REPORT ON BELGIUM

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Free Access to Environmental Information

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1) *Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?*

The Belgian Constitution contains a specific provision on access to administrative documents. Article 32 reads as follows: 'Everyone has the right to consult any administrative document and to obtain a copy, except in the cases and conditions stipulated by the laws, federate laws or rules referred to in Article 134'.

This provision is directly applicable and its implementation can be reviewed by the Constitutional Court. The exceptions to this constitutional right have to be set forth by the lawmakers (federal or regional) and have to be justified as well as proportionate.

Moreover, the Belgian Constitution enshrines a « right to the protection of a healthy environment' (Article 23). According to the Constitutional Court, it is however not possible to deduce from Article 23 a right to access to information regarding nuclear issues that is likely to reach beyond the constitutional guarantees stemming from Article 32 (Constitutional Court n° 150/2004, 15 September 2001, *asbl Ardennes liégoises and Others v. Council of Ministers,* B. 10.2).

Last, access to information can be related to Article 22 that enshrines a right to privacy and family life in accordance with Article 8 ECHR.

2) *Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information*

Given that Belgium is a federal State, the three regions are endowed with extensive competences regarding environmental protection[1]. That being said, the Federal State is still endowed with specific environmental competences (nuclear safety, product standards, marine environment) and a swathe of competences touching upon environmental issues (transport, food safety, general taxation, etc.).

Accordingly, the Directive on Access to Environmental Information and the related provisions of the Aarhus Convention have been transposed by the three Regions and the Federal lawmaker, each according to their own sphere of competences. The four key acts are the following[2].

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[1] For more details, see: L. LAVRYSEN, Belgian Report, Avosetta Meeting on GMOs (Siena, 29-30 September 2006), www.avosetta.org

[2] http://www.health.belgium.be/Aarhus/index.htm

- At the Federal level: Federal Act of 5 August 2006 on access to public information regarding environmental protection
- At the level of the Flemish Region: the Flemish Parliament Act of 26 March 2004 on open government, the Flemish Government Decree of 19 July 2007 establishing the appeal body concerning open government and reuse of public information and the Flemish Government Decree of 28 October 2005 on the dissemination of environmental information.
- At the level of the Walloon Region: legislative decree of 27 May 2004 modifying Book I of the Environmental Code
- At the level of the Brussels Region: Brussels legislative ordinance of 18 March 2004

3) *National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?*

Indeed, EU secondary law has had a major impact prompting the four lawmakers to adopt specific legislations on access to environmental information in the early nineties (1991 as the various regions are concerned). The Directive contributed also to overcome some reluctance against enshrining the right to access to administrative documents – or more broadly open government - in the Constitution. Proposals in that sense dating back to the early eighties resulted finally in a new Article 24c that was introduced in the Constitution on June 18, 1993. It became later on Article 32 of the Consolidated Constitution 1994. General Federal legislation on this issue followed in 1994. Without the Directive, we imagine that access to environmental information would be belittled. In the period 2004-2006 the legislation has been updated to take into consideration the Aarhus Convention and Directive 2003/4/EC. So the 1990 Directive contributed in an important way to shift the approach from secret government to a more open government in Belgium.

4) *Statistical information about the use of the access-right including types of users if known (e.g. NGOs, competitive industry, general public, environmental consultants, etc.). Difficulties of the administration handling the number and/or the scope of applications.*

The information regarding the state of the information is scattered and not integrated. Environmental information is available service-minded (what is available)[3], not really question-based (what is needed). There is no reliable information on the number of yearly requests for information in the sense of the Aarhus Convention or the EU Directive for the whole of Belgium. What the Flemish Region and Community is concerned, figures on requests for access to administrative documents can be found in the annual reports of the Flemish Appeal Commission on Open Government[4]. The statistics do not differentiate between environmental and non-environmental information. In the latest report, covering mid 2013-mid 2014, around 1000 requests to the Department of the Environment, Nature and Energy and the related Agencies are mentioned, with a refusal rate of around 10 %. Off course, requests to other regional departments or agencies and to local governments may well

[3] See e.g: http://www.wallonie.be/fr/competences/environnement-et-ressources-naturelles
[4] http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/bijlage%20jaarverslag%202013-2014.pdf

include a substantial number of requests for environmental information. So the number of requests will be well over 3000 in Flanders every year.

As the appeals are concerned, the Federal Appeal Board mentions in its latest reports, that 9, respectively 11 appeals were introduced in 2012 and 2013, some of which were withdrawn. From the 15 decisions, 9 were partially founded. Greenpeace is very active in appealing mostly decisions concerning access to information in the nuclear sector. In the same period the Council of State delivered 4 judgments in which the Board decisions ware confirmed. In Flanders some 100 to 400 appeals a year are introduced, roughly half of them relating to environmental information. Around 50 % of the decisions are positive for the requester. 34 cases were judged by the Council of State. In only 4 of those the decision of the Board was annulled. The Walloon Board handled in 2014 70 appeals, 30 by NGOs, 2 by companies and 49 by lawyers. Around 30 % of the decisions were positive for the requester.

5) *Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC)*

The Walloon Board on Access to Environmental Information[5] ruled that a legislative proposal on land use planning as well as the opinion granted by the Council of State (*Raad van State* or *Conseil d'Etat*) were deemed to be qualified environmental information within the meaning of the Environmental Code (18th February 2014, *Savary,* request 645).

6) *Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Art. 3 para 1 Dir 2003/4/EC)*

The right holder has been broadly defined under the 4 Acts and has been broadly interpreted hitherto by the Boards of appeal.

7) *Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c 4/EC. (see ECJ 279/11 (Fish Legal)*

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8) *National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Art. 3 para 1 Dir 2003/4/EC)*

As far as federal law is concerned, in a case regarding access to information held by the Airport Ombudsman (*Service de Médiation*), the Federal Board held that such a body was « functionally independent from the administration in charge of air transport…. ». In addition, that *Service de Médiation* carries out his duties « in full independence » and is holding « information held by the administration, the airport operator a well as the Control Authority (Belgocontrol) ». Accordingly, the Service is deemed to be an « environmental institution »

[5] http://environnement.wallonie.be/aerw/dgrne/index.htm On this website the case law of the Walloon Board of Appeal can be consulted. The decisions of the Flemish Appeal Board on Open Government can be found on the following website: http://openbaarheid.vlaanderen.be/nlapps/docs/default.asp?id=27 The decisions of the Federal Appeal Board can be found on the following website: http://www.ibz.rrn.fgov.be/nl/commissies/toegang-tot-milieu-informatie/beslissingen/

within the meaning of Article 3, 1°, a) of the Federal Act of 5th of August 2006 (Federal Board on Access to Environmental Information, Decision n° 2014-9, 2 June 2014, *X/SERVICE DE MEDIATION POUR L'AEROPORT DE BRUXELLES-NATIONAL*, CFR2014/5).

The Walloon Board on Access to Environmental Information ruled that the following institutions should be considered 'public authorities' for the purpose of the Act:

- the Walloon Government when adopting a legislative proposal on land use planning; it was deemed to be an administrative authority within the meaning of the Environmental Code (18th February 2014, *Savary,* request 645),
- the Regional Commission on Land Use planning when granting its opinion on a governmental proposal aiming at modifying a regional land use plan (25 March 2013, request 594),
- the Royal Heritage Commission when granting its opinion on a heritage protection proposal (25 April 2013, request 600).

With respect to the latter case, the Board took the view that in accordance with the Walloon Act, the concept of administration encompasses "all public institutions granting an opinion that are falling within the scope of the regional competences".

However, the Walloon Board on Access to Environmental Information took the view that the Regional Association of Municipalities – the interest group of municipalities - could not be qualified as a "public authority" within the meaning of the Environmental Act (26th February 2013, request 591).

That Board also adjudicated a case regarding the submission of criminal investigation data. In virtue of the Walloon Environmental Code, the persons or institutions contribution to the functioning of justice are not falling within the scope of ambit of access to environmental information. The Board dismissed the claims on the account that official regional environmental inspectors are falling outwith the scope of ambit of the Act (26th February 2013, requests 589 and 590). The question arises as to whether that interpretation is consistent with Cases C-204/09 *Flachglas Torgau* and C-515/11 Deutsche *Umwelthilfe*.

On the contrary, in the Flemish Region the relevant exception has been framed in a more restrictive way than in the Aarhus Convention (Art. 4 (4) (c)) and in the Directive (Art. 4(2) (c)). It says that access can be refused to "confidential administrative documents that have been drafted exclusively for criminal prosecution or for the imposition of an administrative sanction". This means that only such specific reports (in Dutch "Proces-verbaal" (for the criminal track)[6] or "Verslag van vastelling" (for the administrative track) can be exempted from access (after balance of interest). The Flemish Appeal Board ordered the Environmental Inspection to give access to a report on emissions of a certain factory[7] or a municipality to give access to a report on noise measurements[8].

[6]http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-117.pdf; http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-162bis.pdf
[7] http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier 2008-15.pdf; http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-162bis.pdf
[8] http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-162bis.pdf

9) Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements" (see Art.3 paras 3 – 5 Dir 2003/4/EC)

The Walloon Board on Access to Environmental Information adjudicated a case regarding the possible manual consolidation of data regarding the number of night flights from the airport of Charleroi in Wallonia. Given the amount of work entailed by such a request, the administrative authority dismissed it on the grounds that it was "abusive". The Walloon Board dismissed that interpretation on the grounds that the request did not imply a manual intervention. The Walloon Board took into consideration the fact that the claimant was expecting the data already available (5th September 2013, *Longueville v SPW,* request 621). Moreover the administration could calculate rather easily the daily, weekly, monthly average number of flights taking place at night.

Art. 3 (3) to (5) of Directive 2003/4/EC has been transposed in the 4 relevant legislations.

10)Law and practices/jurisprudence on charges for access (copying? administrative time?)

The Federal legislation provides that consultation of the documents with the relevant administration is free of charges. For copies a financial compensation can be asked that do not exceed the cost of it. The Government ("The King") shall determine the amount of that financial compensation. A Royal Decree of 7 August 2007 provides for the tariffs (e.g. black and white copy: first 50 pages free of charge, 50 to 100 pages 0,05 € per page, over 100 pages: 0,02 € per page; electronic copies by e-mail free of charge). The Flemish legislation provides that consultation with the relevant administration is free of charge. For copies a reasonable compensation can be asked, provided that the tariff has been fixed beforehand by the relevant authority. This has not been done yet for the Regional level, so that copies are free of charge.

An Environmental NGO complains that there is a gap between the law in the textbooks and the law in practice, in particular as applied at municipal level. In various cases the appeal procedure had to be used to have access to the requested information[9].

11)Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?

The information produced by the authorities themselves is not subject to copyright. Federal Act provides that if the request for access to information relates to a work protected by copyright, consultation of the information with the authority should be granted without restriction. However when a copy is requested, the authority that has to decide on the request for access shall seek the consent of the author or the person who is holding the intellectual property rights in conformity with the Act of 30 June 1994 on IPR. The Flemish legislation provides that if the information is subject to copyright, the authority is obliged to inform the requester of that element, so that he can respect the IPR.

[9] See http://www.ieb.be/Acces-aux-documents-administratifs-15866

Under Walloon law, access to information can be limited if that would adversely affect intellectual property rights (Article D 19 of the Walloon Environmental Code). No knowledge of relevant case law.

12)National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)

The legal and private persons whose legal interest are jeopardized by environmental data held by public authorities can request the authorities, whenever that information is incorrect or incomplete, to modify or supress it (see, for instance, Article D 20. 5 of the Walloon Code).

The Federal Act provides that when a third person has delivered an opinion or an advice to an environmental institution without being obliged to do so and on a confidential basis and has expressly claimed confidentiality, access to such information can be refused, except in case when his has agreed with the release. A similar ground for refusing access has been provided for in the Flemish legislation.

However, there is no appeal to the Regional and Federal Appeal Boards granted to the persons claiming that the divulgation of environmental information is likely to hinder their legal interests. The Flemish legislation provides that de Appeal Board consults such parties before taking a decision, while the federal legislation provides that these parties can be heard. They can however lodge an appeal for suspension and annulment with the Council of State as has been illustrated by the case concerning the financial provisions for the "nuclear passive" (provisions for future costs of dismantling and long term treatment and disposal of nuclear wastes). In that case the National Agency for Nuclear Waste lodged a demand for suspension and a demand for annulment of the decision of the Federal Appeal Board to release (partially) that information on demand of a green member of Parliament, after initial refusal by the Agency. The Council of State upheld the decision of the Board[10].

13)Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)

More specifically:

a. Confidentiality of commercial or industrial information

These exceptions have been set forth in very broad terms (see, for instance Article 11(2)(4)and (5) of the Brussels Act). Art. 4 (2) (d) of the Directive has been transposed in the Federal Act, however without reference to statistical confidentiality and tax secrecy and with the proviso that the exception cannot be invoked in case the person who delivered the information agrees with the access. The Flemish Act is similar on this point.

b. Confidentiality of the proceedings of public authorities / internal communications

In the Federal Act the exception is limited to the "deliberations" of the federal government and depending authorities. The exception is framed in a similar way in the Flemish

[1010] Council of State, n° 192.371, 14 April 2009, Nationale Instelling voor Radioactief Afval en de Verrijkte Splijtstoffen v. Belgian State and Federal Appeal Board for Access to Environmental Information; Council of State, n° 214.362, 30 June 2011, Nationale Instelling voor Radioactief Afval en de Verrijkte Splijtstoffen v. Belgian State and Federal Appeal Board for Access to Environmental Information.

legislation, regarding the Flemish Government and depending and local authorities. The exception regarding internal communications has not been implemented in the Federal and Flemish legislation.

The Walloon Board on Access to Environmental Information ruled that the non-compulsory opinion of an environmental adviser (eco-conseiller) regarding a building license request, was an official document pertaining to the administrative file. Given that it was not an internal document, the municipality was call on to release it to the party requesting it (29th of April 2004, request 401). Moreover, the grounds for refusal had to be interpreted narrowly. With respect to the latter case, the Board took the view that in accordance with the Walloon Act, the concept of administration encompasses "all public institutions granting an opinion that are falling within the scope of the regional competences".

In the Royal Heritage Commission case, the Walloon Board on Access to Environmental Information ruled that the confidentiality requirement applied only to its members and not to the Commission's opinion on an heritage protection proposal (25 April 2013, request 600).

c. *Approach to the disclosure of:*
   - *"raw data' (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)*
   - *"material in the course of completion" vs "unfinished documents" see AC Implementation Guide 2014 p 85*

In the Federal Act access can be refused to information that has not been completed or could lead to misunderstanding. Under the Flemish Act access to unfinished or uncompleted documents can be refused. Documents that as such are finished but that play a role in an unfinished procedure shall be made public according the jurisprudence of the Appeal Board[11].

The Walloon Board on Access to Environmental Information ruled that the opinion granted by the Regional Commission on Land planning regarding a governmental proposal aiming at modifying a regional land plan could not be considered neither as an unfinished environmental document nor as an internal document (25 March 2013, request 594).

By the same token, the Walloon Board on Access to Environmental Information ruled that a legislative proposal on land planning could not be considered as an unfinished environmental document even though the legislation was not yet enacted (18th February 2014, *Savary,* request 645).

d. *"Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11*

The Federal Board on Access to Information has been stressing the fact that the concept of environmental information is subject to a very broad interpretation. The fact that a swathe of illustrations has been given by the Federal lawmaker eschews a restrictive interpretation of that notion.

Accordingly, "decisions leading to measures and activities having an impact on the level of noise produce by airport activities on the neighborhood » have to be qualified as

[11] E.g. http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-17.pdf

environmental information (Federal Board on Access to environmental information, Decision n° 2014-9, 2 June 2014, *X/SERVICE DE MEDIATION POUR L'AEROPORT DE BRUXELLES-NATIONAL*, CFR2014/5).

The jurisprudence of the Flemish Appeal Board is similar[12].

e. International relations, public security, national defence (see T-301/10 Sophie t' Veldt)

The Regional Acts enshrined broad exceptions regarding foreign policy interests (see, for instance, Article D 18 of the Walloon Code; Article 11(2)(2) of the Brussels Act).

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f. Weighing of interests in every particular case (Art. 4 para 2 subpara 2 Dir 2003/4/EC

As far as the Walloon Board on Access to Environmental Information is concerned, it is settled case law that: 'the exceptions and limitations brought to the right to access to environmental information have to be interpreted restrictively taking into consideration the interest for the broad public of the claim and the obligation placed upon the authority to weigh in every particular case the public interest promoted by the access claim and the interest underlying the refusal to grant access' (see 25 March 2013, request 594).

The Federal Act and de Flemish Act expressly provides for a similar approach.

14) Judicial control of access-decisions

g. Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?

At federal and regional level, special administrative appeal boards for information sought from public authorities have been set up.

- Walloon Region: Commission de recours pour le droit d'accès à l'information en matière d'environnement[13]
- Flemish Region: Beroepsinstantie inzake de openbaarheid van bestuur en hergebruik van overheidsinformatir[14]
- Brussels Region: Commission d'accès aux documents administratifs
- Federal Region: Federeal Appeal Board for Access to Environmental Information[15]

At a second stage, the claimant has to lodge his appeal before the administrative jurisdiction, the Council of State. However, the real access to such a court remains a significant challenge (time consuming, costs, etc.). The egregious case brought before the Council of State and that

[12] http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-15.pdf; http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-90.pdf; http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/dossier%202008-176.pdf
[13] http://environnement.wallonie.be/aerw/dgrne/index.htm
[14] http://openbaarheid.vlaanderen.be/nlapps/docs/default.asp?fid=34
[1515] http://www.ibz.rrn.fgov.be/nl/commissies/toegang-tot-milieu-informatie/

was referred for preliminary rulings to the CJEU is *Housieaux*,[16] by coincidence a neighbour of Nicolas de Sadeleer. In that case the ECJ held:

"*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.*

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.

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"

Following this judgment, the Council of State has annulled the refusal to grand access to certain documents[17], more than 11 years after that refusal intervened !

h. *Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?*

Formally speaking, parties affected by decisions regarding access to information have the right of access to courts. There are no explicit provisions on "in camera" control by the appeal boards and the supreme administrative court.

i. *Effectiveness of review ? Enforcement of decisions ?*

The very informal, free of costs and diligent procedures before the Appeal Boards are resulting in, when the conclusion is reached that the refusal of access was wrongful, ordering the authorities to give access to the requested information. Those authorities should than deliver the information. In the Federal Act a period of maximum 40 or 45 days to obey to the appeal decision is provided for. If the authority is not obeying, the Commission itself can release the information when she has it at her disposal (that should often be the case because needed to judge the case). The Flemish legislation provides for a similar period to obey the decision. If not, a civil servant can be send to the authority concerned to execute the decision on its own motion. Such an execution is at the expenses of the person who is responsible (after having been warned). As have indicated, the success rate is quit high (between 30 and 50 %)

Further appeal to the Council of State for judicial review is very formal, costly and time consuming, although in recent times the backlog of cases is fading away and rulings are given somewhat faster. The Council of State can annul – and by way of interim relief suspend - the decision of an appeal board. On request the Council can specify the measures that should be taken to comply with its judgment. A new decision should than be taken by those boards, taken into consideration the judgment. The Council can also decide to compensate for damages, a daily penalty per day the ruling is not executed can be provided for. There have

[16] ECJ, 21 April 2005, Housieaux, Case C-186/04.

[17] Council of State, n° 161.407, 19 July 2006, Housieaux,

been very few cases before the Council of State, nearly all of them conforming the appeal board decisions.

15) How do states fulfil the duty to make information actively available?

There are explicit provisions on active providing of environmental information on the federal and the regional level. The Federal Act e.g. provides a long list of information that should be made public trough publication on the respective websites of the relevant authorities. In the Flemish legislation an environmental portal side is announced, but awaiting its realisation, each authority or agency should use its own website for publishing the information detailed in the legislation.

There have been a number of initiatives to make environmental information available in recent years, both at federal and regional level. Important websites include the following:

http://www.health.belgium.be/eportal/Environment/index.htm
http://www.health.belgium.be/aarhus
http://www.seveso.be/
http://www.fanc.be/page/homepage-federaal-agentschap-voor-nucleaire-controle-fanc/1.aspx
http://www.niras.be/

http://www.vmm.be
http://www.lne.be/
http://www.ovam.be/
http://emis.vito.be/

http://environnement.wallonie.be/

http://www.leefmilieu.brussels/

Given that environmental pollution ignores regional borders and the allocation of powers within Belgium, it is somewhat difficult to get a global picture of what 's at issue.