environment in any case holds three procedural rights, more particularly the right to access environmental information, the right to participate in decision-making in environmental matters, and the right to access courts in environmental matters.

Since the special Act of 9 March 2003 has empowered the Constitutional Court to review laws, decrees and ordinances directly for compatibility with Article 23, this constitutional provision has acquired a direct procedural effect, which might lead to a relaxation of the conditions for accessing the courts in environmental matters.

Article 23, however, is not an unequivocal clause and its legal scope is therefore not easy to determine. The legal doctrine has attempted to clarify the legal scope of Article 23. Four assumptions can be identified in this legal doctrine:

1) Article 23 merely imposes obligations on the public authorities and does not grant subjective rights.
2) Article 23 has a standstill effect: this assumption – which implies that the public authorities must refrain from issuing new rules that are less favourable to the protection of the environment than the rules that were in force before – has already found its way into the case law of the Constitutional Court and the Council of State. The Constitutional Court is of the opinion that "*Article 23 of the Constitution implies, with regard to the protection of the environment, a standstill obligation, which prevents the competent legislature from substantially diminishing the level of protection offered by the applicable legislation without there being any reasons of public interest for doing so*". The Court already annulled regional

environmental law that violated this provision, in conjunction with the Aarhus Convention[3].

3) Article 23 grants subjective rights: a subjective right consists of two elements: an interest and the legal protection of this interest. Legal protection implies the power to enforce respect for the interest of environmental protection, and therefore the power to take legal action. From this perspective, the case law is very diverse. Some courts considered that Article 23 of the Constitution acknowledges interests but no subjective rights. Other case law held that Article 23 acknowledges procedural rights but no substantive rights. Yet other courts hold the view that Article 23 acknowledges real subjective rights. So far, the Council of State has refused to apply Article 23 separately from any other rule. A recent trend in the case law tends to acknowledge a horizontal action of the law recognized by Article 23, such as in the relations between neighbours.
4) Article 23 is an interpretative guideline for the public authorities (judiciary, legislative, etc). This view has also gained acceptance. Several judgments of the Council of State, in which reference is made to Article 23, have asserted that a risk of infringement of the right to enjoy the protection of a healthy environment is by definition serious and difficult to remedy, since it is a constitutionally protected fundamental right. This interpretation of Article 23 results in a reversal, in favour of the petitioner and the environment, of the burden of proving the serious detriment that is difficult to remedy.

Environmental law is also codified law and is taken to mean all regulation in connection with town and country planning, pollution prevention and abattement , architectural and natural heritage, and conservation. There is no Belgian code of environmental law, since this is not possible given the aforementioned division of powers between the federal state and the constituent states. In Flanders, efforts have been under way for several years now to arrive at an integrated environmental legislation, but it is a very slow process. In the Walloon Region there is now an Environmental Code. Environmental law is a mixture of administrative, penal and private law.

Since 12 January 1993, we have the Act establishing a right of action for the protection of the environment. This Act provides for a special legal procedure to protect the environment (see below).

I.3. THE ADMINISTRATIVE DEPENDENCY OF CRIMINAL LAW

One of the most important characteristics of the environmental criminal law is **the administrative dependency of criminal law**. One can only get to know the contents of the criminal law by studying the material standards of the federal and regional administrative environmental laws. In these laws one can find in most cases a system of vaste regulations, e.g. like the environmental license system, and the criminal law almost always has to fulfil a subordinate role. The pollution of the environment is

[3] Court of Arbitration, nr. 137/2006, 14 September 2006, www.const-court.be, see: L. LAVRYSEN, Presentation of Aarhus related cases of the Belgian Constitutional Court, *Access to Justice Regional Workshop for High-Level Judiciary (Eastern Europe and South Caucasus Region)* , Kiev, Ukraine, 4-5 June 2007

illegal in an indirect way, because violation of the administrative rules leads to criminal sanctions.[4]

I.4. SPECIAL CRIMINAL LAW

The rules of environmental criminal law are considered to be rules of **special criminal law,** as opposed to **general criminal law**. In contrast to the rules of environmental law, criminal laws are mainly federal. Therefore, the main question is: *are the basic principles and rules of federal criminal law applicable to crimes covered by rules of special criminal law like regional decrees and orders?* The basic article is **article 100 of the Penal Code**, according to which all regulations of the first book of the Penal Code can be applied to all crimes imposed by regulations of special criminal law, with the exception of rules concerning participation and mitigation circumstances and cases where laws of special criminal law explicitly have excluded these regulations. Nevertheless, looking at the jurisprudence of the Constitutional Court one can conclude that without an explicit exclusion by rules of special criminal law the regulations concerning participation and mitigation circumstances are also applicable to crimes covered by regional laws.[5]

I.5. THE PRINCIPLE OF LEGALITY

The principle of legality in cases of criminal law can be found in articles 12 and 14 of the Constitution and article 2 of the Penal Code, article 7, subsection 1 of the European Convention on Human Rights and in the International Treaty concerning Civil and Political Rights. In several cases the Constitutional Court has ruled that the principle of legality implies that a legislative provision may not be conceived in a way that would be detrimental to the specific demands of precision, legal clarity and predictability that apply in criminal matters.. More specific, the Court says that the principle of legality implies that a criminal law must be drawn up in a way that anyone can, when he acts in a certain way, know if his actions are legal or not. The expressions used in a criminal law must have a content that is sufficiently accurate and normative.

In cases of environmental criminal law the principle of legality can pose a problem, as it uses a lot of terms that include a general duty of care for the citizens involved. A well known example is the duty of care provided in article 22 of the Flemish decree concerning the environmental license. The principle included in article 22 has been put to the test several times. Both the Court of Appeal of Ghent and the Supreme Court (Court of Cassation) have ruled that this principle is sufficiently accurate and it is specific enough to let the operator know whether his actions are legal or not. However, the demands of the Constitutional Court are more severe and it remains to be seen if this kind of text won't lead to impunity and will cause to benefit those who

[4] F. VAN VOLSEM/ B.J. MEGANCK, *Strafrecht en milieurecht : een aantal bedenkingen met onder meer aandacht voor de strafrechtelijke aansprakelijkheid van rechtspersonen*, Environmental Law Training Programme for the Judiciary, Brussels, 2007, 2.
[5] *Ibid.* , 6-7 .

don't pay much attention to the duty of care for the environment[6]. Another problem of the environmental criminal law is that the criminalisation is too general (see below).[7]

I.6. THE ARREST WARRANT

In 1998 the Court of Cassation ruled that promises to cancel an international arrest warrant or to issue a new one are permitted means of pressure with regard to a person who wants to flee from justice.[8] The European Framework decision of June 13 2002 has been converted into Belgian Law with the **Law of December 19 2003 concerning the European arrest warrant**. A European arrest warrant can be issued for facts that are punishable with an imprisonment sentence or a safety measure with a maximum duration of at least 12 months or, in cases where a sentence already has been imposed, a sentence or safety measure of at least 4 months. When a European arrest warrant is issued with the intent to start criminal proceedings, one must also take into account the conditions of **article 16 of the Provisional Custody Law**: there must be serious indications of guilt, it must be a fact punishable with at least one year of imprisonment and there must be an absolute necessity for reasons of public safety.[9] The Belgian law on the European Arrest Warrant was challenged before the Constitutional Court. The Constitutional Court referred the case to the ECJ for a preliminary ruling on the validity of the European Framework Decision. The ECJ was of the opinion that the Framework Decision was valid[10] and the Constitutional Court has to rule now if the Belgian implementation law is constitutional or not.

II. CRIMINAL ENFORCEMENT

II.1. CONCISE SURVEY OF THE BELGIAN COURTS OF LAW, ACCESS TO THE COURTS IN ENVIRONMENTAL CASES AND SPECIALIZATION OF THE JUDICIAL OFFICERS

II.1.1. THE CONSTITUTIONAL COURT

The Constitutional Court was originally created as an arbitrator between the federal and regional legislators. By having its powers extended, it has become a proper constitutional court.

The Constitutional Court is exclusively competent to review regulations that have force of law. By regulations having force of law are meant both substantive and formal rules adopted by the federal parliament (statutes) and by the Councils

[6] Recently several cases were referred to the Constitutional Court for a preliminary ruling on this issue.
[7] *Ibid.*, 11-15 .
[8] Cass., 23 december 1989, *R.W.*, 1998-1999, nr. 36, 1310.
[9] G. STESSENS, Het Europees aanhoudingsbevel. De wet van 19 december 2003, *R.W.*, 2004-2005, 563-564, nr. 15..
[10] ECJ, 3 May 2007, C-303/05, *Advocaten voor de Wereld*

(parliaments) of the communities and regions (decrees and ordinances). 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, which owes its original name (Court of Arbitration) to its original function as federal arbitrator, the exclusive authority to review regulations having force of law for compliance with the rules that determine the respective powers of the State, the communities and the regions. These power-defining rules are set forth in the Constitution as well as in laws (usually passed by a special majority) that are enacted with a view to institutional reform in federal Belgium.

The Constitutional Court also has jurisdiction to pronounce judgment on any violation by a regulation having force of law 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 aliens).

The Constitutional Court can therefore also review laws relating to the **environment** for compliance with the Constitution. Around 8 % of the cases are dealing with environmental law and town and country planning.

The Constitutional Court is composed of 12 judges, who are assisted by maximum 24 legal secretaries.[11]

II 1.2. 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 Industrial Appeal Courts), 27 districts (Courts of First Instance, Industrial Tribunals and Commercial Courts), 225 subdistricts (Justices of the Peace and Magistrates' Courts).

The public prosecution is largely organized on the basis of the same subdivision, but there is now also a Federal Prosecutor dealing with special types of organized crime.

The **Court of Cassation** is composed of 30 judges; it 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.

[11] See www.const-court.be

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 with the Court of Cassation**.

The **Courts of Appeal and the Industrial Appeal Courts**
Belgium is divided into 5 jurisdictions, each with a Court of Appeal and an Industrial Appeal Court (Antwerp, Brussels, Ghent, Liège and Mons).
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 Industrial Appeal courts have jurisdiction in matters of social and labour law.

Each Court of Appeal and Industrial Appeal Court has a prosecution department headed by an **Attorney-General**.

The Courts of First Instance, Industrial Tribunals and Commercial Courts

In Belgium there are 27 courts of first instance, one for each district. A court of first instance has three types of divisions:
Civil divisions, which have jurisdiction in all cases that have not been exclusively assigned to other courts of law. These divisions also rule on the appeal against judgments delivered by the justices of the peace and the magistrates' courts in civil matters.
Penal Divisions (also called circuit courts or *tribunaux correctionnels*). They decide on offences that have not been assigned to the magistrates' court or the court of assizes (criminal court). They also rule on appeals against sentences passed by the magistrates' courts in criminal cases.
The juvenile divisions (or juvenile court). They 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 as the parties choose.

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 actual 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 magistrates' court) are open to appeal before a court of appeal.

The Industrial Tribunals and Commercial Courts have jurisdiction in cases of social and labour law and in commercial cases respectively.

The Justices of the Peace and Magistrates' Courts

Each subdistrict has one justice of the peace court and one magistrates' court.
There are 225 justice of the peace courts in Belgium. This 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 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 district also has one magistrates' court.
A **magistrates' court** is composed of civil and criminal divisions.
The civil divisions of a magistrates' court decide on claims for compensation for damage suffered in road accidents.
The criminal divisions punish traffic offences and minor offences (night rumour, deliberate damage to property, etc). The magistrates' courts have essentially become traffic courts.
Judgments of the civil divisions are open to appeal before the civil divisions of the court of first instance, whereas appeals against criminal sentences are heard by the circuit courts.[12]

[12] See www.cass.be
website Court of First Instance, Ghent: http://home2.pi.be/ebeaucou/index1.htm

II.1.3. ADMINISTRATIVE COURTS

Council of State

The Council of State is the supreme administrative court and was constituted in order to advise the legislative and the executive and to rule on certain disputes in its capacity as an administrative court.

The Council of State comprises two sections: the Legislation Section, which gives advice, and the Section for Administrative Jurisprudence, which rules as an administrative court.

The Administrative Jurisprudence Section protects the citizen against unlawful government decisions.
Insofar as there are no other competent courts, all natural and legal persons can bring an action for annulment before the Administrative Jurisprudence Section of the Council of State against irregular 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. The rulings of the Council of State are not open to appeal.

The Council of State, however, is faced with a backlog of several years, which means that the legal protection it is supposed to offer is often theoretical. The average backlog is nearly 5 years. It is not exceptional for a ruling to follow more than 9 years after the action for annulment has been brought, by which time the challenged license has already long been executed. The recent installation of a specialized administrative court for immigration matters must help to improve the situation.

By an Act of 1989, the Council of State was empowered to suspend the implementation of a challenged administrative decision.
An action for 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, 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 suspension 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 protection against administrative arbitrariness, however, is not the only task of the Council of State. It also acts as an advisory body in the legislative and regulatory sphere. The main task of the Legislation Section is to address opinions to the

legislative assemblies and governments on draft bills and proposals of statutes, decrees, ordinances and regulatory decisions. In some cases, these bodies are obliged to request an opinion from the Legislation Section of the Council of State. In other cases, this is merely optional. Although the opinions of the Council of State are not binding, they carry considerable weight.

The Council of State boasts a certain degree of **specialization** because cases in the same sphere are dealt with by the same divisions.
For instance, some divisions handle cases in the sphere of town and country planning, while other divisions handle environmental cases.
Also the judge advocates who advise the Council of State handle the same matters, so that they too have a certain degree of specialization.

The large majority of cases that are brought before the Council of State concern aliens law. The number of general cases, such as environmental and town and country planning law, account for about half of the Council's caseload.

The environmental cases and town and country planning cases account for about 22% of the general cases . This is quite a significant proportion.

The Council of State is composed of 42 judges, called State Councillors. Then there are 60 judge advocates who give advice to the Council.[13]

II.1.4. ACCESS TO THE COURTS IN ENVIRONMENTAL CASES

In order to gain access to a court, a personal and direct **interest** must be **proven**. This interest must not be the public interest.

The Belgian Court of Cassation has always given a narrow interpretation to the concept of interest. The protection of the environment as such did not suffice as interest, and actions brought by environmental groups were declared inadmissible.

These decisions of the court were not always followed. Many courts and tribunals declare the actions and claims for damages brought by environmental groups admissible.

In response to the decisions of the Court of Cassation, the legislator on **12 January 1993 passed the Act establishing a right of action for the protection of the environment**. This Act provides for a special judicial procedure for the protection of the environment.

This Act empowers the president of the court of first instance to establish and, where appropriate, to order the cessation of evident infringements of environmental law or serious threats of such infringements, or to order measures to prevent damage to the environment. The president acts at the request of the District Attorney, of an

[13] See www.raadvst-consetat.be

administrative authority, or of a non-profit association which has set itself the task of protecting the environment.
The law, however, imposes restrictive conditions on environmental groups wishing to take legal action in order to protect the environment, while the right to bring an action for cessation is not granted to individual persons.

By virtue of Article 271 of the New Municipal Act, however, each resident of a municipality has the right to institute legal proceedings on behalf of the municipality if the municipal authority itself fails to take legal action to protect municipal interests. After some hesitation in the case law, residents of a municipality can now definitely bring an action for cessation by virtue of the Act of 12 January 1993 if the municipal authority fails to take action.

It is very doubtful whether this Act, with all its limitations, fulfils the constitutional right to enjoy the protection of the environment and the provisions of the Aarhus Convention. Recently an amendment of the law was tabled in the Senate.

Where the Council of State had initially adopted a flexible attitude towards actions brought by environmental groups, it gradually imposed stricter requirements. The Aarhus Compliance Committee recommends Belgium to undertake practical and legislative measures to overcome the previous shortcomings reflected in the jurispruducence of the Council of State in providing environmental organizations with acces to justice in cases concerning town planning permits as well as in cases concerning area plans[14] The Constitutional Court, for its part, seems to be the most open to such actions and, as a result, puts Article 23 of the Constitution into practice[15].

Besides this special procedure there are the normal procedures that can also be used in environmental cases. **Liability actions can be brought before the civil court**, where remediation and compensation can be claimed.
In **interim injunction proceedings**, the president of the court of first instance can order measures in urgent cases without ruling on the merits of the case.

In all cases, the petitioning party must demonstrate its interest and prove the validity of its action.

The victim of an (environmental) crime can **bring an action for damages before the criminal court**. Besides imposing a penalty, the criminal court will also have to decide on the compensation and remediation.
In most cases, the argumentation will be a matter for the public prosecution and the aggrieved party will base its claim for damages thereon.

[14] AARHUS COMPLIANCE COMMITTEE, Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in the case of acces to justice fr environmental organizations to challenge certain decisions in Court (Communication ACCC/C/2005/11 by *Bond Beter Leefmilieu Vlaanderen VZW (Belgium)*
[15] L. LAVRYSEN, *Presentation of Aarhus related cases of the Belgian Constitutional Court*, Access to Justice Regional Workshop for High-Level Judiciary (Eastern Europe and South Caucasus Region), Kiev, Ukraine, 4-5 June 2007

II. 1.5. THE ROLE OF THE JUDGE IN ENVIRONMENTAL CRIMINAL CASES

Article 159 of the Constitution gives judges not only the right but even an obligation to examine, *proprio motu (on their own initiative)*, the legality of administrative acts of law. The examination has to include not only the formal rules of law but also the principles of good governance. If during his examination a judge comes to the conclusion that one of these rules has been violated, he has the obligation to refuse to apply the unlawful act.[16]

An important examination in cases of environmental law is testing the legality of licensing conditions. Sometimes this can have negative side effects for perpetrators. There are numerous examples where the government initially has enforced strict conditions for e.g. the discharge of waste materials but after a while these conditions were considered as illegal because the government has come to the conclusion that they were unreasonably high. Another problem issue criminal judges frequently have to deal with is when they have to examine the legality of licensing conditions while at the same time an annulment or suspension procedure is hanging before the administrative court concerning the legality of the license. In order to avoid conflicting decisions some criminal judges will postpone their decision until the administrative court has pronounced its judgement. However, the Court of Cassation has ruled that the mere fact of an administrative procedure does not stop the time limits of the criminal procedure and systematically postponing criminal procedures because of hanging administrative procedures does in fact constitute a form of refusal of the court to exercise its powers.[17]http://iate.europa.eu/iatediff/FindTermsByLilId.do?lilId=1132738&langId=en

II.1.6. SPECIALIZATION OF THE JUDICIAL OFFICERS

Belgium does not have environmental courts. There is no legal basis for specialization in environmental law, unlike in the case of industrial tribunals and commercial courts. Private Parliament member's bills in order to install environmental courts have not been discussed in parliament.

The court of first instance is the general court of law with general jurisdiction.

Nearly all environmental cases are heard before this court. There is no legal basis for setting up mandatory environmental divisions within the court of first instance, as is the case for instance for juvenile cases or tax-related matters.
The large majority of environmental cases brought before the court of first instance are criminal cases. Only a minority are civil cases and concern mainly liability actions for environmental damage and interim injunction proceedings or environmental actions for cessation aimed at the discontinuation of certain acts.

The number of environmental actions for cessation brought by virtue of the Act of 12 January 1993 may be estimated at a few dozen per year for the whole of Belgium.

[16] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.*,3.
[17] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.,* 3-4.

No figures are available, however, for the number of civil environmental cases.

Insofar as specialization exists, this is essentially a matter of internal organization and concerns mainly criminal cases that are brought before a particular penal division. Civil cases are certainly not heard by judicial officers specializing in environmental law.

Only the bigger courts have a specialized environmental division(s). Many judicial districts are too small to allow specialization and an efficient settlement of environmental cases. There are too few public prosecution officers and too few judges for a wide range of cases to allow such a specialization.
The Belgian government has also come to recognize this problem, for in its policy statement of 12 October 2004 it held out the prospect of a reorganization of the judicial districts, which would probably involve the amalgamation of smaller districts.

In short, it can be said that apart from a few big courts, such as Ghent and Antwerp, there are no judges who are really specialized in environmental law. There are no judges or public prosecution officers who can concern themselves exclusively with the study and application of environmental law. They all have to combine it with certain other tasks.
On the other hand, over the last few decades, several law firms have begun to specialize in environmental law. Particularly the bigger law firms have specialized lawyers. This is a disastrous development from the point of view of the enforcement of environmental law. A judicial officer with an inadequate knowledge of the subject will, when confronted with specialized defence, either waste a lot of time or be more readily inclined to follow the defence's line of reasoning.

II.1.7. RECRUITMENT, TRAINING AND PERMANENT EDUCATION OF JUDICIAL OFFICERS AND ACCESS TO ENVIRONMENTAL INFORMATION

Since 2000, the High Council of Justice plays a crucial role in the recruitment, training and permanent education of judicial officers (with the exception of the magistrates of the Constitutional Court and the Council of State).

The **High Council of Justice** is a constitutional body and has a threefold mission: external supervision of the activity of the judiciary, for instance through complaints handling; giving advice to policymakers on how to improve the way the courts work; objectively selecting the candidates for an appointment to the judiciary order and ensuring the best possible training for the judicial officers.[18]

II.1.7.1. RECRUITMENT OF JUDICIAL OFFICERS

There are three ways to gain access to the Belgian judiciary order:

[18] www.hrj.be

- judicial traineeships, which are intended for young lawyers who essentially have only a few years of professional experience,
- professional capacity exams, which, given the degree of difficulty, are essentially intended for more experienced lawyers,
- limited access for senior lawyers on the basis of past performance[19].

II.1.7.1.1. Judicial traineeship

This is an "indirect" way to gain access to the judiciary order in that it involves the completion of a traineeship. In order to be admitted to the traineeship, candidates must pass the open admission exam for the judicial traineeship, which is organized by the High Council of Justice.

The conditions for admission to the exam are as follows:
- holding a degree of master of law,
- having at least for one year completed a traineeship at the Bar or carried out other judicial functions in the three years prior to entry for the exam.

Candidates who pass the judicial training admission exam can start working as a judicial trainee. Traineeship openings are filled in the order of grading of the exams.

The date on which favourably ranked candidates who passed the judicial training admission exam take up their duties is always set at 1 October.

The judicial trainees can choose between the short traineeship (which lasts 18 months and gives access to the post of public prosecutor) and the long traineeship (which lasts 36 months and gives access to the post of public prosecutor or to that of judge).

The trainee first completes a 12-month training period at the office of the District Attorney or a public prosecutor with an industrial tribunal. Trainees who opted for the short traineeship will subsequently receive 3 months of external training at a penitentiary establishment, a police department or the legal department of a public economic or social institution in Belgium or the EU.
Environmental inspections also qualify as external traineeship. **In 2005, 7 Dutch-speaking judicial trainees completed their external traineeship with the Flemish Environmental Inspectorate. In 2003, 2002, 2001, 2000, 1999 and 1998, there were 9, 14, 10, 18, 9 and 8 such trainees respectively.**

The judicial trainees are first given an introduction at the central office, with an explanation of the duties and powers of the supervisory officers. They also have the codes of good practice explained to them, as well as a discussion of the priorities of the Flemish prosecution policy. The trainees then take part in inspections of firms. In this way, a greater familiarity with daily practice and a closer future cooperation between the judiciary and the environmental inspectorate is brought about.

[19] This "third access way" was challenged before the Constitutional Court. The first version was annulled for discrimination of the categories of persons who can enter the judiciary on the first of second acces way. The second version was accepted by the Court, because only 5 % of judicial officers can be nominated now in that way.

After this external traineeship, the trainees complete another 3-month training period at the District Attorney's office.

The trainees who opted for the long traineeship (to become a judge) first complete 15 months of training at the office of the District Attorney or the office of a public prosecutor with an industrial tribunal, followed by 6 months of external training.
After that, they complete a 14-month training period in several divisions of a court where they take part in the preparation, hearing and deliberation of the cases.
Some trainees will come into contact with environmental cases. In the judicial district of Ghent, for instance, the trainees follow for 3 months the work of the divisions in charge of environmental cases.

The trainees are also obliged to attend a number of (compulsory and optional) training courses during their traineeship.
During their training period at the District Attorney's office as well as at the court, the trainees are supervised by a traineeship supervisor, who is a judicial officer.

For the duration of his traineeship at the public prosecution office, the trainee has the title of officer of judicial police, though he may only act in that capacity with the authorization of the Attorney-General. After 6 months of traineeship, the trainee may be authorized to hold the office of public prosecutor and may conduct the prosecution in court.

At the end of the traineeship (which may be extended twice by six months), the judicial trainees may be appointed judge or assistant public prosecutor, depending on the type of traineeship completed.

II.1.7.1.2. Professional capacity exam

This is a direct means to gain access to the judiciary.

Candidates wishing to take part in this exam must hold a degree of master in law.
Successful candidates who passed this exam and who meet all the statutory appointment conditions may apply by registered letter to the Minister of Justice.
Candidates who opt for this "direct" means of access to the judiciary may be appointed **deputy District Attorney** if they:

- hold a degree of master in law,
- passed the professional capacity exam,
- have worked at the Bar for at least five years, or (other possibility), have held a legal position for at least five years in public or private service.

To be appointed a **judge**, the candidate is also required, in addition to the first two conditions specified above, to have worked at the Bar for at least ten years without interruption.

II.1.7.2. TRAINING AND PERMANENT EDUCATION OF JUDICIAL OFFICERS AND ACCESS TO ENVIRONMENTAL INFORMATION

In the training of judicial trainees and the permanent education of judicial officers, too, the High Council of Justice plays a crucial role.

II.1.7.2.1. Training

The High Council of Justice establishes the general guidelines and the programmes for the judicial traineeships and the permanent education of judicial officers. These programmes must be ratified by the Minister of Justice. The practical organization is taken care of by the Department of Education of Judicial Officers of the Ministry of Justice.
In the long term, a Judicial Officers Training School will have to be responsible for the training of judicial officers. In its policy statement of 12 October 2004, the government announced that it would set up a training college in collaboration with the High Council of Justice.

There are internal training courses that are organized by the High Council and that call in particular upon the experience of judicial officers and universities. There are also external training courses (usually workshops staged by universities, Bars and institutions) that are approved by the High Council and which judicial officers may attend. The fees are paid by the Ministry of Justice.

For the judicial trainees there are a number of compulsory training courses, while other courses are optional. The trainee must attend at least 12 days of courses every six months. He must also collect a minimum number of credit points by taking part in the compulsory and optional courses. The High Council determines the number of credit points per course.

As a rule, the training courses for the judicial officers are optional. The appraisal of the judicial officers must take into account the willingness of the judicial officer to keep up to date in his field and to work on his advancement. Also when nominating candidates for appointment, the High Council may take into account the judicial officer's commitment or lack of commitment to permanent in-service training.

For a judge to be appointed examining magistrate, he must have obtained a certificate by attending a specific training course for prospective examining magistrates. This training course is organized periodically.

Every year, the High Council of Justice offers dozens of training courses in every field of law to judicial trainees and judicial officers.
Courses for proficiency in certain skills such as the hearing and questioning of parties and witnesses, management, victim support etc. are also part of the programme.
All courses are announced on the website of the High Council and in circulars sent out by the Ministry of Justice.

II.1.7.2.2. Training in environmental law

Training courses in environmental law for Dutch-speaking judicial officers were already started up back in **1995** by the Environmental Law Centre of Ghent University at the request of the Ministry of Justice and the Department of the Environment of the Ministry of the Flemish Community. In **1997**, this training course was repeated with the same organization. In **1997**, the Flemish Minister of Town and Country Planning, in collaboration with the Ministry of Justice, organized a special 2-day course in town

and country planning. In the autumn of **1999**, a **3-day course in environmental law was staged for Dutch-speaking judicial officers.** In the autumn of **2001**, a **3-day course in environmental law was staged for French-speaking judicial officers**. In the autumn of **2001**, a **4-day in-service training course** was organized for Dutch-speaking judicial officers. In the spring of **2003**, a **3-day course in environmental law was organized for French-speaking judicial officers.** In **2003**, a **basic training course in environmental law** was organized for the first time, intended for newly appointed and interested Dutch-speaking judicial officers and judicial trainees, public prosecution lawyers and legal secretaries dealing with environmental cases.

On **18 and 19 November 2004**, the High Council of Justice organized a **2-day exchange of professional experience with staff members of the American *Department of Justice* and the *Environmental Protection Agency***.

In the autumn of **2004**, another course in **environmental law** for **French-speaking** judicial officers and judicial trainees was organized.

In the spring of **2005,** there was a **4-day permanent education course in environmental law for Dutch-speaking judicial officers and judicial trainees**.
Early **2007** there was again such a 5-day programme for both Dutch and French speaking persons. Attention was focused on: international and European aspects, criminal law and criminal procedure law, the action for cessation, town and country planning and nature protection, the licensing decree, waste and manure. The course was open for members of the police departments, members of the environmental inspection services and members of the defence department. In the **fall of 2007** there will be an **advanced training course** with thematic days about e.g. noise disturbance and health detriment.

II.1.7.3. Access to environmental information

The public prosecution officers all have an office in the court buildings. Since 1998, these officers have their own computer and since 2000 they have access to the Internet and they have their own e-mail address.

By contrast, few judges have an office of their own in the court building. Traditionally most judges prepare their cases and judgments at home. Many judges had already bought themselves a computer when in 1997 the Ministry of Justice supplied the judges with laptops. For reasons of economy, these laptops are now being systematically replaced by desktop PCs. Nevertheless, a laptop is an essential necessity given the lack of office space for judges in the court buildings.

Many judges have a private Internet connection. Since 2001, the Ministry of Justice pays an annual contribution of 250 euros towards the Internet connection charges, subject to submission of supporting documents.

The Internet provides judicial officers with access to websites containing information on environmental law, such as http://www.emis.vito.be/navigator/default.asp (website on environmental legislation) and http://allserv.rug.ac.be/~pbrewee/cgi-bin/dmr.cgi (environmental case law (updated until 2000) and environmental legal doctrine database of Ghent University).

The *Moniteur belge*, in which all statutes, implementing orders and official notices are published, can now only be consulted over the Internet. Hardcopy versions are no longer made.

The courts and tribunals have a library. The senior officers have an annual budget for 'small purchases'. The size of this budget depends on the number of judicial officers and must be used for buying office supplies as well as books for the library, binding of journals etc.

In a big court such as the court of first instance in Ghent, which numbers 40 judges, this budget amounted to a mere 18,650 euros in 2003. In 2004, this budget was even reduced to 17,100. That means 427 euros for each judge.

Subscriptions for journals must be approved by a commission of the Ministry of Justice and are paid for directly by the Ministry of Justice.

The senior officers decide which books and journals are purchased. Usually the judicial officers can make suggestions for purchases. It will therefore depend on the degree of interest whether **books on environmental law** will be available in the **court libraries**.

There exist a number of specialized **journals on environmental law**. The *Tijdschrift voor Milieurecht* (Environmental Law Journal), which appears 6 times a year, is regarded as the standard for the Dutch-speaking part of Belgium.
It contains articles on legal doctrine and case law in the area of environmental law in the broadest sense.

To give an idea, the *Tijdschrit voor Milieurecht* has nearly 300 subscribers. The Constitutional Court, the Council of State, the Court of Cassation, 3 courts of first instance (of the 27), 1 public prosecution office (of the 27) have a subscription to this journal. 89 law firms also have a subscription. The other subscribers are mainly companies (45) and public authorities (42, of which only 2 police services and 5 municipalities).

The *Tijdschrift voor Ruimtelijke Ordening en Stedebouw* (Journal for Town and Country Planning) is restricted to town and country planning law.

On the French-speaking side, the journal *Aménagement – Environnement* (Town and Country Planning – Environment) contains articles on legal doctrine and case law.

The general legal journals devote varying degrees of attention to environmental law.

II.1.8. DETECTION, PROSECUTION AND NUMBERS OF ENVIRONMENTAL CRIME CASES

The detection of (environmental) crimes is the task of the police and specialized inspection services. They are led by the public prosecution officers, who also decide whether or not to prosecute the perpetrators in court.

An aggrieved party can also institute investigation proceedings by bringing an action for damages before the examining magistrate. An aggrieved party can also directly take a suspect to the criminal court. Both these procedures are exceptional in environmental cases. In most environmental criminal cases, the investigation is conducted by the public prosecution, which also summons the suspects to appear before the court.

Since the police reform of 1998, Belgium has 2 general police services: the Federal Police and the Local Police.

The Local Police (28,550 members) is divided into 196 police zones (50 zones contain 1 city or municipality, 146 zones cover several municipalities). The local police acts under the authority of the mayor or of the police board (composed of several mayors) in the zones covering more than 1 municipality.

Many environmental cases are of a local nature and primarily fall within the scope of the local police. We observe that, partly as a result of the police reform, environmental crimes are not a priority concern for the police. The strengthened hold of the mayor on the local police certainly has something to do with it. Enforcement, and particularly environmental law enforcement, is not really popular at the municipal level. Environmental crimes are not readily perceived as a form of crime, but rather as an incidental circumstance of economic activity. There is little willingness to invest in environmental law enforcement, to conduct an environmental law enforcement policy and to take effective action. Very few local police forces have real environmental specialists among their number.
Moreover, the mayors have supervisory authority over nuisance establishments. In practice, action is hardly ever taken – and if action is taken, then usually after complaints are made.

The Federal Police numbers 12,500 members. One of the five general boards is the General Board of Judicial Police, which has a division in each judicial district, where investigators carry out investigations under the authority of judicial officers.
The Board for Combating Crime against Property has an Environment Unit. This unit only has 5 staff members.

The supply of environmental cases depends to a large extent on the capacity and commitment of the federal investigators in the judicial districts and of the local police.
There is, however, a serious deficiency in terms of uniform data collection.
It can be said with some reservation that the police drew up 11,000 reports on environmental offences in 2000. **In 2005** local and federal **police officers** drew up reports in 21, 189 environmental cases. These reports were related to wastes (8, 998 cases of which 7, 216 related to illegal discharges), sound (4, 223 cases of which 874 related to music and and 3, 151 related to night disturbance), 228 cases related to air, 2 cases related to nucleair substances, water (583 cases of which 447 related to surface waters), 360 cases related to nature preservation and 1376 other cases.

The Flemish Region, the Walloon Region and the Brussels-Capital Region each have their own **environmental inspection service.**

The Walloon and Flemish environmental inspectorates each have a central board and in each province an operational unit.

In 2003, the **Environmental Inspectorate of the Flemish Region** numbered 110 full-time staff members, of whom 86 supervisory officials. They carried out 11,605 inspections at 4,612 companies. 751 new reports were drawn up, of which 270 reports for absence of environmental license or partial environmental license, 596 for non-compliance with the conditions, and 81 for infringements of other legislation such as the Waste Decree, Soil Remediation Decree, etc. 959 warnings were given without a report being drawn up. This can happen if there was no infringement yet, but only a threat of infringement.
In 2003, the Flemish Environmental Inspectorate made 27 recommendations to the government for the suspension or cancellation of an environmental license. In 48 cases, the Environmental Inspectorate itself ordered the discontinuation or closure of the establishment.
In **2005**, the Flemish Environmental Inspectorate numbered 118 full-time staff members, of whom 87 supervisory officials. 497 new reports were drawn up, of which 146 reports for absence of environmental license or partial environmental license, 385 for non-compliance with the conditions. In 2005, the Flemish Environmental Inspectorate made 48 recommendations to the government to intervene.

In 2003, the **Brussels Environmental Inspectorate** opened 1,000 new case files and paid 4,000 visits to sites. Nevertheless, only 113 reports were drawn up. It also took 238 decisions to impose an administrative fine.

The **Walloon Environmental Police Division** has 75 full-time inspectors.
In 2003, they received 3,508 complaints, recorded 2,105 violations, gave 1,408 warnings, drew up 326 reports, made 3 recommendations to the government to suspend a license, ordered 11 closures and sealed a plant 12 times.

Besides these regional environmental inspections, the regions also have **other special supervisory officials**. There are the officials of the manure bank, foresters and rangers of the departments of Forestry, Greenery and Nature Conservation, building inspectors and inspectors of the department of Architectural and Natural Heritage. Most of these services, however, are too understaffed to allow effective supervision. Here, too, action is only taken after a complaint or notification.

II.1.8.1. THE PUBLIC PROSECUTION OFFICES

Unless an aggrieved party brings an action for damages before the examining magistrate or summons the perpetrator directly before the district court, it is the public prosecution officers who decide whether or not to prosecute suspects.
Neither the police nor the administrative authorities have the power to do so.

In Flanders, some 25 public prosecution officers are charged with handling environmental crime cases. As is the case with judges, there are no public prosecution officers who deal exclusively with environmental legislation. They all additionally have to handle cases in connection with other special legislation such as food safety etc.

It has been found that the annual reporting on environmental law enforcement by the various public prosecution offices is not always clear. A few (big) public prosecution offices give a more detailed report with an explanation of the figures. Many (usually the smaller) public prosecution offices restrict themselves to figures without any further explanation. A big public prosecution office such as that in Ghent, which has a special legislation unit composed of 4 judicial officers, had 1,546 new cases in connection with the environment and town and country planning in 2003. That is 249 more than in 2002. 435 cases concerned waste, the majority of which were minor cases of clandestine dumping, for which since 2004 a policy is being conducted of zero tolerance and prosecution before the district court. . 376 cases concerned infringements of town and country planning regulations, while 307 cases concerned noise nuisance.

The similarly sized public prosecution office in Dendermonde had 1,590 new cases in 2003, which is 111 more than in 2002. The same trend as in Ghent can be seen in the type of cases.

The medium-sized public prosecution office in Kortrijk had 502 new environmental cases in 2003. The small public prosecution office in Ypres handled 267 cases.

The dismissal rate is around 60%. The reason for this is usually that the perpetrator is unknown or that the situation has been remedied.
Another portion – around 10% - of the cases are settled amicably (payment of a sum of money suggested by the public prosecution). In only 5% of the cases are proceedings instituted by the court.
The other reports are either joined together with other cases or passed on to other public prosecution offices.

In 1993, a **Prosecution Policy Commission** was set up in Flanders on which representatives of the relevant ministers and the relevant government departments (such as the Environmental Inspection Department, the Building Inspection Department and the Department of Architectural and Natural Heritage) periodically consult with representatives of the attorneys-general and the police.
This consultation resulted in the priority memos regarding the prosecution of town and country planning offences and environmental crimes. In these memos, criteria are established to decide for which crimes prosecution is a priority.
However, there is no integrated prosecution policy. The large majority of criminal proceedings are instituted in response to complaints and notifications. An active detection of environmental crimes will depend on the (rare) commitment and enthusiasm of an individual investigator or judicial officer.
In a few Flemish judicial districts, an effort is made to have each year a particular branch of industry checked by interdisciplinary teams of investigating officers. Such an approach appears to pay off and ought to be generalized.

II.1.8.2. POWERS OF THE SERVICES RESPONSIBLE FOR INVESTIGATION

A number of federal and regional laws give special officials, like forest rangers and town planning officials, powers to investigate and determine certain breaches of environmental law. These powers co-exist with to the general powers of officers of

the criminal police. Officers of criminal police have general powers in order to detect crimes, gather evidence and bring perpetrators to justice. The powers of both categories of officials are pretty similar, sometimes they work together and it is even possible that a special official during the course of exercising his control powers comes across an act that seems to be a crime which will give rise to the start of a procedure of judicial prosecution.[20]

It is important to know in what capacity a reporting officer is acting, whether as a general inspection officer or as a special inspection officer. The difference is important to determine if the officer has general or special powers of control, what the evidential value of the investigation report is, whether or not the reporting officer has an obligation to send the perpetrator a copy of the investigation report, if the crime of prevention of control exists, et cetera…[21]

II. 1.8.2.1. Orders, advisory opinions and reminders

An officer that encounters a breach of environmental law has to draw up a report. However, if this officer is a special inspection officer he can prior to drawing up this report give an order, advisory opinion or reminder. This gives the special inspection officer a discretionary power, which is an exception on the general rule enclosed in **article 29 of the Code of Criminal Procedure**, that says that every official that obtains knowledge of a crime must immediately inform the district attorney. General inspection officers, such as members of the police force, do not have that kind of discretionary powers. When a special inspection officer acts at the request of the district attorney within the framework of a legal action (because his specific knowledge in the matter at hand is needed) he loses this discretionary power too.[22]

II.1.8.2.2. The right of entrance

Most environmental laws give special inspection officers a right of entrance to all buildings that belong to the company. General inspection officers can only use this right of entrance between 5 am and 9 pm. Depending on the specific law, special inspection officers can use their right of entrance during office hours, functioning hours of the company and sometimes 24 hours a day. The right of entrance of these special inspections officers is however limited when it comes to places that are used to live in. They can visit these places but they cannot, for example, search objects in these places, like closets and computers.

While police officers can only search a house if they have indications that a crime has been committed there, this condition does not apply to special investigation officers. Some decrees mention that the special investigation officers have to announce their visit beforehand but that's it. A common element for both categories of investigation officers is that they both need a decision of an "investigation magistrate" before they can do a house search. While in matters of criminal law this magistrate is always the examining magistrate, in cases of environmental law this decision can also be given

[20] S Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, *R.W.*, 2000-2001, 2-3, nrs. 1-4.
[21] F. VAN VOLSEM/ B.J. MEGANCK , *o.c.*32.
[22] S. Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, *R.W.*, 2000-2001, 5-6, nrs. 1-5.

by the justice of the peace or the police magistrate. If in cases of environmental law, the decision is made by the examining magistrate itself, this only complicates things more. The decision given by the examining magistrate to the special investigation officer doesn't mean that this is the start of a criminal investigation (while this usually is the case if there is an intervention of the examining magistrate).[23]

II.1.8.2.3. The production of documents

Special investigating officers have the right to consult any documents they deem necessary to fulfil their task. They can even ask to send them the required documents. If the company in question is unwilling to cooperate, it can be found guilty of the crime of *prevention of supervision*. In the past the European Court of Human Rights has ruled that a company or its representative is not obliged to answer questions or reveal anything but at the same time can not fight the production of documents. In extreme cases the investigating officer can ask the assistance of the police and take the documents by force.[24]

II.1.8.2.4. Interrogations

Most special investigation officers have the right to interrogate anyone concerning facts they consider useful to fulfil their task. A small number of law texts, e.g. the Toxic Waste Law, limit the interrogation to persons who have a particular capacity. However, persons being interrogated have a *right to silence*. The Court of Cassation has ruled that this right is part of the rights of defence and the refusal to talk does not constitute a crime.[25]

II.1.8.2.5. The right to detain a person

The right to detain a person is very limited in Belgium. When a person is caught in the act of committing an offence, he can be detained by everyone, even a private citizen. But the detention can only last for a period of maximum 24 hours and an officer of the judicial police must be informed as quickly as possible. The officer of the judicial police must in turn notify the district attorney by the quickest means of communication available.[26]

Outside the case where someone is caught red-handed, the district attorney can detain a person for 24 hours if there are serious indications of guilt and under a number of strict conditions.[27]The examining magistrate can under strict circumstances issue an order to appear.[28] This order gives him the right to detain a person for a period of maximum 5 days. Before the end of this period the suspect

[23] S. Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, *R.W.*, 2000-2001, 6-10, nrs. 6-11.
[24] S. Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, *R.W.*, 2000-2001; 14-15, nrs. 25-27.
[25] S. Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, *R.W.*, 2000-2001, 15, nrs. 28-29.
[26] Article 1 of the Provisional Custody Act
[27] Article 2 of the Provisional Custody Act
[28] Article 3 of the Provisional Custody Act

must appear before the pre-trial chamber.[29] This chamber will decide whether the detention must be maintained or not and the decision to detain must be re-evaluated by this chamber every month.[30]

Finally, there's the administrative detention. This is a right of detention that only police officers have. For this form of detention also strict rules apply and the detention is valid for a period of 12 to maximum 24 hours.[31]

II.1.8.2.6. The right to search vehicles

Momentarily this right is reserved to customs officers[32] and police officers[33]. And even these officers can only use this power under strict circumstances. For example, police officers can only search a vehicle if they have serious grounds to think that it is being used to commit a crime, to harbour a fugitive or to store or transport objects that can pose a threat to the public order or can prove a crime.

II.1.8.2.7. The right to prosecute

An investigative procedure is conducted under the authority and leadership of the district attorney, who is the responsible official.[34] He has a general duty and a general right to investigate[35], that continue to exist after the criminal prosecution has been started.[36] Only in a small minority of about 10% of all cases, when the investigation is being held as a judicial inquiry, the examining magistrate is the person who has control and responsibility[37]. And even in these cases the district attorney has a right to prosecute. More specifically, he can ask the examining judge to perform certain investigative actions and, in the case of a refusal, file an appeal with the Indictment Division.

The term *prosecution* is a term that is used to refer to a situation where a case is being brought before a judge so that the implementation of the criminal law can be enforced. The public prosecution services have a monopoly on the right to prosecute.[38] All a plaintiff can do is start a civil action claiming damages.

While in earlier times the control of the district attorney was total, there are now certain limits he has to respect. When making his decision he has to take into account the directives of the criminal policy issued by the minister for justice in conformity with article 143ter of the Judicial Code, motivate his decision[39] and keep the victim informed[40].

---

[29] Article 21 of the Provisional Custody Act
[30] Article 22 of the Provisional Custody Act
[31] Article 31 of the Police Force Act
[32] Article 274 of the Customs and Excise Act
[33] Article 29 of the Police Force Act
[34] Article 28bis, paragraph 1 of the Criminal Procedure Code
[35] Article 28ter, paragraph 1 of the Criminal Procedure Code
[36] Article 28quater of the Criminal Procedure Code
[37] Article 55 of the Criminal Procedure Code
[38] Articles 1 and 3 of the Preliminary Title of the Criminal Procedure Code
[39] Article 28quater of the Criminal Procedure Code
[40] Article 5 of the Preliminary Title of the Criminal Procedure Code

The right to prosecute does include the right to plead and the right to take recourse to legal remedies, like the right to appeal. Recently, the legislator tries to persuade the district attorney to use extrajudicial procedure steps, such as settlement[41] and mediation in penal matters[42], in smaller cases.

Sometimes agreements can be made with other services. For example, a while ago in Bruges agreements not to dismiss were made with the marine fishery inspection and nature guards. Also, in cases like e.g. town and country planning Priorities Notes were made up that could be used to know which crimes had to be prosecuted with priority. But even in these cases the district attorney can/could develop his own policy and determine his priorities.[43]

Other services or parties that do not agree with the decision of the district attorney can start a civil action. And since the **Law of January 12 1993** there is another alternative for environmental ngo's. They can file an environmental action for cessation before the president of the court of first instance in cases where they feel that there is an environmental problem that could have enormous consequences if immediate action is not taken. In answer to this demand the president of the court can e.g. rule that certain activities must be stopped immediately. Some claim that the environmental order is an indispensable link in the web of criminal, administrative and civil actions and the right of initiative of the environmental ngo's is essential because the public services take too little actions concerning environmental issues.[44]

The rights of the public prosecution services do not end when an offender has been convicted and a sentence has been pronounced. The implementation of criminal judgments is a task of the public prosecution services, as is the right of initiative for the implementation of prison sentences and the payment of fines. They also can take the necessary steps to start on ordered refund and demand the execution of activities necessary for the implementation of judgments.[45]

II.1.8.2.8. Order or provide the means to commit an offence

Article 67 of the Penal Code considers a person as an accessory to commit a crime when he or she that provides the arms, tools or other means to commit the crime.

Art. 136septies of the Penal Code says that's illegal to give an order to commit a crime.

[41] Article 216bis of the Criminal Procedure Code
[42] Article 216ter of the Criminal Procedure Code
[43] R. Mortier, Hoe sterk is de ketting… twaalf jaar later?, *R.W.*, 2003-2004, nr. 38, 1497.
[44] R. Mortier, Hoe sterk is de ketting… twaalf jaar later?, *R.W.*, 2003-2004, nr. 38, 1483.
[45] J. DE CLERQ, Uitvoering van vonnissen en arresten inzake ruimtelijke ordening, leefmilieu en natuurbehoud in al zijn aspecten, in De handhaving van het milieurecht. Verslag boekdag van de studiedag te Brussel gehouden op 22 februari 2002, J. Van den Berghe (ed.), Kluwer, Mechelen, 2002, 144-146, 3-4.

III. CRIMINAL OFFENCES

III.1. THE MORAL ELEMENT OF A CRIME

Every crime consists of two elements: a material element (an act, behaviour or neglect) and a moral element (guilt). Both the Belgian Court of Cassation and the European Human Rights Court have ruled that a crime consisting of only a material element would be a violation of the principle *nullum crimen sine culpa*.[46]

The term *guilt* can be explained in different ways. In a strict sense it refers to the psychological relation between the offender and his behaviour and can be explained as *intent* or *negligence*. In a broader sense one describes this term as *culpability*. The latter meaning is used more frequently these days and will lead to the fact that, even if intent or negligence has been proven, there will only be criminal responsibility if the offender can be blamed for the action. Thus, in a broader sense there will be a positive and a negative condition (the existence of absolving excuses).

In Belgian law crimes can be divided into *intentional* and *unintentional* crimes. Some actions are only considered as being a crime if there's intent, e.g. theft (article 461 of the Penal Code), rape (article 375 of the Penal Code) and indecent exposure (article 383 of the Penal Code). Unintentional crimes on the other hand are actions that are punishable even if the offender has committed them unintentionally, e.g. like unintentional assault and battery (articles 418-420 of the Penal Code) and most traffic violations.

Unintentional crimes can be further subdivided into two categories: *crimes of negligence* and *crimes of trespasses of the law*. Article 418 of the Penal Code says that a crime of negligence exists when there's a lack of prudence or precaution. Another example of an unintentional crime is *negligent arson* (article 519 of the Penal Code). Some of these crimes are also punishable as intentional crimes but then the severity of the sentences increases.[47]

The subcategory of crimes of trespasses of the law, sometimes also called *technical major offences*, exists as soon as there's a violation of the law. Most crimes introduced by special laws, such as the laws in the sector of the environmental law, are crimes of trespasses of the law. The same sentences apply to crimes of trespasses of the law, whether there is intent or not.

The distinction between intentional and unintentional crimes is significant in relation to the burden of proof. For intentional crimes the prosecution has to prove that there was intent where as for unintentional crimes only the lack of prudence or precaution or the mere violaton of the law has to be proven.[48]

---

[46] Cass. 12 mei 1987, R.W., 1987-88, 538 concl. adv. gen. DU JARDIN (David) and SALABIAKU v. France, E.H.R.M., 7 oktober 1988, *Publ. E.C.H.R., Serie A,* vol. 141.

[47] See e.g. the articles 398 and 510-518 of the Penal Code

[48] C. Van den Wijngaert, Strafrecht, strafprocesrecht & internationaal strafrecht, vijfde herwerkte uitgave, Antwerpen-Apeldoorn, Maklu, 2003, 170-171.

In cases of environmental criminal law the legislator often uses general sentences. For example, the Flemish Waste Decree of 1981 punishes infringements with a number of minimum and maximum sentences, without taking into account the nature of the infringement, the intent and impact to humans and the environment of the action. The decree leaves it up to the judge to decide which penalty to impose considering the gravity of the actions, the consequences for the human population and the environment and the personality of the perpetrator. In some cases the law is more specific. The Walloon Waste Decree of 1996 uses a system of progressive sentences taking into account the nature of the infringement, whether one has acted with the intent to damage or not and the consequences in relation to the health of the human population. Anyway, in a lot of cases the criminal judge will be asked to question the Constitutional Court about the compatibility of the limits of penalties for criminal offences with different impacts on the environment and the human population.[49]

III.2. EMERGENCY CONDITION OR INVINCIBLE ERROR

In some environmental cases the offender will claim that he can not be held responsible for the crime because there was a justification ground, the emergency condition, or an absolving excuse, the invincible error. It will then be up to the public prosecution services to negatively prove that the justification or excuse did not exist.[50]

III.2.1. The emergency condition

The term *emergency condition* was invented by case-law and is mainly used to refer to the situation where one has to make a motivated choice between two legal commodities and one decides to sacrifice a commodity of lower value to protect another commodity of equal or higher value.

The offenders motivate their decision of violating the law by saying that there was a conflict of interests between the protection of the environment and the interest of industry and employment. According to the offenders compliance with the law was not an option because this would have lead to the closure of the plant with consequences that would have been too devastating on a financial and social and economical level.

Some courts follow this type of reasoning. However, in legal theory one points out that a judge must be very prudent when allowing this reasoning for a balancing of interests has already occurred on two levels, the level of the legislator and the level of the administrative authority. Firstly, one must assume that the legislator has taken the financial consequences into account when introducing the new regulation and decided that protection of the environment was more important. Secondly, another balancing of interests was conducted by the licensing authority when imposing the conditions of the license.

---

[49] Strafrecht en milieurecht : een aantal bedenkingen met onder meer aandacht voor de strafrechtelijke aansprakelijkheid van rechtspersonen, 15.

[50] C. Van den Wijngaert, Strafrecht, strafprocesrecht & internationaal strafrecht, vijfde herwerkte uitgave, Antwerpen-Apeldoorn, Maklu, 2003, 170-171.

Criminal judges must be aware of the fact that they may not put themselves in the place of the government and the presence of an emergency condition can only be accepted under two cumulative conditions: there must be consequences that the legislator did not want and the administrative authority could not be predict. One can only accept that financial and social and economic interests are of a higher value in cases where a violation of the law only causes an administrative infringement, there's no concrete environmental damage and the offender has undertaken every possible action to divert the negative consequences without violating the law.[51]

III.2.2. The invincible error

Another argument used by offenders to defend their actions is that *they did not or could not know* that there was a violation of the law. The criminal judge must then decide whether the error was *plausible* and *invincible* taking into account the actions of a reasonable and prudent person placed in the same circumstances. A comparison will have to be made with the actions of *the bonus pater familias in concreto* and thus professionals will be judged more severe than private persons.[52]

IV. CRIMINAL PENALTIES

The penalties are determined separately in each set of sectoral legislation. So far, no general arrangement exists for the punishment of environmental crimes. As a result, there are often substantial differences. The Flemish Waste Decree, for instance, punishes infringements with 1 month to 5 years imprisonment and/or a fine of 100 (x 5,5) to 10,000,000 (x 5,5) euros. The Flemish Environmental Licensing Decree provides for prison sentences of 8 days to 1 year and/or fines of 100 (x 5,5) to 100,000 (x5,5) euros. The Flemish Town and Country Planning Decree provides for prison sentences of 8 days to 5 years and/or fines of 26 (x 5,5) to 400,000 (x 5,5)euros.

There are many such different penal provisions.
Since 2 July 1999, legal persons are also criminally liable in Belgium. A specific penalization system has been introduced for legal persons.

Certain environmental laws provide for safety measures and/or remediation measures that can or must be imposed by the courts. For instance, the court must order the removal of the illegally dumped waste or the closure of an illegally operated establishment.

The public prosecution can also demand such course of action, as well as the imposition of a periodic penalty payment in case of default.

Besides the ordinary penalties, Belgian penal law also provides for special penalties such as the confiscation of unlawful financial benefits.

[51] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.* 7-9.
[52] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.*, 9.

In addition to the penalties imposed by sectoral legislation, there are also a number of **major and minor offences of the Penal Code** that can be used to combat pollution of the environment.
Offences that can be used in an environmental context are:

- throwing substances that can harm fish (article 539 of the Penal Code)
- maliciously raking of one or more trees (article 537 of the Penal Code)
- disturbance of the peace by night rumour (article 561, subsection 1 of the Penal Code)
- the appliance of graffiti (article 534bis of the Penal Code)
- the deliberate damaging of other people's immovable properties (article 534ter of the Penal Code)
- forgery of documents (articles 196-197 of the Penal Code)
- fraud concerning commodities (article 498 of the Penal Code)
- non deliberate assault and battery and manslaughter[53](articles 418-419 of the Penal Code)

IV.1. PROBLEMS WITH THE ENFORCEMENT OF SENTENCES

Some prosecution officers and judges get a bit disillusioned by the problems with the enforcement of sentences. Sentences imposed in the judgments usually are not the sentences offenders have to undergo in reality. Most main sentences of imprisonment below 6 months are not executed due to the overpopulation of jails. A convicted person rarely will have to stay in prison for the full length of the imposed sentence. For the same reasons of overpopulation replacement prison sentences are not being carried out since 1999 and this in turn has a negative influence on the payment of fines. In cases where a convicted person does not pay his fine voluntary or can be forced to into doing this, chances are real that an execution of the sentence will not be possible.[54] Even the execution of a special confiscation can be problematic when a convicted person has no financial resources (anymore) and the execution of an ordered restoration can become an administrative and procedural calvary.[55]

IV.2. JURISPRUDENCE – INTENTIONAL AND UNINTENTIONAL CRIMES

IV.2.1. Intentional crimes

In a number of cases Belgian Courts decided that intent had been established, for example:

- A police court magistrate ruled that the emissions coming from the chimneys and heating equipment of the green houses of the accused were to be considered as infringements meant by article 557, 4° of the Penal Code. The emissions were caused by a technical installation operated by or following the

[53] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.* 16-19.
[54] T. Lambrecht, hoofdproef 2de bachelor criminologie, unpublished, 19.
[55] J. DE CLERQ, Uitvoering van vonnissen en arresten inzake ruimtelijke ordening, leefmilieu en natuurbehoud in al zijn aspecten, in De handhaving van het milieurecht. Verslag boekdag van de studiedag te Brussel gehouden op 22 februari 2002, J. Van den Berghe (ed.), Kluwer, Mechelen, 2002, 183, 38.

instructions of the accused. By choosing a product that almost constantly needs heating the accused knowingly has caused an abnormal level of air pollution of which traces can be found in the immediate surroundings.[56]

- Another police court magistrate said that barking of dogs could be considered as a form of night rumour in the sense of article 561 of the Penal Code. It is sufficient that the rest periods of residents can be disturbed due to intent or negligence. Everyone, including dog owners, should know that they have to make sure that the rest periods of the residents are not disturbed, e.g. by properly arranging the dog kennels.[57]
- In a case of illegal discharges of wastes the court said that the lack of knowledge of an accused could not be used as an excuse. As the manager of a company in the industrial cleaning sector he had to know that the chemicals they were using were poisonous. Furthermore, the Toxic Waste Law explicitly forbids leaving behind toxic wastes, without making a distinction whether this was a voluntary act or negligence. In the same case other accused persons were convicted because they had knowingly carried out certain activities without having the required permits.[58]
- The management of a company was convicted for infringements on the Surface Water Act. The court said that they knew that there was a problem with the waste waters they discharged and that any normal prudent person would have undertaken actions to fix these problems and to make sure that there was compliance with the conditions of the permit. The actions of the offenders have to be compared with the actions of a reasonable person placed in the same circumstances.[59]
- The Court of Cassation ruled that the intentional spreading of smoke on the property of a neighbour, which causes health problems, can be seen as throwing an object on a person that can impede or contaminate him in the sense of article 563, subsection 3 of the Penal Code. It suffices that one voluntary performs an illegal action.[60]
- The Court of Appeal of Ghent convicted a farmer to a prison sentence of 7 months and a fine for keeping more pigs than was allowed in his permit. The court said that the accused had deliberately maintained an illegal situation, even the government had already asked him to put an end to this situation. His actions were purely motivated to protect his own interests and with total disregard for the interests of the society and the preservation of a healthy environment.[61]

In other rulings judges said that there was no intent (necessary), for example:

- In violation of the Waste Decree an offender had dumped inert waste materials on a on a piece of agricultural land without the required license. The judge said that this had to be considered as dumping and no intent had to be proven, because there was an infringement by mere violation of the law.[62]

---

[56] Pol. Roeselaere, A.R. 425/88, *R.W.*, 1990-1991, 195-196.
[57] Pol. Hasselt, *T.Vred.*, 1989, 218-219.
[58] Corr. Antwerpen, N.N. N 3020/85.
[59] Corr. Turnhout, 5 maart 1991, 62.97.100.469/89, 64.97.103.549/90.
[60] Cass., *Arr. Cass*., 1982-83, 2, 952-956.
[61] Gent, 3 mei 1996, P.N. 711/94.
[62] Corr. Kortrijk, P.N. 62.97.3255/88.

- A company was being prosecuted for the illegal emissions of fluorine's, assault and battery and poisoning of animals. The court ruled that the company was cleared from the charge poisoning of animals because of the fact that this was an intentional crime and no intent had been established.[63]

IV. 2.2. Unintentional crimes

There were also cases where judges decided that the offender had been negligent, for example:

- A hunter was convicted for being negligent in controlling the overpopulation of rabbits in an area for which he had a hunting right. Due to this overpopulation damages were caused to neighbouring agricultural fields and a large part of the crops had been destroyed. The court ruled that the overpopulation of rabbits proved that the owner of the hunting right had done something wrong.[64]
- The manager of a dancing club was convicted for a violation of article 561 of the Penal Code (night rumour). The Court of Cassation ruled that he had been negligent by not taking the necessary precautions to prevent a disturbance of the peace.[65]
- The accused were prosecuted for a violation of the conditions of their discharging license. The court ruled that they were negligent because of not taking the necessary measurements in due time.[66]

Examples of cases were the court said that no negligence had been established:

- The manager of a company hired a specialized firm to fix a problem with the heating of his company. During the course of these activities water and oil were discharged into the waters of a river and caused a serious pollution. The court ruled that the manager of the company did not do anything wrong because he did not order the discharge of contaminated waters into the river and there even was no negligence on his behalf.[67]
- A person had planted digitalis on a piece of land on his property neighbouring a piece of land where cattle grazed. Since digitalis is poisonous, the animals got sick and some of them even died. The court said that, since the accused did not know that digitalis was poisonous, he was not negligent en did not make an error that a normal prudent man wouldn't make.[68]

[63] Corr. Brugge, 015095/74.
[64] Vred. Anderlecht, *T.Vred.*, 1985, 271-274.
[65] Cass., 4 september 1990, *J.T.*, 1991, 643-644.
[66] Corr. Gent, 26 oktober 1993, *T.M.R.*, 1994, 3, 194-198.
[67] Corr. Turnhout, 22 oktober 1991, 64.26.100.244/90.
[68] Gent, 15 oktober 1986, *T. Agr. R.*, 1987, 139-141.

IV.3. LEGAL PERSONS

IV.3.1. ARTICLE 5 OF THE PENAL CODE

Since 2 July 1999, legal persons are also criminal liable in Belgium. A specific penalization system has been introduced for legal persons. The main article is **article 5 of the Penal Code** according to which "*a legal person is criminally responsible for crimes that have either an intrinsic connection with the realisation of its goal or the perception of its interests or, as becomes clear from the concrete circumstances, were committed for its account".*

IV.3.2. CUMULATION OF LIABILITY OF NATURAL AND LEGAL PERSONS

Long before the Act of 1999 the Court of Cassation said in its jurisprudence that a natural person with an active role within a legal person can only be considered as criminally liable *if he has committed a personal act through which he has acted as perpetrator or co-perpetrator of a punishable act and it also becomes clear, considering the factual circumstances, that the legal person has acted by means of the natural person*. In other words, a natural person can only be considered as criminally liable for an environmental crime that has been committed within a legal person if he could exercise any influence to prevent or influence a breach of environmental laws. The mere fact of exercising a managerial post does not suffice but an individual error of the natural person must be proven.

In reality this is a factual question that the judge must assess, taking into account the marginal right of review of the Court of Cassation. Things that will be taken into account are: there must be a real decision-making power, functions must really be exercised but there must not necessarily be a statutory power (an actual exercise of functions suffices). In some cases Belgian courts decided that corporate managers were not liable because someone else was in charge of the supervision of compliance with environmental laws.

Article 5, subsection 2 of the Penal Code addresses this matter as follows. There can only be a cumulation of criminal liability of both the legal person AND the natural person *when there is an identified natural person who has knowingly and willingly committed the error*. If a natural person cannot be identified, only the legal person can be hold liable. Some authors indicate that article 5, subsection 2 is applicable on intentional crimes *and* crimes through culpable negligence. If a crime through culpable negligence has been committed by a legal person and at the same time there is intent of a natural person, then a cumulative condemnation can be pronounced.

A number of authors also emphasize that, in matters of environmental criminal law, it is very hard to maintain the statement that a crime has not been committed knowingly and willingly. It is very difficult, if not impossible, to prove that one has not knowingly and willingly built, maintained, developed without a license, breached the conditions of the environmental license, resisted an inspection, ignored an action for cessation, et cetera…

In cases where the natural person has committed a non intentional crime, only the one – either the legal person or the natural person – who has committed the heaviest error can be convicted.

In conclusion one can say that the application of the act of 1999 is problematical and in practice still gives many problems, especially in connection with the cumulative liability of legal persons and natural persons. An amendment of this law is therefore needed.[69]

IV.4. PENALTIES BY INTERVENTION OF THE COURTS

Certain environmental laws provide for safety measures and/or remediation measures that can or must be imposed by the courts. For instance, the court must order the removal of the illegally dumped waste or the closure of an illegally operated establishment.

The public prosecution can also demand such course of action, as well as the imposition of a periodic penalty payment in case of default.

IV.5. SPECIAL PENALTIES

Besides the ordinary penalties, Belgian penal law also provides for special penalties such as the confiscation of unlawful financial benefits.

In only a few Flemish judicial districts does the public prosecution systematically conduct investigations into these financial benefits and demand the confiscation of those benefits. Yet wherever this is done this course of action has proved successful. In the judicial district of Ghent, millions of euros have been confiscated in recent years as unlawful financial benefits, and the court systematically orders the closure of establishments operating without an environmental license or consistently failing to abide by the conditions thereof. In such cases, the public prosecution also demands the imposition of a periodic penalty payment in order to ensure compliance with the court order.

However, just as there is no environmental law enforcement plan, there is no uniform policy on prosecution or on remediation and compensation. Many public prosecution offices still dismiss criminal cases once the suspect has remedied the situation, even if the violation yielded financial benefits for the suspect.

The reflex of seeing environmental crimes from an economic perspective and as a form of distortion of competition is still far from generalized, while enforcement is still perceived too little as an essential cornerstone of a policy to arrive at an effective protection of the environment.

[69] F. VAN VOLSEM/ B.J. MEGANCK, *o.c.* 38-50.

IV.6. DE MINIMIS NON CURAT PRAETOR

Criminal decisions in case of small environmental crimes are rare. Nevertheless, it is important to tackle these forms of crimes because of the problems of nuisance for fellow citizens and their cumulative effect on the environment.

With the **Ordinance of 1999** the Brussels legislator tried to remedy the problem of *illegal dumping* through a system of alternative administrative fines. In cases where the district attorney doesn't seem to want to prosecute an offender, by explicitly saying so or by not prosecuting within a certain time limit, a civil servant can decide to impose an administrative fine. The offender has a time period to appeal this decision before a special environmental board. The minimum and maximum fines for the illegal dumping of domestic wastes that are imposed vary from 62,5 tot 625 euro. This system seems to be working quite well, due to amongst other things a good cooperation with the prosecution services and the relatively short period between the drawing up of the report and the payment of the fine.[70]

IV.7. RESTORATION

The **articles 44 of the Penal Code and 161 of the Criminal Procedure Code** stipulate that the determination of penalties takes place in the forms of restitution and the payment of damages. Nevertheless, it is assumed that the criminal judge can also order a convalescence in kind. In the jurisprudence one does interpret the terms "*payment of damages*" as including all measures that make it possible to restore the legal order that was disturbed as a cause of the infringement. Judges have to order restitution proprio motu and the prosecution can demand restitution, even if there is no plaintiff that claims damages.
Several environmental laws have their own system of restitution. Examples are: **article 29, paragraph 4 of the Groundwater Decree** that explicitly authorizes judges to order a restoration of localities, the convalescence demand in the town and country planning law, **article 59, paragraph 1 of the Waste Decree** that says that if persons who leave waste behind, in violation of the provisions of this decree, will be ordered to remove those waste materials within a time limit set by the judge and, last but not least, **article 59, paragraph 1 of the Nature Decree** that obligates judges to order the restoration of localities in every ruling they make.

Of course, judges can only order a restitution if they have established that there is indeed an infringement of the criminal law. Another important element is that in the sentence file must be mentioned clearly what the original state of the locality was and what the convicted party must do in order to achieve restoration. If the latter condition is not fulfilled one risks that a judge cannot determine what the original state of a locality was and he declines the demand for restitution.

Usually offenders have to be "convinced" that they really have to go ahead with the convalescence in kind. One of the most effective measures to achieve this goal is that the judge also imposes **a periodic penalty payment**. Some laws, like the Town

[70] C. BILLIET en S. ROUSSEAU, De minimis non curat praetor, Kleine milieucriminaliteit in het handhavingsbeleid, *T.M.R.*, 2003, 186-187, nrs. 1-2.

and Country Planning Decree and the Nature Decree, explicitly provide for the possibility of imposing this kind of penalty payment.

Concerning the periodic penalty payment, we would like to add three important remarks. Firstly, a judge cannot order a periodic penalty payment proprio motu. There has to be a demand from one of the parties, taking into account that the prosecution can also be considered as "*a party*". Secondly, a judge can only impose a periodic penalty payment with regard to a demand for convalescence in kind and not to prevent a new infringement in the foreseeable future. And thirdly, the law gives a judge the possibility to order that there will not be a periodic penalty payment above a certain amount. To determine this amount the judge can take into account the financial possibilities of the offender and the gravity of the infringement.[71]

When a restoration measure is not executed willingly by the offender, the government can proprio motu execute this measure. In some legal acts, e.g. the Flemish town and country planning Decree[72], it is assumed that the government has *the possibility but not a duty* to this. However, this assumption has to be reviewed in light of the jurisprudence of the European Court of Human Rights. In **2004** the **European Human Rights court** ruled that, in a case where there is a final judgment containing a demolition order, the refusal or negligence to execute the order for a long time and without serious motivation by the administrative government services constitutes a violation of **the First Protocol of the Human Rights Treaty**. Also **article 13 of the Human Rights Treaty** is considered to be violated by this refusal or negligence. There is a violation of article 13 because other parties involved would have to start new proceedings due the lack of governmental action.[73]

In a prior judgment the European Human Rights Court had already ruled that the lack of governmental action was a violation of **article 6 of the Human Rights Treaty**. The Court said that an efficient protection of a legal subject and a restoration of legality entail a duty for the administration to enforce a judgment. In the above mentioned judgment the Court said that this duty resulted from article 13, which guarantees *a right to actual legal assistance*.[74]

This jurisprudence of the Humans Rights Court is even valid in cases where there was no intervention by the government in a judicial procedure and only an affected third party had obtained a demolition order.[75] And the jurisprudence takes away some discretionary powers of the administration. If there's an affected third party that has a real interested in the execution of a restoration measure than using the instrument of the periodic penalty payment is not an option anymore. A choice for the periodic penalty payment by the administration would again be considered as a

---

[71] F.VAN VOLCEM/B.J. MEGANCK, o.c., 78-80.
[72] Article 153 of the Decree
[73] E.C.H.R., Fotopoulu v. Greece, November 18 2004, T.RO.S., 2006/41, 40.
See also www.echr.coe.int
[74] E.C.H.R., Fotopoulu v. Greece, November 18 2004, note S. Boulliart, *T.RO.S.*, 2006/41, 45.
See also www.echr.coe.int
[75] E.C.H.R., Fotopoulu v. Greece, November 18 2004, note S. Boulliart, *T.RO.S.*, 2006/41, 50.
See also ECHR, June 17 2003, Rianu and www.echr.coe.int

violation of the property right (article 1 First Protocol of the Human Rights Treaty), the right to a fair trial (article 6 of the Human Rights Treaty) or the right to actual legal assistance (article 13 of the Human Rights Treaty) of the aggrieved party.[76]

In a last remark concerning this matter we would like to refer to the jurisprudence of **the Court of Cassation**. The Court of Cassation has ruled that, by waiting of long period of time before executing a restoration order, the administrative services have not acted in a way that could be seen as an abuse of law or a violation of legitimate expectations. Perpetrators of a crime concerning town and country planning too often seem to forget that they are the ones who have to execute the ordered restoration measures in the first place. Their own neglect results in the fact that the execution of a verdict after a certain time period has passed can not be seen as a form of abuse of law.[77]

IV.8. PENALTIES FOR LEGAL PERSONS

Since 1999 there are a number of penalties for legal persons in Belgian law. The main penalty is a fine and there is a special conversion system that converts prison sentences to fines, in cases where the legal person should be convicted to a prison sentence.

In addition to that, there are a number of specific penalties for legal persons:

- confiscation penalties
- decomposition of the legal person
- prohibition to perform an activity that is part of the goal of the legal person
- closure of one or more plants
- distribution and publication of the decision

V. CONCLUSION

V.1. STATISTICAL DATA

V.1.1. The soft teeth of the law

In 2003 a survey was conducted in a combined effort of researchers of the universities of Ghent and Leuven. The survey was limited to the enforcement by one service, the environmental inspectorate, in one specific sector, the sector of textile finishing and carpet production. The companies in this sector are generally considered as being very detrimental for the environment, mainly because of the water pollution they cause.[78]

The inspectorate has powers that are dispersed in a number of law texts, such as the Decree concerning the general stipulations related to environmental policy, the Waste

[76] E.C.H.R., Fotopoulu v. Greece, November 18 2004, note S. Boulliart, *T.RO.S.*, 2006/41, 51.
See also www.echr.coe.int
[77] Cass., March 4 2005, R.A.B.G., 2006/06, note S. Boulliart, 408-416.
[78] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 1-3, nrs. 1-4.

Decree, the Law concerning Air Pollution, the Law concerning surface water, the Groundwater decree, the Law concerning noise pollution, the Decree concerning the licensing system, Vlarem I, et cetera… In reality most of the enforcement efforts of the inspectorate took place in relation to the licensing system. Taking into account that water pollution is the biggest problem, a third of all inspection visits were made to take samples of waste waters.[79]

Infringements that were determined can be categorised into violations of the license duty, violations of the discharging standards, air contamination, oil leaks, inaccessibility of measuring points and the lack of certain documents like maintenance certificates. One of the most striking findings of the survey is that, in cases were infringements were determinated, only in 20 to 30% of these cases the inspectorate took enforcement measures. The authors of the survey think that there are a number of reasons for this kind of behaviour of the inspectorate. As soon as the inspectors make an official report and deliver this to the district attorney, the administrative story becomes a criminal one. During the criminal procedure they no longer have control of the investigation but can play only an assisting role, by making notes or giving technical advices. From the moment the procedure becomes a criminal one other players, like the district attorney and criminal judges, take matters into their hands.[80] Another frustrating element is caused by a lack of communication between members of the inspectorate and members of the public prosecution services. In only 69 out of 140 cases the inspectors got feedback from the prosecution's office about the consequence given to a report they had drawn up. Only 24,6% of all cases were brought before a criminal court. In 23,2% of all cases the prosecution's office suggested a settlement and 52,2% of the cases were dismissed without further remarks.[81]

In light of this lack of communication, in stead of drawing up official reports, most inspectors prefer giving recommendations, orders and reminders. But there are more underlying reasons to use these soft instruments of enforcement. For example, looking at the Licensing Decree, it becomes clear that sanctions, like actions for cessation, sealing of equipment and closing down of plants can only be given *after the operator of an establishment has refused to follow the instructions that were given by the inspectors*. Thus, in order to able to sanction, not only there has to be a breach of the licensing conditions but also a sign of unwillingness to cooperate coming from the operator of the establishment.[82] In addition to that, recommendations, orders or reminders, also called *soft teeth of the law*, given on the grounds of the Licensing Decree are not to be considered as administrative legal

[79] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 4-6, nrs. 5-8.
[80] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 10-11, nrs. 13-15.
[81] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 17, nr. 23.
[82] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 16, nr. 21.

acts. The Council of State has affirmed this in his famous **EIKENAER** judgement.[83] The Council ruled that these measurements do not have legal consequences for those involved because there is no criminal or other sanction linked to non compliance. Therefore, these measurements cannot be appealed before the Council of State and a formal motivation is not necessary (although there must be a compliance with the principle of good governance). [84]

Case-studies show that, when reminders are given, these reminders are always accompanied by a set of measurements the operator has to undertake within a certain time frame. Of course, the inspectors too have to respect these time frames and cannot impose sanctions before the time frames have passed. In cases where infringements of the license duty have been determinated, inspectors can impose sanctions without having to resort to soft measurements of enforcement first. However, they can still opt for a prior reminder or other soft measurement of enforcement.[85]

A final argument of great relevancy is that the system of using soft measurements really works. Administrative sanctions are only imposed in cases where there is an unwillingness or incapability of compliance with the soft measurements. 80 to 90% of all offences can be resolved using only soft measurements of enforcement. Further sanctions in no more than about 10 to 20% of all cases need to be imposed.[86]

V.1.2. Criminal fines

Another study was conducted with regard to the criminal fines imposed by the Court of First Instance and the Court of Appeal in Ghent during the period of 1990 to 2000. Cases were studied concerning infringements on the Law concerning Surface Waters and the Licensing Decree and, to a lesser extent, the General Regulations on Industrial Safety and the Manure Decree. In this survey the authors studied 38 sentences and judgments in which a total of 53 fines were imposed.[87]

Looking at the sentences pronounced by the Tribunal of First Instance, the authors saw a direct link between the duration of the infringement and the height of the fine. In cases where the duration of the infringement increased with about a month, there was an increase of the height of the fine of about 47,87 euro. Concerning the applicable laws one could notice that the fines for infringements of the Licensing Decree and The Law concerning Industrial Safety were significantly higher than

---

[83] R.v.St., N.V. Eikenaer, nr. 65.038, 6 maart 1997.

[84] This reasoning can not be applied to all recommendations and reminders. Recommendations and reminders e.g. given on the grounds of the Seveso agreement are linked to criminal sanctions and administrative fines. Therefore, these do have to be considered as administrative legal acts and can be appealed before the Council of State.

[85] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 13-16, nrs. 17-21.

[86] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 19, nr. 28.

[87] C. BILLIET en S. Rousseau, De hoogte van strafrechtelijke boetes. Een rechtseconomische analyse van milieurechtspraak (1990-2000), *T.M.R.*, 2003, 120-121.

infringements of one of the other laws. Another correlation concerned the personal history of the accused. When there was a criminal register, the height of the fines increased with about 10.500 euro. A last correlation varied according to the corporate sector where he accused was employed. People employed in the concrete, building or sand extracting industry were relatively lower punished than people employed in other sectors. On the other hand, one could suggest that people working in dancing's received a higher punishment.[88]

When looking at the judgments of the Court of Appeal, the researchers came to the same conclusions, namely that there were correlations between the height of the fines and the duration of the infringement, the laws that were applied, the presence of a criminal register and the sector the accused were working in.[89]

Two final remarks in respect with this survey can be mentioned here. Strangely, a correlation was found between the height of the fines and the presence of a criminal register of the accused but not between the height of these fines and the intent of the accused (unwillingness to comply or personal gain).[90] Another factor the authors wish to emphasize is that, when a fine becomes too high, legal persons will stop to adapt their behaviour and the fine loses its usefulness. More important consequences of the conviction of a company seem to be that the supervision of this company will increase and inspection services will more easily be prepared to impose administrative fines when new infringements are determinated.[91]

V.1.3. Annual report 2006

Concluding this part about statistical data, we would like to discuss some statistic data from the annual report 2006 of the 19th and 21st chambers of the Court of First Instance and the Court of Appeal in Ghent. A lot of cases handled by the Court of First Instance are related to town and country planning, followed by cases concerning noise nuisance, air and water pollution.[92]

In the 19th chamber more restoration measurements, more confiscations, more non-exploitation rules, more periodic penalty payments, twice as much imprisonment penalties, 4 times as much work penalties are imposed then in the 21st chamber. This can be explained by the fact that, in contrast to the 21st chamber which is a single judge chamber, the 19th chamber has 3 judges and therefore has to treat heavier crimes. Both chambers are confronted with infringements on the laws concerning the licensing system, the illegal discharge of wastes and forgery of documents.

Comparing the case-load of the 21st chamber with that of other chambers one could get the idea that 21st chamber works slower than other chambers. But this would be a

---

[88] C. BILLIET en S. Rousseau, De hoogte van strafrechtelijke boetes. Een rechtseconomische analyse van milieurechtspraak (1990-2000), *T.M.R.*, 2003, 127.
[89] C. BILLIET en S. Rousseau, De hoogte van strafrechtelijke boetes. Een rechtseconomische analyse van milieurechtspraak (1990-2000), *T.M.R.*, 2003, 129-130.
[90] C. BILLIET en S. Rousseau, De hoogte van strafrechtelijke boetes. Een rechtseconomische analyse van milieurechtspraak (1990-2000), *T.M.R.*, 2003, 130.
[91] C. BILLIET en S. Rousseau, De hoogte van strafrechtelijke boetes. Een rechtseconomische analyse van milieurechtspraak (1990-2000), *T.M.R.*, 2003, 131.
[92] T. Lambrecht, Schriftelijke opdracht intervisiemomenten 1, unpublished, 2006-2007, 4.

wrong assumption. One must not forget that cases of environmental law are usually of a more complex nature and often interim injunction proceedings have to be pronounced in order to appoint a temporary trustee for a legal person or an expert. And then there is the matter of the follow ups. For example, in cases where a restoration measurement is imposed and there is no voluntary compliance with this measurement periodic penalty payments will have to be imposed afterwards.[93]

Looking at the judgments of the Court of Appeal one can come to the following conclusions. In most cases this Court has to pronounce a verdict concerning infringements of the licensing laws, the illegal discharge of wastes, noise nuisance and forgery of documents. In 36,40% of the cases the Court of Appeal pronounces a heavier sentence. The most imposed sentences are fines and main imprisonment sentences. In 30% of all cases a demand for restoration is made and people effectively go to jail in only 3,70% of all cases.

V.1.4. A FEW CLOSING REMARKS

In recent years more and more people have come to see the environment as an endangered judicial commodity that needs to be preserved for future generations.
The legislator in Belgium/Flanders tried to deal with environmental crimes in a preventive and a repressive way. The state reforms have lead to an increasing number of environmental laws and inspection officers. As the number of rules increased, the intentional violation of laws became more profitable.[94]

The inspection officers have similar but often also wider powers then police officers, who have general investigation and determination powers. This variety and complexity of text laws and officers makes it for the average citizen very difficult to stay on to top of things and to determine whether his actions are in conformity with environmental law or not.

The before mentioned survey of 2003 shows that there is a lack of communication between special inspectors and prosecution services. Legislators therefore urgently need to limit in a clear way the limits of the powers of the different inspectors and make things more coherent and transparent.[95]

Another important conclusion that comes forward from the 2003 survey is that, when it comes to administrative sanctions, one can and may not forget the excellent results achieved by the environmental inspectorate in the use of soft teeth of the law. The inspectorate prefers to use soft measurements of enforcement, like recommendations and reminders. And these methods seem to work because in most cases a return to legality can be noticed. Furthermore, some of these soft measurements are not considered to be administrative legal acts that can be appealed in a court of law. Thus, using these instruments a quick solution for an

[93] T. Lambrecht, Schriftelijke opdracht intervisiemomenten 1, unpublished, 2006-2007, 2.
[94] E. Goethals, Juridische aspecten van de verhouding tussen het parket en het toezichthoudend bestuur, in Vervolging en handhaving inzake milieudelicten, J. Van den Berghe (ed.), Kluwer, Diegem, 1994,100.
[95] S. Horvat en K. Peetermans, De bevoegdheden van de toezichthoudende ambtenaar in milieuzaken, 15-17, nrs. 1-3.

important environmental problem can be found without having to await the results of a long legal battle.[96]

Some people blame the public prosecution services for the troubles concerning the enforcement of environmental law. But the public services think this accusation is undeserved and they bite back. Just like other services they point out that there is a problem with the enormous inflation of environmental laws during the last years, the fact that they are understaffed, the lack of technical knowledge in complex matters and a lack of cooperation with other services (e.g. when the administration refuses to execute a measurement of restitution that had been demanded by the same administration and that was ordered by a judge).[97]

A common misunderstanding is that a case is only being handled by the public prosecution services when a subpoena is issued. However, the main goal of the policy concerning environmental crimes is to undo the damages caused to humans and the environment. If this goal can be achieved by other means than issuing a subpoena, the public services will follow these paths. Subpoenas will be issued when serious environmental crimes have been committed, if there is a repetition of crimes and/or serious damages to humans or the environment have been caused. Settlements will only be suggested after the perpetrator has voluntary ended the illegal situation and the caused damages are relatively small. A dismissal of a file can happen in cases where the facts were not too serious and happened only once, a full compensation has been given and there were little or no damages to humans and the environment.[98] At last, it is very important to mention that in environmental cases, the classic number of dismissals is reversed. While normally about 78% of all cases are dismissed, in cases of environmental law only 15% of all cases are dismissed.[99]

Public services find that criminal enforcement remains crucial in the battle against environmental crimes because criminal enforcement goes further than the mere protection of administrative interests. When environmental crimes are being committed, there is not only a threat to the physical integrity or the human health but also a destruction of the environment itself. Moreover, environmental crimes are often used as a means to earn large amounts of money by avoiding environmental taxes or by neglecting to make investments that are necessary to protect the environment.[100]

All things considered one must reach the conclusion that in cases of environmental law, the public prosecution services have, especially in the Offices of Antwerp and Ghent, tried to efficiently combat the problems they were confronted with. And these efforts must be placed in a correct perspective. Firstly, one may not forget that environmental cases form only a small percentage of the total case-load. A solution to this problem could be the erection of a special team of legal experts under the supervision of the federal prosecutor. These teams especially could prove their usefulness in cases where smaller prosecution services are confronted with matters

[96] C. Billiet en S. Rousseau, Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse, *T.M.R.*, 2005, 32, 52.
[97] R. Mortier, Hoe sterk is de ketting… twaalf jaar later?, *R.W.*, 2003-2004, nr. 38, 1488.
[98] R. Mortier, Hoe sterk is de ketting… twaalf jaar later?, *R.W.*, 2003-2004, nr. 38, 1497.
[99] T. Lambrecht, Schriftelijke opdracht intervisiemomenten 1, 2006-2007, 3.
[100] R. Mortier, Hoe sterk is de ketting… twaalf jaar later?, *R.W.*, 2003-2004, nr. 38, 1483.

of a technically legal very difficult nature. Secondly, public prosecution services are but one link in the enforcement chain. They can not perform properly if there is no cooperation with other services[101] and not enough means are being provided for both the public prosecution services and other actors in the enforcement chain, like members of the police force and inspection services.[102]

Another solution for the above mentioned problems is the new Environmental Enforcement Decree that is in the making in Flanders. The Decree has two main parts: one part about the policy and organisation concerning environmental enforcement and another part about control and instruments of enforcement and safety measures.[103]

The Decree says that regional inspection services should continue playing an important role in the environmental enforcement and therefore shall receive more manpower and means to perform their duties. But in addition to that local authorities and supervisors will also be given more support from the Flemish government.[104]

This Decree makes a considerable effort to solve the problems of transparency of the environmental law. For 10 laws in the field of environmental health law (waste, water, soil, air, noise, manure and licensing permits) the provisions will be harmonised. This will lead to a better environmental enforcement on the field.

Another key element the Decree tackles is the administrative enforcement by setting up a system of administrative measurements and fines and the erection of a new administrative jurisdictional body, the Environmental Enforcement Body.[105]

The Commission Policy on Prosecution shall now become an official organ and will be turned into the Flemish High Council for the Policy on Environmental Enforcement. This Council will have an important advisory role as it will have to assist the Flemish government in its supervision on the coordination and substantive design of the environmental enforcement policy and will e.g. negotiate and follow up enforcement protocols between the different actors in the field of environmental enforcement.[106] The council will be composed of members of all services involved

[101] For instance, in matters of town and country planning prosecution services tend to get frustrated when a restoration ordered by a judge is not being executed by an inspection officer that demanded the restoration in the first place. See A.M. GEPTS, De Commissie Vervolgingsbeleid: sleutel tot een betere handhaving van de leefmilieuregelgeving?, in De handhaving van het milieurecht. Verslagboek van de studiedag te Brussel gehouden op 22 februari 2002, J. Van den Berghe (ed.), Kluwer, Mechelen, 2002, 72.

[102] R. Mortier, De behandeling van leefmilieudossiers. Analyse van de situatie in Nederlandstalig België, in De handhaving van het milieurecht. Verslagboek van de studiedag te Brussel gehouden op 22 februari 2002, J. Van den Berghe (ed.), Kluwer, Mechelen, 2002, 40-41.

[103] Explanatory memorandum, 7, nr. 5.

[104] Explanatory memorandum, 7, nr. 5.

[105] See also the first principal authorisation of the Decree by the Flemish government on April 21st 2006.

[106] Explanatory memorandum, 7, nr. 5.

with environmental enforcement (inspection services, police officers, prosecution services, et cetera).

In matters of small environmental crimes administrative enforcement seems to be the best and quickest way to protect both humans and the environment. Of course, the inspection services do not have the means and finances to handle cases concerning environmental crimes on a larger scale, like illegal trafficking in endangered species, crimes concerning big time fraud, money laundering, illegal discharges of wastes, et cetera.

This is where criminal enforcement is a key element and needs to be strengthened. Law and policy makers should be aware of the fact that laws should be made more transparent, cooperation between police, prosecution services and other services should be improved, more manpower and finances should be made available. Serious environmental crimes do not stop at the borders of a region but should be dealt with on a national, European, and even worldwide scale…

When transboundary environmental crimes happen, one is being confronted not only with national but also with transboundary aspects of criminal law. The completion and improvement of national legislation with other instruments provided for by international treaties doesn't always seem to do the trick. Some conditions, like the double incrimination, and fiscal exceptions, can obstruct a transboundary combat of (mostly economic) crime or at least make it more difficult.

Therefore, it might be in order to investigate if a harmonisation of a number of environmental enforcement rules could be an option. Possibilities that come to mind are: the European Commission become the licensing authority in a number of cases and could be given certain powers to impose administrative sanctions, the Environmental Agency could be given a number of controlling and investigative powers.

In the past important European powers have been created particularly in matters of agriculture, fishery, customs and excises. Operational powers were given to European inspectors and a coordinative role to the European Commission. Using a same model for environmental enforcement could be conceivable. However, this would take a certain amount of political courage…[107]

June 2007

[107] J.A.E. Vervaele, Grensoverschrijdend (strafrechtelijk) handhaven in de Unie: droom of werkelijkheid?, in Strafrechtelijke aanpak van grensoverschrijdende milieucriminaliteit, capita selecta, G.A. Biezeveld (ed.), Tjeenk Willink, Zwolle, 1996, 226-228, 17-20.

APPENDIX:
SUMMARY OF BELGIAN AND FLEMISH ENVIRONMENTAL LAWS

A. GENERAL PROVISIONS RELATING TO ENVIRONMENTAL POLICY

The decree of the Flemish Region of 5 April 1995 concerning the general provisions concerning environmental policy establishes the basic principles of environmental policy, while relating to environmental policy planning, environmental quality standards and internal company environmental care. It is conceived as a basic decree to which other titles and sections can be added in the future. So far the decree has been completed with titles concerning environmental impact and safety assessment, environmental conditions, agencies and a strategic advisory council. The Decree will in short be supplemented with a Title on Environmental Liability and with a Title on Enforcement.

Introductory provisions

Definitions

First of all the decree contains some definitions of terms often used in environmental legislation. The term "*the environment*" is defined as "*the atmosphere, soil, water, flora, fauna and other organisms other than persons, ecosystems, landscapes and the climate*". With this wide-ranging definition the emphasis is placed on the integral approach to environmental issues.

The atmosphere, the soil and the water are the abiotic components of the environment. Only the ambient air falls under the term "*atmosphere*", not the air within enclosed spaces. "

"*Soil*" is understood in the decree as: "*the solid constituents of the soil including the groundwater, the micro-organisms and other components located therein*". The Decree understands the term "*water*" as including all surface water. Water does not however comprise drinking water nor groundwater, that is covered by the term "soil".

In addition there are the biotic, living, components of the environment: the flora, fauna and other organisms other than people. The phrase "*the flora and the fauna*" only covers plant and animal species living in the wild, while "*other organisms*" refers to trained and bred species.

Finally, a third group of components is explicitly mentioned, being *the ecosystems, the landscapes and the climate*.

This wide-ranging definition of the term "environment" is associated with the objectives of environmental policy set out in the Decree.

Other definitions include the terms "*polluting factors*", "*polluting*" and "*pollution*", "*emission*" and "*immission*" and "*extraction*".
The collective term "***polluting substances****"* refers to "*solid substances, liquids, gases, micro-organisms, forms of energy such as heat, radiation, light, noise and other vibrations*".

It must be noted that the term "*radiation*" **does not include** the ionizing radiation falling under federal competence. An "*emission*" is any introduction by persons of polluting substances into the atmosphere, soil or water. An "*immission*" on the other hand, is a change in the presence of polluting factors in the atmosphere, soil or water around one or more sources of pollution as a result of emissions from this source or sources. "*Pollution*" is understood as the causing of an emission which in a direct or indirect manner does or can detrimentally affect persons or the environment. Pollution is described as the presence of polluting substances caused by persons in the atmosphere, soil or water which in a direct or indirect manner does or can detrimentally affect persons or the environment. "*Extraction*" is the removal by persons of soil, water, air or light which in a direct or indirect manner does or can detrimentally persons or the environment.

Environmental quality standards

"*Environmental quality standards*" are standards established by the Flemish Government that determine which quality requirements the parts of the environment must meet within the periods set by the government.

Environmental quality standards concern the maximum permissible quantities of polluting substances in the atmosphere, water, soil, sediments or biota and any natural or other elements that must be present in the environment for the protection of ecosystems and the promotion of biodiversity.

This means environmental quality standards can occur in two forms. The first form is the traditional one referred to in the explanatory report as *environmental protection environmental quality standards*. The total quantity of polluting factors that may be present in a certain environment compartment is determined by means of chemical and physical parameters. The second form that can occur, that includes environmental quality standards, is new. This is to enable the establishment of so-called *ecological environmental quality standards*. This was based on the advice of the MINA Council that, for example, considered standards that determine that a certain volume of dead wood must be present in woodland because this benefits the biodiversity of the woodland ecosystem. Another example is that of the standard that determines that a watercourse must have certain structural elements to ensure that the watercourse forms an appropriate habitat for fish. In the explanatory report the example is given of standards concerning the bank structure of non-navigable watercourses.

The Flemish Government is competent and obliged to establish environmental quality standards and the term within which they must be complied with. There was however no period set within which such standards must be established by the Flemish Government. The obligation of the Flemish Government to establish environmental quality standards concerns three components of the environment (atmosphere, water and soil). On this basis environmental quality standards relating to noise pollution can also be established.

Each draft order concerning the establishment or changing of environmental quality standards must be announced by the Flemish Government to the MINA Council and the SERV. These issue documented advice within a term of forfeiture of two months of receipt of the draft. Insofar as necessary due to time frames imposed by international obligations, the Flemish Government can shorten the period specified for issuing advice.

The Flemish Government must, when it intends to establish special environmental quality standards for areas bordering neighbour states or other Regions, consult beforehand with the competent authorities of these States or Regions.

Basic environmental quality standards are standards applying for the whole territory. They aim to provide a minimum degree of protection for a certain environment compartment. In certain areas it will be necessary or desirable to achieve a better quality of the environment. This is why **special environmental quality standards** can be established… When for a certain area both basic environmental quality standards and special environmental quality standards apply, the strictest standard is then each time applicable for the parameters in question.

The Flemish Government must evaluate the environmental quality standards at set intervals and revise them as appropriate. With special environmental quality standards the evaluation also concerns the areas for which such standards apply.

Environmental quality standards can be established in the form of "*limit values*" and "*guide values*". Limit values may in principle (except in case of force majeure) not be exceeded. They indicate a sort of danger threshold whereby, if this is exceeded, certain interests can be endangered. The Flemish Government, that determines limit values, must indicate in the regulations what exactly has to be done in the case of the (threatened) exceeding of the limits and who takes these measures. Guide values are comparable with limit values, but their binding nature is less great. They determine the environmental quality level that must be reached or maintained to the maximum extent possible. While the limit values in principle may never be exceeded, and their exceeding as a result of force majeure

situations gives rise to urgent safety measures, guide values can be varied from for "*significant reasons*". Neither is there an obligation to take urgent safety measures when they are exceeded.

The order of the Flemish Government of 1.06.95 providing for general and sectoral provisions relating to environmental protection (VLAREM II)

In Part 2 of VLAREM II environmental quality standards are included for noise, surface waters, soil and groundwater and air. It is explicitly determined that these standards must be respected by the government during the planning and implementation of its policy. Such not only applies for environmental policy (water purification policy, waste policy, etc.), but also for policies in other areas (e.g. infrastructure policy, traffic policy, town and country planning policy, etc.).

The standards themselves remained largely unchanged with respect to the old Vlarem II, except for that concerning soil and groundwater. For soil, background values were included that apply as target values. An important aspect is that in the different sections in each case the relative policy tasks are mentioned (measuring, drawing up of programmes, reporting to the European Commission).

Environmental management within companies

Environmental management within companies has the purpose of striving for durable production patterns and managing and reducing the impact on the environment of a company in all its aspects, with the objective of contributing to the achieving of the objectives described in article 1.2.1 of this decree.
In the Decree a number of elements of internal company environmental care are regulated: the environmental coordinator, the environmental audit, compulsory measurements and recording, the annual environmental report, the operating policy to prevent major accidents and to limit their consequences for persons and the environment, and the reporting and warning obligation in the case of accidental emissions and disruptions.

B. ENVIRONMENTAL IMPACT AND SAFETY ASSESSMENT

Environmental impact assessment

The implementation of the European directives concerning this matter is mainly a competence of the regions. The Directive 85/337/EEG was implemented into Flemish law too late by a number of Government Decisions of March 23 1989. The legal basis for these decisions can be found partly in the Licensing Decree and partly in the former Town and Country Planning Act. Although these decisions were considered as temporary measures, they have been in force for a time period of more than twelve years now. Both Belgian and Flemish laws were found in contradiction with the European Directive by the European Court of Justice. The Flemish government has amended its regulations on February 4 1997 and March 10 1998 in order to be in compliance with the judgment of the European Court of Justice.

Safety assessment

Both federal and regional regulations have, with the exception of a small number of rules, been replaced by the Seveso cooperation agreement concerning the control of the dangers of serious accidents involving serious accidents.[108] Infractions of the cooperation agreement are punishable by prison sentences ranging from 8 days to 1 year, criminal fines from 1000 euro (x5,5) to 1000000 euro (x5,5) and administrative fines from 49,58 euro to 1239,47 euro.

Decree general provisions environmental policy

By Decree of December 18 2002 a new title was introduced in the above mentioned decree, called Environment Impact and Safety Assessment, in which a new legal basis was formed for both the

[108] The Seveso cooperation agreement of June 21 1999 was approved by Law of May 22 2001, Moniteur belge, June 16 2001 and replaced by the cooperation agreement of June 1 2006 approved by Law of March 2 2007, Moniteur belge, April 26 2007.

environmental impact assessment and the regional aspects of safety assessment. This title became effective on February 13 2003.

Federal developments

Also on a federal level measures were taken in order to implement the European Directives on Environmental Impact Assessment. Measures were taken within the framework of the Law of January 20 1999 concerning the protection of the marine environment in the maritime regions under the jurisdiction of Belgium and the Law of June 13 1969 concerning the continental shelf of Belgium. Regarding ionizing radiations a regulation was inserted in General Regulations for the protection of the population, employees and the environment against the dangers coming from ionizing radiations. By means of the Law of February 13 2006 concerning the assessment of the consequences for the environment of certain plans and programmes and the participation with regard to the elaboration of plans and programmes concerning the environment additional measures were taken. This procedure applies to plans and programmes being drafted and/or accepted by a federal government or drafted by a federal government for the acceptance by the federal legislative chambers or by the King and that are prescribed by legislative, regulatory or administrative provisions.

C. ENVIRONMENTAL CONDITIONS

The Decree concerning general provisions concerning environmental policy contains **two systems** of environmental conditions. On the one hand there is the system of **integrated environmental conditions**: the intention of this system of environmental conditions is to come up with an all round, all in one system of environmental conditions that makes it possible to prevent and limit all negative effects caused to humans or the environment by one industrial activity or plant. In this system there is no need for individual environmental conditions or further assessments. On the other hand, there is the system of **general, sectoral and individual environmental conditions**. Both systems exclude one another. Either the system of integrated environmental conditions or the system of general, sectoral and individual conditions can be applied to an activity or plant but never both systems together.

The system of integrated environmental conditions can *only* be applied to activities or plants that cause a restricted environmental disturbance and on the condition that means are available to prevent, limit and undo the environmental disturbance by using the best available techniques not entailing excessive costs (batneec).

General and sectoral conditions for classified establishments

General environmental conditions

Part 4 of VLAREM II (and the various associated appendices) contain the general environmental conditions for classified establishments, i.e. the conditions that in principle are applicable to all classified establishments of the first, second and third category. These conditions apply for the whole technical environmental entity and therefore also for those parts of an establishment and associated buildings and land that are not as such subject to a license or a notification obligation.

The most important general environmental conditions are:
- the operator must use due diligence in always using the best available techniques (BAT's) for the protection of the population and the environment, and this both with the selection of treatment methods concerning emissions, as with the selection of measures for reduction at source; this obligation also applies for modifications to classified establishments, as well as for activities which in themselves do not require a license or a notification; compliance with the requirements in VLAREM II and/or the environmental license is assumed to conform to this obligation;
- the establishment should be kept clean and tidy in a properly maintained condition;
If the occasion calls for it, effective measures should be taken against vermin;
- the operator will take all the measures required with due diligence to not cause nuisance in the surrounding area due to odour, smoke, dust, noise, vibration, non-ionizing radiation, light, etc. and to protect the surrounding area against the risks and the consequences of accidental events particular to the establishment or the operation of the establishment;

- in the event of nuisance or damage to the surrounding area, or if such nuisance or damage threatens to occur, the operator should immediately take the necessary measures to remedy this situation and - should the occasion arise - stop all further pollution; he should clear or remove any pollution that has occurred in an environmentally sound way;
- accidentally spilled liquids may never be drained directly to a groundwater layer, a public sewer, a watercourse or any other basin or reservoir for surface water; they must be collected and processed immediately and in accordance with the prevailing regulations; the operator disposes of the means and/or the material enabling him to rapidly take the necessary measures;
- the operator will immediately provide notification of the incident and of the measures (considered) to the Mayor and the environmental inspectorate in the case of serious nuisance or damage or the imminent threat of this to the surrounding land, or if a leak has resulted in soil pollution or dispersion in the sewer systems, the surface waters, the groundwater layers or adjacent properties; If it proves necessary to determine the cleaning measures to be taken, the operator should at his own expense have an accredited environmental expert carry out the required measurements;
- if necessary after consultation with the supervisory official, the operator will deploy all measuring, sampling, and recording devices imposed by VLAREM II or the environmental license;
- the operator provides the supervisory officials upon request with all the relevant data known to him concerning the raw materials, products, waste material flows or emissions used and/or produced at the establishment emissions; If the official has good cause to doubt the completeness or correctness of these data, he may have an accredited environmental expert take samples and carry out measurements and analyses at the operator's expense; the operator is informed beforehand and in writing of the official's decision and its reasons;
- all documents and data that in pursuance of VLAREM II must be provided to the government must also be made available to the representatives of the employees on the O.R., the Committee for Prevention and Protection at Work or, in the absence of these organs, of the trade union representatives.

Any installations or parts of them that have been shut down definitively by the operator must, within the 36 months of putting out of operation, be adapted in such a way that damage to the environment or nuisance is excluded.
Bulk solid substances containing leachable hazardous substances - within the meaning of appendix 2 B or 7 of VLAREM I - must, unless specified otherwise in the prevailing regulations or in the environmental license, be stored on an impervious base, provided with a collection system. Aboveground tanks and/or drums containing hazardous liquids - within the meaning of appendix 2 B or 7 of VLAREM I - must, unless specified otherwise in the prevailing regulations or in the environmental license, be placed in a bund that suffices with regard to certain requirements
Spilt, diluted or otherwise, pollutants must be disposed of in accordance with the prevailing regulations. The collection system must be constructed in such a way that any direct discharge to surface water or public sewers of fire extinguishing water contaminated with these hazardous substances is prevented to the maximum extent possible. The collection capacity for contaminated fire extinguishing water is established in consultation with the local fire department.
Other general environmental conditions concern:
- the management of waste materials (art. 4.1.6. and 1.4.1.2);
- the use of dangerous substances (art. 4.1.11.1. to 4.1.11.7)
- the management of surface water pollution (art. 4.2.1.1 to 4.2.7.3.1);
- the control of soil and groundwater pollution (art. 4.3.1.1 to 4.3.3.1);
- the management of air pollution (art. 4.4.1.1. to 4.4.5.5);
- the management of noise pollution (art. 4.5.1.1. to 4.5.6.1.):
- the management of light nuisance (art. 4.6.0.1. to 4.6.0.4.);
- asbestos control (art. 4.7.0.1 to 4.7.0.3);
- the disposal of PCBs and PCTs (art. 4.8.0.1. to 4.8.0.4.).
It is also determined that the operator must take the necessary measures to prevent light nuisance. The use and the intensity of light sources in the open air are limited to necessities related to operation and safety. The lighting must be conceived in such a way that the non-functional emission of light to the surrounding area is limited to the extent possible. Emphasis lighting may only be aimed at the establishment or parts thereof. Illuminated advertising may not exceed the normal intensity of public lighting.

Sectoral conditions

Part 5 of VLAREM II (and the various associated appendices) contain the sectoral environmental conditions for classified establishments. These sectoral conditions apply as supplementary to the general conditions for the categories of classified establishments mentioned. The order in which they are mentioned is that of the classification list of VLAREM I.
The following sectoral conditions have been established:
- petroleum or petroleum products (art. 5.1.0.1);
- waste treatment plants (art. 5.2.1.1. to 5.2.5.5.4);
- the discharge of waste water and cooling water (art. 5.3.0.1 to 5.3.2.4.);
- coatings (art. 5.4.1.1. to 5.4.4.2);
- biocides (art. 5.5.0.1. to 5.5.0.7);
- solid fuels (art. 5.6.1.1. to 5.6.3.1);
- chemicals (art. 5.7.1.1. to 5.7.16.1);
- diamond cutting and polishing (art. 5.8.0.1);
- animals (art. 5.9.1.1. to 5.9.10.1);
- beverages (art. 5.10.0.1. to 5.10.0.5);
- the printing and photographic industries (art. 5.11.0.1 to 5.11.0.5);
- electricity (art. 5.12.0.1 to 5.12.0.5);
- pharmaceuticals (art. 5.13.0.1 to 5.13.0.5);
- photographic products (art. 5.14.0.1);
- garages, car parks and repair shops for motor vehicles (art. 5.15.0.1 to 5.15.0.6);
- gases (art. 5.16.1.1. to 5.16.7.8.);
- the storage of hazardous products (art. 5.17.1.1. to 5.17.5.7);
- trenches and quarries (art. 5.18.1.1. to 5.18.3.1);
- wood (art. 5.19.1.1. to 5.19.2.3.4);
- industrial establishments that may cause air pollution (art. 5.20.1.1 to 5.20.5.1.);
- dyes and pigments (art. 5.21.0.1);
- cosmetic substances (art. 5.22.0.1);
- synthetic materials (art. 5.23.0.1 and 5.23.1.1.);
- laboratories (art. 5.24.0.1);
- leather (art. 5.25.0.1. to 5.25.0.3);
- adhesives and gelatine not for consumption (art. 5.26.0.1 tot 5.26.0.3);
- matches, torches and similar products (art. 5.27.0.1);
- mineral manures and animal manure (art. 5.28.1.1. to 5.28.3.5.3.);
- metals (art. 5.29.0.1 tot 5.29.0.10);
- construction materials and mineral products (art. 5.30.0.1 to 5.30.2.1.);
- machinery with internal combustion (art. 5.31.0.1 and 5.31.3.1.);
- leisure establishments and shooting ranges (art. 5.32.1.1. to 5.32.10.4);
- paper (art. 5.33.0.1 to 5.33.1.2);
- cleaning agents (art. 5.34.0.1);
- funeral parlours (art. 5.35.1.1 tot 5.35.3.2);
- rubber (art. 5.36.0.1. to 5.36.0.4);
- demolition contractors (art. 5.37.0.1);
- explosives (art. 5.38.0.1 to 5.38.0.3);
- steam appliances (art. 5.39.0.1 and 5.39.0.2);
- tobacco (art. 5.40.0.1);
- textiles (art. 5.41.0.1 to 5.41.0.4);
- transport resource manufacturers (art. 5.42.0.1);
- incineration plants not included in category 2 (art. 5.43.1.1. to 5.43.5.1);
- greases, waxes, oils, etc. (art. 5.44.0.1);
- the foodstuffs industry and trade (art. 5.45.1.1. to 5.45.5.2);
- laundries (art. 5.46.0.1 to 5.46.0.3);
- outlets for retail and/or wholesale (art. 5.47.0.1);
- transit storage places in seaport areas (art. 5.48.0.1 and 5.48.0.2);
- hospitals (art. 5.49.0.1 to 5.49.0.3);
- salt (art. 5.50.0.1. and 5.50.0.2);
- biotechnology (art. 5.51.1.1. tot 5.51.8.1);
- discharging into groundwater (art. 5.52.0.1);

- abstraction of groundwater (art. 5.53.1.1. to 5.53.6.3.3)
- artificial replenishment of groundwater (art. 5.54.1. to 5.54.5)
- bore holes (art. 5.55.1. to 5.55.3)
- airfields (art. 5.57.1.1. to 5.57.2.2)
- crematoria (art. 5.58.1. to 5.58.3)
- activities making use of organic solvents (art. 5.59.1.1.)
- whole or partial filling with non-contaminated excavated soil (art. 5.60)

Many companies fall under different sections of the classification list of VLAREM I. For these companies, besides the general conditions, the various sectoral conditions are applicable for the separate classified establishments from which the company is made up.

Legal nature of the general and sectoral conditions

The general conditions and the applicable sectoral conditions of VLAREM II are in principle directly applicable to all classified establishments. According to art. 7.3.0.2, § 1, without prejudice to the special conditions specified in a license and the transitional provision of article 3.2.1.2, the general and sectoral conditions of Vlarem II apply instead of those mentioned in an environmental license granted before 1 August 1995. In certain cases the conditions are applicable after the end of transitional periods. Different hypotheses must be distinguished here are, where the terms "existing establishment", "new establishment" and "existing new establishment" are of importance.

Variations from general and sectoral conditions

On the written request of the operator the Flemish Minister of the Environment can by reasoned decision, allow individual variations from the general and sectoral conditions of VLAREM II, providing that the applicant uses the best available techniques. The variation can entail no easing of emission limit values. Such a variation can be allowed for a maximum period of 20 years. It expires with the ending of the period of validity of the environmental license to which it relates, or of the environmental license granted on the basis of the variation. The Mayor and Aldermen can in cases explicitly determined in VLAREM II grant individual variations from the conditions for third category plants.

Variations for a certain sector or category of establishments can be permitted by the Flemish Government at the request of organisations represented in the SERV or the MINA Council or at the request of these councils. The reasoned application must be submitted to the Minister, who requests the advice of the Regional Environmental Licensing Committee and, unless the request comes from the relative council(s), the SERV and the MINA Council.

Special conditions

With the granting of a license the licensing authority can, provided it states the grounds for its decision, enforce special operating conditions for the protection of the population and the environment, and in particular for the maintaining or the achieving of environmental quality standards. In such cases one needs to take into account aspects such as the toxicity, the persistence and the bioaccumulation of the substances involved in the environment where they are being emitted. The special operating conditions supplement the conditions of VLAREM II or impose additional requirements. They can only be less stringent than VLAREM II when this is explicitly determined in VLAREM II, or providing that permission for variations has been obtained from the Minister or the Flemish Government.

Supervision and penalties

Besides the ability to trace and determine infringements by the officers of criminal investigation, compliance with the decree and 7 VLAREM I and II is monitored by:
- the police service of the municipality, as well as the technical officials of the town/city itself who are in possession of a certificate of competence in accordance with VLAREM I, or who in accordance with VLAREM I have been granted exemption (category 2 and 3 establishments);
- the supervisory official of LNE and the officials appointed by the Minister from the Environmental Inspectorate of LNE (category 1 establishments and high-level monitoring of category 2). For some aspects officials from other administrations can exercise supervision.

If the Mayor establishes that an establishment is operating without a license, he can immediately order its discontinuation, closure and sealing, even orally and on-site.
If he establishes that a category 3 or category 2 establishment is being operated in violation of the operating conditions, providing that the operator has refused to follow written instructions, and after consultation with the technically authorized officials, he can order its discontinuation, closure, and sealing.
If he establishes that a category 1 establishment is being operated in violation of the operating conditions, providing that the operator has refused to follow written instructions provided, and after consultation with the technically authorized officials, he can take the same measures. These measures can also be taken in the case of possible danger to the population or the environment.

The technically authorized officials can take the same measures for all categories of installation, if the installation is operated in violation of the conditions and the operator has refused to follow instructions, or when there is a possible danger to people or the environment. If the conditions of the license appear to be unsatisfactory, in anticipation of their adaptation they can temporarily enforce all measures needed to end any shortcomings that comprise a danger to people or the environment.

Infringements of the decree are punished with a fine of 100 (5,5) to 100,000 (x5,5) euros and/or a prison sentence of 8 days to 1 year. The court can allow certain establishments to still continue operating.

D. THE ENVIRONMENTAL LICENSE DECREE, VLAREM I AND VLAREM II

Scope

The decree of 28 June 1985 concerning the environmental license had the purpose of modernizing the regulations in the Flemish Region concerning hazardous, unhealthy and nuisance-producing establishments. It came into force on 1 September 1991 force together with the implementing decision "VLAREM I" - or "Title I of VLAREM".

As far as the scope is concerned the decree is applicable to a restrictive list of plants, summarized in appendix 1 to VLAREM I (art. 2, 1°). The scope of the type of nuisance covered by the decree is much wider than the previous regulations of title I of the ARAB (Algemeen Reglement voor de ArbeidsBescherming - General Regulations for Occupational Safety and Health). Where these regulations mainly related to air pollution, noise pollution and external safety - and therefore not the aspects of surface water pollution, groundwater pollution and waste management - the environmental license not only incorporated the former operating permit, but also the discharge permit, the license for the protection of groundwater against pollution, the license for the removal of waste, and that relating to toxic waste.

Since 1 September 1991 all these aspects were governed by VLAREM I. On 1 May 1999 the scope of the environmental license was further widened to cover the abstraction of groundwater and the artificial replenishment of groundwater. The licensing system existing up to this date lapsed and was integrated in the environmental license.

Classification in categories

Nuisance-producing establishments are classified in three categories. Licenses for first category establishments are granted by the Provincial Executive, the license for second category establishments by the Mayor and Aldermen. Third category establishments do not require a license, and notification suffices. This notification must in principle be made to the Mayor and Aldermen.

When, however, a third category establishment installation comprises a technical environmental entity with an establishment of a second or first category, notification can take place either by mentioning the third category installation in the license application (or in the notification of a minor change) for the parts of the technical environmental entity subject to a license requirement, or by notifying the authority competent for the granting of the license of the parts of the technical environmental entity subject to a license requirement (Mayor and Aldermen or Provincial Executive as the case may be).

Licensing procedure

VLAREM I thoroughly sets out the procedure rules applying for the application for and the granting of licenses.
The most important changes compared with the former regulations of Title I of the ARAB (General Regulations for Occupational Safety and Health) were:
- the drastic extension of the data that must be mentioned in the application file;
- preparatory examination into the admissibility and the completeness of the license application;
- extension and wider announcement of any public enquiry, including a hearing as to whether an environmental impact assessment or safety report is required;
- the setting up of a provincial and regional environmental licensing committee for first category applications and first and second category appeals;
- parallel processing of the public enquiry, advising by the municipality (first category) and the procedure for the environmental licensing committee;
- the equating of the absence of an on-time decision with non-acceptance, which is also served and subject to appeal;
- the regulation of the period between the licensing decision and bringing into use;
- the mutual suspension of building permit and environmental license for as long as either has not been finally granted;
- the regulation of the maximum duration of the license (max. 20 years), with ex-officio review every four years for the discharging of toxic substances in accordance with Directive 76/464/EEC;
- special conditions for so-called GPBV installations, i.e. establishments covered by the integrated pollution prevention and control directive; they are indicated in the classification list (fourth column) by a letter X.
Appeals can be made to the Provincial Executive against decisions of the Mayor and Aldermen; appeals taken against decisions of the Provincial Executive in the first instance can be made to the Flemish Government. This appeal can be initiated by the applicant, by the Governor, by the public authorities giving advice, by the bench of aldermen (first category) and by any individual or corporate body, who as a result of operations can directly experience nuisance, or by any legal person with the purpose of the protection of the environment and who can suffer nuisance.

Varying procedures are provided for establishments operated by the State, the Region, the Community, a province or a body established by them, for temporary establishments, for establishments subject to a license requirement due to a change in the classification list, for mobile establishments that are temporarily used in a mobile way and small changes to licensed establishments.

An important note is that licensing authorities have wide discretionary powers and, when an application has to evaluated, a balancing of interests is necessary. The Licensing Decree only has a few criteria that can/need to be used when evaluating the license application. Even when all legal provisions have been fulfilled, the licensing authority can still come to the conclusion that the application has to be denied. However, should a refusal decision to grant an environmental license be set aside by the Council of State, then a misconduct of the licensing authority is clear and damages will have to be paid.

The licensing authorities must take a decision taking into account the goal of the Licensing Decree, the protection of humans and the environment. Key elements in the decision-making process are the provisions of the town and country planning, that must be respected by the licensing authorities. However, even when these provisions are met, the authorities can still decide that a license cannot be given, if their decision is bases on reasonably acceptable motives and the nuisance cannot be reduced to an acceptable level, not even by imposing conditions.

E. COMBATING AIR POLLUTION, ODOUR AND LIGHT NUISANCE

Introduction

The combating of industrial air pollution traditionally takes place within the framework of the regulations on hazardous, unhealthy and nuisance-producing establishments, which still also remains the most important instrument to this end. In addition there is the law of 28 December 1964 on combating air pollution. This is a framework law that only gains content as orders for its enforcement

are established. The framework law also provides the legal basis for the regulations relating to the composition of fuels.

Environmental quality standards for air

In the eighties environmental quality standards were established for a number of air pollutants in pursuance of the Law of 28 December 1964; this concerned a pure transcription of E.E.C. directives. More specifically, standards (guide values and/or limit values) were established for sulphur dioxide and suspended particulate matter, lead and nitrogen dioxide.

These standards were replaced as of 1 August 1995 by the standards identical regarding content included in appendix 2.5.1, 1, of VLAREM II. With the threatened exceeding of the limit values the European Commission is immediately informed by the Inter-regional Cell for the Environment (IRCEL). The Minister draws up a cleaning plan that is forwarded to the Commission; consultation with adjacent countries can also be necessary. At set intervals the IRCEL informs the Commission of the measurement results of the measurement network. The VLAREM II also determines environmental quality standards (limit values) for a number of other substances: cadmium, chloride, hydrogen chloride, CO, vinyl chloride monomer and hydrogen fluoride (appendix 2.5.1.2). Guide values and/or limit values are also determined for particulate fallout (deposited non-hazardous substances, lead, cadmium and thallium) (appendix 2.5.2.).For ambient ozone concentrations the threshold values determined in appendix 2.5.3. of VLAREM II apply.

The limit values or alert thresholds are established by the Flemish Government for other air pollutants in order to implement the framework Directive on air quality and its Daughter Directives.

Industrial plants

The emission conditions for such installations are now included in VLAREM II.
In Vlarem II there is a whole series of special provisions for the combating of air pollution resulting from classified establishments. This largely concerns the adoption of the German TA-Luft 1986 or the European daughter directive in pursuance of the industrial air pollution framework directive.
Part 4 (general conditions), (see section 4.4. Vlarem II) includes conditions with respect to:
- the design and the construction of installations;
- the use of chimney stacks;
- the minimum height of chimney stacks;
- general emission limit values applicable to the extent there are no varying conditions for the sector concerned;
- measuring strategy;
- winter smog periods (appendix I, VLAREM I).

The sectoral part of VLAREM II (part 5) includes further supplementary and varying conditions for certain categories of establishments:
It concerns, among others:
- waste incineration plants - general requirements (art. 5.2.3.1.4- 5.2.3.1.5.);
- hazardous waste incineration plants (art. 5.2.3.2.3.- 5.2.3.2.6);
- household waste incineration plants (art. 5.2.3.3.3.- 5.2.3.3.7);
- wood waste incineration plants (art. 5.2.3.4.4. - 5.2.3.4.5);
- incineration plants for spent oil to be used as fuel (art. 5.2.3.5.4- 5.2.3.5.7);
- production of lacquer, paint, printing inks, dyes and pigments (art. 5.4.2.3);
- the application of coatings (art. 5.4.3.4);
- thermal treatment of coated objects (art. 5.4.4.2);
- biocides (art. 5.5.0.6);
- chemicals - general (art. 5.7.1.4); production of titanium dioxide (art. 5.7.2.3);
- production of sulphur dioxide, sulphur trioxide, sulfuric acid or oleum (art. 5.7.3.2);
- production of nitric acid (art. 5.7.4.1);
- chlorine production (art. 5.7.5.1);
- production of sulfur (art. 5.7.6);
- production of organic chemicals or solvents (art. 5.7.7.1);
- production of hydrocarbons (art. 5.7.8.1);
- production of carbon (art. 5.7.9.1);
- production of polyvinyl chloride (art. 5.7.11.1);

- the production of caprolactam (art. 5.7.12.1);
- the production of polyacrylonitrile-based synthetic materials (art. 5.7.13.1);
- production and processing of viscose (art. 5.7.14.1);
- the production of enamel (art. 5.7.15.);
- batch processes in the production of fine chemicals and pharmaceuticals (art. 5.7.16.)
- diamond cutting and polishing (art. 5.8.0.1);
- the printing and photographic industries (art. 5.11.0.5);
- wood (art. 5.19);
- petroleum refineries (art. 5.20.2.2);
- coke ovens (art. 5.20.3.1);
- production of glass fibre or mineral fibre and glass wool, glass and coarse ceramics (art. 5.20.4.1.1. - 5.20.4.2.1);
- synthetic materials (art. 5.23.1.1.)
- leather (art. 5.25.02 - 5.25.0.3);
- mineral manures (art. 5.28.1.6);
- metals (art. 5.29.0.3 -5.29.0.6);
- new large heating installations/incinerators (art. 5.43.2.1- 5.43.2.5);
- new medium-sized heating installations/incinerators (art. 5.43.3.1);
- new small heating installations/incinerators (art. 5.43.4.1);
- existing heating installations/incinerators (art. 5.43.5.1)
- crematoria (art. 5.58.3.).

Odour and light nuisance

Both the Licensing Decree and VLAREM contain provisions that obligate **classified establishments** to prevent nuisance. Infractions of these obligations are sanctioned by administrative and criminal penalties. Residents can launch an objection when a license is being authorized and they have a right of appeal against the license before the Council of State.

Nevertheless, a strict limitation of odour and light nuisance is impossible on the basis of the current provisions. Neither the government nor the citizen or the operator have clear rules about what types of measures an operator has to take and how far he has to go in limiting the nuisance.

In relation to odour and light nuisance apparently the licensing system can only be powerful enough if there are clear emission limits or environmental quality standards. But the problem is that odour and light nuisance is a subjective perception with a source that isn't always easy to find and can be influenced by a number of factors, like temperature, wind direction, et cetera. Despite of this problem, the Flemish government tries to establish a clear set of rules.[109]

For nuisance caused by **non classified establishments** the situation is even more difficult. Infractions of provisions concerning the limitation of light nuisance are sanctioned by criminal but not by administrative penalties. Residents can claim damages but will have to prove a fault, the damage and the causal relation between both. In these cases one often will have to fall back on the theory of nuisance caused by neighbours.[110]

F. COMBATTING SURFACE WATER POLLUTION

The protection of surface waters against pollution is based on the one hand on the law of 26 March 1971 on the protection of the surface waters and on the other hand on the law of 24 May 1983 concerning the general standards to determine the quality objectives determine for surface waters intended for specific purposes and their respective implementing decisions.

In the Flemish Region the decree on the environmental license and VLAREM I and II are mentioned.

[109] I. Martens, Geur- en lichthinder in het Vlaams gewest, *M.E.R.*, 2003, 74.
[110] I. Martens, Geur- en lichthinder in het Vlaams gewest, *M.E.R.*, 2003, 77.

Environmental quality standards for surface waters

In pursuance of the Law of 26 March 1971, section 2.3. of VLAREM II now includes the environmental quality standards for surface waters.

The basic environmental quality standards - applying to all surface waters - are included in appendix 2.3.1. of VLAREM II (art. 2.3.1.1). The environmental quality standards for chlorides, sulphates and conductivity specified are not applicable for tidal surface waters or surface waters affected by the infiltration of sea water. Neither do they apply in situations of exceptional drought. Any exceeding of the environmental quality standards that is a consequence of flooding, natural disasters or exceptional weather conditions is not taken into account. Neither do the standards apply for waters or parts of them for which it cumulatively shown that: a) all discharges meet the discharge conditions for discharging in surface waters; b) for these waters the pursuit of a normal and balanced development of biological life on the basis of these environmental quality standards is not ecologically meaningful; c) the waste load of the waters concerned is minor with respect to the total hydrographic network. The VLAREM II does not however determine who must demonstrate such, nor who assesses if the requirements set are met.
In addition VLAREM II also contains the special environmental quality standards for:
- surface waters intended for drinking water production (appendix 2.3.2);
- surface waters for use as bathing water (appendix 2.3.3)
- surface waters for use as fishing water (appendix 2.3.4);
- surface waters intended for shellfish (appendix 2.3.5).
Surface waters for which these standards apply are indicated in the Order of the Flemish Government. of 08.12.1998. It must be mentioned that the basic environmental quality standards also apply to these waters insofar as they supplement the special environmental quality standards or make them stricter (art. 2.3.1.2).

Vlarem II also makes mention of the policy tasks related to the origination and maintaining of environmental quality standards (section 2.3.6). To this end it is primarily of importance that the quality of the surface waters is checked. The VMM. takes responsibility for the measuring of the quality of the surface waters, in accordance with the indicated frequency and methods. The VMM must also now draw up programmes to reduce the pollution of surface waters by hazardous substances on the grey list (appendix 2 C, list II, VLAREM I). In pursuance of these programmes the emission standards are calculated in environmental licenses on the basis of the environmental quality standards set. These programmes are reported to the European Commission. The VMM also compiles an inventory of discharges that contain substances on the black or grey list.

With regard to discharges of urban waste water the VMM draws up a programme for urban waste water treatment every 2 years and reports it to the European Commission. The VMM also consults with neighbouring states or other regions if the waters there are adversely affected by Flemish discharges.

Regulations for discharges

The law of 26 March 1971, that applies to waters of the public hydrographic network and the territorial sea, forbids the throwing of objects or substances into public waters, as well as the discharging of polluting liquids or gases and the depositing of solid or liquid substances in a place where they could arrive in the water due to a natural process. The only exception concerns the discharging of waste water subject to and in accordance with the discharge or environmental license, or for private persons that stipulated in the VLAREM II conditions.

Since 1 September 1991, the date of the coming into force of the decree on the environmental license, discharge permits in the Flemish Region have become a part of the environmental license. Which discharges are subject to either licensing or notification is indicated in heading 3 of the classification list of VLAREM I.

It must be mentioned that when discharges of category 3 or 2 take place by an establishment that is classified in a higher category because of other aspects, the establishment including the discharges is

classified in the higher category. Conditions are associated with the license. A distinction must be made between general, sectoral, special and other conditions.

The general discharge conditions (different depending on discharging in surface waters or in sewers and depending on the nature of the waste water: household, industrial or cooling water) apply for all discharges. They are included in the General Discharge Regulations (art. 6, 7, 8, 19) and, for the Flemish Region, in section 4.2. of VLAREM II.

Sectoral discharge conditions only apply for a certain industrial sector or sub sector. They were up until a while ago included in some 55 Royal Decrees and are now included in VLAREM II (see sections 5.3.). It must be mentioned that as far as the content is concerned VLAREM II has integrated the majority of these sectoral discharge conditions unchanged. Some conditions were, however, added to or made more stringent. The sectoral conditions are included in article 5.3.2.4. and appendix 5.3.2. of VLAREM II. They supplement the general conditions (i.e. containing limit values for parameters not in the general conditions, taking into account the specific characteristics of the sector involved), but they can also vary both in a more stringent sense (if economically viable for the sector), or in a less stringent sense (if no commercialized purification system makes it possible to comply with the general conditions).

Article 3.3.0.1 of VLAREM II determines that with the granting of an environmental license the licensing authority can, provided it states the grounds for its decision, impose particular operating conditions in view of the protection of the population and the environment, and in particular in view of the maintaining or reaching of environmental quality standards. If appropriate, account must also be taken here of the toxicity, the persistence and the bioaccumulation of the substances involved in the environment into which they are emitted. The special operating conditions supplement the general or sectoral conditions, or impose additional requirements. Specifically with regard to the discharging of industrial waste water, in article 5.3.2.4., § 2 it is determined that if necessary for the receiving surface water to be able to reach the applicable quality the environmental license can impose emission limit values that are more stringent than the general and sectoral conditions. For the parameters marked l.p.l. (license permitted level) in the sectoral conditions, emission limit values shall be imposed to prevent an excessive load on the receiving surface water with oxygen-binding substances. In an environmental license, for parameters for which environmental quality standards apply for the receiving surface water but for which there are no emission limit values in the general or sectoral conditions, emission limit values are imposed in view of the quality standards to be reached (art. 5.3.2.4, § 5).

In addition, other or control conditions can also be included in the license (separation of different kinds of waste water, limitation of the risk of incidental discharges, reporting obligation, maximum quantities, compulsory measurements and recording).

VLAREM II contains detailed conditions relating to the presence of monitoring facilities and relating to self-checks.

Specific quality standards

The Law of May 24 1983[111] made it possible to determine quality standards for waters used for specific purposes. Thus, specific quality standards were made up for: 1) fishing waters, shellfish waters, swimming waters and waters used for the production of drinking water.

G. WASTE LAWS

Scope

The Decree of 20 April 1994 amended the majority of the provisions of the **decree of 2 July 1981 on Waste Management**. The title of the decree now reads: "Decree of 2 July 1981 concerning the prevention and management of waste materials". The decree is executed VLAREA.

[111] Moniteur Belge, June 15 1983.

- Waste materials to which the decree applies

The amended decree is applicable to all waste materials, including the waste materials previously covered by the law on toxic waste (Law of 22.07.74). The new decree is not however applicable to (art. 4): gaseous effluents which are discharged into the atmosphere; animal manure referred to in the decree of 23 January 1991 relating to the protection of the environment against pollution by fertilisers; waste water, with the exception of wastes in a liquid state; soil, excavated outside mining areas that can be reused freely as soil or as building material. Neither is the decree applicable to radioactive waste that falls outside the competence of the Flemish Region.

The scope of the Decree is restricted to the Flemish Region. The dumping or the incineration of waste at sea does not fall under the scope of the decree: this is regulated by the laws in pursuance of the dumping treaties of Oslo and London. For as long as the waste materials are still on land they are subject to the requirements of the decree.

- What the term "waste material" means

Each substance or each object which the owner discards, intends to discard or must discard.
This broad definition, that does not differ from the former definition, corresponds with the EEC directives in this field. Since there is no difference between the Flemish and European term *waste material*, for the interpretation of this term also the jurisprudence of the European Court of Justice has to be taken into account.

- Classification of waste materials.

The Flemish Government has compiled **a waste catalogue** (appendix 1.2.1. VLAREA). This catalogue is now known as the European waste list (**EURAL**).

This is a non-exhaustive list in which the different kinds of waste materials (including hazardous wastes) are summarized along with the methods of analysis available. The Flemish Government has adopted the European Waste Catalogue (art. 3, § 1), to replace the former "Waste Code Register" of the OVAM.

The waste materials are further subdivided into main and additional categories. All waste materials are first of all classified in one of both main categories: the household wastes and industrial wastes. In addition, the waste materials can be classified in an additional category, in particular either as a hazardous waste material or as a special waste material.

Disposal, recovery, collection and waste materials management

The decree makes a distinction between the disposal of waste materials and the recovery of waste materials.

The "*disposal of waste materials*" must be understood as the destruction and final storage in or on the soil of waste materials and activities to this end, as well operations determined as such by the Flemish Government in accordance with prevailing European conditions (art. 2, 6°, decree). The Flemish Government has defined the term in more detail by adopting appendix II A of the European framework Directive relating to waste materials, that in turn largely corresponds with appendix V A of the Treaty of Basel.

The "*recovery of waste*" must be understood as: the recovery of raw materials, products or energy from waste, the direct and legal use of waste, as well as operations determined as such by the Flemish Government in accordance with prevailing European requirements (art. 2, 7°, decree). The Flemish Government has defined the term in more detail by adopting appendix II A of the European framework Directive relating to waste materials, that in turn largely corresponds with appendix V A of the Treaty of Basel.

The "*processing of waste materials*" includes both previous definitions, and therefore concerns the disposal and the recovery of waste materials (art. 2, 8°). The "*collection of waste materials*" is understood as the collection, sorting and/or bringing together of waste materials to transport them. The

term "*waste materials management*" is the broadest term: it includes all the previous definitions and also includes the supervision of these operations and the aftercare of landfills after their closure.

Objectives and priorities of the waste policy

The objective of the waste policy is to protect the health of the population and the environment and to prevent the wasting of raw materials and energy. The top priority is to prevent or reduce the production of waste materials, and prevent the harmfulness of waste or reduce it to the extent possible. Secondly there is the promotion of the recovery of waste. Finally the disposal of waste must be organized for waste that cannot be prevented or recovered (art. 5).

To achieve these objectives a policy must be aimed at the development of clean technologies and clean products and the recovery of waste, and the development of techniques for the disposal of hazardous substances from waste materials intended for recovery must be encouraged. The decree determines that all authorities in the Flemish Region must contribute to achieving these objectives within the framework of their competence. A specific role in this context is given to the VITO, the IWT, the MINA Fund, the Flemish Environmental Holding Company and the laws on economic expansion. It will also be attempted to match these efforts with each other within the framework of the yearly environment programme that is established annually by the Flemish Government (art. 6 and 8).

The Flemish Government can, to achieve these objectives, also conclude environmental covenants (binding covenants). At present such agreements have been concluded relating to the selective collection of old and expired medicinal products, of paper and vehicles intended to be scrapped Such covenants can also relate to the organisation of the disposal of waste materials (art. 9).

Take back obligation

The decree gives the Flemish Government the competence to indicate obligatory acceptance for waste for their recovery or their efficient disposal for the final seller, the intermediary and the producer or importer. Hence, responsibility for the disposal or recovery of waste materials can be placed with producers who market products that cause waste problems at the end of their life cycle. This obligatory acceptance can be conceived in a narrow or broad sense.

In the **narrow sense** this concerns an obligation to accept returned materials. For the final seller this means when a consumer purchases a product he is obliged to take back the corresponding product when the consumer wishes to discard it. The intermediaries are bound to accept waste materials held the by the final seller, and this proportionate to deliveries made by them to the final sellers. The producers or importers are bound to accept waste materials held by the final sellers or by the intermediaries, and be responsible for their recovery or disposal and this proportionate to the deliveries of products made by them to the final sellers or intermediaries.

The text of the decree also enables the application of **a wider obligatory acceptance**. In that case the rule does not apply one for one, but consumers can return products they wish to discard to a final seller without purchasing a replacement product. This system is then continued through the rest of the distribution chain.

It is explicitly determined that to comply with their obligations final sellers, intermediaries, producers and importers can, at their own expense, use third parties under the conditions determined by the Flemish Government.
They can also conclude environmental covenants with the sectors involved (art. 10).

Examples of the obligation to accept returned materials are:
- paper waste;
- accumulators and batteries;
- medicines;
- vehicle wrecks or vehicles intended to be scrapped;
- waste tires;
- brown goods and white goods;
- waste oil;

- waste photo chemicals;
- et cetera

The possibility is also provided for persons bound by the obligation to use the services of an accredited waste management organisation (art. 3.1.2.1 - 3.1.3.3 VLAREA).
Specifically for packaging waste there is the interregional agreement of cooperation of 30 May 1996 concerning the prevention and the management of packaging waste approved by decree and order. This agreement of cooperation provides for the uniform regulation of the problem in the three regions. So far two bodies have been accredited for being able to take over obligatory acceptance. These are v.z.w. Fost Plus and Val-I-Pac.
Article 11 of the Decree determines that the Flemish government draws up a list of waste materials that may be legally used as secondary raw materials if they meet the conditions relating to composition and/or use established by the Flemish Government. These conditions must ensure that the use of these waste materials as secondary raw materials takes place without danger to the health of the population and without adverse effects on the environment.

The use of wastes as secondary raw materials

The Flemish Government can also issue a certificate for use for these substances as secondary raw materials that certifies their conformity with the conditions. For the purposes of the decree these waste materials are not regarded as waste materials as soon as they are delivered to a user who disposes of the necessary licenses and/or satisfies the conditions for using these secondary raw materials.
This provision was worked out in more detail in section 4 of VLAREA. Conditions relating to composition and/or use were established for the use of waste materials:
- in or as fertiliser or soil-improving substance (art. 4.2.1.1- 4.2.1.3 and appendix 4.1. and appendix 4.2.1 of VLAREA);
- in or as building material (art. 4.2.1.1- 4.2.2.3 and appendix 4.1. and 4.2.2. of VLAREA);
- as soil (art. 4.2.3.1 and appendix 4.2.3 VLAREA);
- in or as lubricant and/or solvents and/or technical liquids (art. 4.2.4.1 -4.2.4.3 VLAREA);
- in or as fuel (art. 4.2.5.1.-4.2.5.3. VLAREA).

Management and disposal of waste: general regulations

- general regulations

It is forbidden to discard or dispose of waste materials (unmanaged) in violation of the requirements in the Waste Management Decree or its implementing decisions (art. 12).
Anyone involved with waste carries an obligation of care. Article 13 determines that individual or corporate bodies managing or disposing of these waste materials are obliged to take all measures that can be reasonably expected to prevent danger to the health of the population or the environment, or to reduce it to the extent possible. The Flemish Government can further specify these measures.
Distributive trade and transport
The control of the distributive trade was made stricter by the decree of 20.04.94. An accreditation and registration system was introduced, as well as an obligation to keep a waste materials register and meet the annual reporting obligations to the OVAM. As regards the reporting obligation exceptions can be made for transporters. Natural persons or legal persons who store or collect wastes, with the exception of household wastes collected by the municipality door-to-door, as well as traders or agents who make arrangements for others for the disposal or recovery of waste are subject to accreditation granted by the Flemish Government. The accreditation includes aspects such as the solvency, the expertise and the morality of persons responsible.

Natural or legal persons who transport waste materials by order of third parties are subject to registration, to the extent they are not accredited themselves. The Flemish Government can issue sectoral conditions for these activities.

- establishments for the disposal or recovery of waste materials

The disposal of waste materials is subject to a license requirement. The recovery of waste materials by establishments requires a license or notification, and this in accordance with the Decree on the environmental license. Exactly which establishments require a category 1 or 2 environmental license,

or for which notification must take place is indicated in heading 2 of the classification list of VLAREM I. These establishments must also keep a waste materials register and have an annual reporting obligation to the OVAM.
The dumping and incineration of certain waste materials has been prohibited since 1 July 1998 or 1 July 2000, as the case may be.

Household wastes

Each municipality must ensure that, in collaboration with other municipalities or otherwise, household wastes are regularly collected or brought together in another way. The collection of household wastes is regulated by municipal regulations. Special regulations apply for the discarding of household wastes through waste disposal chutes in apartment buildings.
The activities of each person required for the normal working of services for the collection of household wastes, as well as the material needed for this, may be established by the Mayor, the district commissioner and the governor (art. 15).

The Flemish Government determines which household wastes must be separately collected or brought together in another way for their recovery or disposal. At present this concerns hazardous household waste, glass waste, paper and board and bulky waste. The municipalities can conclude agreements with the OVAM to promote or supervise the organisation of the selective collection of household wastes. The Flemish Government can contribute to any costs involved here. (art. 16, §§ 1 to 4). This provision is specified further in Section 5.2. and 5.3. of VLAREA.

When a municipality does not comply with these obligations or those of the sectoral implementation plans within the period imposed by the Flemish Government, and as a result affects the general interest, the Flemish Government can, after notice of default by a reasoned decision, act in the place of the relative municipality in implementing all measures necessary to ensure compliance with these obligations. The Flemish Government can recover the associated costs from the municipality (art. 16, § 5).

Industrial wastes

The producers of industrial wastes keep ***a waste materials register*** which includes mention of the nature, origin, composition, quantity, use and recovery or disposal method of the waste materials. They have an annual reporting obligation to the OVAM. Notification must take place each year, each time before 10 February of the following year, and this on a report form prescribed by ministerial order that is available on simple request without charge from the OVAM. The Flemish Government can discharge certain categories of producers of these obligations because of low quantities or the modest degree of damage caused by the waste materials they produce (art. 17). Exemption was granted for industrial wastes comparable to household wastes because of their nature and composition. Registration is also required for waste materials one wishes to use as secondary waste materials (art. 5.1.5.3 VLAREA). This must be done by 15 December of the year of planned use at the latest.
If required for their recovery or for their efficient disposal, the different waste material flows are collected separately and stored and identified in an appropriate manner (art. 18).
Producers of industrial wastes must recover or dispose of these waste materials at their own expense. Industrial wastes may only be disposed of or recovered:
a) at companies where the waste materials originate, and this in accordance with the environmental license or other applicable requirements;
b) by delivery to a license-holder for the disposal of waste materials, an accredited enterprise or person for the collection of waste materials, an accredited intermediary or agent or an establishment that recovers waste materials;
c) as secondary raw materials, in accordance with the applicable requirements;
d) by delivery to a person in another region or country who in accordance with the prevailing legislation there may dispose of the waste materials, to the extent there is no licensed disposal establishment significantly closer by that can dispose of or recover the waste materials in an appropriate way (art. 20).
Each delivery of industrial wastes within the Flemish Region, takes place with acknowledgement of receipt. The acknowledgement of receipt makes mention of: a) date of delivery; b) name and place of residence of the producer or the establishment accepting the waste materials; c) name and place of

residence of the natural or legal person to whom the waste materials are transferred; d) nature, source, composition and quantity of the transferred waste materials (art. 21).

Hazardous waste

- the term hazardous waste

Hazardous waste are waste materials comprising or able to comprise a particular hazard to the health of persons or the environment, or which must be processed in special installations. Certain additional obligations apply for hazardous waste materials. The Flemish government determines which wastes are regarded as hazardous wastes in accordance with prevailing European requirements (art. 3, § 3, 1, decree). Hazardous waste are described in conformity with the European directive on hazardous waste. VLAREA lists these materials.

- disposal of hazardous waste

Hazardous waste materials being disposed of must be registered and identified. The different kinds of hazardous waste materials must be kept separate, and the hazardous waste materials must be kept separate from non-hazardous waste materials. An environmental license can allow hazardous waste materials to be mixed with other hazardous waste materials or with other waste materials, substances or materials if this is required for safety reasons during disposal or to improve recovery. If hazardous waste materials are mixed with other waste materials, substances or materials, in principle separation must take place when this is technically and economically practicable (art. 23, §§ 1, 3 and 4).
Hazardous waste materials may only be recovered at establishments having an environmental license to this end, or be used as a secondary raw material in accordance with the applicable requirements (art. 24).
With their collection, transportation and temporary storage hazardous waste materials must be suitably packaged and/or stored in accordance with prevailing international and European conditions. During transport they must also be accompanied by an identification form (art. 23, § 2).

Special wastes

- term

Special wastes are household, hazardous, industrial wastes or other waste materials which because of their nature, composition, source or disposal require special regulations. These include: used oil, used PCBs, waste materials from the titanium dioxide industry, animal waste, medical waste, builders' and demolition rubble, hazardous household waste, agricultural waste materials, mine waste materials, sludge originating from drinking water abstraction, the cleaning of sewers, septic tanks and grease traps and sewage treatment plants, vehicle wrecks and rubber tires (art. 3, § 5, decree). The Flemish Government can add to this list and make more specific requirements. In VLAREA the following supplementary categories are mentioned: sludges resulting from dredging operations, certain waste materials originating from the scrapping of and/or the maintenance of certain means of transport, paper waste and brown goods and white goods (art. 2.3.1 VLAREA).

- applicable regulations

The Flemish Government must determine specific regulations for the management of special wastes. These regulations supplement the general regulations for waste materials management. It can also prescribe conditions for specific special wastes and activities aimed at the management of these waste materials that vary from the provisions of the decree relating to licenses, accreditations, reporting and registration if this is required for the efficient disposal or recovery of these waste materials. These conditions must ensure that disposal or recovery is effected without danger to the health of the population and without adverse effects on the environment (art. 32).
These regulations are included in VLAREA. The regulations concern certain waste materials originating with the destruction or maintenance of means of transport (subsection 5.5.1), hazardous household waste (subsection 5.5.2) and medical waste. There are also regulations for animal waste: art. 25-31 of the decree and the Order of the Flemish Government 24 May 1995.

The environmental license, VLAREM I and VLAREM II

- license or reporting obligation

Since the coming into force of the Environmental license decree and its implementing decision VLAREM I on 1.09.91 the separate licensing system enforced by the Waste Management Decree for establishments for the disposal of waste has no longer been in force.

Exactly which establishments require a category 1 or 2 environmental license or for which notification must take place is indicated in heading 2 of the classification list of VLAREM I.

The general license conditions are included in section 4.1.6. of VLAREM II. The general conditions applicable for all classified establishments concern:
- without prejudice to the provisions applicable on the storage of dangerous substances, specially adapted
packing and/or containers must be used for the temporary storage of waste materials other than inert waste materials;
- unless specified otherwise in VLAREM II or in the environmental license, these waste materials should regularly be removed from the establishment for processing; the removal of the waste materials should be performed in such a way that no waste can spread outside the establishment;
- without prejudice to other conditions or license conditions, for processing (excl. collection, separation and transport) priority must be given in the following order: a) reuse of products, b) recycling of materials, c) energy recovery, d) incineration without energy production. Only when the best available techniques cannot be used may depositing at a licensed establishment according to the legal provisions take place In order to be able to comply with the hierarchy of processing methods, waste material flows that need to undergo a different form of processing must be collected separately or must be separated mechanically after collection.
VLAREM II also determines the sectoral conditions for waste treatment operations referred to in heading 2 of the classification list of VLAREM I (section 5.1).

Section 5.2.1. contains the conditions that in principle are applicable to all these establishments. They concern the acceptance and the registration of waste materials, the work plan, layout and infrastructure, operation of the establishment and fire prevention and fire fighting. Then follows the conditions applicable to specific categories of such establishments:
- waste storage and treatment plants (section 5.2.2.); including:
- civic amenity sites (subsection 5.2.2.1);
- establishments for the storage and sorting of hazardous household waste (subsection 5.2.2.2);
- establishments for composting park and garden waste (subsection 5.2.2.3);
- establishments for the storage and treatment of specific non-hazardous solid waste materials (subsection 5.2.2.4);
- establishments for the storage and treatment of hazardous waste and industrial wastes not indicated elsewhere (subsection 5.2.2.5);
- vehicle wreck storage and processing plants (subsection 5.2.2.6);
- scrap storage and processing plants (subsection 5.2.2.7);
- establishments for the storage and processing of spent oil (subsection 5.2.2.8);
- establishments for the decontamination and cleaning of receptacles used for the storage or transport of substances (subsection 5.2.2.9);
- animal waste storage and processing plants (subsection 5.2.2.10);
- establishments for the treatment of waste materials in, or forming part of a sewage treatment plant (subsection 5.2.2.11.)
- Waste incineration plants (section 5.2.3), including:
- general conditions (subsection 5.2.3.1);
- hazardous waste incineration plants (subsection 5.2.3.2);
- household waste incineration plants (subsection 5.2.3.3);
- wood waste incineration plants (subsection 5.2.3.4);
- incineration plants for spent oil to be used as fuel (subsection 5.2.3.5);
- incineration plants for risk-entailing medical waste and for liquid and paste-like non-
risk-entailing medical waste (subsection 5.2.3.6);

- Sites where waste materials are deposited in or on the soil (section 5.2.4), including: conditions relating to waste acceptance at the site, the work plan, the design, infrastructure and finishing of the site of disposal, operation of the establishment, finishing and after-care and the bank guarantee.
- Mono-landfills for dredging sludge originating from surface waters of the public hydrographic network (section 5.2.5.)
- The operators of disposal establishments must pay taxes to the Flemish Region.

H. SOIL POLLUTION

The Land rehabilitation Decree of 1995 was recently replaced by **the Soil Decree of October 27 2006**.

The Soil Decree says that its aim is *to create a sustainable management of the soil taking into account the needs of the present generation without compromising the opportunities of future generations to satisfy their needs*.[112]

To effect this, the Decree has extensive regulations for (the financing of) land rehabilitation and soil testing, the identification of polluting soils, a register of polluting soils, regulations for new and for historical soil pollution and special regulations for the transfer of soils. Both Decrees give significant competence to the inspection service, OVAM. The Land rehabilitation Decree was given more details by the Order of the Flemish Government of 5 March 1996 for the establishment of Flemish Regulations concerning land rehabilitation (VLAREBO). The latter order will be replaced by a new one soon.

The Decrees understand *soil pollution* as the presence - as a result of human activities - of substances or organisms on and in the soil or buildings (e.g. old polluting factories) and structures erected on it, that adversely affect or may affect the quality of the soil either directly or indirectly. Only soil pollution as a (direct or indirect) result of human activities is therefore covered by the Decrees. In the Soil Decree *soil* is understood as the solid constituents of earth, including groundwater and other components and organisms that form part of it or live therein. Water bottoms are also covered by the Decree.[113]

Of great importance, both for the question in which cases rehabilitation must take place and for the question who must (pre-)finance the costs and who is ultimately responsible, is the distinction the Decrees make between new and historical soil pollution.

The inspection service, OVAM, can take far-reaching enforcement measures against owners or users of land that do not cooperate, if necessary with the assistance of the police.[114] Infringements of the Soil Decree are punishable by a prison sentence of between one month and five years and/or a fine of 100 (x5,5) to 10,000,000 (x5,5) euro.[115]

I. OTHER LAWS WORTH MENTIONING

Laws concerning protected animals, plants regions and/areas

- Law concerning the protection of the marine environment – January 20 1990
- Forest Decree – June 13 1990
- Hunting Law – February 18 1882 and Hunting Decree – July 24 1991
- Nature Decree – October 21 1997

Law concerning illegal trafficking in protected animals

- Law concerning the approval of the CITES Treaty – July 28 1981

[112] Article 3, paragraph 1 of the Soil Decree
[113] Article 2 of the Soil Decree
[114] Article 171 of the Soil Decree
[115] Article 173 of the Soil Decree

Law concerning radioactive radiation

- Law concerning ionizing radiations – July 12 1985

Law concerning hazardous substances and preparations

- Law concerning product standards – December 12 1998

Laws concerning water pollution

- Decree concerning the complete protection of ambient waters – July 18 2003[116]
- Manure Decree – December 22 2006

.

[116] An important instrument that was created in Flanders by this Decree is the *water test*. The water test is used to prevent or limit possible negative effects caused by plans, programmes or authorisation decisons on the water system.

TABLE OF CONTENTS