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National Courts and European Environmental Law

Belgian Report on the case law 2001-2011

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1. DIRECT EFFECT DOCTRINE

1.1. Introduction

In general, jurisprudence in Belgium holds that only international and European law that has direct effect can be invoked by citizens before the courts[1]. An exception in this respect is the Constitutional Court. According to the case law of the Belgian Constitutional Court, every pertinent rule of international or European law, that is binding for Belgium, can be invoked before it, in combination with the provisions of the Belgian Constitution and the Special Acts for which the Court is competent, independent from the question of such rules have direct effect or not. A quick search in the database of the Constitutional Court revealed that more than 40 different Treaties (amongst which the different EC/EU treaties are, together with the ECHR, the most frequently invoked), 120 different European Directives, 15 European Regulations, 5 European Decisions and 1 Framework Decision served, in combination with a constitutional or special act provision, as yardstick for review of federal and regional acts of parliament by the Court. As Environmental Law is concerned, in the last ten years, the UNFCC (1 case), the European Landscape Convention (1 case), the Kyoto Protocol (2 cases) and the Aarhus Convention (11 cases) were invoked, either to justify one or another act or to attack them. The following Directives were invoked in the same period: Directive 75/442/EEC (waste framework directive)(2 cases); Directive 78/319/EEC (toxic and dangerous waste) (1 case); Directive 79/409/EEC (birds directive) (7 cases); Directive 85/337/EEC (EIA) (7 cases); Directive 91/156/EEC (update waste framework directive) (2 cases); Directive 91/676/EEC (nitrates) (1 case); Directive 92/43/EC (habitats directive) (9 cases); Directive 94/62/EC (packaging and

[1] The Council of State e.g. was, based on the wording of art. 6, of the opinion that the Bern convention on the conservation of European wildlife and natural habitats has no direct effect (Council of State, n° 191.265, 11 March 2009, *vzw Werkgroep Natuurreservaten Linkeroever-Waasland and vzw Bond Beter Leefmilieu Vlaanderen).*

packaging waste) (3 cases); Directive 98/69/EC (emission motor vehicles) (1 case); Directive 98/70/EC (fuel) (1 case); Directive 2000/60/EC (water framework directive) (1 case); Directive 2000 /76/EC (waste incineration) (2 cases); Directive 2001/42/EC (SEA) (7 cases); Directive 2002/49/EC (noise framework directive) (1 case); Directive 2003/87/EC (ETS) (3 cases); Directive 2006/12/EC (updated waste framework directive) (3 cases) and Directive 2009/30/EC (fuel quality) (1 case). The CITES Regulation (EC) n° 338/87 was at stake in 1 case. Off course, if they have no direct effect, the room for manoeuvre for the legislators will be much wider, than in the case they do have such an effect, because than the provision will be relatively precise and unconditional. It seems that only provisions of treaties or directives that could be qualified as having direct effect were used for the moment by the Court to annul or to contribute to the annulment of an act of parliament. That was the case in a judgment concerning the relaxation of the provisions of the Walloon legislation dealing with EIA for Annex II projects (violation of the art. 10, 11 and 23 of the Constitution in combination with the relevant provisions of Directive 85/337/EEC)[2] and the judgment concerning a relaxation of some provisions of the Walloon Town and Country Planning Law (violation of art. 23 of the Constitution in combination with Directive 2001/42/EC and art. 7 of the Aarhus Convention)[3].

1.2. Jurisprudence

Environmental Directives

The Council of State accepted *expressis verbis*[4] the direct effect of different provisions of environmental directives:

- Art. 4.1, 4.2., 4.4., 5 and 9 of the Birds Directive[5];
- Art. 2, 3, 4, 6.2, 6.3 and 6.4 of the Habitats Directive[6];

[2] Constitutional Court, n° 11/2005, 19 January 2005, *Inter-Environnement Wallonie;* in the same sense: Constitutional Court, n° 83/2005, 27 April 2005, *Inter-Environnement Wallonie.*

[3] Constitutional Court, n° 137/2006, 14 September 2006, *Inter-Environnement Wallonie.*

[4] Sometimes the Council of State takes into consideration provisions of European Environmental law, without discussing first if the provisions in question have direct effect or not. That is the case in some of the judgments referring questions for preliminary rulings to the ECJ discussed below. That is also the case with Council of State, n° 144.349, 12 May 2005, *Feron and de Lantsheere* (art. 9 of Directive 75/442/EEC); Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel* (art. 12 of Directive 96/82/EC – Seveso II Directive); Council of State, n° 199.664, 19 January 2010, J*acquinet* (art. 15 Directive 2006/12/EC – application of the polluter pays principle in waste affaires); Council of State, n° 209.866, 20 December 2010, *Peirs*, *TMR* 2011, 549—573 (Directives 2008/50/EC and 1999/30/EC – air quality standards); Council of State, n° 211.023, 3 February 2011, *Dalhem* (Directive 2000/60/EC-Water Framework Directive).

[5] Council of State, n° 96.198, 7 June 2001, *Wellens and* others, *Amén.* 2002, 74-76; Council of State, n° 100.777, 13 November 2001, *Ligue Royale belge pour la protection des oiseaux;* Council of State, n° 109.563, 30 July 2002, *Apers and Others*, *TMR* 2003, 135-143; Council of State, n° 147.047, 30 June 2005, *Soete and gemeente Knokke-Heist*, *TMR* 2006, 93-106; Council of State, n° 191.265, 11 March 2009, *vzw Werkgroep Natuurreservaten Linkeroever-Waasland and vzw Bond Beter Leefmilieu Vlaanderen;* Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel.*

- Art. 1, 2, 4, 5, 6, 7, 8 and Annex I, II and IV of the EIA Directive[7];
- Art. 3.2 and 13 of the SEA Directive[8].

In at least one case, the Council of State however was of the opinion, that a plea derived from the violation of art. 6 (3) of the Habitat Directive and of art. 10 of the EC Treaty, should not be examined by the Council, because it was not part of the initial request, and only "public order pleas" (*moyens d'ordre public)* can be introduced in a later stage of the proceedings[9].

Environmental Principles

In most of the cases were environmental principles are involved, reference is made to the principles enshrined in domestic law (federal or regional), that are the same as the European ones. Only exceptionally there is reference to the European version of the principles.

The Supreme Court accepted, at least implicitly, the direct effect of the environmental principles of the EEC Treaty, at that time enshrined in art. 130 R EEC, in a matter not regulated by EU law, while checking the conformity of a provision of the Flemish wastewater tax with the polluter pays principle, taking into account the relevant case law of the ECJ[10] stating that "in view of the need to strike a balance between

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[6] Council of State, n° 94.527, 4 April 2001, *asbl L'Erablière and Others, Amén.* 314-323; Council of State, n° 96.097, 1 June 2001, *asbl L'Erablière and Others;* Council of State, n° 109.563, 30 July 2002, *Apers and Others*, *TMR* 2003, 135-143; Council of State, n° 147.047, 30 June 2005, *Soete and gemeente Knokke-Heist*, *TMR* 2006, 93-106; Council of State, n° 182.770, 8 May 2008, *Commune de Watermael-Boitsfort;* Council of State, n° 191.265, 11 March 2009, *vzw Werkgroep Natuurreservaten Linkeroever-Waasland and vzw Bond Beter Leefmilieu Vlaanderen*; Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel.*

[7] Council of State, n° 99.794, 15 October 2001, *De Vries and Pana* (suspension of the building permit for a waste incinerator), *TMR* 2001, 165-171; Council of State, n° 147.047, 30 June 2005, *Soete and gemeente Knokke-Heist*, *TMR* 2006, 93-106; Council of State, n° 154.217, 27 January 2006, *Musschoot and others, TMR* 2006, 492-494; Court of Cassation, 4 December 2008, *A. and others*, *Arr. Cass.*, 2008, n° 696; Council of State, n° 195.230, 14 July 2009, *Brussels Hoofdstedelijk Gewest and others;* Council of State, n° 189.870, 29 January 2009, *Massange de Collombs and de Tornaco*, *TMR* 2009, 255—256 (art. 4.2,a) –implicit); Council of State, n° 191.924, 26 March 2009, *Laga and others, TMR* 2009, 466-468; Council of State, n° 192.592, 23 April 2009, *VZW Beter Bruggestraat and others*, *TMR* 2009, 780-791; Council of State, n° 208.572, 28 October 2010, *asbl Grez-Doiceau Urbanisme et Environnement and Others;* Council of State, n° 211.023, 3 February 2011, *Dalhem.*

[8] Council of State, n° 163.267, 6 October 2006, *Van Linden and Keirens*, *TMR* 2009, 382-386 with annotation H. SCHOUKENS; Council of State, n° 179.933, 20 February 2008, *Van Poucke and Others, TMR* 2009, 219-229 with annotation H. SCHOUKENS; Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel* (implicit); Council of State, n° 195.995, 14 September 2009, *Van Pollaert*, *TMR* 2010 394-398; Council of State, n° 206.078, 29 June 2010, *nv Nieulandt Recycling and others, TMR* 2011, 46-50; Council of State, n° 208.918, 10 November 2010, *vzw Natuur en Landschap Meetjesland, TMR* 2011, 131-136; Council of State, n° 209.861, 20 December 2010, *Kerckhof and others*, *TMR* 2011, 307-308; Council of State, n° 211.806, 4 March 2011, *bv Hydralibur*, *TMR* 2011, 625-627; Council of State, n° 211.807, 4 March 2011, *nv F. Industries*, *TMR* 2011, 627-630; Council of State, n° 212.265, 28 March 2011, *Seghers and others, TMR* 2011, 630-632.

[9] Council of State, n° 210.082, 21 December 2010, *Koevoet.*

[10] ECJ, Case-341/94*, Gianni Bettati and Safety Hi-Tech Srl,* 14 July 1998.

certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether" in this case the legislator "committed a manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty"[11].

The Council of State, after having stated that the polluter pays principle of article 15 of the Waste Framework Directive was not applicable in the case before it, because the waste in question was not already disposed of, judged that it was impossible to verify if the polluter pays principle of article 174 (2) EC Treaty was respected or not because the decision at stake was not well reasoned on this point[12]. In another case the Council of State held that the polluter pays principle, contained in art. 174 (2) of the E6 Treaty should inspire legislation, but is not a rule of positive law and thus cannot be invoked before the Council[13].

Sometimes it is unclear if a domestic or the corresponding international or European environmental principle is at stake[14]. In one case, were a building permit for a GSM –antenna was refused on the basis of the precautionary principle, and this decision was challenged before the Council of State because such a principle was not enshrined in the Walloon legislation, the Council of State referred to article 174 (2) of the EC Treaty and added that although the principle was not *expressis verbis* mentioned in the Walloon legislation, it is implicitly laid down in article 23 of the Constitution (the right to the protection of health and the environment), article 1 of the Walloon Town and Country Planning Code and art. 6 of the EIA Decree. The Council was thus of the opinion that given the scientific uncertainties concerning the radiation of GSM-antenna's, the government could apply the precautionary principle[15]. The Court of Appeal of Mons considered that the polluter pays principle is a general principle of law, consecrated by different international and European legal texts and that it should be applied as "a principle of the ecological public order"[16].

International Treaties

The Council of State was on the contrary of the opinion that the following provisions of international or European law have no direct effect:

[11] Court of Cassation, 20 October 2006 (F.05.0075.N), *Brussels International Airport Company nv*, *TMR* 2007, 152-153.
[12] Council of State, n° 199.664, 19 January 2010, *Jacquinet.*
[13] Council of State, n° 210.082, 23 December 2010, *Koevoet.*
[14] Council of State, n° 96.095, 1 June 2001, *Beck*; Court of Appeal, Liège, 29 November 2001, *Amén.* 2002, 158-160; Council of State, n° 109.508, 23 July 2002, *sprl Azimut and Others, Amén*. 2003, 49 (restrictions on kayaking not in violation of the precautionary principle because they tend to avoid the possible occurrence of harmful environmental impacts); Council of State, n° 172.507, 20 June 2007, *Petit* (suspension of permit for GSM Antenna that violates the obligation to give reasons and the precautionary principle).
[15] Council of State, n° 118.214, 10 April 2003, *sa Mobistar*, *Amén.* 2003, 254.
[16] Court of Appeal, Mons, 9 June 2009, *Amén.* 2009, 303.

- Bern Convention op 19 September 1979 on the Conservation of European Wildlife and Natural Habitats[17];
- Art. 9.2 of the Aarhus Convention in the period before ratification[18];
- Art. 3.4 of the SEA Directive[19].

The Council of State is of the opinion that the following provisions have direct effect:

- Art. 2.5 and 9.2 of the Aarhus Convention since the ratification of the Convention by Belgium[20].

Waddenzee/Kraaijveld doctrine

On can read an application of the so-called *Waddenzee/Kraaijveld* doctrine in a case were the Council of State annulled a Ministerial Order of 27 May 1999 concerning the capture of Finch and the promotion of Finch breading because in derogating from the interdiction of capture of Finch it did not respect the boundaries of the (limited) discretionary power of the Member States contained in art. 9.1 of the Birds Directive[21]. On the other hand, the Council of State was in the *Vlakte van de Raan* –case of the opinion that there was not a breach of the (limited) discretionary power that member states have under art. 4 of the Birds Directive in not assigning that area as a Special Protection Area and art. 4 of the Habitats Directive in not assigning the area as a Special Conservation Area[22].

[17] Council of State, n° 113.102, 2 December 2002, *VZW Koninklijk Belgisch Verbond voor Bescherming van de Vogels*, *TMR* 2003, 276-284; Council of State, n° 191.265, 11 March 2009, *vzw Werkgroep Natuurreservaten Linkeroever-Waasland and vzw Bond Beter Leefmilieu Vlaanderen.*

[18] Council of State, n° 166.651, 12 January 2007, *vzw Werkgroep Natuurreservaten Linkeroever-Waasland and vzw Bond Beter Leefmilieu Vlaanderen*, *TMR* 2007, 376-378 (treaty becoming binding for Belgium on 21 April 2003 – demand for annulment dating from 1998).

[19] Council of State, n° 179.933, 20 February 2008, *Van Poucke and Others, TMR* 2009, 219-229 with annotation H. SCHOUKENS; Council of State, n° 195.995, 14 September 2009, *Van Pollaert*, *TMR* 2010 394-398; Council of State, n° 211.806, 4 March 2011, *bv Hydralibur*, *TMR* 2011, 625-627; Council of State, n° 211.807, 4 March 2011, *nv F. Industries*, *TMR* 2011, 627-630.

[20] Council of State, n° 193.593, 28 May 2009, *vzw Milieufront Omer Watez*, *TMR* 2009, 760-765; Council of State, n° 211.023, 3 February 2011*, Dalhem.*

[21] Council of State, n° 113.105, 2 December 2002, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*, *TMR* 2003, 292-297 (with reference to the ECJ case C-10/96); see also Council of State, n° 179.254, 1 February 2008, *nv Electrabel and nv Ondernemingen De Nul* (annulation of the assignment of the Vlakte van de Raan as SPA because of lack of scientific evidence).

[22] Council of State, n° 147.047, 30 June 2005, *Soete and gemeente Knokke-Heist*, *TMR* 2006, 93-106 (with reference to the ECJ case law concerning that problem). See for similar cases: Council of State,nr.167.645, 9 February 2007, *de Briey and Others*, *TMR* 2007, 637-639 and different similar judgments of the same day.

Inter-Environnement doctrine

The Council of State applied *the Inter-Environnement doctrine (*ECJ, Case C-129/96, 18 December 1997, *Inter-Environnement*) in the case were the Council of State had raised the questions for a preliminary ruling that led to this doctrine, by annulling provisions of an Executive Order of the Walloon Government of 9 April 1992 that was found in violation of provisions of directives that should have been transposed in domestic law in the course of 1993 (March and December respectively)[23]. The Constitutional Court[24] referred to case C-129/96 in the pending case were it referred a question for a preliminary ruling to the ECJ[25].

Indirect Horizontal Side-Effects

When a permit is delivered in violation of an environmental directive, the Council of State will annul such a permit on demand of an interested party (neighbours, ngo..) and thus clearly affect a third party who will lose is right to build or operate a facility[26]. This is seen as a normal effect of the judicial control exercised by the Council of State. At our knowledge the effect as such was only few times explicitly discussed with reference to the *Wells*-case[27].

Fratelli Costanzo

There was no application of the *Fratelli Costanzo* doctrine in the case law under review. The doctrine is applied for the moment in the Flemish Region for Annex II Projects of the EIA Directive that do not meet the thresholds defined in het Flemish EIA Legislation, and for which Belgium was found in non-compliance by the ECJ[28]. As long as the legislation is not brought in conformity with the Directive, public

[23] Council of State, n° 92.669, 25 January 2001, *asbl Inter-Environnement Wallonie.*
[24] Constitutional Court, n° 149/2010, 22 December 2010, *Belgische Petroleum Unie*.
[25] Pending Case C-26/11, *Belgische Petroleum Unie and Others.*
[26] E.g. Council of State, n° 99.794, 15 October 2001, *De Vries and Pana* (suspension of the building permit for a waste incinerator), *TMR* 2001, 165-171; Council of State, n° 144.349, 12 May 2005, *Feron and de Lantsheere* (annulation of an amendment of a permit in violation of art. 9 of Directive 75/442/EEC).
[27] Council of State, n° 192.592, 23 April 2009, *VZW Beter Bruggestraat and others*, *TMR* 2009, 780-791 (annulation of the environmental permit of a slaughter house for violaton of Directive 85/337/EEC); Council of State, n° 208.572, 28 October 2010, *asbl Grez-Doiceau Urbanisme et Environnement and Others.*
[28] ECJ, Case C-435/09, 24 March 2011, *Commission v. Kingdom of Belgium.*

authorities are requested in a circular[29] to apply directly the EIA Directive for Annex II projects not covered by the Flemish legislation with reference *to Fratelii Costanzo*, *Wells* and *Kraaijveld*.

2. Consistent/sympathetic interpretation

Different examples of such an interpretation can be found in the case law:

- The notion of "reasonable alternative" in Flemish SEA legislation: the Council of State refers to the SEA Guidance of the European Commission[30];
- The notion "where there is no other satisfactory solution" in the Flemish Birds Protection legislation should be interpreted in conformity with the ECJ case law on art. 9 of the Birds Directive[31];
- The definition of waste[32] must be interpreted according the ECJ case law;
- The regional reduction program established under art. 7 of Directive 76/464/EEC can at least be used as guidance while fixing the conditions for the discharge of waste water containing black list substances[33];
- Exceptions on access to environmental information should be interpreted narrowly according Directive 2003/4/EC[34];
- Transboundary effects of projects should be fully taken into account according to art. 7 of Directive 85/337/EEC[35];
- The notion of "interest" to bring a case must be interpreted broadly for environmental ngo's in accordance with articles 2.5 and 9.2 of the Aarhus Convention[36];
- The risk of significant effects on SPA must be interpreted according to the case law of the ECJ[37];
- The notion of a "highway" in the EIA/ SEA legislation must be interpreted in accordance with the EIA/SEA Directive[38];

[29] Omzendbrief LNE 2001/1 – 22 July 2011, *Belgisch Staatsblad* 31 Augustus 2011.
[30] Council of State, n° 200.738, 10 February 2010, *bvba Pomphuis*, *NjW* 2010, 279.
[31] Council of State, n° 113.105, 2 December 2002, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*, *TMR* 2003, 292-297 (with reference to the ECJ case C-10/96); Council of State, n° 182.188, 21 April 2008, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*, *TMR* 2008, 818-822 (with reference to the ECJ case C-10/96).
[32] Commercial Tribunal, Ghent, 25 April 2007, *nv RC t. nv NC*, *TMR* 2007, 537-540 (with reference to the ECJ case C-1/03); Council of State, n° 205.744, 24 June 2010*, sa PROLOG Benelux and Others* (with reference to different ECJ cases); Court of Appeal, Liège, 31 January 2011, M.P., *Amén.* 2011, 224.
[33] Council of State, n° 187.297, 23 October 2008, *NV Indaver*, *TMR* 2009, 169-177; see for a similar case in relation to Directive 200/60/EC: Council of State, n° 202.973, 15 April 2010, *nv Terumo Europe*, *TMR* 2010, 708-712.
[34] Council of State, n° 192.371, 14 April 2009*, Van Der Straeten*, *TMR* 2009, 438-442.
[35] Council of State, n° 191.924, 26 March 2009, *Laga and others, TMR* 2009, 466-468.
[36] Council of State, n° 193.593, 28 May 2009, *vzw Milieufront Omer Watez*, *TMR* 2009, 760-765.
[37] Council of State, n° 209.930, 21 December 2010, *Van Der Poel, TMR* 2011, 265-266 (with reference to ECJ, Case – C-127/02).

- A proper assessment in nature conservation law has to be understood in accordance with the ECJ case law[39];
- The notion of project/development consent/works in relation to airports and EIA legislation should be interpreted in conformity with EU law[40].

3. Supremacy of EU Law

Supremacy of EU Law is accepted by the Belgian judiciary without reservation. There are some examples were this is illustrated as European environmental law is concerned. The Council of State judged that a Ministerial Order of 27 May 1999 concerning the capture of Finch and the promotion of Finch breading in the Flemish region was violating article 9 of the Birds Directive and should therefore be annulled[41]. There was a similar concerning the Walloon regional regulations[42]. In another case an Amendment to the Executive Order of the Flemish Government containing general and sectoral environmental conditions, was annulled for violation of Directive 2001/90/EC concerning dangerous substances, because the exceptions on the interdiction to use some wood preserving products, were not implemented[43]. The Council of State also annulled an Amendment of a Regional Land Use Plan for violation of art. 4 of the Birds Directive[44].

The Constitutional Court partially annulled an Amendment of the Walloon Town and Country Planning Code for violation of article 23 of the Constitution in conjunction with Directive 2001/42/EC and art 7 of the Aarhus Convention[45] . It also annulled a sensible reduction by a Decree of the Flemish Region of the period available for logging an judicial appeal in land use matters, for violation of art. 23 of the Constitution in combination with art. 9 of the Aarhus Convention[46].

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[38] Council of State, n° 189.508, 15 January 2009, *Pierson and others*; Council of State, n° 211.224, 14 February 2011, *Keustermans*, *TMR*, 2011, 311-313; Council of State, n° 211.023, 3 February 2011, *Dalhem.*

[39] Council of State, n° 211.533, 24 February 2011, *vzw Milieufront Omer Wattez*, *TMR* 2011, 573-577 (references to ECJ Case C-241/08, Case C-127/02 and Case C-304/05).

[40] Court of Cassation, 4 December 2008, *A. and others*, *Arr. Cass.*, 2008, n° 696.

[41] Council of State, n° 113.105, 2 December 2002, *VZW Koninklijk Belgisch Verbond voor Bescherming van Vogels*, *TMR* 2003, 292-297 (with reference to the ECJ case C-10/96).

[42] Council of State, n° 100.777, 13 November 2001, *Ligue Royale belge pour la protection des oiseaux.*

[43] Council of State, n° 177.448, 30 November 2007, *nv VFT Belgium* (with reference to ECJ Joined Cases C-281/03 and C-282/03, *Cindu Chemicals and Arch Timber Protection*); the Council of State annulled also a refusal of a demand for derogation of continue measurement that was wrongly based of art. 11 and 18 of Directive 200/76/EC, because applied also to other parameters without proper justification; Council of State, n° 192.586, 23 April 2009, *bvba Haltermann*, *TMR* 2009, 755-759.

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

[45] Constitutional Court, n° 137/2006, 14 September 2006, *vzw Inter-Environnement Wallonie*, *TMR* 2006, 551-556.

[46] Constitutional Court, n° 8/2011, 27 January 2011, *TMR* 2011, 396-406.

The Correctional Tribunal of Ghent found that a provision of the Flemish bird protection regulations should be set aside because it was found contrary to art. 36 of CITES- Regulation (EC) Nr. 180/2001[47].

The Constitutional Court checked the constitutionality of a Decree of the Walloon Region on Bird Protection, taking into account the Birds Directive, the EC Treaty (art. 28-30) and the Benelux Committee of Ministers Decision M(99)9. After having referred some questions for a preliminary ruling tot the ECJ[48] and having taking into account the answer provided by the ECJ[49], the Court was of the opinion that the Decree was compatible with EU law[50].

The Constitutional Court has referred different times to the obligations for national judges derived from the community loyalty obligation of art. 10 EC Treaty as interpreted by the ECJ in the *Kolpinghuis Nijmegen* and *Rewe* cases[51].

A difference in treatment is from time to time the consequence of the implementation of EU Law. In general, the Constitutional Court will accept, while checking the equality principle, the necessity to apply EU law as a sufficient justification for the difference in treatment between categories of person falling under the rules that implement EU law and those who are falling outside the scope of such rules. The Constitutional Court was in that respect e.g. of the opinion that the necessity to designate Special Protection Areas on scientific criteria under art. 4 of the Birds Directive (ECJ, case C-378/01, *Commission v. Italian Republic)* could justify that the Flemish Government assigned in the past such areas without public participation. Those areas were already some years before notified to the European Commission on the basis of provisional legislation to transpose the Directive, while public participation is prescribed in general when protected areas under domestic legislation are assigned and also when new SPA's are assigned[52].

In view of the respect of the legal certainty principle and to insure that Belgium is able to give full effect to Directive 2008/101I/EC (amending the ETS Directive) the consequences of the annulment of the Decree of the Flemish Region must be postponed so that the matter of ETS for Aviation can be regulated by a Co-operation Agreement between the Federal State and the Regions[53].

There are of course also a lot of cases in which national judges came to the conclusion that domestic law is not in conflict with EU law[54] or were they preferred to annul a regulation, permit or provision for violation of a domestic norm instead of going into the European Environmental Law pleas[55].

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[47] Correctional Tribunal, Ghent, 6 June 2006, *O.M. v. E.R.*, *TMR* 2006, 564-567.
[48] Constitutional Court, n° 139/2003, 29 October 2003, *TMR* 2004, 185-190.
[49] ECJ, Case C-480/03, *Clerens.*
[50] Constitutional Court, n° 28/2005, 9 February 2005, *Clerens and bvba Valkeniersgilde TMR* 2005, 285-288.
[51] Constitutional Court, n° 151/2003, 26 November 200, *Gemeente Beveren, TMR* 2004, 190-198.
[52] Constitutional Court, n° 31/200, 3 March 2004, *vzw Hubertusvereniging Vlaanderen and Others*, *TMR* 2004, 315-320; in the same sense: Council of State, n° 170.336, 7 February 2008, *nv Maatschappij van de Brugse Zeevaartinrichtingen*, *TMR* 2008, 646-653.
[53] Constitutional Court, n° 33/2011, 2 March 2011, *Brusselse Hoofdstedelijke Regering*, *TMR* 2011, 249-254.
[54] Council of State, n° 109.508, 23 July 2002, *sprl Azimut and* Others, *Amén.* 2003, 49 (restrictions on kayaking not in violation of art. 43 EC Treaty); Court of Appeal, Ghent, 31 October 2003, *OM and KBVB v. EC, TMR* 2004, 581-582

4. State Liability

There seems no case law in Belgium concerning state liability for breaches of European environmental law.

5. National Courts considering EU Law on their own motion

It seems that in the vast majority of the cases were European environmental law is applied, it is done on the suggestion of one or more of the parties. Considering EU Law on their own motion seems to be very exceptional. Only in cases were the definition of waste plays a role, we see that judges often refer to the

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(domestic provisions on birds born and reared in captivity or not in conflict with the Birds Directive); Court of Appeal, Antwerp, 8 January 2004, *OM and Koninklijk Belgisch Verbond voor de Bescherming van de Vogels v. D.S., TMR* 2004, 557-558 (domestic provisions on marking birds born and reared in captivity or not in conflict with the CITES Regulation); Council of State, n° 127.031, 12 January 2004, *nv Wattplus* (Flemish regulation concerning green certifcats not violating art. 28 et seq EC (with reference to ECJ, Case C-379/98, *Preussen Elektra*), but violating Belgian EMU principles); Constitutional Court, n° 69/2004, 5 May 2004, *nv André Celis and Others, TMR* 2004, 703-706 (regional tax on waste management operations is not in conflict with EC Treaty Provisions on the free movement of goods); Constitutional Court, n° 195/2004, 1 December 2004, *nv Nestlé Waters and Others*, *TMR* 2005, 61-73 (environmental taxes and bonuses on beverage packaging not conflicting with Directive 94/62/EC, 80 EC Treaty); Constitutional Court, n° 186/2005, 14 December 2005, *nv Nesté Waters Benelux and nv Danone Water Brands Benelux*, *TMR* 2006, 66-73 (idem); Council of State, n° 158.548, 9 May 2006, *nv European Air Transport and others*, *TMR* 2006, 341-349 (Brussels noise standards for aircraft noise not conflicting with Regulation (EEC) n° 2408/92 and Directive 92/13/EC); Corr. Tribunal Ghent, 6 June 2006, *OM t.* ER, *TMR* 2006, 564-567 (domestic provisions on birds born and reared in captivity or not in conflict with the Birds Directive); Constitutional Court, n° 92/2006, 7 June 2006, *nv Cockerill Sambre and sa Arcelor*, TMR 2006, 450-459 (annulation of initial allocated allowances when running out of business not conflicting Directive 2003/87/EC and not violation art. 43 EC Treaty eather); Constitutional Court, n° 143/2006, 20 September 2006, *d'Arripe and Others* (Amendment of Walloon Town and Country Planning Code not in contradiction with art. 23 of the Constitution in conjunction with Directive 2001/42/EC and art. 7 Aarhus Convention); Constitutional Court, n° 145/2006, 20 September 2006 (waste taxation not contradicting Directives 75/442/EEC, 2006/12/EC and 2000/76/EC with reference to case C-444/00, *Mayer Parry Recycling*); Constitutional Court, n° 53/2008, 13 March 2008, *vzw Fédération Royale de l'Industrie des Eaux et des Boissons refraîchissantes*, *TMR* 2008, 545-548 (eco tax on beverage packaging not violating art. 86, 87 and 90 EC Treaty and Directive 94/62/EC); Council of State, n° 183.356, 26 May 2008, *Peirs and Others* (regional land use plan for Ghent Railway Station and surroundings is not violating Directive 1999/30/EC on air quality standards and Directive 2001/42/EC on SEA); Constitutional Court, n° 121/2008, 1 September 2008, *VZW FEBELCEM*, *TMR* 2008, 856-862 (Flemish waste tax not violating Directive 2002/12/EC, with reference to ECJ case C-444/00 *Mayer Parry Recycling* and Directive 200/76/EC*);* Constitutional Court, n° 2/2009, 15 January 2009, *NV Belgacom Mobile and Others*, *TMR* 2009,162-169 –the by the precautionary principle inspired Brussels regional legislation on standards for GSM antenna's is not violating different directives concerning telecommunication); Council of State, n° 210.958, 2 February 2011, *Stoclet* (extending the protection of a monument to some movables specially designed for the building not violating art. 28 EC et seq Treaty).

[55] E.g. Council of State, n° 94.211, 22 March 2001, *asbl Inter-Environnement Wallonie, Amén.* 2001, 312-314; Council of State, n° 108.540, 27 June 2002, *Salaets* (suspension of a tacit delivered permit); Council of State, n° 129.417, 18 March 2004, *Salaets* (annulation of that same permit).

pertinent case law of het ECJ when arguing that a given material should be considered as a waste[56] or not[57], even when parties seems not to be at the origin of such references.

6. National Courts and parallel infringement proceedings by the European Commission

In the *VLABAVER* case, in witch the Council of State suspended and later annulled a building permit for the construction of a waste incineration plant, because no EIA was produced and taken into account during the permitting procedure in violation of art. 8 of Directive 85/337/EEC, the Council referred to a reasoned opinion of the European Commission of 28 June 2000 in which the Commission held that EIA's should also be taken into account in procedures for delivering building permits for projects were also an environmental permit (with EIA) is necessary[58]. The Council of State referred also to reasoned opinions of the European Commission of 10 February 2000 and 19 July 2000 (and the reply of the Flemish Government of 12 May 2000 and 4 September 2000 to these opinions) concerning the bad implementation of the Birds- and Habitats Directives in the case of the amendment of the regional land use plan of the region *Sint-Niklaas-Lokeren*[59].

In the *Deurganck-dock* case the Constitutional Court[60] was of the opinion that, as the special permitting Decree concerned activities that could have a significant effect on a Special Protection Area, a proper assessment was needed, but that in the absence of alternative solutions, the project could nevertheless be carried out for imperative reasons of overriding public interest, under the condition that all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, are taken and that the European Commission is informed of the compensatory measures adopted (art. 6.4 Habitats Directive). The Court was of the opinion that these conditions were met in the case under consideration, but added that it was eventually up to the European Commission to assess if "the overall coherence of Natura 2000 is protected", because the construction of the Natura 2000 network was still underway at that moment. The Court came to the conclusion that art. 6.4 of the Habitat Directive, in conjunction with art. 10 of the EC Treaty, was not violated "subject to another decision of the European Commission or the European Council, under the control of the ECJ as the case maybe". Later on the

[56] Corr. Ghent, 25 September 2001, *TMR* 2001, 195-196 (reference to the *Vessoso and Zanetti*-case), Court of Appeal, Antwerp, 15 March 2005, *Vlaamse Gewest v. BASF Antwerpen* (with reference to the *Arco Chemie*-case); Corr. Ghent, 8 March 2011, *TMR* 2011, 287-289 (with reference to ECJ case C-1/03 *Van de Walle*); Court of Appeal, Mons, 31 January 2011, *MP*, *Amén.* 2011, 224.
[57] Council of State, n° 172.529, 21 June 2007, *bvba Zandgroeven Roelants.*
[58] Council of State, n° 99.794, 15 October 2001, *De Vries and Pana*, *TMR*, 165-171.
[59] Council of State, n° 109.563, 30 July 2002, *Apers and Others*, *TMR* 2003, 135-143.
[60] Constitutional Court, n° 94/2003, 2 July 2003, *Creve and Others*, *TMR* 2003, 485-494.

European Commission closed the related infringement file and took no further action[61], being satisfied with the compensation measures taken[62].

7. National Procedural Rules

There seems no relevant case law on this topic.

8. National substantive principles

There seems no relevant case law on this topic.

9. National Checking of "Constitutionality " of EU Law

The Constitutional Court was asked to check the constitutionality of the Decree of the Walloon Region of 10 November 2004 that transposed, more or less literally, Directive 2003/87/EC (on the European Emission Trading Scheme). The pleas in the cases were about violation of the equality principle (because of the inclusion of the steel industry, but the exclusion of other sectors), violation of the principle of freedom of trade and industry and violation of property rights (because initial allocated allowances are annulled when the establishment is terminated within the trading period and these allowances are added to the reserve for new comers). The Court rejected the appeal on its own, without consulting the ECJ on the validity of the Directive on these points (the requesting parties asked to submit questions on the validity and the interpretation of the Directive for preliminary ruling to the ECJ). The Court was of the opinion that Directive 2003/97/EC did not forbid to extend the scope of the domestic scheme to other sectors – so it was in the hands of the legislator to respect the equality principle of the Belgian Constitution – and that for the other points it left sufficient room for the legislator to implement the directive in a way that is compatible with the Belgian Constitution[63], so there was no need to consult the ECJ on the validity of the directive. Although the Constitutional Court did not checked the constitutionality of Directive 2003/87/EC as such, it checked the constitutionality of provisions of domestic law that transposed the directive very literally, so that this judgment could be seen as an

[61] See in the same sense: Constitutional Court, n° 151/2003, *Gemeente Beveren,* 26 November 2003, *TMR* 2004, 190-198.
[62] Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel.*
[63] Constitutional Court, n° 92/2006, 7 June 2006, *nv Cockerill Sambre and sa Arcelor*, TMR 2006, 450-459.

"indirect check" of the constitutionality of the Directive. Eventually this judgment worked out well as the ECJ came several years later[64] to the same conclusion as it was asked by the French Council of State to check the validity of the Directive. Off course, if the Constitutional Court would have had serious doubts on the compability of the Decree (and thus the Directive) with the equality principle, if would not have been in the position to judge so, without consulting the ECJ first, according the *Foto Frost* case-law[65].

The Constitutional Court was also of the opinion that the criminal sanctions imposed by Walloon regional legislation for illegal activities with waste, were not violating the constitutional and conventional principle of legality in criminal law. With reference to the case law of the ECJ , the Court held that the notion of "waste" was sufficiently clear[66].

The Council of State was asked to annul a Ministerial Order designating an particular area as a special conservation area under the Brussels regional legislation transposing the Habitats Directive. Meanwhile the site was included in Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region. By Order of the Court of First Instance of 19 September 2006 (CFE v Commission Case T-100/05) the application for annulment of that Decision was dismissed as inadmissible. Subsequently the Council of State held that Decision 2004/813/EC has become final so that the attacked Ministerial Order had no legal effect anymore, and that the demand for annulment had become without interest for the party concerned[67].

[64] ECJ, Judgment of the Court (Grand Chamber) of 16 December 2008, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie,* Case C-127/07. The ECJ held « Consideration of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, from the point of view of the principle of equal treatment has disclosed nothing to affect its validity in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope." See also the Judgment of the General Court (Third Chamber) of 2 March 2010, *Arcelor SA v European Parliament and Council of the European Union*, Case T-16/04.

[65] See for such a case concerning the Belgian federal legislation to transpose Directive 2004/113/EEC on equal treatment of man and woman: Constitutional Court, n° 130/2009, 18 June 2009, *vzw Belgische Verbruikersunie Test-Aankoop;* ECJ, Case C-236/09, 1 March 2011, *Belgische Verbruikersunie Test-Aankoop VZW and Others*; Constitutional Court, n° 116/2011, 30 June 2011, *vzw Belgische Verbruikersunie Test-Aankoop.*

[66] Constitutional Court, n° 143/2008, 30 October 2008, *OM and DG Directoraat-generaal natuurlijke rijkdommen en leefmilieu*, *TMR* 2008, 805-807.

[67] Council of State, n° 212.005, 14 March 2011, *sa Compagnie François d'entreprises.*

10. Submissions to ECJ for Preliminary Rulings

The Constitutional Court , when confronted with questions of validity or interpretation of European Law, is referring consistently to the *CILFIT-criteria*[68] to decide if a reference should be made or not[69].

Different arguments are used in the jurisprudence to avoid to refer a case to the ECJ for a preliminary ruling:

- The interpretation of EU law proposed by the requesting party is based on a factual premise that is not proven[70] or is wrong[71];
- Questions proposed by the parties are badly drafted and not pertinent for the solution of the case[72];
- The question(s) proposed by one or another party are outside the scope of art. 234 EC Treaty (most of the time this argument is used when the proposed question is about the conformity of domestic law with EU law, not on the interpretation or the validity of EU Law)[73];
- There is no reasonable doubt about the interpretation of EU law (*acte claire* or *acte éclairé*)[74];
- The proposed questions are not pertinent for the solution of the case[75].

[68] "The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of *Community* law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, *unless* it has established that the question raised is *irrelevant* or that the Community provision in question *has already been interpreted by the Court of Justice* or that the correct application of Community law *is so obvious as to leave no scope for any reasonable doubt.* The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community". See ECJ, 6 October 1982, *CILFIT v. Ministry of Health*, 283/81).

[69] Constitutional Court, n° 151/2003, *Gemeente Beveren,* 26 November 2003, *TMR* 2004, 190-198; Constitutional Court, n° 92/2006, 7 June 2006, *nv Cockeril Sambre and sa Arcelor*, TMR 2006, 450-459; Constitutional Court, n° 121/2008, 1 September 2008, *VZW FEBELCEM*, *TMR* 2008, 856-862; Council of State, n° 208.572, 28 October 2010, *asbl Grez-Doiceau Urbanisme et Environnement and Others;* Council of State, n° 209.866, 20 December 2010, *Peirs*, *TMR* 2011, 549—573.

[70] Council of State, n° 200.738, 10 February 2010, *bvba Pomphuis*, *NjW* 2010, 281.

[71] Council of State, n° 98.840, 13 September 2001, *Ville de Péruwelz*, *Amén.* 2002, 127-134; Council of State, n° 191.266, 11 March 2009, *Apers and Van Buel.*

[72] Constitutional Court, n° 151/2003, *Gemeente Beveren,* 26 November 2003, *TMR* 2004, 190-198; Council of State, n° 206.078, 29 June 2010, *nv Nieulandt Recycling and Others, TMR* 2011, 50; Constitutional Court, n° 151/2003, *Gemeente Beveren,* 26 November 2003, *TMR* 2004, 190-198.

[73] Constitutional Court, n° 94/2003, 2 July 2003, *Creve and Others*, *TMR* 2003, 495-496; ; Council of State, n° 211.023, 3 February 2011, *Dalhem.*

[74] Constitutional Court, n° 151/2003, *Gemeente Beveren,* 26 November 2003, *TMR* 2004, 190-198 (obligations deriving from art. 10 EC Treaty for national judges); Constitutional Court, n° 92/2006, 7 June 2006, *nv Cockerill Sambre and sa Arcelor*, TMR 2006, 450-459; Council of State, n° 192.592, 23 April 2009, *VZW Beter Bruggestraat and others*, *TMR* 2009, 780-791 (with reference to ECJ Case C-201/02 *Wells*); Council of State, n° 195.995, 14 September 2009, *Van Pollaert*, *TMR* 2010, 394-398; Council of State, n° 208.572, 28 October 2010, *asbl Grez-Doiceau Urbanisme et Environnement and Others* (with reference to different cases of the ECJ); Council of State, n° 210.958, 2 February 2011, *Stoclet (*with reference to the recent case law of the ECJ on the free movement of goods).

According the information available on the website of the ECJ, in the period up to the end of 2011, 21 cases concerning environmental law were referred by Belgian courts to the ECJ (on a total of 592 Belgian cases).

In the last decade the following interesting cases were referred:

Waste Dumping Sites – Permit – Waste Management Plan – Requirements – Absence - Consequences

The Walloon Government granted a permit to extend and operate a landfill *in Braine-le-Château*. The commune of Braine-le-Château brought an action before the Council of State for annulment of the permit. In support of its application, it alleges, among other things, infringement of Articles 4, 5, 7 and 9 of the Waste Framework Directive. It submited that, despite Article 7 of the Directive and Article 24(2) of the Walloon Waste Management Decree, the Walloon Government had not adopted any waste management plan on the date when that permit was issued. The Council of State decided to stay the proceedings and to refer two questions to the ECJ for a preliminary ruling[76].

By Ministerial Order of 16 December 1998, *Propreté, Assainissement, Gestion de l'environnement SA* was issued a permit to continue to operate a landfill in *Mont-Saint-Guibert*. That order lays down aftercare conditions and sets up a support committee and a scientific committee for the landfill. Mr Tillieut and Others and the association *l'Épine blanche ASBL* brought actions before the Council of State for the annulment of the Ministerial Order. Mr Tillieut and Others claimed that the permit granted under the Order was issued for a site not listed in a plan for waste disposal sites, contrary to Articles 7(1) and 9 of the Waste Framework Directive and Article 24(2) of the Waste Management Decree. Also in this case the Council of State decided to stay proceedings and to refer ollowing questions to the ECJ for a preliminary ruling[77].

The ECJ answered those questions as follows in its judgment of 1 April 2004[78]:

"1. Article 7 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, must be interpreted to mean that the management plan or plans which the competent authorities of the Member States are required to draw up under that provision must include either a geographical map specifying the exact location of waste disposal sites or location criteria which are sufficiently precise to enable the competent authority responsible for issuing a permit under

[75] Constitutional Court, n° 92/2006, 7 June 2006, *nv Cockerill Sambre and sa Arcelor*, TMR 2006, 450-459; Council of State, n° 154.063, 7 February 2006, *Apers and Others*, *TMR* 490-492; Council of State, n° 170.336, 7 February 2008, *nv Maatschappij van de Brugse Zeevaartinrichtingen;* Constitutional Court, n° 121/2008, 1 September 2008, *VZW FEBELCEM*, *TMR* 2008, 856-862; Council of State, n° 209.866, 20 December 2010, *Peirs*, *TMR* 2011, 549—573.
[76] Council of State, n° 103.473, 8 February 2002, *Commune de Braine-le-Château.*
[77] Council of State, n° 107.085, 28 May 2002, *Tillieut and Others.*
[78] ECJ, Joined Cases C-53/02 and C-217/02, *Commune de Braine-le-Château and Others.*

Article 9 of the Directive to determine whether the site or installation in question falls within the management framework provided for by the plan.

2. Article 7(1) of Directive 75/442, as amended by Directive 91/156, must be interpreted as requiring Member States to draw up waste management plans within a reasonable period, which may go beyond the time-limit for transposing Directive 91/156 laid down in the first subparagraph of Article 2(1) of the latter.

3. Articles 4, 5 and 7 of Directive 75/442, as amended by Directive 91/156, read in conjunction with Article 9 thereof, must be interpreted as not precluding a Member State which has not adopted, within the period prescribed, one or more waste management plans relating to suitable sites or installations for waste disposal from issuing individual permits to operate such sites and installations. "

On the basis of that answer the argument put forward by the requesting parties in the case of the landfill in Braine-le-Château was declared not founded by the Council of State[79], but the written and oral proceedings were reopend to allow the parties to take position on the necessity to refer a question of constitutionality to the Constitutional Court. The Council of State was of the opinion that it was not necessary to do so in this case [80], given the fact that the Constitutional Court had meanwhile answered a similar question[81]. Finally the Council of State declared that the demand for annulment had lost its object because meanwhile the competent Minister had taken another decision refusing the permit for the exploitation of the waste dump[82] according to new regulations that came into force[83].

In the case of the landfill in Mont -Saint-Guibert the permit was many years later annulled by the Council of State[84] on the ground that the EIA was not complete, after having rejected the argument of the absence of the waste management plan[85] and of the violation of the equality principle by the transitional measures for the new requirements of the landfills, on the basis of a preliminary judgment of the Constitutional Court[86]. The legal battle continues as a new permit was delivered in 2001, but suspended by the Council of State in 2002[87] and subsequently annulled in 2004[88]. In 2004 a new permit was delivered again, the suspension of it was rejected by the Council of State[89], but the demand for annulment is still pending.

[79] Council of State, n° 147.570, 11 July 2005, *Commune de Braine-le-Château and Feron and Others*
[80] Council of State, n° 151.904, 29 November 2005, *Commune de Braine-le-Château and Feron and Others*
[81] Court of arbitration, n° 59/2005, 16 March 2005, *Tillieut and Others*
[82] Council of State, n° 144.598, 19 May 2005, *sa Biffa Waste Services*
[83] Council of State, n° 166.262, 21 December 2006, *Commune de Braine-le-Château and Feron and Others*
[84] Council of State, n° 201.935, 16 March 2010, *Tillieut and Others*
[85] Council of State, n° 187.140, 16 October 2008, *Tillieut and Others*
[86] Constitutional Court, n° 120/2009, 16 July 2009, *Tillieut and Others*
[87] Council of State, n° 107.792, 12 June 2002, *Ville d'Ottignies-Louvain-la-Neuve and Others*
[88] Council of State, n° 138.584, 16 December 2004, *Ville d'Ottignies-Louvain-la-Neuve and Others*
[89] Council of State, n° 185.840, 8 August 2008, *Ville d'Ottignies-Louvain-la-Neuve and Others*

Waste for export - Disposal/recovery – Notification – Reclassification – Competent authority

Siomab operates an incineration plant for household waste and similar products in Brussels. The plant produces residues, in particular, salts. Siomab concluded a contract with GTS-Grunde Teutschenthal Sicherungs GmbH & Co. KG for burying the salts in the galleries of the salt mines at Teutschenthal, in Germany**.** In order to ship that waste, Siomab sent the IBGE (Institut Bruxellois pour la gestion de l'environnement) a notification file for transmission to the competent authority of destination, the Landesamt für Geologie und Bergwesen Sachsen-Anhalt. In the documents sent under that cover to the IBGE, Siomab classified the planned shipment as a recovery operation of type 'R 5 Recycling/reclamation of other inorganic materials', listed in Annex II B to the Waste Framework Directive. The IBGE took the view that the operation concerned was a shipment of waste for disposal of type 'D 12 Permanent storage (e.g. emplacement of containers in a mine, etc.), listed in Annex II A to the Directive. After consulting Siomab, the IBGE amended the notification form to reflect its view and, on 20 December 2001, informed Siomab that its export application had been sent to the competent authority in Germany. That authority objected to the requested shipment on the ground that under national mining law only recovery, and not disposal, is permissible in the Teutschenthal mine. Siomab once again sent its file to the IBGE, retaining the classification of the operation as a shipment of type R 5, and relying on the case-law of the Court (Case C-6/00 ASA [2002] ECR I-1961) to argue that the IBGE was required to transmit the notification, in its original version, to the competent authority of destination, and that it was not entitled to reclassify the purpose of the shipment. The IBGE, adhering to its assessment, returned the file to Siomab on the ground that the classification of the operation was incorrect. Siomab then brought an action before the Council of State seeking annulment of the IBGE's decision to refuse to transmit the notification of the shipment of waste to the competent authority of destination. On 14 May 2002, in interlocutory proceedings, Siomab requested the President of the Court of First Instance, in Brussels, to order the IBGE to transmit, without amendment, the notification of the shipment of waste to the competent authority of destination. That request was rejected by order of 8 July 2002. Siomab lodged an appeal against that order with the Court of Appeal in Brussels, claiming, inter alia, that it was not for the IBGE to reclassify on its own initiative the purpose of the shipment of waste and that, in the context of the specific procedure for recovery operations, the Regulation does not empower the competent authority of dispatch to refuse to transmit the notification. The IBGE contended that, on the contrary, it had a duty to verify the classification of the planned shipment and that it was therefore not required to make notification in the case of abuse of the Regulation. In those circumstances, the Court of Appeal took the view that an interpretation of the Regulation was necessary in order to settle the dispute before it and decided to stay proceedings and referred some questions to the ECJ for a preliminary ruling.

The ECJ[90] answered those questions as follows:

[90] ECJ, Case C-472/02*, Siomab.*

"Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Commission Decision 98/368/EC of 18 May 1998 and Commission Decision 1999/816/EC of 24 November 1999, is to be interpreted as meaning that, where a Member State has recourse, under Article 6(8) of that regulation, to the specific procedure whereby the competent authority of dispatch transmits the consignment note for a shipment of waste for recovery, that authority, if it considers it necessary to object to the shipment on the ground that it has been incorrectly classified by the notifier, may not reclassify the shipment on its own initiative and is required to transmit that document to the other competent authorities and the consignee. It is then for that authority to inform the notifier and the other competent authorities concerned of its objection by any appropriate means before the end of the period laid down in Article 7(2) of the Regulation at the latest."

Waste definition – Polluted Soil – Holder – Notion

The renovation of a building of the Brussels Capital Region which it had undertaken in order to set up a social assistance centre had to be halted as the result of the discovery that water saturated with hydrocarbons was leaking into the cellar of the building from the wall which separates that building from the adjacent building where a Texaco service station was at that time located. The service station was covered by a commercial lease between Texaco and the owner of the premises. Following the discovery of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in April 1993, alleging serious negligence on the part of the manager. It subsequently terminated the commercial lease in June 1993. Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities which gave rise to the hydrocarbon leak. It carried out no further activities on the site after May 1994. The Brussels‑Capital Region took the view that decontamination had not been completed and paid for other remedial measures which it considered necessary in order to carry out its building plan. Since Texaco's actions appeared to constitute infringements of the Order of 7 March 1991, and in particular Articles 8, 10 and 22 thereof, proceedings were brought against Mr Van de Walle, Texaco's managing director, Mr Laurent and Mr Mersch, officers of the company, and Texaco as a legal entity before the Tribunal correctionnel (Criminal Court) of Brussels. The Brussels‑Capital Region claimed damages in those proceedings. By judgment of 20 June 2001, that court acquitted the defendants, exonerated Texaco and stated that it was not competent to rule on the application by the party claiming damages. The Ministère public (Public Prosecutor) and the party claiming damages appealed against that judgment before the court which has made the reference. That court took the view that Article 22 of the Order of 7 March 1991 imposed penalties for failure to comply with the obligations set out in Article 8 thereof and not for failure to comply with the requirements of Article 10. It therefore considered that in order to be subject to criminal sanctions under Article 22, the actions of the accused must constitute abandonment of waste within the meaning of Article 8. It observed that Texaco had not rid itself of its waste by supplying it to the service station and that neither the petrol delivered nor the tanks which remained buried in the ground after the decontamination activities carried out by that undertaking could constitute waste

within the meaning of Article 2(1) of the Order, that is to say, 'a substance or object which the holder discards or intends or is required to discard'. The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste. Having noted that the definition of 'waste' in Article 2(1) of the Order of 7 March 1991 reproduces literally that in Directive 75/442 and that the Annex to the Order which lists categories of waste reproduces the terms used in Annex I to the Directive, the Cour d'appel of Brussels decided to stay the proceedings and referred some questions to the Court of Justice for a preliminary ruling[91].

The ECJ answered those questions as follows in its judgment of 7 September 2004[92]:

"Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking."

Bird protection – Birds born and reared in captivity

By judgment of the Constitutional Court of 29 October 2003 reference for a preliminary ruling in the case brought by H. Clerens against the Walloon Region was made on the following questions:

"1. Must Council Directive 79/409/EEC of 2 April on the conservation of wild birds be interpreted as not authorising Member States to introduce rules which also apply to birds mentioned in Annex I to the Directive that are born and reared in captivity?

2.Must that directive be interpreted as authorising Member States to lay down rules to protect birds born and reared in captivity only to the extent that those rules apply solely to trade in those birds, or may those rules apply to all the operations which trade in birds may entail?

The ECJ answered these questions by order of 1 October 2004[93] as follows:

"Declares that Council Directive 79/409/EEC of 2 April on the conservation of wild birds is to be interpreted as not being applicable to species born and reared in captivity and, accordingly, Member

[91] Court of Appeal, Brussels, 3 December 2002, *Amén.* 2003, 115-120.
[92] ECJ, case C-1/03, *Van de Walle and Others*
[93] ECJ, case C-480/03, *Clerens.*

States remain competent, as Community law now stands, to regulate the matter, subject to Articles 28 to 30 EC".

Access to environmental information – Time limits – Appeals –Implied refusal

In 1991, the Région de Bruxelles-Capitale expropriated the site of a former military hospital for the benefit of the Société de développement régional de Bruxelles (hereinafter 'the SDRB'), which was designated as the operator for the redevelopment of the site. The SDRB then entered into a contract by private treaty (hereinafter 'the contract') with a temporary association made up of the companies Batipont Immobilier SA and Immomills Louis de Waele Development SA (hereinafter 'Batipont'). Under the terms of that contract, Batipont agreed to put up a complex of buildings and structures on the said site in accordance with a plan pre-established by the SDRB. Mr Housieaux asked to be allowed to consult the contract and to obtain a copy of it. By decision dated 5 April 1994, the SDRB refused the request on the ground that, according to the 1991 Order, it is the Executive which 'shall decide the arrangements for organising access to information for each individual public authority'**.** Mr Housieaux appealed to the Board against that decision, and repeated his request for access to the contract. After various exchanges of correspondence with Mr Housieaux, the Board took the decision to provide to the applicant Annexes H and I to the contract, which related to the environment and whose disclosure did not compromise any commercial or industrial interest. Being dissatisfied with that decision, Mr Housieaux brought an action before the Conseil d'État for annulment of that decision. The Council of State[94] referred diffferent questions to the ECJ for a preliminary ruling.

The ECJ[95] answered the following:

"1. The two-month time-limit laid down in Article 3(4) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment is mandatory.

2. The decision referred to in Article 4 of Directive 90/313, against which a judicial or administrative review may be sought by the person who made the request for information, is the implied refusal which arises from the failure by the public authority competent to decide on that request to respond within two months.

3. Article 3(4) of Directive 90/313, in conjunction with Article 4 thereof, does not preclude, in a situation such as that in the main proceedings, national legislation according to which, for the purposes of granting effective judicial protection, the failure of a public authority to respond within a period of two months is deemed to give rise to an implied refusal which may be the subject of a judicial or administrative review in accordance with the national legal system. However, by virtue of Article 3(4) it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In those circumstances, the implied refusal must be regarded as unlawful."

[94] Council of State, n° 130.058, 1 April 2004*, Housieaux v. les Délégues du Conseil de la Région de Bruxelles-Capitale and Others.*
[95] ECJ, Case C-186/04, *Housieaux*

After having received these answers the Council of State annulled the attacked decision[96].

Waste definition – Materials to be considered as products

Inter-Environnement Wallonie demands the annulment of a Decree of the Walloon Government establishing a list of materials that are considered to be products, for violation of Directive 75/442/EEC. In that context the Council of State[97] refers a question to the ECJ. The ECJ answered the question by Order of 28 January 2005[98] as follows:

"*Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, precludes the introduction by States of a new category of materials which do not come under either the category of waste or that of products even though that new category of materials may contain substances or objects liable to meet the definition of 'waste' within the meaning of that provision."*

The Council of State has subsequently annulled the Decree of the Walloon Government of 20 May 1999 for violation of art. 1 (a) of Directive 75/442/EEC[99].

Airport infrastructure and EIA

The individuals who live near Liège-Bierset Airport complain of noise pollution, often at night, resulting from the restructuring of the former military airport and its use since 1996 by air freight companies.

An agreement signed on 26 February 1996 between the Region of Wallonia, *Société de développement et de promotion de l'aéroport de Liège-Bierset* and TNT Express Worldwide provided for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened. A control tower, new runway exits and aprons were also constructed. The length of the runway of 3 297 metres was not altered however. Planning consents and operational authorisations were also granted so that the works could be carried out. The dispute pending before the Belgian national court concerns liability: the claimants in the main proceedings have sought compensation for the harm suffered, in their view, by them as a result of the nuisance – which they claim to be serious – linked to the restructuring of the airport. It is in that context that an appeal on a point of law was brought before the Court of Cassation against a judgment delivered on 29 June 2004 by the Court of Appeal of Liège. Considering that the

[96] Council of State, n° 161.407, 19 July 2006, *Housieaux v. les Délégues du Conseil de la Région de Bruxelles-Capitale and Others*
[97] Council of State, n° 130.865, 29 April 2004, *Inter-Environnement Wallonie ASBL v. Région wallonn*
[98] ECJ, case C-208/04, *Inter-Environnement Wallonie ASBL v. Région wallonne*
[99] Council of State, n° 156.825, 23 March 2006, *Inter-Environnement Wallonie ASBL v. Région wallonne.*

dispute before it raised questions of interpretation of Community law, the Court of cassation decided to stay the proceedings and to refer some questions to the Court of Justice for a preliminary ruling.

The ECJ answered the questions as follows in its judgment of 28 February 2008[100]:

"*1. While an agreement such as the one at issue in the main proceedings is not a project within the meaning 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, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.*

2. Point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

3. The competent authorities have to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity."

The Court of Cassation subsequently quashed the appealed judgment for inter alia violation of Directive 85/337/EEC and has sent the case to the Court of Appeal of Brussels for reconsideration[101].

Positive list of animals that maybe commercially used

Before the Council of State, the Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW submitted that a Royal Decree, read in conjunction with the animal welfare law, gives rise to an absolute prohibition on importing from another Member State, holding or trading in mammals belonging to species which are not included in the 'positive' list attached as an Annex to the Royal Decree, whereas such a prohibition is contrary to Regulation No 338/97 and to the Treaty, in particular to Article 30 EC. The Council of State observed that the Royal Decree means that, except in the cases listed in Article 3bis(2) of the animal welfare law, no mammal which does not belong to the species included in that list may be held in Belgium. A regulatory decree of that kind undeniably has an influence on trade between

[100] ECJ, Case C‑2/07, *Paul Abraham and Others v Région wallonne and Others*
[101] Court of Cassation, 4 December 2008, *A. and others*, *Arr. Cass.*, 2008, n° 696.

Member States. In those circumstances, different questions were referred to the ECJ for a preliminary ruling.

The ECJ answered those questions in its judgment of 19 June 2008[102]:

"Articles 28 EC and 30 EC, read separately or in conjunction with Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, do not preclude national legislation, such as that at issue in the main proceedings, under which a prohibition on importing, holding or trading in mammals belonging to species other than those expressly referred to in that legislation applies to species of mammals which are not included in Annex A to that regulation, if the protection of or compliance with the interests and requirements referred to in paragraphs 27 to 29 of this judgment cannot be secured just as effectively by measures which obstruct intra-Community trade to a lesser extent.

It is for the national court to determine:

– whether the drawing up of the national list of species of mammals which may be held and subsequent amendments to that list are based on objective and non-discriminatory criteria;

– whether a procedure enabling interested parties to have species of mammals included in that list is provided for, readily accessible and can be completed within a reasonable time, and whether, where there is a refusal to include a species, it being obligatory to state the reasons for that refusal, that refusal decision is open to challenge before the courts;

– whether applications to obtain the inclusion of a species of mammal in that list or to obtain individual derogations to hold specimens of species not included in that list may be refused by the competent administrative authorities only if the holding of specimens of the species concerned poses a genuine risk to the protection of the abovementioned interests and requirements; and

– whether conditions for the holding of specimens of mammals not referred to in that list, such as those set out in Article 3bis(2)(3)(b) and (6) of the Law of 14 August 1986 concerning the protection and welfare of animals, as amended by the Law of 4 May 1995, are objectively justified and do not go beyond what is necessary to achieve the objective pursued by the national legislation as a whole."

Subsequently the Royal Decree was annulled by the Council of State on the basis of a provision of its organic law that states that if the defending and intervening parties are not asking to continue proceedings after having received the Opinion of the member of the Auditorat in charge of instructing the case proposing the annulment; the case can be disposed of by summary proceedings[103].

[102] ECJ, Case C‑219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v. Belgische Staat*

[103] Council of State, n° 191.161, 9 March 2011, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v. Belgische Staat.*

Nitrogen Management Programs and SEA

By judgment of 22 September 2005 in Case C‑221/03 *Commission v Belgium* [2005] ECR I‑8307, the ECJ held that, by failing to adopt within the relevant time-limit the measures needed for the full and correct implementation of Directive 91/676, the Kingdom of Belgium had failed to fulfil its obligations under that directive. In order to comply with that judgment, the Walloon Government adopted the contested order in pursuance of Article 5 of Directive 91/676. That order amends Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture. *Terre wallonne ASBL* and *Inter-Environnement Wallonie ASBL* applied to the Council of State for annulment of that order, claiming in particular that the program which it contains was not subjected to an environmental assessment in accordance with Directive 2001/42. The Council of State is of the view that the possibility cannot be ruled out that action programmes such as the one referred to by Directive 91/676 are plans or programmes within the meaning of Directive 2001/42. It also observes that no provision of the law of the Region of Wallonia applicable at the date of adoption of the contested order made nitrogen management plans subject to an environmental impact assessment, that it is not necessarily established that that situation contravenes Directive 2001/42 and that the correct application of European Union law is not so obvious as to leave no room for reasonable doubt.

With its judgment of 17 June 2010[104] the ECJ answered the referred questions as follows:

" *An action programme adopted pursuant to Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources is in principle a plan or programme covered by Article 3(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 environment since it constitutes a 'plan' or 'programme' within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II 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. "*

The Council of State took up the case again and was confronted with the question if it could, in the light of EU law, defer the annulment of the challenged order (see pending case - C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, below).

Regional permits ratified by Parliament

Different cases pending before the Council of State are dealing with "regional permits" , that are building permits, environmental permits or combined permits for some projects of regional interest that, according to special Walloon legislation, are ratified by the Walloon Parliament, transforming them to

[104] ECJ, Joined Cases C‑105/09 and C‑110/09, *Terre wallonne ASBL and Inter-Environnement Wallonie ASBL v Région wallonne.*

Acts of Parliament that cannot be challenged before the Council of State. In these cases the Council referred questions for preliminary ruling both to the Constitutional Court – that on its turn referred some questions to the ECJ - and to the ECJ.

The ECJ answered these questions with its judgment of 18 October 2011[105] as follows:

"1. Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive's scope. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337, as amended by Directive 2003/35.

2. Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:

– when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law;

– if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act".

The Council of State has still to wait the answers of the Constitutional Court on the parallel questions, but that Court itself has to wait for the judgment of the ECJ on the questions it referred to it (see below pending case C-182/10 - *Solvay and Others*).

[105] ECJ, Joined Cases C‑128/09 to C‑131/09, C‑134/09 and C‑135/09, *Boxus and Others v Région wallonne;* ECJ, Joined cases C-177/09 to C-179/09 of *Le Poumon vert de la Hulpe ASBL and Others v Région wallon (*Order of the Court of 17 November 2011).

Renewal of Environmental Permit of an Airport and EIA

In the case of the renewal of the environmental permit of Brussels Airport (Council of State, n° 195.230, 14 July 2009, *Brussels Hoofdstedelijk Gewest and others)*[106] the question arose if an EIA was necessary before that permit was delivered, even when the permit is restricted to the renewal of an existing permit delivered for a limited time (5 years).

The Court answered the question in its judgment of 17 March 2011 as follows;

" *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 "*[107].

Air transport – Directive 2002/30/EC – Noise-related operating restrictions – Noise level limits that must be observed when overflying built-up areas near an airport

*European Air Transport (DHL) c*ommitted infringements of the Order of 17 July 1997, the Order of 25 March 1999 and of the Decree of 27 May 1999 of the Brussels Capital Region. It was claimed that EAT was responsible for night-time aircraft noise in excess of the limit values provided for in those regulations. IBGE initiated proceedings against EAT with a view to imposing an administrative penalty of EUR 56 113. EAT lodged an appeal against that decision before the *Collège d'environnement de la Région de Bruxelles-Capitale*, which confirmed, by decision of 24 January 2008, the penalty imposed by

[106] In the similar case of Ostend Airport the Council of State suspended proceedings in attendance of the answers of the ECJ in case C-273/09 (Council of State, n° 195.231, 14 July 2009, *Musschoot and Others*).
[107] ECJ, Case C-273/09, *Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest.*

IBGE. EAT then initiated proceedings before the Council of State, that decided to stay its proceedings and refer different questions to the Court for a preliminary ruling[108].

The ECJ[109] answered those questions as follows:

"Article 2(e) of Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports must be interpreted as meaning that an 'operating restriction' is a prohibition, absolute or temporary, that prevents the access of a civil subsonic jet aeroplane to a European Union airport. Consequently, national environmental legislation imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, does not itself constitute an 'operating restriction' within the meaning of that provision, unless, in view of the relevant economic, technical and legal contexts, it can have the same effect as prohibitions of access to the airport in question."

Pending cases

The following cases, referred by Belgian courts, are pending:

- **C-121/11, *Pro-Braine and Others*** - Reference for a preliminary ruling – Council of State[110] - Interpretation of Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste and of Article 1(2) 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 -

"*Does the definitive decision on the carrying on of operations at an authorised or already operational landfill site taken on the basis of Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste constitute a consent as referred to in Article 1(2) of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment? "*

- **C-41/11 , *Inter-Environnement Wallonie and Terre wallonne*** - Reference for a preliminary ruling – Conseil d'État (Belgium) – Assessment of the effects of certain plans and programmes on the environment – Protection of waters against pollution caused by nitrates from agricultural sources – Annulment of a national rule found to be contrary to Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30) – Possibility of maintaining, for a short period, the effects of that rule -

"*Can the Conseil d'État,*

[108] Council of State, n° 201.373, 26 February 2010, *sa European Air Transport*
[109] ECJ, Case C-120/10, *European Air Transport SA*, 8 September 2011.
[110] Council of State, n° 211.521, 24 February 2011, *ASBL Pro-Braine and Others.*

- *seised of an action seeking the annulment of the decree of the Government of Wallonia of 15 February 2007 amending Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture,*
- *finding that that decree was adopted without compliance with the procedure prescribed by Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and that it is, for that reason, contrary to the law of the European Union and must be annulled,*
- *but finding at the same time that the contested decree provides for an appropriate implementation of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources,*
- *defer in time the effects of the judicial annulment for a short period necessary for the redrafting of the annulled measure in order to maintain in European Union environmental law a degree of specific implementation without any break in continuity?"*

- ***C-26/11 - Belgische Petroleum Unie and Others*** - Reference for a preliminary ruling – Grondwettelijk Hof – Interpretation of Article 4(3) TEU, Articles 26(2), 28, 34, 35 and 36 TFEU, Articles 3, 4 and 5 of Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EC and Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services – National rules requiring petroleum companies releasing petrol and diesel products for consumption also to make available for consumption in the same year a quantity of bio-ethanol, pure or in the form of bio-ETBE, and fatty acid methyl esters (FAME)

"1. Should Articles 3, 4 and 5 of Directive 98/70/EC1 of the European Parliament and of the Council of 13 October 1998 'relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC' as well as, where appropriate, Article 4(3) of the Treaty on European Union and Articles 26, 28 and 34 to 36 of the Treaty on the Functioning of the European Union be interpreted as precluding a statutory provision on the basis of which every registered petroleum company which releases petrol products and/or diesel products for consumption is also obliged in the same calendar year to make available for consumption a quantity of sustainable biofuels, namely bio-ethanol, pure or in the form of bio-ETBE, amounting to at least 4% vol/vol of the quantity of petrol products released for consumption, and FAME amounting to at least 4% vol/vol of the quantity of diesel products released for consumption?

2. If the first question referred for a preliminary ruling is answered in the negative, should Article 8 of Directive 98/34/EC2 of the European Parliament and of the Council [of 22 June 1998] 'laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services', notwithstanding Article 10(1), first indent, of the same Directive, be interpreted as imposing an obligation that the Commission be notified of a draft standard on the basis of which every registered petroleum company which releases petrol products and/or diesel products for consumption is also obliged in the same calendar year to make available for consumption a quantity of sustainable biofuels, namely bio-ethanol, pure or in the form of bio-ETBE, amounting to at least 4%

vol/vol of the quantity of petrol products released for consumption, and FAME amounting to at least 4% vol/vol of the quantity of diesel products released for consumption?"

- C-567/10 - Inter-Environnement Bruxelles and Others – Reference for a preliminary ruling - Cour constitutionnelle - Interpretation of 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 environment - Applicability of the Directive to a procedure for the total or partial repeal of a 'plan particulier d'affectation du sol' (specific land-use plan) - Interpretation of the concept of 'required plans and programmes' - Exclusion of plans the adoption of which is not compulsory

"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 environment 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?"

- C-182/10 - Solvay and Others Reference for a preliminary ruling – *Cour constitutionnelle* – Interpretation of Articles 2(2), 3(9), 6(9) and 9(2), (3) and (4) of the Aarhus Convention on access to information, public participation in the decision-making process and access to justice in environmental matters concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 – Interpretation of Articles 1(5), 9(1) and 10a 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 – Interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – Concept of 'public authority' – Value and scope of the guidance given in the Aarhus Convention Implementation Guide – Whether legislative acts such as town-planning or environmental consents granted by means of decree by a regional legislature are outside the scope of the Aarhus Convention – Whether a procedure leading to the granting of consents which can be challenged only by an action brought before the Cour constitutionnelle and the ordinary courts is compatible with the Convention and with Community law – Project authorised without an appropriate environmental impact assessment.

" *1. Must Articles 2(2) and 9(4) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters be interpreted in accordance with the guidance provided in the Aarhus Convention Implementation Guide?*

2. (a) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from its application legislative acts such as the town-planning and environmental consents granted in accordance with the

procedure established by Articles 1 to 4 of the Decree of the Walloon Region of 17 July 2008 on certain consents for which there are overriding reasons in the general interest?

(b) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from its application legislative acts such as the ratifications of town-planning and environmental consents contained in Articles 5 to 9 and 14 to 17 of the decree in question?

(c) Must Article 1(5) of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment be interpreted as excluding from its application legislative acts such as the town-planning and environmental consents granted in accordance with the procedure established by Articles 1 to 4 of the decree in question?

(d) Must Article 1(5) of Directive 85/337/EEC be interpreted as excluding from its application legislative acts such as the ratifications of town-planning and environmental consents contained in Articles 5 to 9 and 14 to 17 of the decree in question?

3. (a) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337/EEC be interpreted as precluding a procedure such as that established by Articles 1 to 4 of the decree in question, under which the regional legislator grants town-planning and environmental consents which have been prepared by an administrative authority and which are amenable only to the legal actions mentioned in paragraphs B.6. and B.7 of this order that may be brought before the Constitutional Court and the ordinary courts?

(b) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337/EEC be interpreted as precluding the adoption of legislative acts such as the retroactive ratifications contained in Articles 5 to 9 and 14 to 17 of the decree in question, which are amenable only to the legal actions mentioned in paragraphs B.6. and B.7 of this order that may be brought before the Constitutional Court and the ordinary courts?

4. (a) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337/EEC be interpreted as precluding a procedure such as that established by Articles 1 to 4 of the decree in question, under which a decree granting town-planning and environmental consents need not itself contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337/EEC?

(b) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337/EEC be interpreted as precluding the adoption of legislative acts such as the ratifications contained in Articles 5 to 9 and 14 to 17 of the decree in question, which do not themselves contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337/EEC?

5. Must Article 6(3) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora be interpreted as permitting a legislative authority to authorise projects such as those referred to in Articles 16 and 17 of the decree in question, even though the impact assessment carried out in that connection has been held by the Council of State, in a judgment given under the

emergency procedure, to be incomplete and even though the assessment has been contradicted in an Opinion of the authority of the Walloon Region responsible for the ecological management of the natural environment?

6. In the event of a negative reply to Question 5, must Article 6(4) of Directive 92/43/EEC be interpreted as permitting the creation of infrastructure designed to accommodate the administrative centre of a private company and a large number of employees to be regarded as an imperative reason of overriding public interest?"