

EUFJE – Warsaw Conference – 2011

Strategic Environmental Assessment, Environmental Impact Assessment and Town and Country Planning

Belgian Report

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Introduction

SEA is in Belgium a mixed competence. Plans and programmes that are elaborated on the federal level are, as the case maybe, subject to the federal legislation that was adopted in view of the transposition of the SEA Directive. Plans and programmes that are elaborated on the regional, provincial or local level are subject to the regional legislation that was adopted in view of the transposition of the same Directive by the respective regions: the Flemish, the Walloon and the Brussels Capital Region. So, there are 4 different legislations on SEA in Belgium.

EIA in Belgium is meanly a regional competence. So there are three different legislations according to the region concerned. Besides that, there are two types of projects that are subject to federal EIA legislation. The first category comprises nuclear projects, as the protection against ionizing radiations is a federal competence. The second category comprises projects carried out in the marine areas for which the federal authorities are also competent, as those areas are not falling within the territorial remit of the regions.

In answering the questions we indicate each time the type of legislation concerned, as follows:

- FED = Federal Legislation
- FLE = Legislation of the Flemish Region
- BRU = Legislation of the Brussels Capital Region

The legal situation in the Walloon Region is presented in a separate document.

Part A – SEA

I. How is the SEA-directive (Directive 2001/42/EC) implemented in your country? What is the scope of its implementation?

FED :

The Act of 13 February 2006 concerning the assessment of the effects of certain plans and programmes on the environment and the participation of the public during their elaboration (*Moniteur belge (Official Journal)* 10 March 2006) was adopted in view of the implementation of Directive 2001/42/EC on the federal level. The Act is applicable to plans and programmes which are prepared and/or adopted by a federal authority or which are prepared by a federal authority for adoption by the federal Parliament or the King (Federal Government) and which are required by legislative, regulatory or administrative provisions.

FLE :

The Decree “Algemene Bepalingen inzake milieubeleid” of 5 April 1995 (further *DABM*), Chapter IV (added by a Decree of 18 December 2002, *Moniteur belge* 13 February 2003, modified by a Decree of 27 April 2007, *Moniteur belge* 20 June 2007) implements the SEA- and EIA-directives in the Flemish legislation. More in particular, Chapter II handles SEA, further implemented by an Executive Order of the Flemish Government of 12 October 2007 on environmental impact assessment of plans and programmes (*Moniteur belge* 7 November 2007) and a *Circulaire* of 1 December 2007 (*Moniteur belge* 17 December 2007). The Flemish legislation is applicable to plans and programmes that are elaborated on the regional, provincial or local level as well as plans and programmes which are prepared by an administration for adoption by the Flemish Parliament or the Flemish Government, and which are required by legislative, regulatory or administrative provisions.

BRU :

The Brussels Town Planning Code, or COBAT, established by Decree of the Brussels Regional Government of 9 April 2004 (*Moniteur belge* 26 May 2004), implements the SEA-directive in the legislation of the Brussels Capital Region, as far as urbanistic development plans and land use plans are concerned. The other plans and programmes, as mentioned in the directive, are covered by the Ordinance of 18 March 2004 on the environmental impact assessment of certain plans and programmes (*Moniteur belge* 30 March 2004) (SEA-ordinance).

II. What types of public plans and programmes are subject to a strategic environmental assessment in accordance with the SEA-directive?

FED :

The Act of 13 February 2006 lists some plans and programmes for which SEA is mandatory: plans and programmes concerning the production and the supply of electricity, plans for the development of the electric grid, plans for supply of natural gas, the general programme for the management of radio-active waste, plans for the exploration and exploitation of the continental shelf, plans and programme that might have a significant effect on Natura 2000 areas. Furthermore “every other plan or programme which set the framework for future development consent of projects and that are likely to have significant environmental effects” and the modification or review of such plans and programmes is subject to SEA¹. Plans and programmes which determine the use of small areas at local level and minor modifications to plans and programmes may be exempted when they are likely to have no significant environmental effects.

FLE :

DABM, Chapter IV, duplicates the SEA-Directive: plans and programmes concerning agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in the EIA-Directive as well as plans and programmes which are likely to have a significant effect on Natura 2000 areas. Furthermore, other than the aforementioned plans or programmes that are likely to have significant environmental effects are also subject to SEA. Plans and programmes which determine the use of small areas at local level and minor modifications to plans and programmes may be exempted when they are likely to have no significant environmental effects. Finally, plans and programmes solely concerning national defence or civil emergency, and financial or budget plans and programmes, are not subject to SEA.

BRU :

Title II (Planning) of the Brussels Town Planning Code, or COBAT, refers to Regional and communal development plans, as well as Regional and communal land use plans. The SEA-Ordinance duplicates the directive, with the same exemptions.

¹ See for the running or completed SEA-procedures on the federal level:

<http://www.health.belgium.be/eportal/Environment/Inspectionandenvironmentalrigh/SEAstrategivEnvironmentAsses/HetAdviescomiteSEA/Teruggegevenadvies/index.htm?fodnlang=fr>

III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?

FED:

The SEA shall be carried out by the federal authority that prepares the plan or programme. The authority may rely for that on external consultants, provided that they have no direct interest in the plan or programme concerned. Before the SEA work starts, the competent authority should provide a sort of outline of the SEA to the Advisory Committee that was established under the Act and that is composed of 10 environmental experts from different federal agencies. The outline comprises the envisaged scope and level of detail of the SEA and the alternatives to be examined. The Advisory Committee delivers within 30 days an opinion on the draft outline that should be taken into account by the author of the SEA.

FLE :

The SEA shall be carried out under the responsibility and at the expense of the authority that prepares the plan or programme. The authority must rely for that on an accredited external consultant (EIA-coordinator). The coordinator may have no direct interest in the plan or programme concerned. Before the SEA work starts, the authority that prepares the plan/programme asks the advice of the administrations/authorities that can be involved by the plan. After this consultation, she provides an outline of the plan/programme as well as the remarks of the other involved administrations to the competent authority, established by the Flemish Government, in order to obtain a derogation of the obligation to carry out an SEA, if applicable. Otherwise, or in the case of a refusal, the authority that prepares the plan/programme notifies the envisaged scope and level of detail of the SEA, information on the coordinator etc. to the same competent authority. Within a period of 20 days, the competent authority notifies her decision on the proposed SEA.

BRU :

SEA for regional development and land use plans (COBAT) are carried out under the responsibility and at the expense of the Regional government. For local plans, the *commune* is responsible. For regional plans, the government elaborates the SEA, but local authorities must rely for their plans on an accredited external consultant. SEA for the other plans/programmes are drafted by the authority that prepares the plan or programme.

IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?

FED:

After the SEA has been carried out, the draft plan or programme and the SEA, shall be considered again by the Advisory Committee. Advisory opinions are also requested from the Federal Council for Sustainable Development (a multi-stakeholder advisory council), the regional governments and every other body that the author feels it is appropriate to consult. They should deliver their opinion within a period of 60 days. If the plan of programme is believed to have transboundary effects, the competent authorities of the relevant states are consulted too.

FLE :

See also A III. After the SEA has been carried out, it has to be sent to the competent authority, that approves or disapproves the plan/programme within 50 days, and informs the other authorities and administrations as mentioned sub A III of her decision, as well as the authority that took the initiative for the plan/programme, that has to consult all the local communities that are concerned, as well as the SERV (Sociaal-economische Raad van Vlaanderen) and MINA-Raad (Milieu- en Natuuraad van Vlaanderen). If the plan or programme is supposed to have transboundary effects, the competent authorities of the relevant states are consulted too.

BRU :

Before the SEA work starts, the authority that prepares the plan/programme asks the advice of the administrations/authorities that can be involved by the plan (under COBAT the *Commission régionale* and *Institut Bruxellois pour la Gestion de l'Environnement* or IBGE, as well as other concerned administrations or public organisations, for most other plans and programmes, depending on the scope, the consulted authorities are the Environmental Advisory Board, the Economical and Social Board for Brussels, the Regional Board for Nature Protection etc.).

After the finalisation of the SEA follows a public consultation, including - if the plan or programme is supposed to have transboundary effects – consultation of the competent transboundary authorities, the aforementioned administrations and the IBGE.

V. What types of decision are resulting from strategic environmental assessment proceedings?

FED:

The environmental report, the opinions expressed in the course of the SEA procedure and the results of any transboundary consultations shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure. When a plan or programme is adopted the competent authorities shall issue a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report, the opinions expressed during the SEA procedure and the results of consultations have been taken into account. The statement mentions the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and the measures decided concerning monitoring.

FLE :

See FED

BRU :

See FED

VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?

FED:

The draft plan and programme and the SEA are subject to public participation. The public consultation is announced, at the latest 15 days before the start of it, by an announcement in the *Moniteur belge*, on the federal portal website² and by another means of communication determined by the competent authority. The consultation period runs for 60 days and is suspended in the period from 15 July to 15 August. During the consultation period everyone can consult the draft plan or

² See e.g.:

http://www.belgium.be/fr/actualites/2011/news_elia_consultation_plan_developpement_gestionnaire_reseau_transport_electricite.jsp?referer=tcm:116-125998-64-a2

programme and the SEA (as a rule they are published on the internet) and send its comments by post or electronically to the author of the plan³.

FLE :

The draft plan/ programme and the outline of the SEA, as notified to the competent authority, and the final plan/programme and SEA are subject to public participation. The first public consultation is announced on the website of the competent authority⁴, and by the authority that prepares the plan/programme. The second consultation (the finalised SEA) is organised by the local authorities.

BRU :

Under COBAT, as well as under the SEA-Ordinance, the draft plan/programme and the finalised SEA are submitted to public consultation.

VII. Who is authorized to take part in strategic environmental assessment proceedings? What about for example people living in the neighborhood, Ngo's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

FED:

The public participation procedure is open to the "public", that is: "one or more natural or legal persons and their associations, organizations or groups, including those aiming to protect the environment." So there is not any restriction as who should have access to the participation procedure. They have the participation rights contained in the Act and described in answer to question VI. However, when for one or another reason those rights would not been respected, legal proceedings are subject to respective conditions set out for the different types of proceedings.

FLE :

See FED

BRU :

See FED

³ See:

<http://www.health.belgium.be/eportal/Environment/Inspectionandenvironmentalright/SEAstrategie/EnvironmentAsses/index.htm?fodnlang=en>

⁴ See:

<http://www.lne.be/themas/milieuffectrapportage/raadplegen-milieuffectrapportages/dossierdatabank>

VIII. To what extent are the SEA and EIA procedures were integrated in your country? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give examples?

FED:

There are no specific provisions on this issue.

FLE and BRU :

When a project is submitted tot EIA, but is part of a (land use or development) plan that formerly has been evaluated in an SEA, the EIA is limited to the specific (additional) effects of the project (Brussels), or the competent authority can even grant a derogation (Flanders).

Part B - EIA

I. How is the EIA-directive implemented in your country? What is the scope of its implementation?

FED:

Nuclear sector: For installations belonging to the category I – nuclear reactors, installations in which combustibles are used or held in quantities of more than halve the minimal critical mass, installations for the reprocessing of irradiated nuclear fuels that are enriched or not, nuclear waste treatment plants, nuclear waste disposal facilities – an EIA is part of the application for an operating permit delivered by application of the federal regulation on the protection of the public, the workers and the environment against the dangers of ionizing radiations (Art. 6.2.9 of the Royal Order of 20 July 2001). On top of that an EIA is under the relevant regional legislation also necessary for obtaining a building permit for such facilities, as well as an environmental permit for the non-nuclear parts of such facilities.

Marine environment: each activity in the marine areas of Belgium that is subject to a permit or consent –except fishing activities - is subject to EIA (art. 28 of the Act of 20 January 1999 on the protection of the marine areas within the jurisdiction of Belgium; Royal Order of 9 September 2003; Royal Order of 1 September 2004).

FLE :

The Decree “Algemene Bepalingen inzake milieubeleid” of 5 April 1995 (further *DABM*), Chapter IV (added to *DABM* by a Decree of 18 December 2002, *Moniteur belge* 13 February 2003) implements the SEA and EIA-directives in the Flemish Region. In particular, Chapter III concerns the Directive

85/337/EC on EIA. An Executive Order of the Flemish Government of 12 October 2007 (*Moniteur belge* 17 February 2005) lists the projects that are submitted to EIA.

BRU :

For activities that are subject to an environmental permit, the EIA-directive is implemented by the Ordinance of 5 June 1997 on the environmental permit (*Moniteur belge* 26 June 1997) and an Ordinance of 22 April 1999, listing the installations of class 1A (*Moniteur Belge* 5 august 1999). Environmental impact assessment for installations and buildings that are solely subject to a building permit, is covered by the Brussels Town Planning Code, or COBAT, established by Decree of the Brussels Regional Government of 9 April 2004 (*Moniteur belge* 26 May 2004).

II. What types of public and private projects are subject to an environmental impact assessment in accordance with EIA-directive?

FED:

Nuclear sector: see answer in response to question I

Marine environment: each activity that requires a permit or a consent –fishing activities excepted – is subject to EIA. However, the Minister who is competent for the protection of the marine environment can determine activities with little environmental impact for which EIA is restricted to the fill in a standard form (cf. Ministerial Order of 3 June 2009).

FLE :

The Executive Order of the Flemish Government of 12 October 2007 lists (*mutatis mutandis*) all the public and private projects as mentioned in the Annexes I and II of the EIA-Directive, as amended by Directives 97/11/EC, 2003/35/EC and 2009/31/EC. As Annex II of the EIA-Directive is concerned, those projects are however only subject to EIA if they meet some threshold values defined in the aforementioned Executive Order. The Court of Justice of the European Union is in its judgment of 24 March 2011 (case C-435/09) of the opinion that by excluding smaller projects not meeting this thresholds completely from EIA, without securing that they have no important environmental impacts, taking into account Annex III to the Directive, the Flemish legislation is not in conformity with the Directive. The Court declares that “ *by reason of the fact that the measures necessary for the correct and complete implementation have not been adopted as regards the Flemish Region, Article 4(2) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of 26 May 2003, in conjunction with Annexes II and II thereof, the Kingdom of Belgium has failed to fulfil its obligations under that directive.*”⁵

BRU :

The Ordinance of 22 April 1999, listing the installations of class 1 A (*Moniteur belge* 5 August 1999) and the Annexes A and B of the Brussels Town Planning Code, or COBAT, established by Decree of

⁵ ECJ, 24 March 2011, C-435/09, *European Commission v. Belgium*

the Brussels Regional Government of 9 April 2004 (*Moniteur belge* 26 May 2004) at first glance contain all the public and private projects as mentioned in the Annexes of the EIA-Directive, albeit it in a different order. However, as projects of Annex II of the Directive are concerned, for some of the categories threshold values were introduced like in the Flemish Region. This approach was also condemned by the Court of Justice of the European Union in the said judgement for similar reasons. The Court declares that “*by reason of the fact that the measures necessary for the correct and complete implementation have not been adopted as regards the Brussels-Capital Region, Article 4(2) and (3), in conjunction with Annexes II and III of Directive 85/337, as amended by Directive 2003/35, and Annex III as such, the Kingdom of Belgium has failed to fulfil its obligations under that directive*”⁶.

III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?

FED:

Nuclear sector: all category I installations are subject to EIA.

Marine environment: see answer to question II

FLE :

The Executive Order of the Flemish Government of 12 October 2007 lists (*mutatis mutandis*) all the public and private projects as listed in the Annexes I and II of the EIA-Directive, as amended by Directives 97/11/EC and 2003/35/EC. However, the selection criteria as mentioned in Annex III of the Directive, and to be read in conjunction with Annex II, criteria that should be applied to identify projects requiring an EIA because of their potentially significant environmental effects, are not implemented in the Flemish legislation. This resulted in the judgement of the Court of Justice of 24 March 2011 (C-435/09), declaring that Belgium failed to fulfil its obligations under that directive. In the main time, and in anticipation to an adaptation of the legislation, the Flemish Government prepares a *Circulaire*, that specifies that the criteria of Annex III must be applied by the competent authorities when identifying the potentially significant environmental effects.

BRU :

As for the Flemish legislation, the abovementioned judgement of the Court also applies to the Brussels Capital Region, in so far that the criteria of Annex III are not, or not completely, implemented.

⁶ *Ibidem.*

IV. What kind of authority (local, regional, central) is responsible for performing the duties arising from the EIA-directive?

FED:

Nuclear sector: It's the operator who has to compile the Environmental Impact Report (EIR) as part of the application for an operating permit. The application will be reviewed by the Scientific Council, the European Commission, the government of the commune concerned and the government of the Province concerned in the framework of the opinion they have to deliver on the application for the operating permit. The decision is taken by the Federal Minister for the Interior.

Marine environment: the Environmental Impact Report must be drawn up by a co-ordinator who can be in the service of the operator. The co-ordinator has to perform its duties in an independent way. The Management Unit of the North Sea Mathematical Models and the Scheldt Estuary (MUMM)⁷ has to review the quality of the EIR. It delivers also an opinion about the acceptability of the proposed activity. The decision is in the hands of the Minister responsible for the protection of the marine environment. MUMM is also in charge of monitoring the environmental effects of permitted activities that were subject to EIA.

FLE :

The EIA shall be carried out under the responsibility and at the expense of the operator that prepares the project, as part of the application for an operating permit or a building permit. The operator must rely for that on a team of accredited external (independent) consultants, managed by an EIA-coordinator. The experts and the coordinator may have no direct interest in the project concerned. Before the EIA-work starts, and if applicable, the operator asks the advice of the competent (regional) authority, in order to obtain a derogation of the obligation to carry out an EIA, if applicable (projects as listed under Annex II). Otherwise, or in the case of a refusal, the operator notifies the competent authority of his intention to carry out an EIA, with information on the project, the outline of the EIA, the team of experts, the possible transboundary effects etc. Within a period of 20 days, the competent authority decides on the formal completeness. The operator has to inform the local authorities, as well as the authority that will grant the (environmental of building-)permit for the project, other administrations that can be involved by the project, and, if applicable, the workers-union representation in the plant where the project will be realised. The local authorities (the municipality) also informs the public and, if applicable the competent authority informs other member states or regions that may be affected by the environmental impacts of the planned project.

After the public consultation, and within a period of 60 days, the competent authority decides on the proposed outline of the EIA, and the team of experts.

After finalisation of the report, the competent authority has to validate it. Only after this validation, the operator can introduce his demand for an environmental and/or building permit. The validated impact assessment is part of the application file(s).

⁷ <http://www.mumm.ac.be/EN/index.php>

BRU :

The EIA is carried out under the responsibility and at the expense of the operator that prepares the project, as part of the application for an operating or a building permit. The operator must rely for that on an independent consultant company, accredited by the Brussels government to assess environmental impacts. The application form for an environmental or building permit for a Class IA installation of a project of list A (COBAT) contains the basic information to allow the competent authority (in the case of an environmental permit, the competent authority is the *Institut Bruxellois pour la Gestion de l'Environnement* or IBGE, in the case of a building permit, the *Administration de l'aménagement et du territoire* or AATL) to decide on the content of the EIA and to draft the estimate-document within a periode of 30 days. After that, the entire file is sent to the Commune, in order to organise a public consultation and ask for the advice of the *Commission de concertation*, the communal environmental and urbanistic advisory board. Based on the results of the public consultation, a supervising board with *inter alea* civil servants of IBGE, AATL and other experts, decides of the final content of the EIA. Once the EIA is finalised, the supervisory board validates the report, and, if applicable, instructs the operator to conform his application file to the conclusions and suggestions of the EIA. However, the operator can decide to keep the demand unchanged, in case he doesn't agree with the conclusions of the final report.

For projects as defined on list B (COBAT) (almost identical to Annex II of the Directive), one has to add a study on the environmental impacts (a light-version of the EIA), submitted *mutatis mutandis* to the same publicity. However, in exceptional conditions and based on the study, the competent authority can suggest the government to instruct the operator to follow the procedure of an EIA.

V. When should an environmental impact assessment take place during the investment procedure?

FED:

Nuclear sector: EIA is part of the procedure for obtaining an operating permit. It has to be performed before an operating permit is granted en thus before construction and operation of the facility can start.

Marine environment: EIA is part of the permitting procedure (Royal Decree of 7 September 2003) and thus EIA has to be carried out before a permit is delivered and activities can start.

FLE :

The EIA takes place – and has to be finalised and validated – before the application file for an environmental of building authorisation can be introduced.

BRU :

The EIA takes place – and has to be finalised and validated – before the application file for an environmental of building authorisation can be introduced.

VI. Does the decision resulting from an environmental impact assessment grant the final development consent?

FED:

Nuclear sector: EIA is part of the application for an operating permit. There is no separate decision taken on the EIA. The decision on the operating permit allows the operator to operate the facility. He however will need first a building permit for the construction of the facility in accordance with the regional legislation.

Marine environment: an EIR that has been approved by MUMM or that has been reviewed by MUMM will be part of the application of a permit or consent. Final development consent is given at the end of that procedure by the competent Minister.

FLE :

EIA is part of the application for an operating or building permit. There is no separate decision taken on the EIA. According to art. 4.1.7. DABM, the authority that grants the permit, has to take into account the conclusions of the EIR, and motivates her decisions on the proposed actions, alternatives etc. In general, the operator confirms his project to the conclusions of the EIA.

BRU :

Cfr B IV. In general, the operator confirms his application file for a permit to the conclusions of the EIA.

VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?

FED:

Nuclear sector: the environmental impact report, as part of the application for the operating permit, is made public at the local administration during the public consultation process of 30 days – period that is suspended between 15 July and 15 August - in the commune concerned and in other communes in a circle of 5 km around the planned facility.

Marine environment: applications of permits or consents are made public through an announcement in the *Moniteur belge*. There is a public consultation procedure of 60 days. During that period the application and the EIR can be consulted with MUMM and with all local administrations alongside the Belgian coast. The EIR may also be posted on the website of MUMM.

FLE :

The decision on the derogation (if applicable cfr Annex II), and the decision on the formal completeness of the outline and scope of the projected EIA, can be consulted. Therefore, the local authority informs the public that the notification is available, and that possible remarks can be suggested within a period of 30 days. Furthermore, the public is invited to consult the finalised and validated EIR (as part of the application file) during the public consultation process (30 days), in the

beginning of the application procedure for an environmental or building permit. Also in this stage, the public (people living in the neighbourhood, ngo's with an environmental interest etc.), can suggest remarks on the project and the EIR.

BRU :

See above, sub B IV. Further on, the public is invited (by means of billboards in the neighbourhood), to consult the finalised and validated EIR (as part of the application file) during the public consultation process (30 days), in the beginning of the application procedure for an environmental or building permit. Also in this stage, the public can suggest remarks on the project.

VIII. Who is authorized to take part in environmental impact assessment proceedings? What about for example people living in the neighborhood, Ngo's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

FED:

Nuclear sector: this is not specified in the regulation. As mentioned, local and provincial governments and the Scientific Council will deliver an opinion. The opinion of the Scientific Council is binding when it is negative for the application.

Marine environment: Art. 18 of the Royal Decree of 7 September 2003 states that "every interested party" can participate in the public participation process around the application of a permit or a consent. An "interested party" is defined as "each person that as a consequence of the envisaged activity can be harmed and each legal person that has as its objective the protection of the marine environment that can be harmed". Environment Ngo's can thus participate. Interested parties have access to the application and the EIR. They may send their observations, points of view and objections to MUMM. MUMM will deliver a reasoned opinion to the Minister taking into account the results of the public participation.

FLE :

Cfr B VII

BRU :

Cfr B VII

IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceeding and the judgement.

Most of the Court cases dealing with EIA issues are demands for annulment (or suspension) of permit decisions (building permits, environmental permits or operating permits). In these cases it is argued

that the permit has been delivered in violation of the law, because, either an EIA was lacking, or an EIA was available but was of poor quality not meeting the legal standards or the permit decision has not taken fully account of the EIA or the results of the public participation. As a rule these cases are brought directly before the Council of State. Only in the Flemish Region and as building permits (not environmental permits) are concerned there is now a specialised Administrative Court of first instance (*Raad voor Vergunningsbetwistingen*) where such cases can be brought.

X. What are the specific characteristics of the transboundary environmental impact assessment of certain public and private projects?

FED:

Nuclear sector: each application for a category I facility is subject to the opinion of the European Commission (see also art. 37 of the EURATOM Treaty). When the Scientific Council is of the opinion that the facility can have serious environmental impacts in other Member States or if the authorities of such Member States demand so, a transboundary consultation will take place.

Marine environment: when the activity has transboundary effects transboundary consultation will take place (art. 19 of Royal Decree of 7 September 2003)

FLE :

For projects with possible transboundary effects, transboundary information/consultation is foreseen in the different stages of the procedure (derogation, notification, validation, application for a permit, final decision on a permit).

BRU :

Idem.

Appendix – Some cases

EIA

- Railways - Land use plans in view of the realization of a high speed train connection between France, Belgium and Germany /The Netherlands

In the period before the adoption and implementation of Directive 2001/42/CE the question arose if an EIA was needed for the adoption of land use plans in view of the realization of a TGV connection through Belgium. The Council of State came to the conclusion that this was not the case, referring to the notion of ‘project’ utilized in Directive 85/337/CEE. A project is something that has a real impact on the environment and which is subject to permit for the realization of it. A land use plan itself has no effect on the environment and is neither project nor a permit.

(Council of State, Nr. 66.654, 9 June 1997, *Van Havre*, www.raadvst-consetat.be – In the same sense: nr. 69.253, 29 October 1997, *Van Havre* ; nr. 73.618, 13 May 1998, *vzw Beter Leefmilieu Brecht*)

- Incinerator – Environmental Permit – Building Permit – EIA

To operate a waste incinerator in the Flemish region of Belgium one need not only an environmental permit (needed to operate the installation) but also a building permit (to construct the plant). A building permit was delivered by the Flemish regional administration for the construction of a waste incinerator in *Drogenbos*, very close to the border of the Brussels Capital Region. There was no EIA joined to the demand for the building permit (according to the legislation of that time the EIA should only be carried out for obtaining the environment permit) so that also the results of the public participation around the EIA were of course not taken into account. The Council of State was of the opinion that the building permit had been delivered in violation of Directive 85/337/CEE, as amended by Directive 97/11/CE and annulled the permit. The incinerator was never built.

(Council of State, Nr. 99.794, 15 October 2001, *A.De Vries and A. Pana*, www.raadvst-consetat.be)

- National Airport – Environmental Permit – EIA – Referral for a preliminary ruling

Since 1 May 1999 one need an environmental permit to operate an airport in the Flemish region of Belgium (before only the operation of certain installations on the airport were subject to an environmental permit). Operators of airports were obliged to ask such a permit for existing airports within a certain period of time. In 2004 environmental permits were delivered to the existing airports without a prior EIA. Different interested parties introduced a demand for annulment of these environmental permits (that of Brussels National Airport, Ostend Airport...), arguing that a prior EIA was needed. This was contested and the Council of State referred the following questions to the ECJ for a preliminary ruling:

(1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term ‘construction’, referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an

environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?

(2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?

(3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?'

The ECJ answered those questions by its judgment of 17 March 2011 in the following way:

"The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:

– the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;

– however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted."

The Council of State has now to deliver its final judgment taking into account the judgment of the ECJ.

(Council of State, Nr. 195.230, 14 July 2009, *Brussels Hoofdstedelijk Gewest e.a.*, www.raadvst-consetat.be, in the same sense Council of State, Nr. 195.231, 14 July 2009, F. Musschoot and others – Court of Justice, 17 March 2011, Brussels Hoofdstedelijk Gewest, C-257/09, <http://curia.europa.eu/>)

INTEGRATION EIA/SEA

- SEA Provincial Land Use Plan – EIA for a concrete project made possible by that Plan

In the Flemish region, according to art. 4.1.6. of the Decree containing general provisions on environmental policy, an integration of EIA and SEA is possible under certain conditions, by decision of the competent authority taken during the screening/scoping phase. In a certain case – the so called thematic park *Plinius* - one report was drawn up that served as SEA for a

particular provincial land use plan. In this particular case, the Council of State found no violation of this provision, as the provincial land use plan was made up specifically to allow the realization of a particular project and the report responded to the legal provisions for both SEA and EIA. It has to be noted that the operator of the thematic park went bankrupt soon after the opening of the park.

(Council of State, nr. 166.511, 10 January 2007, de Briey e.a., www.raadvst-consetat.be)

SEA

- Land Use Plan – Road Infrastructure Antwerp – *Oosterweelverbinding* - Alternatives – Review by Council of State



An owner of a restaurant demands the annulment of the Regional Land Use Plan that was approved by the Flemish Government in view of the realization of new road infrastructure (the so called *Oosterweelverbinding*) around the city of Antwerp, including a series of high bridges above docks and land (the so called *Lange Wapper*) (see picture above) and a tunnel under the River Scheldt. One of the arguments raised before the Council of State (the Supreme Administrative Court) was based on the SEA Directive and the provisions adopted to implement the Directive in the Flemish Region. It was argued that the SEA that was made before the approval of the plan was unlawful because a particular alternative (realizing the whole junction via a tunnel) was not studied in detail. In the EIA Report it was said that the alternative was not studied because it was considered to be technically very difficult to realize and very costly compared with the alternative that was chosen, so that it was not a reasonable alternative. The in depth research of this alternative would also be very costly with no tangible environmental benefits. The Council of State rejects the argument of the complainant saying that in such highly technical question its legal review should be marginal: it can only check if the authority has based its decision on correct facts, that it has evaluated these facts correctly and that on the basis of that it could reach reasonably the contested decision. The Council of State reveals that the "Cel MER" (the EIA Service of the Department of the Environment, Nature and Energy) that has to check the quality of EIA and SEA Reports before they are used in the further decision making procedure, and that is composed of environmental experts working as civil servants, accepted the conclusion that it was not a reasonable alternative, as did the VLACORO (Flemish Commission for Land Use Planning), a body that has to review the remarks introduced during the public consultation on the draft

land use plan and deliver a reasoned opinion on it to the Flemish Government and that the SEA Report and the two bodies used a relative detailed reasoning to substantiate that conclusion. The Council of State argues that the arguments invoked by the complainants (general references to two studies of which one was carried out after the approval of the land use plan), were not of a nature to judge that the conclusion reached by the two earlier mentioned bodies was wrong, the Council restricting itself to a marginal review. The Council came to a similar conclusion in relation to the allegation that not all reasonable localization alternatives for the bridge solution were investigated. The choice to restrict the SEA to two localization alternatives was believed to be substantiated in a sufficient way in the relevant documents. The alternative proposed by the complainant was believed to be problematic for the navigation safety of vessels in the relevant part of the Antwerp Harbor. Restricting the assessment to only two alternatives was not found clearly unreasonable. The appeal was thus rejected.

Later on, the chosen solution was rejected by a large majority during a referendum held in the city of Antwerp. The tunnel-alternative, combined with other investments, was preferred and is under consideration now.

(Council of State, nr. 200.738, 10 February 2010, *b.v.b.a. Pomphuis e.a. v. Flemish Region*, www.raadvst-consetat.be – See in the same sense in relation to the federal legislation for the marine environment: Council of State, nr. 147.047, 30 June 2005, *Y. Soete and others*, www.raadvst-consetat.be)

- Land Use Plan – Regional – Local – Not mandatory – Repeal – SEA – Reference for a preliminary ruling

Inter-Environnement Bruxelles – the Brussels umbrella organization of environmental ngo’s – and others have introduced with the Constitutional Court a demand for annulment of certain Amendments to the Brussels Town and Country Planning Code that are believed to violate art. 23 of the Constitution (the right to the protection of a healthy environment) in conjunction with certain provisions of Directive 2001/42/EC. One of the arguments is that the (partial or complete) repeal of a local land use plan – so that building projects would only be checked *vis-à-vis* the more general regional land use plan, not any more *vis-à-vis* the more detailed local land use plans - should be subject to SEA, as a modification of such a plan is. The Brussels Capital Regional Government argued that local land use plan – and thus certainly not a modification or repeal of such plan - are not subject to SEA because there is no legal obligation to make up such plans. The Constitutional court referred the following two questions to the ECJ, before deciding on the merits:

“1. *Must the definition of 'plans and programmes' in Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment¹ be interpreted as excluding from the scope of that directive a procedure for the total or partial repeal of a plan such as that applicable to a 'plan particulier d'affectation du sol' (specific land-use plan), provided for in Articles 58 to 63 of the Code bruxellois de l'Aménagement du Territoire (Brussels Town and Country Planning Code)?*

2. *Must the word 'required' in Article 2(a) of that directive be understood as excluding from the definition of 'plans and programmes' plans which are provided for by legislative*

provisions but the adoption of which is not compulsory, such as the specific land-use plans referred to in Article 40 of the Brussels Town and Country Planning Code?"

(Constitutional Court, nr. 133/2010/25 November 2010, www.const-court.be – ECJ, Pending Case –C 567/10 - *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL, Atelier de Recherche et d'Action Urbaines ASBL v Government of the Brussels-Capital Region*)

- Circular road – Slicing - Belgian Exclaves in The Netherlands

Belgian and Dutch authorities are planning a circular road around the Communes of *Baarle-Hertog/Baarle-Nassau*. *Baarle-Hertog* is a Belgian exclave in The Netherlands⁸. The most important part of the road will be realized on Dutch territory. As the Belgian territory is concerned (around 10 % of the road would be on that territory) a provincial land use plan was adopted to make the realization of this circular road possible. An SEA was found not necessary for the Belgian territories involved (in the Netherlands an SEA was realized) by the Belgian authorities, saying that only 4 smaller Belgian areas are hit. This is found contrary to the objective of the SEA Directive. One may not subtract a plan from SEA by taking not into account the whole project. Environmental effects on the territory of the Netherlands should be taken into account.

(Council of State, Nr. 204.827, 7 June 2010, *J. Keustermans*, www.raadvst-consetat.be)

- SEA – Directive – Late transposition – Direct effect

Directive 2001/42/EC was transposed in the legislation of the Flemish region with some delay. The Flemish legislation on SEA entered into force on 1 June 2008 for planning, processes starting after that date. Directive 2001/42/CE should however have been transposed on 21 July 2004. Some plans that potentially fall within the scope of Directive 2001/42/EC were adopted without an SEA. Some of them were challenged before the Council of State. The Council of State accepted that some of the provisions of the Directive have direct effect and annulled some plans that should have been subject to SEA in that period.

(Council of State, Nr. 163.267, 6 October 2006, *A. Van Linden*, www.raadvst-consetat.be; Council of State, Nr. 206.078, 29 June 2010, *nv Nieulandt Recycling and others*)

⁸ Baarle-Hertog is noted for its complicated borders with Baarle-Nassau in the Netherlands. In total it consists of 24 separate parcels of land. Apart from the main division (called Zondereigen from the main hamlet) located north of the Belgian town of Merksplas, there are twenty Belgian exclaves in the Netherlands and three other sections on the Dutch-Belgian border. There are also seven Dutch exclaves within the Belgian exclaves. Six of them are located in the largest one and a seventh in the second-largest one. An eighth Dutch exclave lies nearby Ginhoven. The border is so complicated that there are some houses that are divided between the two countries. There was a time when according to Dutch laws restaurants had to close earlier. For some restaurants on the border it meant that the clients simply had to change their tables to the Belgian side. The border's complexity results from a number of equally complex medieval treaties, agreements, land-swaps and sales between the Lords of Breda and the Dukes of Brabant. Generally speaking, predominantly agricultural or built environments became constituents of Brabant and other parts devolved to Breda. These distributions were ratified and clarified as a part of the borderline settlements arrived at during the Treaty of Maastricht in 1843.(source: Wikipedia: