European Environmental Law Principles in Belgian Jurisprudence

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I. Introduction

A quick review of the Belgian environmental case law that is available to us[1] teaches us that in over 100 Belgian cases there is reference to one or more of the environmental principles that are enshrined in the EC-Treaty. The relatively intense use of these principles in recent Belgian jurisprudence may be explained by the fact that these principles are also incorporated in national law, both at the federal level[2] and at the Flemish regional level[3],[4]. Given the important number of cases where reference is made to these principles, it is impossible to give a complete overview of the case law. Therefore we will restrict ourselves to the most leading cases for each of the relevant principles. We have chosen to quote the relevant paragraphs of these judgments after a brief introduction.

Our attention will go in the first place to the Polluter-Pays Principle (II), the Precautionary Principle (III), and the Prevention at Source Principle (IV). Although they aren't mentioned as such in the EC-Treaty, we thought it might be of interest also to discuss the constitutional right of the protection of a healthy environment (art. 23 of the Belgian Constitution) and of privacy (art. 22 Belgian Constitution) as well as the Stand Still Principle, an environmental law principle of a general nature in the Flemish region that is often invoked in conjunction with these constitutional rights (V).

After having reviewed these leading cases, we will try to formulate some conclusions (VI).

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[1] Only the case law of the highest courts is systematically reported. The case law of lower courts and tribunals is reported only fragmentarily. The archives of the *Tijdschrift voor Milieurecht* (Flemish Environmental Law Review) and the *Databank Milieurechtspraak* (http://allserv.rug.ac.be/~pbrewee/cgi-bin/dmr.cgi), however, contain a rich collection of over more than 9,000 environmental law cases. We are currently working with the Environmental Law Centre of Ghent University on an entirely new database containing all environmental jurisprudence of the Dutch-speaking part of Belgium in full text. We hope to have this database available on the Internet within a few months.

[2] Act of 20 January 1999 for the protection of the marine environment in the marine areas that come under the jurisdiction of Belgium, *Moniteur belge*, 12 March 1999.

[3] Article 1.2.1., § 2 of the Flemish Decree of 5 April 1995 laying down general provisions of environmental policy, *Moniteur belge*, 3 June 1995 (several times amended).

[4] See on this issue: N. DE SADELEER, "The Enforcement of the Precautionary Principle by German, French and Belgian Courts", *RECIEL*, 9(2) 2000, 149-150; *Environmental principles: from political slogans to legal rules*, Oxford University Press, 2002, p. 32, 71, 135-136, 330-331, 332-333, 393-394; L. LAVRYSEN, "The Precautionary Principle in Belgian jurisprudence: unknown, unloved?", *European Environmental Law Review*, 1998, 75-76; I. LARMUSEAU, "The Precautionary Principle in Belgian Jurisprudence: So many Men, So many Minds?" in M. SHERIDAN/L. LAVRYSEN (eds.), *Environmental Law Principles in Practice*, Bruylant, Brussels, 2002, 173-179; I. LARMUSEAU, "Beginselen van milieubeleid", in L. LAVRYSEN (ed.), *Milieurechtspraak*, Kluwer uitgevers, Mechelen, 2002, 281-326.

II. The Polluter Pays Principle

This principle is mainly[5] invoked before the Court of Arbitration (the Belgian Constitutional Court) in cases where taxpayers demand the annulment of a particular environmental tax on the grounds of violation of the constitutional principle of equality and non-discrimination (articles 10 and 11 of the Belgian Constitution) in conjunction with the Polluter Pays Principle[6]. We found over 30 judgments where this was the case. A selection of the most striking ones is given below.

COURT OF ARBITRATION, NO. 59/92, 8 OCTOBER 1992

In the case of *the action for annulment of Article 35c, §1 of the Act of 26 March 1971 on the protection of the surface waters against pollution, as inserted by Article 69 of the Decree of the Flemish Council of 21 December 1990 establishing budgetary provisions as well as provisions accompanying the 1991 budget, instituted by the company Primeur.*

The Court of Arbitration,

Composed of the presiding judges J. Delva and J. Wathelet, and the judges F. Debaedts, L. De Grève, H. Boel, L. François and P. Martens, assisted by the clerk of the court, L. Potoms, and presided over by J. Delva, president,

Has delivered the following judgment after careful consideration:

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* *

I. Subject of the action for annulment

By a petition of 26 June 1991, mailed on 27 June 1991 and received at the court registry on 28 June 1991, the company Primeur, with registered office at Sint-Eloois-Vijve, instituted an action for annulment of Article 35c, §1 of the Act of 26 March 1971 on the protection of the surface waters against pollution, as inserted by Article 69 of the Decree of the Flemish Council of 21 December 1990 establishing budgetary provisions as well as provisions accompanying the 1991 budget, for being contrary to Articles 6 and 6b of the Constitution.

[…]

Regarding the scope of the action

B.1.1. In the enacting terms of its petition, the appellant requests the Court "to annul Article 35c, §1 of the Act of 26 March 1971, inserted by the Decree of 21 December 1990 for being contrary to Articles 6 and 6b of the Constitution".

B.1.2. The aforementioned Article 35c, §1 contains the general formula (H = N x T) for determining the amount of the tax which the individual taxpayers referred to in Article 35b are liable to pay. According to Article 35c, §1, factor "N" (the pollution burden of the wastewater expressed in pollution units) is "determined according to the calculation method indicated in the present article". Article 35c, however, contains no calculation method. By "the present article" is apparently meant Article 69 of the Decree of 21 December 1990 - which inserts Articles 35b to 35n into the Act of 26 March 1971. The different calculation methods have been laid down in Articles 35d (and annex 2), 35e (and annexes 1 and 2), 35f and 35h.

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[5] We also found eight judgments of the Council of State were the polluter pays principle was invoked by de parties, but eventually the Council made no use of the principle in its final judgments, except in cases of local environmental taxes (See: Council of State, N° 107.317, 4 June 2002-).

[6] N. DE SADELEER, *Environmental Principles*, *o.c.* 333.

B.1.3. The appellant operates a company as referred to in Article 35b, §1, 2° - a so-called surface water discharger - which in the year preceding the tax year was connected to a public water distribution network, of which the water consumption on the basis of the consumption invoiced by the public water distribution company for the year preceding the tax year exceeded 500 m³, and which had its own or additional water supply with a pumping capacity of more than 5 m³ per hour. It therefore falls within the scope of Article 35d, §1, 2°, and annex 2, possibly of Article 35e and annexes 1 and 2.

In its argument (A.2.1), the appellant complains about a discriminatory treatment of these surface water dischargers in relation to sewer dischargers (Article 35b, §1, 1°) and about a discriminatory treatment of some surface water dischargers in relation to other surface water dischargers.

B.1.4. It appears from the substance of the petition that the action for annulment is directed at Articles 35b, §1, 2°; 35c, §1; 35d, §1, 2°, (and annex 2) and 35e (and annexes 1 and 2) of the Act of 26 March 1971 on the protection of the surface waters, as inserted by Article 69 of the Decree of 12 December 1990.

[…]

Regarding the alleged discrimination within the category of firms discharging into the surface waters

B.4.1. The appellant contends that the challenged tax regime institutes a discrimination between firms discharging into the surface waters, since they are taxed in 1991 on discharges carried out in 1990, without having been given the opportunity to deduct the environmental investments borne in that year. Consequently, the incentive function of the tax (A.2.1) has been disregarded. Furthermore, the sectorially established remediation coefficients contained in annex 2 in themselves already institute an unequal treatment between certain categories of firms discharging into the surface waters (A.2.2.2.4).

B.4.2. The constitutional rules of the equality of all Belgians before the law and of non-discrimination do not rule out that a difference in treatment between certain categories of persons may be instituted, provided that there is an objective and reasonable justification for the criterion of distinction. Those same rules oppose the fact that categories of persons who are in an entirely different situation with regard to the challenged measure are treated identically without any objective and reasonable justification.

The existence of such a justification should be assessed, taking into account the objective and the consequences of the challenged measure and the nature of the principles at issue; the principle of equality has been violated if it has been established that no reasonable relationship of proportionality exists between the means and the objective.

Regarding the insufficiently incentive nature of the tax

B.4.3. The appellant is of the opinion that, by imposing a tax for the year 1991 that is calculated on the basis of the water pollution caused in 1990 and by not allowing the investments made in 1990 or in 1991 to limit this pollution to be deducted for the purposes of this tax, the challenged provisions institute a difference in treatment between firms that make such investments and firms that do not. This difference in treatment is thought not be in proportion to the incentive function of which the primary nature is confirmed by the Recommendation of the Council of the European Communities 75/436/EURATOM, EEC, ECSC, of 3 March 1975 (A.2.1.b and A.2.3.2.2).

What the appellant actually criticizes in the challenged provisions is that they treat all firms that discharge into the surface waters in the same way regardless of whether or not they carry out such investments.

*B.4.4. According to the parliamentary preparation of the challenged provisions, the environmental tax on water pollution is intended not only as a means to entirely or partially pay for the collective measures to combat pollution, but especially as a policy instrument to incite polluters to limit the pollution they cause at source. As from 1991, the challenged tax regime will apply the "polluter pays" principle in a more refined way, as established in the above-mentioned Council Recommendation (*Gedr. St., *Flemish Council, 1990-1991, Document 424/1, p. 9-10, Document 424/7, p. 4-5).*

The legislator had a twofold objective in mind when introducing the tax. While the aforementioned financing objective comes first for the firms that discharge into the public sewers, the main objective as far as the firms are

concerned that discharge into the surface waters is to cause as little pollution as possible. This distinction explains the differences between the two categories of taxpayers as to the calculation of the tax. The formula for this calculation contains an element "a", which is equal to 0.20 of

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for the firms that discharge into the public sewers, whereas it is 0 for the firms that discharge into the surface waters (Article 35d, §1, 2°). The different k-coefficients that appear in the same formula are 1 for the firms that discharge into the sewers and less than 1 for various categories of firms that discharge into the surface waters (Article 35d, §1, in fine*, and Annex 2).*

B.4.5. The aforementioned Council Recommendation provides:

"Recommends, within the meaning of the EEC Treaty, that the Member States, with regard to cost allocation and action by public authorities on environmental matters, comply with the application principles and the implementing provisions as set out in the Commission Communication which is attached to this Recommendation." In the "Communication of the Commission to the Council regarding cost allocation and action by public authorities on environmental matters: Application principles; implementing provisions", it is stipulated under 4.b), "The tax is intended to incite the polluter to take the necessary measures at the lowest cost in order to reduce the pollution it causes (incentive function) and/or *to let him bear his share of the costs of collective measures, such as the treatment costs (redistributing function). The tax shall be withheld according to an effective procedure by the public authorities according to the degree of the pollution caused.*

The tax must be set in such a way that priority is given to the incentive function (…)."

Under 4.c) it is stipulated,

"In order to prevent unfair competition that impairs trade and location of investments in the Community, it will undoubtedly be necessary to arrive at ever greater harmonization at Community level of the various instruments that are applied in similar cases.

As long as this has not happened, the issue of the allocation of costs for combating pollution will not be fully settled at the Community level. The present communication of the Commission is therefore only a first step towards the application of the 'polluter pays' principle. This first step should be followed as soon as possible by a harmonization within the Community of the instruments for the application of this principle when they are used is similar cases, which is also set out in the third indent of paragraph 8 of this document."

B.4.6. By referring to a recommendation that has been worded in this way, the legislator definitely expressed the intention of taxing the discharges into the surface waters in such a way that they incite those firms to pollute as little as possible, but was not obliged to follow one particular method rather than another with a view to this. By introducing an important tax and by making the amount of the tax dependent not on the investments carried out during the tax year or the preceding year, but solely on the pollution actually caused in the preceding year, the legislator has adopted a measure that is in proportion to the objective that it has set itself.

Regarding the coefficients k1, k2 and k3

B.4.7. The appellant also adduces that the remediation coefficients k1, k2 and k3 established in Annex 2 of the challenged decree in themselves institute an unequal treatment between the surface water dischargers (A.2.2.2.4).

B.4.8. During the parliamentary preparation, those coefficients were explained as follows:

"As set out in the explanatory memorandum, a remediation period which in principle may last until 1995 at the latest will be allowed for industrial discharges into surface waters that are governed by less stringent discharge regulations and which the proposed draft decree will subject for the first time to an environmental tax according to the volume of waste discharged into the surface waters.

During this remediation period, the volume of waste actually discharged will only be partly taken into consideration for the industrial sectors targeted by the decree.

*In short, it may be said that the new regulation safeguards the guarantee of achieving by 1995 the planned 50 to 70 percent reduction in nutrients and dangerous substances in relation to the reference year 1985." (*Gedr. St., *Flemish Council, 1990-1991, Document 424/7, p. 7).*

*"The value of the k-coefficient used here must be set each year by the Flemish Council, since it is the Council that has to determine the tax base. It will be considered sector by sector how the value k=1 will be attained by 1995. The gradual development of the k-coefficient will therefore differ from sector to sector." (*Idem, *p. 17).*

"Each of the aforementioned subparts will be multiplied by a coefficient that may be smaller than 1 for certain surface water discharges. In pursuance of Article 45 of the aforementioned Act of 26 March 1971, the national authority that was competent in this area until 1 January 1989 issued sectorial discharge conditions for 55 categories of industries. Several of these sectorial discharge conditions stipulate for certain pollution parameters less stringent standards than those imposed in the general discharge regulations currently in force.

From the point of view of the environment, and in the light of the water quality policy set out in the MINA (Environmental Policy) plan 1990-1995, however, it is advisable that in practice these less stringent discharge regulations are applied as little as possible.

*To this end, the firms which discharge into the surface waters and fall within the scope of these sectorial conditions should be given maximum incentive to use the best available clean technologies. Since so far these surface water dischargers were not liable to pay any contribution or tax in direct proportion to the degree of pollution of the discharged wastewater, the water pollution tax which the present decree aims to introduce is an important new economic element for the industries concerned. It is therefore fair that these firms should be given a chance to implement the technical measures necessary to substantially reduce the larger volume of pollutant discharges permitted in accordance with the sectorial discharge conditions in force. It is therefore suggested that each of the subparts be multiplied by a factor that is to a greater or lesser extent lower than 1 according to whether the sectorial standard for the parameter(s) in question deviates to a greater or lesser extent from the general discharge standards. Taking into account the objective of attaining by 1995 the surface water quality standards laid down by a Executive Order of the Flemish Executive of 21 October 1987, it should be assumed that the factors k1, k2 and k3 shall in any case as from 1995 at the latest be set at 1 in all cases and for all industrial sectors." (*Idem, *p. 18)*

B.4.9. With those coefficients, a lower tax is introduced for surface water dischargers who previously were not liable for the tax. Those coefficients have been determined in accordance with the sectorial discharge conditions. A reduction is allowed provided that those discharge conditions deviate more flexibly from the general discharge conditions. The coefficients are temporary, and the legislator has expressed the intention of setting them all at 1 with effect from 1 January 1995.

*B.4.10. The Court observes that when those coefficients were determined, fifty-five sectorial discharge conditions were provided for, some of which are stricter and others less strict than the general discharge conditions. They were more favourable, not only for the sectors that are mentioned in Annex 2 to the challenged decree, but also for the sector to which the appellant belongs. For this sector, the Royal Decree of 2 October 1985 establishing the sectorial conditions for the discharge of wastewater from the potato processing industry into the surface waters and into the public sewers (*Belgisch Staatsblad, *4 December 1985) applies. This Royal Decree contains supplementary (Article 2) and deviating (Article 3) conditions for the discharge by this sector of wastewater other than ordinary domestic wastewater into the surface waters: the BOD of the discharged water must not exceed 60 milligrams per litre (Article 3, 1°), whereas according to the general discharge regulations (Royal Decree of 3 August 1976 establishing general regulations for the discharge of wastewater into the surface waters, into the public sewers and into the artificial rainwater drainage systems,* Belgisch Staatsblad, *29 September 1976, err.* Belgisch Staatsblad, *11 November 1976) this may only be 30 or 15 milligrams per litre according to the kind of surface water concerned (Article 7, 3°, a) and b)).*

The level of depositable substances in the discharged water must not exceed 1.5 millilitres per litre, whereas according to the general discharge regulations this may only be 0.5 millilitres (Article 7, 5°, a).

Thus the King made use of what is provided for in Article 9, §4 of the general discharge regulations, according to which sectorial discharge conditions "(may deviate) in a less strict sense if it turns out that no purification process available on the market makes it possible to meet the general conditions for the sector or subsector concerned".

B.4.11. The Court also observes that Annex 2 to the challenged decree does not contain equivalent remediation coefficients for all sectors that benefit from less stringent discharge conditions. Annex 2 contains a list of only 27 sectors that benefit from lower remediation coefficients. The sector to which the appellant belongs comes under heading 29, "activities not mentioned above", of which the coefficients k1, k2 and k3 have been set at 1. The appellant therefore does not qualify for a reduction, although the sectorial discharge conditions provide for less stringent discharge conditions for the reasons stated above.

B.4.12. The legislator is authorised to allow reductions, where appropriate, taking into account the wish to provide for a transitional arrangement and the observation that less stringent sectorial discharge conditions have been laid down for certain sectors, taking into consideration the developments in wastewater treatment technology.

However, where the legislator uses those criteria, he is obliged to apply those criteria equally to all sectors that are in an equivalent situation in regard to the measure under review and the objective aimed at. By allowing certain sectors to benefit from those remediation coefficients and excluding others, without any justification being offered or emerging from the answers to the questions put by the Court, the legislator introduced a distinction that is contrary to Articles 6 and 6b of the Constitution.

For those reasons,

The Court

Annuls the words "29 / activities not referred to above / 1 / 1 / 1 /" in Annex 2 to the Act of 26 March 1971 on the protection of the surface waters against pollution, as inserted by Article 69, §2 of the Decree of the Flemish Community of 21 December 1990 establishing budgetary provisions as well as provisions accompanying the 1991 budget, insofar as they are applicable to activities that were covered by sectorial discharge conditions that deviate in a less strict sense from the general conditions, in accordance with the Royal Decree of 3 August 1976 establishing general regulations for the discharge of wastewater into the surface waters, into the public sewers and into the artificial rainwater drainage systems.

COURT OF ARBITRATION, NO. 41/93, 3 JUNE 1993

In the case of *the action for annulment of Articles 3, 4 and 5 of the Decree of the Walloon Region of 25 July 1991 on the taxation of waste in the Walloon Region, instituted by A.M. Begaux-Lateur and co-appellants.*

The Court of Arbitration,

Composed of the presiding judges F. Debaedts and M. Melchior, and the judges L. De Grève, L.P. Suetens, L. François, P. Martens and J. Delruelle, assisted by the clerk of the court, H. Van der Zwalmen, and presided over by M. Melchior, president,

Has delivered the following judgment after careful consideration:

I. Subject of the action for annulment

By a petition of 19 May 1992, addressed to the Court by registered letter on the same day and received at the court registry on 20 May 1992, Anne-Marie Begaux-Lateur, actor, residing at 15 Rue de la Chistrée, 5190 Spy; Martine Dardenne, senator, residing at 2 Rue de la Jussière, 5670 Vierves-sur-Viroin; Catherine Maas, tax consultant, residing at 152 Rue de Rotheux, 4100 Seraing; Anne-Marie Schoffers-Braun, housewife, residing at 11 Heidkopf, 4720 Kelmis; Pascale Toussaint, clerk, residing at 12 Rue Froidbise, 5300 Coutisse; Viviane Watteau, nurse, residing at 34 Trou Chenevrau, 6880 Auby-sur-Semois, and the non-profit association "Die Raupe", with

registered office at 29 Pavestrasse, 4700 Eupen, demand the annulment of Articles 3, 4 and 5 of the Decree of the Walloon Region of 25 July 1991 on the taxation of waste in the Walloon Region, published in the Belgisch Staatsblad *of 20 November 1991.*

[…]

B.3.1. The challenged decree of 25 July 1991 institutes a waste tax, of which the regime differs according to the type of waste. On non-domestic waste, a proportional tax of 5,000 francs per ton is charged. Domestic waste is taxed on a flat-rate basis according to the rules that have been fixed in the following three challenged provisions:

"Art. 3. A tax on domestic waste shall be levied on account of the fact that waste is generated as a result of the temporary or permanent occupation of a building that is used as private dwelling and is situated in the Walloon Region.

Art. 4. The owner, the occupier, the leaseholder, the holder of building and planting rights, the usufructuary, the holder of a right of use or occupation and the tenant of all or part of a building that is used as private dwelling and is situated in the Walloon Region shall be jointly and severally liable for the tax on domestic waste.

Art. 5 §1. The amount of the tax on domestic waste shall be fixed at 1,000 francs per building or part of a building that is used as private dwelling.

§2. Notwithstanding any proof to the contrary, the persons who have their residence at that address according to their registration in the municipal population register shall be deemed to occupy a private dwelling.

§3. Notwithstanding §1, the amount of the tax shall be fixed at:
1° 300 francs if the private dwelling is occupied by one person;
2° 600 francs if the private dwelling is occupied by two persons;
3° 900 francs if the private dwelling is occupied by three persons."

B.3.2. The legislation section of the Council of State had raised objections to the flat-rate tax because, although Article 3 cites the generation of waste as the circumstance giving rise to the tax, Articles 4 and 5 rather assume that the tax is levied on the occupation of a property as a dwelling place, without the quantity of waste being generated, the type of waste and the method of disposal being taken into account, unlike in the rules that apply for non-domestic waste. The Council of State concluded in its opinion that such a regime cannot be allowed since it does not comply with the principles of community law on waste, is not in keeping with the "polluter pays" principle since the dissuasive aspect of the tax is lacking, and is contrary to the equality principle insofar as, according to that principle, dissimilar situations should be treated distinctly (Opinion L. 20.364/9 of 18 January 1991, Gedr. St., *C.R.W., 1990-1991, no. 253-1, annex 1, pp. 21-23).*

B.3.3. The authors of the challenged decree replied to the objections of the Council of State in the explanatory memorandum of the decree. In order to justify the difference in treatment between domestic and non-domestic waste, they first adduced that it is easy to identify domestic waste and difficult, even impossible, to identify non-domestic waste, but that it is easy to identify the sites where industrial waste is dumped. The distinction is said to be justified by a requirement of efficiency. The authors also pointed out that a proportional regime would be discriminatory for Walloon households: as the Region cannot levy a tax on the importation of waste, only Walloon households would indirectly bear the cost of the disposal of all - Walloon or other - waste that is on the territory of Wallonia. They stressed that a proportional tax would undo the efforts that have been made in Brussels and in Flanders to implement an active recycling policy, since waste disposal in Wallonia would become less expensive. The authors referred to the great number of polluters and the small quantity of domestic waste that is produced by each polluter, so that a close correlation between the volume of waste produced and the tax levied was virtually impossible.

*The authors cited the impossibility of letting households make the investments that are necessary to combat pollution, while the tax would enable the government to provide the necessary resources to fund all those investments. The authors gave a detailed explanation of the measures that were decided, namely the reimbursements to the municipalities according to their policy on prevention, awareness, selective domestic waste collection and recycling. Finally, in their commentary on Article 5 they stressed that at this moment it seemed neither possible nor financially feasible to determine the exact volume of pollution generated by each individual household (*Gedr. St., *C.R.W., 1990-1991, no. 253-1, pp. 4-6).*

B.3.4. Where a waste tax is inspired by the "polluter pays" principle, it will only comply with the non-discrimination principle if it is levied on the polluters and if it takes into account the degree in which each taxpayer contributes to the pollution against which the tax is directed. In accordance with this principle, the legislator has introduced a tax which for non-domestic waste is determined according to the volume of waste produced by each taxpayer. On the other hand, as far as domestic waste is concerned, the legislator concluded that at this moment it is impossible to institute a proportional tax for the reasons that have been summed up in B.3.3.

B.3.5. By taxing households, the legislator reaches the polluters who produce domestic waste. By setting the tax at an amount that does not vary according to the volume of waste produced by each household but according to the number of persons constituting the household, the legislator started from the assumption that the volume of waste produced differs according to the number of persons. It thus opted for a tax regime that, in theory, is based on an application of the "polluter pays" principle, although in fact it does not fully attain this objective. It justified this choice by contending that the introduction of a proportional tax met with practical difficulties which it considered insurmountable.

B.3.6. The flat-rate taxation method introduced by the legislator does not have the dissuasive or incentive effect of a proportional tax because it does not take into account the efforts which each household makes to limit its waste production. However, it is up to the legislator, mindful of the requirements of which the Council of State had reminded him, to decide whether it was possible to introduce a proportional tax on domestic waste comparable to that levied on non-domestic waste.

B.3.7. The Court does not have the same kind of freedom of judgment that democratically elected assemblies have. It would put itself in the place of the legislator if it were to pronounce itself on the validity of the considerations that are formulated in the explanatory memorandum of the challenged decree with regard to the costs that a proportional tax would entail, the technical difficulties of organizing such a tax, the doubts that may be entertained about its effectiveness, and the "adverse consequences" it might have. Within the limits of its review, however, the Court observes that those considerations are not based on an apparently unreasonable assessment.

B.3.8. By taxing all households at the same rate and by letting the amount of the tax vary according to the number of persons making up a household, the legislator treats persons in different situations in the same way, and adjusts the tax using a criterion that, for practical reasons, represents the real situation only approximately and in a simplified way. The practical reasons why the legislator refrained from introducing a proportional tax which would have made better allowance for the differences between taxpayers and the reimbursement to the municipalities and associations of municipalities of all or part of the tax, as allowed by Article 35, in order to stimulate their initiatives for waste disposal and recycling show, however, that the challenged measure, even if it is not perfectly adequate in regard to the objective pursued, is still sufficiently in keeping with it.

For those reasons,

The Court

Dismisses the action.

COURT OF ARBITRATION, NO. 79/93, 9 NOVEMBER 1993

In the case of *the actions for annulment of Article 44 of the Decree of the Flemish Council of 25 June 1992 establishing miscellaneous provisions accompanying the 1992 budget and of Article 21, 1° of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget, instituted by the company Electrabel.*

The Court of Arbitration,

Composed of the presiding judges L. De Grève and M. Melchior, and the judges L.P. Suetens, H. Boel, L. François, P. Martens and G. De Baets, assisted by the clerk of the court, L. Potoms, and presided over by L. De Grève, president,

Has delivered the following judgment after careful consideration:

I. Subject of the actions for annulment

*By a petition of 8 January 1993, addressed to the Court by registered letter on the same day and received at the court registry on 11 January 1993, the company Electrabel, with registered office at 8 Regentlaan, 1000 Brussels, represented by its Board of Directors, demands the annulment of Article 44 of the Decree of the Flemish Council of 25 June 1992 establishing miscellaneous provisions accompanying the 1992 budget (*Belgisch Staatsblad *of 17 July 1992), insofar as the challenged provision replaces Section IIIb of the Act of 26 March 1971 on the protection of the surface waters against pollution, inserted by the Decree of 21 December 1990, by Articles 35b up to and including 35g, and insofar as these provisions relate to the discharge of cooling water. This case is registered under cause list number 511.*

*By a petition of 27 January 1993, addressed to the Court by registered letter on the same day and received at the court registry on 28 January 1993, the company Electrabel, aforesaid, demands the annulment of Article 21, 1° of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget (*Belgisch Staatsblad *of 29 December 1992), insofar as this provision relates to the discharge of cooling water. This case is registered under cause list number 519.*

[…]

The merits

Regarding the alleged violation of the rules determining powers

[…]

Regarding the alleged violation of the principles of equality, non-discrimination and Article 112 of the Constitution

B.4. The appellant criticizes the challenged provisions first of all for introducing an environmental tax without any technical or ecological justification, chargeable to dischargers of cooling water as well as dischargers of wastewater, for determining the calculation of the tax on the discharge of cooling water in a discriminatory way in comparison with the tax on the discharge of wastewater, and for introducing a tax which, as a result of this calculation method, is not in keeping with the function that is ascribed to it, namely to encourage industries and individuals to pollute less.

[…]

B.6. Contrary to what the first of the three contentions mentioned under B.4 suggests, which by the way contradicts the second contention, the fact that a tax is levied on two similar activities, of which the amount as well as the calculation method differ for the two activities, does not constitute an equal treatment that can be criticized in regard to Articles 6 and 6b of the Constitution.

The first part of the argument is inadmissible.

B.7.1. In the second part of the argument, the appellant regards as discriminatory the fact that the flat-rate calculation that is prescribed for the cooling water, unlike the calculation method for the wastewater, does not take into account the actual volume of waste in the discharged water and, more particularly, does not take into account the difference in temperature between the surface water that is drawn and that which is discharged, so that Article 35f, which determines the calculation method for the volume of waste in the used surface water that may be deducted in the event that the wastewater derives wholly or partially from the use of surface water, cannot be applied.

B.7.2. The challenged measures are aimed, on the one hand, at discouraging the discharge of cooling water on account of the adverse ecological effects of the thermal and chemical pollution on the receiving surface waters, and on the other hand at the financing and division of the costs resulting from the pollution according to the "polluter pays" principle.

Where a tax is inspired by the "polluter pays" principle, it will only comply with the non-discrimination principle if it is levied on the polluters and if it takes into account the degree in which each taxpayer contributes to the pollution against which the tax is directed. In accordance with this principle, the legislator has introduced a tax which for the discharge of cooling water is determined according to the volume of cooling water produced by each taxpayer.

The term Nk in the tax base for charging the tax on the discharge of cooling water is exclusively a function of the volume of cooling water being discharged. Two reduction factors are taken into consideration in the calculation of this term (a and 0.0004), which make allowance for the fact that cooling water is a special kind of wastewater.

In judging the flat-rate basis of a tax, the Court needs to examine whether the legislator did not exceed its power of judgment, bearing in mind, on the one hand, that a tax law necessarily needs to assign a diversity of situations to categories which correspond only approximately and in a simplifying manner to the real situation, and on the other hand the difficulties that accompany the calculation of a tax in terms of the effectiveness of the criteria as well as the administrative and infrastructural costs for the taxpayer and the collecting authority.

By fixing the tax base and the rate of the tax on the discharge of cooling water on a flat-rate basis until a less approximate calculation method can be worked out, the legislator was mindful of the technical difficulties and the costs that would accompany a system in which the real environmental impact of the cooling water discharges can be measured precisely in terms of oxygen level, flow intensity and difference in temperature between the water that is drawn and that which is discharged. Apart from the uniform reduction factors (a and 0.0004) which are not disputed, the calculation of the tax is not on a flat-rate basis insofar as it is in proportion to the discharged volume, an element which is easy to measure and of which the relevance is beyond dispute. Consequently, there is no obvious disproportionality between the challenged measure and the objectives of the legislator.

The impossibility of deducting the volume of waste in the used surface water in the event that the wastewater derives wholly or partially from the use of surface water is inextricably linked to the choice made by the legislator in favour of a flat-rate base for charging the tax on the discharge of cooling water.

The second part of the argument is inadmissible.

B.8. In the third part of its argument, the appellant criticizes the incentive function of the tax introduced by the challenged provisions by referring to the adverse financial and economic consequences and environmental effects, more particularly on the climate, of the use of air cooling processes.

With the introduction of this tax and the determination of its base, the legislator opted to discourage the discharge of cooling water into the surface waters and to promote a reduction in the volume of discharged cooling water. Apart from the fact that it is not certain whether the drawbacks of other cooling techniques are as great as those of discharging into the surface waters, it is up to the legislator to indicate which types of pollution need most to be prevented and how heavy the charges are to be that need to be imposed to this end.

The third part of the argument is inadmissible.

For those reasons,

The Court

Dismisses the actions.

COURT OF ARBITRATION, NO. 39/94, 19 MAY 1994

In the case of *the action for partial annulment of Article 22 of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget, instituted by the company Primeur.*

The Court of Arbitration,

Composed of the presiding judges L. De Grève and M. Melchior, and the judges K. Blanckaert, H. Boel, Y. de Wasseige, G. De Baets and E. Cerexhe, assisted by the clerk of the court, H. Van der Zwalmen, and presided over by L. De Grève, president.

Has delivered the following judgment after careful consideration:

I. Subject of the action for annulment

By a petition addressed to the Court by registered letter on 28 June 1993 and received at the court registry on 29 June 1993, the company Primeur, with registered office at Sint-Eloois-Vijve, 221 Schoendalestraat, instituted an action for the annulment of the figures "0.82/1/1" and "0.96/1/1" relating to the sector "30/ Potato-processing industry" in Annex A to the Decree of 25 June 1992 establishing miscellaneous provisions accompanying the 1992 budget as well as in Annex B to the Act of 26 March 1971 on the protection of the surface waters against pollution, as inserted by Article 22 of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget.

[…]

The merits

B.4.1. Paragraph 1 of the challenged Article 22 of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget replaces, with effect from 1 January 1992, Annex 2 to the Decree of 25 June 1992 establishing miscellaneous provisions accompanying the 1992 budget by Annex A to the Decree first mentioned.

The appellant demands the annulment of the figures "0.82/1/1" that are cited in the above-mentioned Annex A for the sector "30/ Potato-processing industry".

B.4.2. Paragraph 2 of the challenged Article 22 of the Decree of the Flemish Council of 18 December 1992 establishing provisions accompanying the 1993 budget replaces, with effect from 1 January 1993, Annex 2 to the Act of 26 March 1971 on the protection of the surface waters against pollution, amended by the aforementioned Decree of 25 June 1992, by Annex B to the Decree first mentioned.

The appellant demands the annulment of the figures "0.94/1/1" that are cited in the above-mentioned Annex B for the sector "30/ Potato-processing industry".

B.4.3. The only argument that is adduced is the violation of Articles 10 and 11 of the Constitution (former Articles 6 and 6b). The appellant complains that for other sectors in circumstances similar to those of the potato-processing industry the Decree establishes relatively more favourable remediation coefficients or without any justification provides for a prolonged allocation of favourable coefficients.

B.5. The constitutional rules of equality and non-discrimination do not rule out the establishment of a difference in treatment between categories of persons, insofar as this difference is based on an objective criterion and is reasonably justified.

The existence of such a justification must be assessed in the light of the objective and the effects of the challenged measure and of the nature of the relevant principles. The principle of equality has been violated if it is certain that the means employed are out of proportion to the intended purpose.

B.6.1. The environmental tax on water pollution is aimed, on the one hand, at limiting water pollution and, on the other hand, at financing and dividing the cost of pollution according to the "polluter pays" principle.

B.6.2. For certain categories of industries for which sectorial discharge conditions had been established which deviated in their favour from the general discharge standards, the Decree, as a transitional measure, fixed the so-called remediation coefficients - k1, k2 and k3 - which bring about a reduction in the tax insofar as these coefficients are less than 1.

B.6.3. It is for the legislator to establish the transitional measures of the regulations which it has adopted and, in this respect, to provide for reductions that take into account the observation that less stringent sectorial discharge conditions have been laid down for certain sectors according to the developments in wastewater treatment technology.

Thus the legislator must, however, apply the criteria it has adopted equally to all sectors that are in an equivalent situation with regard to the measure under review and the intended purpose.

B.6.4. It appears from the parliamentary preparation of the challenged decree that, for the activities which from the outset had been listed in Annex 2 to the Act of 26 March 1971 as well as those which have been added by the challenged provision, account has been taken of the deviation that exists between the sectorial discharge conditions of the activities concerned and the general discharge standards in the determination of the remediation coefficients (the so-called k-value) (see Gedr. St.*, Flemish Council, B.Z. 1992, no. 235/6, p. 4). This deviation is the result of a fraction, where the numerator represents the volume of waste authorized by the general conditions and the denominator represents the volume of waste authorized by the sectorial standard. Consequently, the greater the difference between the sectorial standard and the general standard, the smaller the fraction and, consequently, the smaller the remediation coefficient. This working method is in keeping with the aim of the legislator to allow sectors which benefited from a differing regulation before the introduction of the tax a transitional period in which to take the technical measures necessary to reduce the authorized higher discharge levels.*

Also in accordance with this objective, and more particularly the wish to phase out the transitional period by 1995, a gradual increase in the coefficients is planned. As an objective criterion, the Decree has set, for the original as well as for the subsequently added sectors of Annex 2 to the Act of 26 March 1971, an annual increase by two-fifths of the difference between the originally determined k-value and the value 1.

The appellant does not dispute that the ratio between the sectorial and the general discharge standards is an objective criterion that is relevant for the aforementioned objective, nor does it argue that the principle whereby a greater deviation from the general discharge standards gives rise to a lower remediation coefficient has been disregarded for the sector to which it belongs.

The fact that the remediation coefficients show significant differences is due to the application of the proposed criteria to the various sectors. As such, those criteria therefore do not violate Articles 10 and 11 of the Constitution (former Articles 6 and 6b).

B.6.5. If for certain activities the legislator departed from the very principles which it had set forth, it did so because it was of the opinion that certain circumstances and situations justified such deviations.

In this connection, it does not emerge from the examination of the case that the legislator had been led by considerations that are based on such an obviously unreasonable assessment that it should have to be censured by the Court.

The sole argument is invalid.

For those reasons,

The Court

Dismisses the action

III. The Precautionary Principle

In 1998 I could write, without violating the truth, that this principle wasn't known in Belgian jurisprudence, although one could find a hidden precautionary approach in some judgments[7]. Things have dramatically changed since then. Nowadays it is the most popular principle in environmental jurisprudence and a lot of comments are published on the subject[8]. The precautionary principle is particularly prevalent in the abundant jurisprudence on mobile phone masts[9]. But in other issues, too, the principle is invoked. A selection of the most important judgments is given below.

COUNCIL OF STATE - N° 82.130 of 20 August 1999

A.84.946/XIII-1202

Between: *VENTER Nadine*
(…)

And: *The Walloon Region,*
(…)

Intervening party: *The limited liability co-operative society "Société pour la coordination de la production et du transport d'électricité" (CPTE)*
(…)

THE PRESIDENT OF THE 6TH VACATION CHAMBER OF THE COUNCIL OF STATE, SITTING IN INTERIM INJUNCTION PROCEEDINGS

Having regard to the action brought on 24 June 1999 by Nadine VENTER for the suspension of the two building permits that were issued to the co-operative society CPTE by the acting official on 1 October 1998 and 3

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[7] L. LAVRYSEN, "The Precautionary Principle in Belgian jurisprudence: unknown, unloved?", *European Environmental Law Review*, 1998, 75-76; N. DE SADELEER, *Environmental Principles*, *o.c.* 134- 138

[8] N. DE SADELEER, "Het voorzorgsbeginsel: een stille revolutie", *T.M.R.*, 1999, 82-99; "Réflexions sur le statut juridique du principe de précaution" in E. ZACCAI/N. MISSA, *Le principe de précaution: significations et conséquences*, Brussel, ULB, 2000, 117-142; "Les avatars du principe de pécaution en droit public: effet de mode ou révolution silencieuse?", *Rev. Fr. Dr. Adm.*, 2001, 547-562; "The effect of uncertainty on the threshold levels to which the precautionary principle appears to be subject", M. SHERIDAN/L. LAVRYSEN, *Environmental law principles in practice*, Brussel, Bruylant, 2002, 17-43; I. LARMUSEAU, "Het voorzorgsbeginsel geïntroduceerd in de Belgische rechtspraak: zoveel hoofden, zoveel zinnen ?", *T.M.R.*, 2000, 24-32; "The Precautionary Principle in Belgian Jurisprudence: So many Men, So many Minds?" , *l.c.*; L. LAVRYSEN/ P. DE SMEDT, "Over het succes van mobieltjes en de emancipatie van het voorzorgsbeginsel. Een *status questionis* van de wetgeving en rechtspraak met betrekking tot de exploitatie van GSM-zendmasten", *T.M.R.*, 2002, 470-485; L. LENAERTS, "GSM-mast zorgt voor stralend recht. Noot bij arresten van de Rechtbank van Brugge van 21 december 2001 en 4 februari 2002", *Juristenkrant*, 2002, 43, 6; D. MISONNE, "Het voorzorgsbeginsel", *Milieurecht Info*, 2001, 72 p. We found eighteen cases in witch the Principle was invoked before the Council of State.

[9] See: L. LAVRYSEN/ P. DE SMEDT, *l.c.*, 475-484; M. PAQUES, "Antennes GSM, urbanisme, préjudice et précaution dans la jurisprudence du Conseil d'état", *Le Point sur le droit des biens*, Edition Formation Permanente CUP - Novembre 2000, Université de Liège, 419-436.

November 1998 respectively with a view to carrying out technical works on a property in Aubange to install the 2nd three-phase transmission line of the existing 220 kV Aubange-Esch line;

(…)

Whereas the facts that are useful for examining the action for suspension are as follows:

On 7 July 1998, the limited liability co-operative society SOCIETE POUR LA COORDINATION DE LA PRODUCTION ET DU TRANSPORT DE L'ENERGIE ELECTRIQUE, "CPTE" for short, applied to the acting official for a permit to carry out technical works for installing the second three-phase transmission line on the existing pylons on the territory of the municipalities of Aubange and Messancy.

The note attached to the brief shows that the agent is TRACTEBEL. It also reads as follows:

"The present high-voltage station of Aubange is located in the industrial expansion zone situated to the east of the town.

At the start of this station, the high-voltage line heads north-east, skirts round the centre of Aubange and continues eastward in the direction of the border of the Grand-Duchy of Luxembourg.

In 1971, when the high-voltage line was being constructed, the neighbourhood that was found there consisted essentially of the roads from Aubange to Halanzy and Messancy and the road from Athus to Longeau.

Since then, housing estates have been created and houses built on either side of the high-voltage line. The areas still used for agriculture are essentially meadows.

The line completes its route in Belgium as it enters the forest of Athus. The pylons have been built fairly high there in order to avoid cutting down trees under the high-voltage line."

The note also says the following:

- "The pylons of the high-voltage line already exist; the installation of the 2nd three-phase transmission line will therefore in no way disrupt the developed and undeveloped sites";

- "There is neither school nor hospital in the vicinity of the works. The high-voltage line already exists on the site";

- and that the question of any nuisance is irrelevant.

In order to justify the second Abange-Esch 220 kV three-phase transmission line, it is written in a note that "the electricity grid of the ARBED factories in the Grand-Duchy of Luxembourg has been supplied for more than 60 years by the Belgian grid in Aubange"; that "the presence of a single three-phase transmission line on the 220 kV Aubange-Esch line makes the entire steel production directly dependent on it"; that "transferring the power supply for the furnaces to the grid of CEGEDEL (company supplying electricity in the Grand-Duchy) is not acceptable to CEGEDEL since this would result in an excessive degradation of the quality of the voltage"; that "the recent decision of the authorities of the Grand-Duchy to install in Esch a gas-steam power station (TGV) of around 350 MW, of which 100 MW has been earmarked for SOTEL-ARBED, makes more urgent the need for a second 220 kV three-phase transmission line between Aubange and Esch". The note concludes that "ELECTRABEL is aware of the fact that installing this second 220kV three-phase transmission line on the existing pylons of the 225 kV Aubange-Esch line will add to the environmental burden already being borne by the region" and that "it therefore proposes to examine together with the relevant authorities adequate compensatory measures (for example by substituting an overhead section of voltage lower than 225 kV)".

At their meeting of 14 July 1998, the mayor and aldermen of Aubange delivered a favourable opinion on the project, "considering that, for economic reasons, there are no grounds for opposing this project"; the government departments that were consulted (agriculture, roads, forestry) did not formulate any objections.

On 28 September 1998, the acting official granted the requested planning permission, for the following reasons:

"Having regard to the opinion of 14/7/1998 delivered by the mayor and aldermen of Aubange;

(…)

Whereas the project is located in multiple zones on the zoning plan of Southern Luxembourg;

Whereas the project makes use of the existing facilities and therefore will not significantly increase the impact of these installations;

Having regard to the various favourable opinions."

This is the first challenged act.

On 7 October 1998, the acting official passed the same application for consideration on to the mayor and aldermen of the municipality of Messancy; the letter mentions that a first permit for the works on the territory of Aubange had recently been issued to the applicants.

At their meeting of 13 October 1998, the mayor and aldermen of Messancy delivered a favourable opinion on the planned works "given that no remarks had been made about the project (…)".

In a letter of 13 October 1998, the non-profit association TESLA "TROIS FRONTIERES" notified the acting official of its opposition to the project. It cited the various regulations, and in particular the Walloon plan for a permanent development that provides for a space of 30 metres between the 220 kV line and buildings. It also pointed out that in the Grand-Duchy of Luxembourg, without imposition from any regulations, the section of that same line will be moved out of all residential areas, and that in February 1996, before the Walloon Regional Council, the Minister for Town and Country Planning proposed that the installation plan for 200 kilometres of new high-voltage lines be turned down. The non-profit association asked the acting official at what stage the application was and to consider the withdrawal of any authorization that has been given.

On 3 November 1998, the acting official issued a new permit on the basis of a slightly different justification, formulated as follows:

"Having regard to the opinions of 14/7/1998 and 13/10/1998 delivered by the mayor and aldermen of Aubange and Messancy;

(…)

Whereas the project is located in multiple zones on the zoning plan of Southern Luxembourg;

Whereas the project coincides with that provided for in the zoning plan;

Whereas the project makes use of the existing facilities and therefore will not significantly increase the impact of these installations;

Whereas the project accords with the general purpose of the zone and its architectural character;

Having regard to the favourable opinions delivered by the government departments consulted (DGA, MWET, DNF)."

This is the second challenged act.

Whereas by an application submitted on 13 July 1999, the limited liability co-operative society CPTE requests to intervene in the interim injunction proceedings; whereas there are grounds for allowing this request;

Whereas it can be inferred from the comparison of the two permits that were issued that the second permit, issued on 3 November 1998, replaces the first; whereas the first permit is endorsed only by the opinion of the mayor and aldermen of the municipality of Aubange, the second permit is also endorsed by the opinion of the mayor and aldermen of the municipality of Messancy; whereas it appears that the acting official had neglected to ask for the opinion of the municipality of Messancy, although the project concerned the two municipalities; whereas consequently the permit that was issued on 28 September 1998 had been withdrawn implicitly, but certainly by the

permit issued on 3 November 1998; whereas the appeal should be examined in so far as it is directed against the latter permit;

(…)

Whereas, among other considerations, the action for suspension points out that "an impact assessment report" which CPTE mentions in its planning application has never been passed on, that it is not part of the brief jointly received, that it is evidently inaccurate, succinct and misleading … does not reveal the reality of the situation as it existed at the time of the application"; whereas this constitutes an argument indicating a violation of Articles 1, 5 and 7 of the Walloon Decree of 11 September 1985 organizing environmental impact assessment in the Walloon Region, and a violation of Articles 3 and 7 of the decision of the Walloon Regional Executive implementing this decree; whereas this is the fifth argument entered by the intervening party;

Whereas the intervening party replies in substance that the brief did contain the impact assessment report, and whereas the elements which the plaintiff claims are absent are imprecise in their description and are not provided for by the applicable laws and regulations;

Whereas a preliminary environmental impact assessment report of 7 July 1998 is included in the brief, along with the planning application; whereas there is nothing to suggest that it had not been present at the time when the application was filed; whereas the argument is not serious in so far as it claims that the report was missing;

Whereas this report reads in section III, b, "Compatibility of the planned activity with the neighbourhood (presence of a school, hospital, etc.)" as follows: "There is neither school nor hospital in the vicinity of the works. The high-voltage line already exists on the site";

Whereas this section is worded in such a way that school and hospital are evidently mentioned merely as examples, as is borne out by the "etc." that follows; whereas in order to profitably enlighten the planning authority on the compatibility of the planned works with the neighbourhood, it is incumbent on the planning applicant to mention all the activities that could suffer disruption;

Whereas in this case it emerges from the brief that the high-voltage line in questions overhangs several houses, including that of the plaintiff; whereas it will appear later on, as we examine the risk of serious detriment that is difficult to rectify, the compatibility of a high-voltage line with a residential area is subject to discussion; whereas the presence of houses underneath the high-voltage lines should have been mentioned in order to draw the attention of the authorities to this matter; whereas in this connection the argument is serious;

Whereas the plaintiff claims that the challenged act threatens to cause a serious detriment that is difficult to rectify, consisting primarily of the effects of a doubling of the power of the line overhanging her house, following the contested works; whereas, besides the "presence of electricity on all immovable metal objects, depending on the kind of weather", the vibrations of the pylons which, during gale force winds, are transmitted through the ground to the whole whose, and the hissing noises that diminish the quality of life, she is also afraid of the effects of exposure to the electromagnetic waves on her health and on that of the other people living in the vicinity of the line;

(…)

Whereas it has been established that the line in question passes vertically over the plaintiff's home; whereas the claim that the doubling of the present line would diminish the electromagnetic field being induced appears to be unconfirmed, and whereas, according to the explanations given at the hearing, the strength of the current conveyed by the new line is likely to be subject to major and sudden variations that would limit this effect;

Whereas it emerges from the documents submitted in the proceedings that the effects of magnetic fields induced by a high-voltage line are the subject of debate in medical circles; whereas it is not up to the Council of State to settle such a debate; whereas the Council can merely note that there are elements that lead it reasonably to suspect a health risk, even if the relevant existing regulations are amply respected, as the intervening party points out; whereas if this risk cannot be established with certainty, as the defendant points out, it cannot be ruled out either; whereas for the Council of State to be able to suspend a challenged act, the detriment need not be certain; whereas it suffices for the risk of detriment to be plausible; whereas this applies in the present case; whereas the risk in question poses a threat to the right to the protection of health, guaranteed by Article 23, 3rd paragraph, 2°, of the Constitution, as well as the right to the safeguarding of a healthy environment, guaranteed by 3° of the same paragraph; whereas with respect to the basic rights, the detriment, of which the risk must be considered certain, is serious; whereas it is, by its very nature, difficult to rectify;

Whereas the conditions necessary for the Council of State to be able to order the suspension of the challenged act are brought together here;

Whereas because of the suspension of the performance of the second challenged act pronounced in the present judgment, the first challenged act is likely to produce its effects again; whereas, given that it is marred by the same kind of irregularity, the performance of this act should also be suspended for the same reasons;

(…)

ANTWERP COURT OF APPEAL, 11 OCTOBER 1999

Presiding judge: *J.M. Wetsels*
Justices: *F. Peeters and M. Bax*
Lawyers: *P. Van der Straten, J. De Lat* loco *M. Boes, T. De Waele, M. Ballon, H. Sebreghts and Y. Loix*

ACTION FOR CESSATION - ACT OF 12/01/1993 - CESSATION OF LICENSED OPERATION OF DOMESTIC WASTE INCINERATION PLANT - REVIEW OF LICENCE ON THE BASIS OF ARTICLE 159 OF THE CONSTITUTION - NO VIOLATION OF PRECAUTIONARY PRINCIPLE

The domestic waste incineration plant operated by ISVAG was built in accordance with the building permit and the operation of the plant has been licensed by the relevant authority. No action for annulment has been instituted against these licences before the Council of State. In accordance with Article 159 of the Constitution, the Court is authorized to verify the internal and external legality of this building permit and environmental licence.
The permits were issued in accordance with the forms and procedures prescribed by law and are externally legal. At the moment when they were granted, the licensing decisions complied in terms of content with the legal limits within which the licensing authority was permitted to use its administrative discretionary authority and are therefore also internally legal. The authority has given shape to the precautionary principle by imposing on ISVAG the emission standards specified in the environmental licence.

ACTION FOR CESSATION - ACT OF 12/01/1993 - CESSATION OF OPERATION ALREADY CEASED - PATENT VIOLATION OF ENVIRONMENTAL LAW BY RESUMPTION OF OPERATION

Since the operation of the domestic waste incineration plant had already been ceased before the action for cessation was instituted, there can be no question of an obvious violation of one or several provisions of laws, decrees, orders, regulations or decisions relating to the protection of the environment, upon which an action for cessation may be based.
What is at issue, however, is the question whether the start-up and resumption of operation of this incineration plant, even if in accordance with the licensing conditions, as such constitutes a patent violation or poses a serious risk of violation of one or several of those provisions. Through the unanimous recommendation of the Baeyens Committee, ISVAG has made a reasonable case for the fact that the residual emission of dioxin will be so small, and even barely measurable, that the start-up of the plant in question, even with the accumulated pollution from the past, in the neighbourhoods concerned does not constitute a patent violation, or a serious risk of violation, of one or several provisions of laws, decrees, ordinances, regulations or decisions relating to the protection of the environment.

(c.v.b.a. ISVAG v. G.A. and others - Flemish Region and OVAM)

(…)

3. Concerning the merits of the case

Whereas the local residents had founded their reasoning partly on psycho-medical and social factors (such as the fear or anxiety of the people, the poor communication, the advisability of a dioxin exposure survey), ethical considerations (such as the necessity of conducting a policy of communication, the reporting to ISVAG by the relevant minister in connection with the recommendation of the Baeyens Committee), economic or ecological principles or principles of good government (such as compliance with the rules of good management, the advisability of waste prevention and of a reorientation of waste processing, the advisability of a detailed investigation into all dioxin sources that make a significant contribution to overall dioxin deposition), which could have been important, or even crucially important, in a discussion with the government concerning the policy to be conducted in connection with domestic waste processing or in an attempt at reconciliation between the parties; whereas, since the parties opted to have their dispute settled in court, they have consequently limited the discussion to what is relevant at law; whereas consequently in this case these factors, considerations and principles are only to be taken into account in so far as they can be transposed to provisions of laws, decrees, ordinances, regulations or decisions concerning environmental protection, against which an evident violation or the serious risk of a violation is presented; whereas this limitation of the discussion also indicates the relativity of the present decision, which is not an administrative act, but only a court judgment;

Whereas the first judge made the convincing observation that the issue of public health concerns the future of the population and the quality of life, something which affects everyone and should not leave anyone indifferent; whereas in society there is certainly the need for a drastic reduction of the waste mountain, as well as for the processing of the existing waste in an ecologically sound manner and using the best technology available;

Whereas it is up to the legislative authority to create the legal framework for this purpose and up to the executive to implement it; whereas the court has not been given any power to take decisions in this matter;

Whereas the waste incineration plant in question had been constructed in accordance with the building permit and the operation of the plant has been licensed by the relevant authority;

Whereas, in accordance with Article 159 of the Constitution, the tribunals and courts apply the general, provincial and local decisions and regulations only in so far as they agree with the laws;

Whereas on the basis of this legal provision, each body charged with jurisdiction - and this Court is such a body - has the power and the duty to examine whether the decisions, rules and regulations, the implementation of which is at issue, agree with the laws; whereas the authority granted to this Court by this article concerns the verification of the internal and external legality of the administrative acts, to which the building permit and operating licence of ISVAG belong;

Whereas the parties concerned have not brought any action for annulment of these permits before the Council of State;

Whereas these permits had been issued in accordance with the forms and procedures laid down by law and are externally legal; whereas in this respect the licensing decisions in question, at the time when they were issued, remained essentially within the legal limits within which the licensing authority was allowed to use its administrative discretionary power, and are also internally valid; whereas the government has given shape to the precautionary principle by imposing on ISVAG the emission standards stated in the environmental licence; whereas these permits, as regular unilateral administrative legal acts of the competent administrative authority, should be deemed to be in accordance with the law and are therefore applicable in this respect;

Whereas, since the operation of the domestic waste incineration plant in question had already been ceased before the present action was brought, there can be no question of an evident violation of one or several provisions of laws, decrees, ordinances, regulations or decisions concerning environmental protection on which an action for cessation can be founded;

Whereas, however, what is under discussion is the question whether the start-up and resumption of operation of this incineration plant, even if in accordance with the licensing conditions, as such constitutes an evident violation or poses a serious risk of violation of one or several of those provisions;

Whereas in this connection it should be noted that:
- The maximum limit of 0.1 ngTEQ/Nm³ imposed on ISVAG corresponds to the strictest standards that are imposed worldwide by way of precaution;

- According to the recommendations of the Baeyens Committee of 9/3/1998 and 24/8/1998, and the reports of environmental impact assessment expert De Geyter, the dioxin emission standard of 0.1 ngTEQ/Nm³ will be attained, that this standard is perfectly acceptable and that it meets the legal emission limits and the objectives of the precautionary principle;
- According to the final evaluation of 4 January 1999 for the Committee on Incineration and Smoke Emissions in connection with the new start-up of ISVAG, the "Report drawn up by the environmental impact assessment expert on Air, in response to questions from the Committee", it should in all fairness be noted that the emissions, immissions and deposits related to the operation of ISVAG in its present, altered and renovated structure can be considered negligible in terms of their environmental impact;
- According to the recommendation of 11 January 1999, annex 4, concerning the acceptability, from an environmental and health point of view, of ISVAG, the ISVAG plant is equipped in accordance with the current state of technology, that it is capable of meeting all emission standards, including the 0.1 ngTEQ/Nm³, and that on the basis of an emission of 0.1 ngTEQ/Nm³, and taking into account the standard meteorological conditions, the calculations, which only concern the impact of the domestic waste incineration plant, indicate that an immeasurable or barely measurable effect will manifest itself in the environment in terms of concentrations in the air, deposition on the soil and vegetation, and augmentation in the soil;
- According to the same annex to that recommendation, deposition measurements that were carried out during the time that the Edegem and ISVAG plants were shut down have shown that the readings had barely changed in comparison with the situation before the shutdown, which is a clear indication of the presence of other dioxin sources in the vicinity;
- According to the unanimous conclusion of that recommendation, which says nothing about any disagreement or conflict between the engineers and health experts on that Committee concerning that recommendation, the operation of the ISVAG plant is acceptable;
- According to the conclusion of Ir. F. De Geyter, environmental impact assessment expert on Air, of June 1999, the calculated and measured concentrations in the soil and of the deposition all lead to the same objective findings: "In the current situation, the contribution of ISVAG to the present pollution of the environment is negligible (< 1%) and immeasurable. With the present knowledge and the present possibilities for making measurements, no causal connection can be established or presumed as far as ISVAG is concerned. The contribution of ISVAG is situated well below accurate measurement and natural seasonal variations and is therefore undetectable. That is why it is only normal that the readings taken during the recent shutdown of ISVAG do not show any noticeable difference with earlier readings";
- According to the unanimous judgment of the Baeyens Committee, the incineration plant meets all emission standards from a technological and health point of view, and that the impact of the residual emission of dioxin on the local residents will be so small as to be immeasurable or barely measurable, which means that the operation of the plant is acceptable from a technical, environmental and health point of view;
- The Committee, though, urges that the problem of dioxin exposure and impact be specially highlighted in the general health survey for Flanders, without however making the start-up of the incineration plant conditional upon the results of that survey;

Whereas the local residents wish to see the independence of the Committee and the objectivity of its decisions called into question, partly on the basis of various press cuttings which they have submitted; whereas in particular its chairman, Prof. Jan Baeyens, was being targeted personally;

(…)

Whereas the controversies, statements and findings contained in the letters collected by local residents, press cuttings and newspaper articles are not convincing, since the independence and objectivity of the sources and the accuracy of their research are not at all guaranteed, and the circumstances and the context in which those controversies, statements and findings were situated and journalistically translated are not known; whereas it does not appear, or it cannot be deduced from those documents that the findings and statements contained in them, and which are inconsistent with the recommendation, are scientifically founded; whereas consequently they are unable to detract from the explicit data of the scientific research carried out by the Baeyens Committee and from the unanimous conclusion of the said Committee;

Whereas, consequently, it should be assumed that the ISVAG domestic waste incineration plant in question meets the standards of the best technology available and that the start-up of the plant will not result in any evident damage to man and the environment; whereas the start-up will make it possible to incinerate in the plant in question a major part of the waste that was now being dumped to the greater detriment of the environment, and consequently increase the current level of protection of the environment in general;

Whereas, through the unanimous recommendation of the Baeyens Committee, ISVAG has made a reasonable case for the fact that the residual emission of dioxin will be so small, and even barely measurable, that the start-up of the plant in question, even with the accumulated pollution from the past, in the neighbourhoods concerned does not constitute an evident violation, or a serious risk of violation, of one or several provisions of laws, decrees, ordinances, regulations or decisions concerning environmental protection;

(…)

Whereas the claims of the local residents were wrongly allowed by the first judge;

GHENT COURT OF APPEAL, 20 NOVEMBER 2001

Justice: *D. Van Dorpe*
Lawyers: *H. Van Dooren and D. Lindemans*

ACT OF 12/01/1993 CONCERNING A RIGHT OF ACTION IN MATTERS OF ENVIRONMENTAL PROTECTION - ART. 271 OF THE NEW MUNICIPAL ACT - PRECAUTIONARY PRINCIPLE - PRINCIPLE OF PREVENTIVE ACTION - RIGHT TO PROTECTION OF HEALTH - JUDICIAL REVIEW - APPLICATION OF BEST AVAILABLE TECHNOLOGIES - SERIOUS THREAT OF VIOLATION - PREVENTIVE JUDICIAL MEASURE - CLOSING DATE - PENALTY

An action for cessation may also be based on a violation of the precautionary principle and the principle of preventive action.Citizens have the right to an adequate and the greatest possible protection of their health. The non-application of the best available technologies constitutes a violation of the aforementioned principles and of the licensing conditions and constitutes a threat within the meaning of Art. 1 of the Act of 12/01/1993. The preventive effect of the aforementioned Act permits a judicial supervision and judicial measures to prevent damage. The licensee may be allowed a time limit by which the activity that represents a serious threat to the environment will have to be ceased.

(D.B.F. and cs. v. c.v. Intercommunale Vereniging voor Huisvuilverwerking Midden-Waasland)

(…)

1. According to the interlocutory judgment of 26 June 2001 of this chamber of the Court, the principal action and the incident action were declared admissible.

The personal appearance of the parties in chambers as ordered by the Court took place on 4 September 2001.

At the hearing of 23 October 2001, the Court once more heard the arguments and pleadings of the parties.

The documents were perused.

2. Contrary to what the respondent says in the minutes of its Board of Directors meeting of 3 July 2001 and in its press kit of 5 July 2001, the "complaint" of the appellants was not declared inadmissible.

(See folder III containing additional documents of the respondent: exhibits f and h).

The Court merely concluded that the appellants failed to furnish proof or make a reasonable case for the fact that the respondent exceeded the emission limits of smoke gases during the operation of the domestic waste incineration plant, or that it incinerated other kinds of waste than is allowed.

The appellants also based their action for cessation on violations of the precautionary principle and of the principle of preventive action.

The examination of this argument of the appellants led the Court to request the respondent to supply additional information and to submit a number of additional documents. The Court also deemed it appropriate to order the parties to appear in person.

The Court formulated it in this way:

Firstly, it cannot be disputed that the general precautionary rule also applies to the respondent.

Whereas the respondent on page 34 of its first appeal pleadings confirms that "regard for public health must be an absolute priority for the legislator and for the executive", this priority naturally applies for the respondent too.

So far, there is no absolute certainty that the operation of a domestic waste incineration plant does not entail any health risk for the neighbourhood.

Various scientific studies and the almost permanently ongoing social debate show that it is a delicate and controversial issue."

(See documents 9, 17, 23, 28, 29, 37, 38, and the additional documents 39, 40 and 41 in the file of the appellants, and in the file of the respondent a VITO study carried out in September 2000 (document 20), commissioned by the VMM, and the "cautious and qualified" reply of the Flemish Minister of Welfare, Health and Equal Opportunities (document 24) to a parliamentary question of 9 February 2001)

Besides Article 1.2.1 §2 of the Decree of 5 April 1995 establishing general environmental policy principles (precautionary principle, preventive action, etc), there are the special obligations imposed by Article 4.C.22b of the licensing decision issued on 13 August 1998, which has already been extensively quoted in the interlocutory judgment, more particularly the obligation for the respondent to apply the best available technologies (hereinafter referred to as BAT) in all departments of its company in order to prevent or limit the emissions and to report thereon each year.

In its BAT report of 1999, the respondent mentioned that the Flemish BAT Knowledge Centre (VITO Mol) had opted to elaborate BAT studies per branch of industry, or per group of similar activities, but that the sector of domestic waste incineration had not been investigated in such a way.

The respondent added that at the European level, too, no publications were available yet on the subject of BAT.

In the BAT report of 2000 (7 July 2000), the respondent said that VITO had not yet prepared any BAT studies concerning smoke gas scrubbing techniques.

The respondent did refer to the following studies:

- Investigation into a possible application of new waste disposal methods in the province of Antwerp (May 1999, Technical Working Group with IGEAN, IGEMO, INDAVER, VLAR and the Province of Antwerp)

- Comparison of scenarios for the disposal of residual domestic waste and class II industrial waste (VITO, K. Vrancken et al., provisional report, June 2000)

- Joint study of alternative methods for the disposal of domestic and comparable industrial waste by the districts of Mechelen and Turnhout (IGEMO & IOK, June 1999).

In the evaluation of its company in relation to technological progress and changes in scientific knowledge and insights, the respondent refers explicitly to the ISVAG domestic waste incineration plant in Wilrijk, where a DENOx system (SNCR version) was installed, and to that of IVAGO in Ghent, where a SCR version was brought into use in 2000.

According to the respondent, it is a technology that is already being applied, it is an investment that is clearly recommendable, an SNCR version is available which on account of its simple principle represents good value for money, a study of the financial situation by the company auditor allows this investment to be planned in the short term, an additional investment in a DENOx system will widen the safety margin between emission and emission standard, and it is important from a financial point of view to carry out the investment in a DENOx system as soon as possible, since the plant only has a licence until 2008.

The respondent stated in its report that it had commissioned a first comparative study of the different technical principles (SCR and SNCR) from a consulting firm.

Evidently it concerned the assignment that had been given to NV Miplan in 1999. In this connection is should be pointed out that in July 2000 this study must have been known to the respondent for some time already, since the Miplan report dates from 25 August 1999.

The conclusion of the consulting firm Miplan reads as follows:

"To remove the NOx as well as the dioxin from the smoke gases and to meet future emission standards for these two pollutants, it is advisable to integrate a simple SCR DENOx installation into the existing smoke gas scrubbing installation."

(See page 25/29 of the Miplan study submitted by the respondent after the interlocutory judgment)

In short, in 2000 there was nothing to stop the respondent either from taking the decision to invest in the best available technologies at that time to prevent or limit harmful emissions, or from informing the licensing authority, the AMINAL environmental licences departments and the environmental inspectorate in Ghent, the mayor and aldermen of Sint-Niklaas and OVAM, of the reasons for not taking such a decision.

With regard to the study already carried out by Miplan in August 1999, the respondent writes in its pleadings that were filed on 20 August 2001 with the Court registry:

"…

Therefore there have been no more new studies. The existing study retains its value: if the DENOx is to be installed, it should best be done in accordance with the proposal in this preliminary study.

The issue of the DENOx filter and the implication of the judgment of the Court were discussed at a meeting of the Board of Directors on 3 July 2001."

In other words, the decision not to use the best available technologies, or not to increase the safety margins, was taken by the respondent on 3 July 2001, almost two years after the (favourable) opinion of Miplan and one year after the conclusion by the respondent that such an investment was recommendable.

The reference made by the respondent in its last appeal pleadings to Article 1, 29° of Vlarem I and Article 4.4.3.1.4 of Vlarem II, saying that in accordance with those legal provisions no excessively high costs can be imposed on it, is irrelevant.

The Court reminds the respondent that it had written in its BAT report of July 2000 that a SNCR version was available which on account of its simple principle represented good value for money, that a study of the financial situation by the company auditor allowed this investment to be planned in the short term, and that it was important from a financial point of view to carry out the investment in a DENOx system as soon as possible, since the licence only lasted until 2008.

The respondent also adduces that the Court would violate Article 4.1.2.1 of Vlarem II by inferring from the mere possible existence of a better technology - regardless of the cost of its application - that every licensee should apply it immediately on pain of closure.

This argument of the respondent cuts no ice.

Assuming that as great a safety margin as possible cannot be imposed at any cost, there is the conclusion which the respondent itself drew in July 2000 that the installation of a DENOx system was financially practicable, and that this investment had to be decided upon without delay precisely in order to keep the costs within reasonable limits.

The Court adds that if the argument of the respondent were to be supported, a fairly long period of indecision would suffice to subsequently argue that the application of the best available technologies is no longer justifiable from a financial and/or business economic point of view.

Judged against the precautionary principle and the principle of preventive action, such an argument is indefensible.

Furthermore, the respondent's line of reasoning that further action is needed from the regulatory or licensing authority before the best available technologies can be used cannot be upheld either.

The obligation imposed on the respondent according to the environmental licence of 13 August 1998 is clear:

"…

In this connection, a report must be drawn up each year giving a description of the technologies available at that moment for smoke gas scrubbing (for maximum protection of the emissions and immissions).

This report must also specify which additional measures will actually be taken, along with the time limits for implementation.

…"

(Underlining by the Court)

The BAT report of 26 July 2001 reads:

"…

Referring to the study recently carried out by VITO in which an SCR-DENOx is evaluated as an installation with a better performance, the SCR system is the DENOx system to be recommended in 2001. If Mi-Wa decides to install a DENOx system, the SCR type is to be recommended.

For further details I refer to the preliminary study carried out by the consulting firm whose final report was completed at the end of 1999.

…"

In conclusion, the three possible options are cited, without making a choice: start the construction of a DENOx as soon as possible, request the Minister of the Environment to grant a derogation from European Directive 2000/76/EC for the remaining licence period, or continue to work until the end of 2005 without further investments.

As in 2000, the respondent did not inform the licensing authority in 2001 which measures would actually be taken and which time limits for implementation would be observed.

The respondent does not say why it did not or could not supply this information, but it is strange that on 26 July 2001 the respondent still left all its options open in its BAT report, whereas three weeks earlier, on 3 July 2001, it had formally decided not to install a DENOx filter, not to request a derogation from the European Directive, and to carry on working until 31 December 2004.

At his personal appearance on 4 September 2001, J.D.C., Chairman of the Board of Directors of the respondent, declared before the Court:

"As to your question whether between 25 August 1999 (date of the Miplan report) and the meeting of the Board of Directors on 3 July 2001 it was explicitly put on the agenda and discussed whether or not filters would be fitted, my answer is that this was not the case.

I wish to add that the Board of Directors meets once a month.

The decision to definitively and irreversibly cease the incineration activities on 31 December 2004 was taken on the basis of financial and economic considerations, meaning a weighing up of the investment cost involved by the installation of the filters on the one hand and the expiry date of the operating licence (April 2008) on the other.

In addition, there were social and political arguments, primarily the impossibility of setting up a new plant in the same location, and the political decision that was taken by the city council of Sint-Niklaas, which is the principal shareholder, to discontinue the incineration activities in the course of the current term of office.

At the meeting that was held on 26 June 2001 with the partners (the mayors) of the municipalities involved who are shareholders, it was decided to approve the conversion plan…"

R.V., director of the respondent, declared during that same personal appearance:

"The BAT report of 2 July 2000 was discussed and approved by the Board of Directors.

Between that BAT report of July 2000 and the meeting of the Board of Directors on 3 July 2001, the question of whether or not to install the filters was never officially on the agenda.

This does not mean, however, that no informal consultation had taken place with the daily management and with the political authorities."

The Court points out that the statements by chairman J.D.C. and director R.V. are at variance with the minutes of the Board meetings of 17 August 2000 and 12 October 2000, which were submitted at the hearing of 23 October 2001.

In the minutes of the Board meeting of 17 August 2000, item 7 reads:

"During the period 1/1/1999 and 30/9/1999, Mi-Wa has done everything at least to comply with environmental law. In certain respect (e.g. testing campaigns and actual emissions), the company went further than was legally required. In this way, potential harm to man and the environment is minimized. A few minor adjustments have yet to be made, but this something which is constantly being worked at. The firm is in the process of setting up a standardized environmental protection system.

The BAT (Best Available Technology) report, too, is positive and only the NOx parameter is still capable of improvement. Therefore we need to consider that investment in a DENOx installation will probably be necessary in the future.

The director pointed out in this connection that the company auditor is currently working on the assignment for the 2000-2008 working group. In his scenarios up to 2008, he will work out two hypotheses: one with this investment and one without this investment. The investment will amount to around 40 million BEF."

The respondent had commissioned the financial analysis referred to from the company auditor W.D.N. on 7 June 2000. The report became available on 14 September 2000.

The investment in 2002 for the NOx installation was estimated at 45 million BEF.

In the minutes of the meeting of the same Board on 12 October 2000, it is mentioned under item 3:

"The Board gave an explanation of the financial analysis that was drawn up by the company auditor, Mr D.N. This business economic analysis is based on two scenarios: one until 2008 and one in case of cessation in 2004. In the first hypothesis, an investment in an NOx installation in 2002 was anticipated.

This analysis takes no account of the workforce or of the conversion or cleanup of the site, or of the extra cost of transportation to another waste disposal plant in case of early closure.

For both scenarios, the evolution in the costs and the funds becoming available in the event of a cessation of waste incineration at Mi-Wa was shown in a clearly arranged table.

Roughly speaking, the break-even point in both scenarios is expected to be around 2003.

In the first hypothesis (incineration until end of licence), Mi-Wa will generate funds to cover the additional costs, which may exceed 300 million BEF in 2007.

In the second hypothesis, the partners will have to bear these costs as well as the extra cost of disposal at a different location.

The auditors will first analyze this report. After they have delivered their opinion, the Board of Directors will present this report to its partners."

The analysis by the auditors is not at hand. In any case, it took until 3 July 2001 before the respondent took a decision and opted for the second hypothesis: no DENOx filter would be installed, European Directive 2000/76/EC of 4 December 2000 would be implemented in its strictest sense and no derogation would be requested, and the incineration activities would be ceased on 31 December 2004.

The Court had already formulated the following consideration in its interlocutory judgment:

Judged against the BAT conditions in Article 4.C.22b of the environmental licence of 13 August 1998, and having regard to its own findings in the BAT report of 2000, there can reasonably be no other conclusion than that there rests upon the respondent the strict obligation of observing the greatest possible safety margin.

Such an obligation is an application of the "principle of preventive action", which provides that action must be taken to prevent environmental damage rather than having to repair the damage afterwards.

Such an obligation is also an application of the "precautionary principle", which means that scientific consensus should not be awaited in order to deal with certain potential threats to the environment and to public health.

The respondent cannot, without being criticized for inconsistency, on the one hand claim that its initiative to carry out additional investments in order to further reduce emission levels proves that it thus operates its waste incineration plant with due diligence and in so doing complies fully with the precautionary principle, and on the

other hand contend that it is not up to the appellants to investigate whether this claim is consistent with the truth and that no judicial review of this can take place.

As neighbours, the appellants are entitled to an adequate and the greatest possible protection of their health.

A relevant judicial review is in keeping with the preventive effect of the Act of 12 January 1993.

This review concerns the means used by the respondent to prevent environmental damage and the question whether these means include the "best available technologies" as imposed by the licensing authority, and as the respondent itself puts forward.

Failure by the respondent to scrupulously observe the obligations imposed by the licensing authority, in this case the use of the "best available technologies" in order to prevent or minimize the total impact of the emissions on the environment, is to be classed as a serious threat as referred to in Article 1 of the Act of 12 January 1993.

The Court observes that the respondent had wittingly decided not to carry out any investments with a view to using the best available technologies during the remaining licence period.

The respondent had decided on the basis of financial and economic considerations to carry on operating its domestic waste incineration plant until 31 December 2004.

This decision of the respondent to continue its incineration activities until 31 December 2004 under those circumstances, without making use of the best available technologies, constitutes in the view of the Court a serious threat within the meaning of Article 1 of the Act of 12 January 1993.

In the event of a serious threat, it is up to the court to take appropriate measures to prevent damage.

If necessary, a time limit may be allowed in which to comply with the measure imposed.

According to the minutes of the Board meeting of 18 September 2001 of the respondent, the parties had negotiated a closing date on 13 September 2001.

The appellants urged that the incineration plant be closed down on 1 July 2002, whereas the respondent wished to keep 31 December 2004 as the final closing date.

(See folder IV, document 4 in the respondent's file)

An action for cessation is not so much a means for settling a private dispute as an instrument for enforcing environmental law and preventing damage to the environment, and this in the public interest.

Naturally the Court has regard for the collective interest that is served by the waste incineration activity carried out by the respondent, the time needed to convert the incineration plant into a transhipment and transportation unit, the implications for the workforce, etc.

The documents show that the respondent has since July 2001 been working on a concrete and comprehensive plan to deal with the various problems that an early closure of the plant will entail.

(See press conference given by the respondent on 5 July 2001 entitled "Mi-Wa 2003 - …")

The respondent should therefore be given the opportunity to take the closing date imposed by the Court into account in its conversion plan, which it says will be known by the end of December 2001.

Having regard to all the interests involved, the Court orders that the respondent cease by December the thirty-first two thousand and two (2002) the activities carried out at the plant situated at Vlyminckshoek 12, Sint-Niklaas, which consist of the incineration of waste, whatever its nature or origin, on pain of a penalty of 100,000 francs for every violation that is reported.

Having regard to the foregoing, the counterclaim of the respondent aimed at having the appellants ordered to pay 50,000 francs for provocative and reckless litigation is unfounded.

(…)

IV. The Prevention at Source Principle

The Prevention at Source Principle is less prevalent in litigation[10]. As the following case shows, it is nevertheless a Principle that could have a decisive impact on the outcome of some litigation.

COUNCIL OF STATE, N° 85.462, 21 FEBRUARY 2002

No. 85.462 of 21 February 2000
in the case A. 89.483/VII-20.472

In the case: *NV STEENBAKKERIJEN FLOREN,*
[..]

Versus: *The Flemish Region, represented by the*
Flemish Government,
[…]

Intervening party:

The municipality of MALLE,
[…]

THE PRESIDENT OF THE VIIth CHAMBER

Having regard to the petition which NV Steenbakkerijen Floren filed on 11 February 2000 in order to demand by way of extremely urgent necessity the suspension of the enforcement of the Executive Order of the Flemish Minister of Agriculture and Environment of 21 January 2000, in which the appellant is refused, on appeal, a licence to operate a dumping site for inert materials at Paaltjesdreef in Malle;

(…)

3. Whereas in accordance with Article 17, §§ 1 and 2, of the coordinated acts concerning the Council of State, suspension of implementation by way of extremely urgent necessity may only be decided on the threefold condition that such extremely urgent necessity exists, that serious arguments are adduced that can justify the annulment of the challenged decision, and that the immediate implementation of the challenged decision may cause a serious detriment that is difficult to remedy;

(…)

3.2.1. Whereas the second argument is taken from the absence of a legal and factual basis, from the violation of Article 30b and Article 52, 3°, b of Vlarem I, of Articles 2 and 3 of the Act of 29 July 1991 concerning the express justification of administrative acts, and the violation of the material obligation of justification and the reasonableness principle, general principles of good administration, and from the proximity principle, as contained in Article 174, paragraph 2 of the EEC Treaty (formerly 130R, paragraph 2); whereas the argument of the appellant consists of the fact that an environmental licence can only be refused on the basis of motives that have their legal basis in the environmental licensing decree and its implementing orders, that all advisory authorities, except the municipality of Malle, have delivered a favourable opinion, that it appears from the opinion of OVAM, which had been delivered in the first instance, that there is a local shortage of safe dumping capacity for construction and demolition waste, that the question whether or not, generally speaking, there is a need for additional dumping capacity is not a legal motive

[10] We found only 4 Council of State judgments where the Principle or one of its variants (e.g. the Principle of Proximity) was invoked.

for refusal, that such a criterion does not have a legal basis in either the environmental licensing decree or the implementing orders, not even in any policy or implementation plan, that the challenged decree ignores the unanimously favourable opinions and in no way indicates "why it believes it had to substitute its motives for these opinions", which constitutes a violation of the formal obligation of justification, that the challenged decision is patently unreasonable since it ignores the various opinions, the fact that a local shortage of dumping capacity has been established, the fact that the dumping pit turns out to be highly suitable for the requested dumping capacity, as well as the obligation for the appellant to refill the dumping pit in order to effectuate its subsequent use, that the proximity principle provides that waste must be disposed as close as possible to its place of production and that every province must provide sufficient dumping capacity in order to meet the local needs in terms of waste disposal, particularly as the dumping site is considered by OVAM as the only one in the province where waste can be dumped in an environmentally hygienic way, so that this principle has been violated;

(…)

3.2.4.1. Whereas Article 4.1.6.2, §1 of Vlarem II provides:

"Without prejudice to other legal provisions, environmental conditions from this regulation or environmental licensing conditions, preference should be given in the processing of waste, apart from collection, sorting and transportation, to the processing methods listed below in decreasing order of priority:
1. reuse of products;
2. recycling of materials;
3. extraction of energy;
4. incineration without energy extraction.
Only where the best available technologies do not allow any of the above-mentioned processing methods may waste be dumped in a licensed establishment in accordance with the legal provisions";

Whereas the aforementioned provision was adopted in pursuance of the Decree of 28 June 1985 on environmental licensing, so that, according to the appellant's argument, it could indeed be put forward as a criterion for evaluating the environmental licence application at issue; whereas prima facie the respondent appears to have rightly considered from the aforementioned provision that "it follows from Article 4.1.6.2 of Section II of Vlarem that the dumping of waste should be prevented as much as possible; that dumping has the lowest priority of the various waste processing methods"; whereas if dumping has the lowest priority, it would on the face of it be obvious that the mere dumping of inert waste, without reuse or recycling, is discouraged and that it is obviously not unreasonable not to create any new dumping sites, in this case Class 3 sites, if there is still a lot of residual capacity, in this case for 10 years, a fact that is not disputed as such by the appellant;

3.2.4.2. Whereas Article 174, point 2, first paragraph of the EEC Treaty, which reads, "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay", does not appear to have been violated, since the question as to where dumping sites are created would only appear to be relevant in the event that dumping sites are needed; whereas the first question with regard to waste management is whether and to what degree dumping is allowed and that only afterwards the question is relevant as to where dumping is allowed; whereas observance of the proximity principle appears to imply that, if waste has to be dumped, this happens as close as possible to the place where the waste is produced; whereas it does not seem to imply that new dumping sites have constantly to be opened if dumping has the lowest priority in waste processing and there is still sufficient dumping capacity;

3.2.4.3. Whereas, as regards the alleged violation of the formal obligation of justification, it appears from the justification of the challenged decision given under 2.5 that the essential point in this justification is that dumping should be discouraged and that from this viewpoint the creation of an additional dumping site is not advisable; whereas this justification would seem to be sufficient; whereas in this light the circumstance that the dumping site would be able to meet a number of environmental criteria in terms of nuisance and risks is not relevant; whereas it also emerges from this justification why the opinions in the other sense were not followed; whereas finally this justification also clearly shows that it is not necessary to fill up the clay pit with inert waste in order to effectuate its subsequent use;

3.2.4.4. Whereas it emerges from the above that the second argument is not valid;

3.3. Whereas the second condition required under Article 17, §§ 1 and 2, of the coordinated acts concerning the Council of State has not been fulfilled; whereas this observation suffices to dismiss the action for suspension by way of extremely urgent necessity;

CONCLUSION

Article 1

The request for intervention of the municipality of Malle in the administrative interim injunction proceedings is granted.

Article 2

The action for suspension by way of extremely urgent necessity is dismissed.

V. The Constitutional Rights on the Protection of a Healthy Environment and of Privacy – The Stand Still Principle

The right to the protection of a healthy environment forms part of the economic, social and cultural rights that were incorporated in 1994 in the Belgian Constitution (Article 23, third paragraph, 4°). The concept of environment has a broad scope in this article of the Constitution.[11] Although the Belgian Council of State expressly denies direct effect to the economic and social rights enshrined in Article 23 of the Constitution, it has accepted the *standstill* action of the right to the protection of a healthy environment[12] and linked this to the standstill principle enshrined in Article 1.2.1, § 2, of the Decree of 5 April 1995 establishing general provisions of environmental policy. The standstill principle of that Decree in turn has a European background. It is derived from a series of European environmental directives that establish quality standards. In the Flemish Region, the principle has been upgraded to a general principle of environmental policy as such.

Article 22 of the Belgian Constitution concerns the right to respect for private and family life, which according to the Court of Arbitration should be given the same scope as Article 8 of the European Convention on Human Rights. In the case of the regional airport of Liège, this gave rise to the application of the case law of the European Court of Human Rights in the case of *Powell and Rayner* and of *Hatton* versus the United Kingdom, which itself builds on the judgments in the cases of *Lopez Ostra* and *Guerra*, among others.

The main parts of the two most noteworthy judgments are quoted below.

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[11] J. THEUNIS, "Milieubescherming en grondrechten" in L. LAVRYSEN (ed.), Milieurechtspraak, Kluwer Publishing, Mechelen, 2002, 3; "Deel IV – Milieu en staatsrecht", K. DEKETELAERE (ed.), Handboek milieurecht, Bruges, die Keure, 2001, 3555-362.

[12] The issue also came up in the Court of Arbitration judgment no. 50/2003 of 30 April 2003. In this case, however, the Court did not have to rule on the question whether or not Article 23 of the Constitution concerning the right to the protection of a healthy environment implies a standstill obligation, because the challenged regulation on night flights did not involve a deterioration in relation to the previously existing situation. The Court has already accepted such a standstill effect in respect of the right to social security (Court of Arbitration, no. 169/2002, 27 November 2002).

COUNCIL OF STATE, N° 80.018, 29 APRIL 1999

Chamber President: M.-R. Bracke
State Councillors: R. Stevens and D. Moons
Judge Advocate: P. Sourbron
Lawyers: G. Van Thuyne, D. De Greef and M. Boes

RIGHT TO PROTECTION OF A HEALTHY ENVIRONMENT - ART. 23 OF THE CONSTITUTION - STANDSTILL PRINCIPLE - ART. 1.2.1, §2 OF THE DECREE ON GENERAL PROVISIONS OF ENVIRONMENTAL POLICY - CONSEQUENCES

The fundamental right to the protection of a healthy environment appears to imply, among other things, that relaxing the current environmental regulations can only be deemed compatible with the Constitution if there are compelling reasons for doing so. The standstill principle that emerges from this provision has been laid down for the Flemish Region in the Decree of 5 April 1995 establishing general environmental policy principles. The Flemish Government must bear those principles in mind when enacting environmental conditions that apply either generally or per category of establishment by virtue of Article 20 of the Environmental Licensing Decree.

VLAREM II - AMENDMENT OF ART. 5.32.10.2 - MOTOR VEHICLE RACES

The new regulation for motor vehicle races cannot be regarded as an equivalent alternative for the previous regulation. The new regulation stipulates that the organizer only has one weekend per month in which he cannot organize competitions and practice runs, whereas according to the current regulation the organizer must each month observe a balance between weekends with and weekends without planned events. It is true that the new regulation imposes stricter rules on events organized during the week, yet recreational activities usually take place at weekends, which is precisely the time of the week during which the interests of the neighbourhood prevail.
The challenged regulation has the effect of diminishing the protection of man and the environment against the unpleasant effects of the organization of motor vehicle races. Neither the administrative case file nor the defence set up by the Flemish Government shows that there are compelling reasons to justify all this in the light of Article 23 of the Constitution.

(M. Jacobs v. Flemish Region - Intervening party: v.z.w. Terlamen)

(…)
Having regard to the petition which Marcel Jacobs filed on 2 April 1999 to demand the suspension by way of extremely urgent necessity of Article 218 of the Regulation of the Flemish Government of 19 January 1999 amending the Regulation of the Flemish Government of 1 June 1995 establishing general and sectorial regulations in the area of environmental protection.
(…)

5. The validity of the arguments

5.1.1. Whereas the appellant adduces as his first argument the violation of Article 23, §3, 4° of the Constitution, which stipulates:
"Every person has the right to lead a decent life. To this end, the laws, the decrees and the rules referred to in Article 134 guarantee, taking into account the corresponding obligations, the economic, social and cultural rights, of which they determine the conditions of exercise.
Those rights comprise in particular:
(…)
4° The right to the protection of a healthy environment;
(…)";
(…)

5.1.2. Whereas the respondent argues that the appellant wrongly believes that the amendment of Article 5.32.10, §2 of Vlarem II implies a reduction in the level of protection; whereas after citing the draft version of Article 218 submitted to the legislation section of the Council of State for an opinion, and the opinion of the Council of State, the respondent cites in this connection the content of the memorandum of Minister Kelchtermans of 13 January 1999 to

the members of the Flemish Government, as well as the content of the communication by the same minister of 26 January 1999 to the members of the Flemish Government, (…)

5.1.4.1. Whereas Article 23 of the Constitution guarantees for every person the right to the protection of a healthy environment; whereas this fundamental right appears to imply, among other things, that relaxing the current environmental regulations can only be deemed compatible with the Constitution if there are compelling reasons for doing so; whereas the "standstill principle" that emerges from this provision has been laid down for the Flemish Region in the Decree of 5 April 1995 establishing general environmental policy principles; whereas Article 1.2.1, §2 of this decree provides:

"Environmental policy aims for a high level of protection on the basis of a careful consideration of the various social activities. It rests, among other things, on the precautionary principle and the principle of preventive action, the principle that environmental damage should preferably be tackled at source, the standstill principle and the polluter pays principle";

Whereas the Flemish Government must bear those principles in mind when enacting environmental conditions that apply either generally or per category of establishment by virtue of Article 20 of the Environmental Licensing Decree of 28 June 1985;

5.1.4.2. Whereas the question arises whether the challenged regulation can be regarded as an equivalent alternative for the present regulation; whereas this seems not to be the case, as will become clear below; whereas the challenged regulation implies that the organizer only has one weekend per month in which he cannot organize competitions and practice runs, whereas according to the current regulation the organizer must each month observe a balance between weekends with and weekends without planned events; whereas it is true that, along with this relaxing of the rules for the weekends, a regulation has been worked out for weekdays in the sense that competitions and/or practice runs with vehicles without noise restriction are only allowed for maximum one working day per week; whereas a regulation for the weekends is not comparable to a regulation for working days; whereas a racetrack is an establishment for recreational purposes; whereas recreational events usually do not take place during the week, but at weekends, so that the operation of the establishment at issue will also mainly be concentrated during the weekends; whereas however the weekends are precisely the time of the week during which the interests of the neighbourhood prevail; whereas those interests would seem to merit a greater protection; whereas having regard to the fact that the organization of motor vehicle races not only creates noise nuisance, but during the weekends, when people engage in their favourite recreational pursuits, also draws large crowds, stricter regulations for weekday events do not, as far as the neighbourhood is concerned, make up for a relaxing of regulations for weekend events; whereas moreover it is already stipulated in Article 3 of the current licence of 22 December 1989 of the intervening party that Class A activities, i.e. competitions, trial and practice runs without noise restriction, are allowed "every Thursday from 9 to 12 am and from 1 to 5 pm"; whereas consequently the equivalence defended in the ministerial communication of 26 January 1999 (see 5.1.2) lacks all cogency, since the stricter measure for weekdays established in the regulation appears to be tailored to the current operating licence of the intervening party; whereas this also applies for the additional limitation to ten weekends per year for competitions and/or practice runs with vehicles without noise restriction, as imposed in the challenged provision, since in the current licence a limitation to nine weekends per year has been imposed for those activities;

5.1.4.3. Whereas the above shows that the challenged provision diminishes the protection of man and the environment against the unpleasant effects of the organization of motor vehicle races; whereas, as was already said, if such a regulation is to be compatible with Article 23 of the Constitution, compelling reasons should be given; whereas the existence of such reasons cannot be inferred either from the administrative case file or from the defence set up by the respondent; whereas the argument is valid;

5.2.1. Whereas in the second part of the second argument the appellant claims the violation of Article 3 of the coordinated laws governing the Council of State, "insofar as subsequent to the opinion of the Council of State essential changes have been made to a text that was submitted to it, without this text first having been resubmitted to the legislation section for an opinion";

(…)

5.2.3. Whereas the draft version of Article 218 as was submitted to the legislation section for an opinion with regard to the existing Article 5.32.10.4, §4 of Vlarem II involved the replacement of the words "monthly basis" by "calendar year basis"; whereas it was after the legislation section of the Council of State had delivered its opinion - opinion which was cited by the appellant as well as by the respondent in their petition and note respectively (see 5.1.1 and 5.1.2 above) - that the currently challenged regulation came about; whereas it is observed that the text approved by the Flemish Government is totally different from the version that had been submitted to the legislation section of the Council of State for an opinion; whereas it concerns an entirely new regulation which replaced the

regulation that was submitted to the legislation section and in any case entails more than a mere technical adjustment; whereas in addition it emerged prima facie from the discussion of the first argument that this amended text cannot be regarded as an equivalent environmental protection regulation for the neighbourhood; whereas this entirely new regulation should have been resubmitted to the legislation section of the Council of State for an opinion; whereas the second part of the second argument is valid;

6. SERIOUS DETRIMENT THAT IS DIFFICULT TO REMEDY

6.1. Whereas the appellant points out that the current regulation contained in Article 5.32.10.2, §4 of Vlarem II had as from 1 January 1996 guaranteed him for at least two weekends per month some relief from the nuisance, such as the terrible noise, the chaos on the roads, parking problems, litter etc caused by the race in question, which draws 750,000 visitors per year; whereas he argues that this right to peace and quiet is undone by the ministerial order;

6.2. Whereas, as it emerged from the discussion of the first argument, the challenged provision will result in the racecourse being used more during the weekend; whereas in relation to the current regulation it may be assumed that by upsetting the weekend balance, the nuisance level will substantially increase for the neighbourhood; whereas it cannot be ignored that the racecourse in question, which is situated in the immediate vicinity of the appellant's home, already benefits from a derogation from the basic prohibitions of Article 5.32.10.2, §1 of Vlarem II, which stipulate that a racecourse which does not comply with the distance rules enumerated in that article must not be operated; whereas the condition of serious detriment that is difficult to remedy has been fulfilled;

7. CONCLUSION

Whereas the three cumulative conditions prescribed by Article 17, §§1 and 2 of the coordinated acts concerning the Council of State have been met; whereas since the complaints of the appellant are exclusively directed at Article 218, 3° of the Regulation of the Flemish Government of 19 January 1999, the suspension of the implementation may be limited to that;

(…)

Article 2

The suspension by way of extremely urgent necessity of the implementation of Article 218, 3° of the Regulation of the Flemish Government of 19 January 1999 amending the Decree of the Flemish Government of 1 June 1995 establishing general and sectorial regulations in the area of environmental hygiene is hereby ordered.

(…)

COURT OF ARBITRATION, N° 51/2003, 30 APRIL 2003

In the case of*: the actions for complete or partial annulment of:*

*- the Decree of the Walloon Region of 8 June 2001 amending Article 1*b *of the Act of 18 July 1973 on combating noise nuisance, instituted by L. Beckers and others and by the non-profit association Net Sky and others;*

*- the Decree of the Walloon Region of 25 October 2001 amending Article 1*b *of the Act of 18 July 1973 on combating noise nuisance, instituted by the non-profit association Net Sky and others and by L. Beckers and others.*

The Court of Arbitration,

Composed of the presiding judges M. Melchior and A. Arts, and the judges L. François, P. Martens, R. Henneuse, M. Bossuyt, E. De Groot, L. Lavrysen, A. Alen, J.-P. Snappe, J.-P. Moerman and E. Derycke, and assisted by the clerk of the court, P.-Y. Dutilleux, presided over by M. Melchior, president,

Has delivered the following judgment after careful consideration:

(…)

Regarding the first argument in cases nos. 2304 and 2431

B.4.1. The appellants in cases nos. 2304 and 2431 derive a first argument from the violation by the challenged decrees of Article 22 of the Constitution. They point out that this Article, as does Article 8 of the European Convention on Human Rights, enshrines the right to a healthy environment and that only the federal legislator can enact derogations from that, since the Communities and Regions are empowered only to guarantee the protection of that right.

B.4.2. The review of a decree for compatibility with the rules of authority must precede the review of its compatibility with Articles 10 and 11 of the Constitution.

B.4.3. Article 22 of the Constitution provides:

"Everyone has the right to respect for his private and family life, except in the cases and under the conditions stipulated by law.
The laws, the decrees and the rules referred to in Article 134 guarantee the protection of that right".

Article 8 of the European Convention on Human Rights provides:

"Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

*B.4.4. The essential objective of the right to respect for private and family life is to protect individuals against interference in their private and family lives, their homes or their correspondence. The proposal that preceded the adoption of Article 22 of the Constitution stressed "the protection of the individual, the recognition of his identity and the importance of his development and that of his family" and it underlined the necessity of protecting private and family life against "interference, as a consequence of the unceasing development of information technologies, when measures of investigation, inquiry and verification are carried out by the authorities and by private institutions in the course of their duty or their activity" (*Parl. St., *Senate, 1991-1992, no. 100-4/2°, p. 3).*

*B.4.5. It also emerges from the parliamentary preparation of Article 22 of the Constitution that the constitutioner "[wanted to achieve] the closest possible concordance with Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), in order to avoid disputes about the content of this Constitutional article and Article 8 of the ECHR […] » (*Parl. St., *Kamer, 1993-1994, nr. 997/5, p. 2).*

B.4.6. The European Court of Human Rights accepted (Powell and Rayner v. United Kingdom, judgment of 21 February 1990, Hatton v. United Kingdom, judgment of 2 October 2001) that the noise nuisance caused by aircraft, where this is excessive, may impair the quality of the private lives of the people living in the neighbourhood and that this noise nuisance may be regarded either as a failure in the positive obligation of the States to take adequate measures in order to protect the rights which the appellants draw from Article 8, par. 1, of the European Convention on Human Rights, or as an interference by an authority which should be justified according to the criteria enumerated in the second paragraph of that article. In this connection, account should be taken of a fair balance that needs to be achieved between the interests of the individual and those of society as a whole, where the State, in both cases, enjoys a margin of appreciation for determining which measures have to be taken, in particular when a legitimate aim is pursued with the operation of an airport and the negative effects thereof on the environment cannot be entirely avoided.

B.4.7. With this reservation, it may be assumed that, where noise nuisance caused by aircraft reaches an unbearable level, this nuisance may prejudice the rights which the neighbourhood of an airport derives from Article 22 of the Constitution.

B.4.8. The right to the protection of a healthy environment is enshrined in Article 23 of the Constitution. From this it cannot be inferred, however, that Article 22 can no longer be cited when noise nuisance is likely to impair the respect for private and family life guaranteed in that Article.

B.4.9. It follows from the actual text of Article 22 of the Constitution that the regions, in the exercise of their authority, must guarantee the respect for private life.

B.4.10. Under Article 6, § 1, II, 1°, of the Special Act of 8 August 1980 on reforming the institutions, the regions have authority in the protection of the environment and in combating noise nuisance. Article 6, § 1, X, 7°, of the same Special Act gives them authority with regard to the equipment and operation of the airports and the public airfields, with the exception of Brussels National Airport.

B.4.11. By adopting the challenged provisions, the legislator exercised authority in matters that come within its province. In doing so, it had to guarantee respect for private life, in accordance with Article 22, second paragraph, of the Constitution. That is the objective pursued by the challenged provisions, which are intended to protect people living near airports against the noise nuisance caused by the operation thereof.

B.4.12. Although it follows from Article 22, first paragraph, of the Constitution that only the federal legislator can decide in which cases and under what conditions the right to respect for private and family life can be restricted, this authority can reasonably only relate to the general restrictions of this right, which apply to any matter. To judge otherwise would mean that certain powers of the communities and regions would be eroded. The circumstance that an interference in private and family life is the result of the regulation of a particular matter that has been assigned to the regional legislator does not impair his authority.

B.4.13. The argument that is derived from the non-competence of the regional legislator is unfounded.

Regarding the first argument in cases nos. 2303 and 2432, and regarding the first part of the first argument in cases nos. 2304 and 2431 jointly

B.5.1. The appellants in the four cases claim the violation of Articles 10 and 11 of the Constitution, read individually or in conjunction with Articles 22 and 23, third paragraph, 2° and 4° thereof, Article 8 of the European Convention on Human Rights and Article 1 of the First Additional Protocol to the said Convention. They criticize the two challenged decrees for imposing on the Walloon Government the use of the average noise indicator L_{DN} to demarcate the zones in terms of noise exposure. This criterion is said not to be suitable for assessing noise nuisance caused by the operation of an airport which is mainly active at night. It is thought to give rise to discrimination towards the people living in zone B of the noise exposure plan, compared with those living in zone A, since these two categories of neighbours are subject to different legal systems whereas they undergo the same noise peaks.

Furthermore, the application of the L_{DN} noise indicator is said to call into existence a form of discrimination by allocating the same treatment to neighbours who mainly suffer noise nuisance at night and those who mainly undergo noise nuisance during the day.

B.5.2. The appellants believe that only the application of the L_{max} criterion would permit an adequate evaluation of the real effects of aricraft noise on their sleep. This criterion represents the maximum noise level that is caused by an aircraft flying over and is measured in dB(A).

B.5.3. According to the Walloon Government, the argument is defective in law, since the L_{DN} indicator has already been used in the Decree of the Walloon Region of 1 April 1999 amending the Act of 18 July 1973 on combating noise nuisance, to demarcate zone A of the noise exposure plan. The argument would therefore amount to a criticism of the aforementioned decree, whereas no action whatsoever has been brought against it.

*B.5.4. Article 1, 2° of the Decree of 8 June 2001 amending Article 1*b *of the Act of 18 July 1973 on combating noise nuisance defines zone B of the noise exposure plan as the zone for which the L_{DN} indicator is equal to or higher than 65 dB(A) and lower than 70 dB(A).*

*The Decree of 25 October 2001 amending Article 1*b *of the Act of 18 July 1973 provides that any real property, built on or not, exposed to a noise level with an L_{DN} noise indicator equal to or higher than 70 dB(A) is deemed to belong to zone A. Furthermore, any real property, built on or not, exposed to a noise level with a noise indicator equal to or higher than 65 dB(A) and lower than 70 dB(A) is deemed to belong to zone B.*

B.5.5. The challenged decrees use the L_{DN} noise indicator to determine the size of zone B of the noise exposure plan. The appellants are entitled to claim that the criterion used in the decree is unsuitable, even if this criterion has already been used in an earlier decree. The objection raised by the Walloon Government is therefore dismissed.

B.5.6. The Court, however, must take into consideration the parliamentary preparation of the Decree of 1 April 1999 when examining the justification of the criterion chosen by the legislator for defining the different zones with regard to noise exposure, since this justification was articulated for the first time on the occasion of the adoption of that decree and is implicitly confirmed in the challenged decrees by the choice of the L_{DN} criterion for defining the extent of zone B.

B.5.7. The Court also needs to investigate whether there is an objective and reasonable justification for an equal treatment of neighbours who chiefly undergo noise nuisance during the day and those who chiefly undergo noise nuisance at night.

*B.5.8. With the adoption of the challenged decrees, the legislator sought to strike a balance between the economic interests of the Region and the protection of the health of the neighbours suffering noise nuisance caused by the operation of the airports (*Parl. St.*, Walloon Parliament, 2000-2001, no. 184/1, p. 2).*

B.5.9. In the parliamentary preparation of the Decree of 1 April 1999, the following is set out:

"The internationally recognized L_{DN} criterion has been chosen because it takes account of four parameters that are connected with the aircraft noise and that have been identified by experts as crucial in terms of the nuisance which individuals may experience:

1. maximum noise level of any aricraft flying over: the noise peak;

2. aircraft flyover time (a less noisy aircraft that flies less quickly may be experienced as more of a nuisance than a noisier aircraft that flies faster);

3. total number of aircraft;

*4. moment when the aircraft flies over (during the day or at night, it being understood that in the latter case it is experienced as more of a nuisance, even if the aircraft makes the same noise as during the day. Thus a penalty point of 10 dB is added in the L_{DN} calculation for every night flight, making it possible to chart more efficiently the nuisance that is experienced at night)" (*Parl. St.*, Walloon Parliament, 1998-1999, no. 485/4 and no. 403/2, p. 6).*

*As regards the choice of the L_{DN} noise indicator for Bierset airport, which currently operates mainly at night, the parliamehtary preparation of the Decree of 8 June 2001 states that it was the intention of the Walloon legislator to "arrive at a definition of maximum traffic level on the basis of an extrapolation of a fictitious situation of full activity at Bierset airport" (*Parl. St.*, Walloon Parliament, 2000-2001, no. 184/5, p. 4;* Hand.*, 2000-2001, no. 21, p. 6).*

B.5.10. It is not for the Court to substitute its assessment for that of the legislator with regard to the choice of the criterion to be used in order to take account of the noise nuisance endured by the people living in the neighbourhood of the Walloon airports. However, the Court is obliged to examine whether the chosen criterion is not based on a patently unreasonable assessment.

B.5.11. Besides the fact that the L_{DN} criterion takes into consideration the noise peaks, the number of aircraft and the flyover time of each aircraft, this criterion also takes into account the volume of night flights, since it awards a penalty point of 10 dB(A) for every night flight.

By adopting a criterion that represents the average noise level created by air traffic over a 24-hour period and by justifying this measure by the fact that Bierset airport needs to be extended in such a way that this traffic takes place by night as well as by day, the Walloon Region has taken a measure that is not based on an assessment that is patently unreasonable with regard to the objective defined in B.5.8.

B.5.12. For the rest, the Court observes that, contrary to what the appellants claim, the legislator has made us in its Decree of 8 June 2001 of the L_{Amax} criterion. This criterion stipulates that, as concerns the airport of

Liège-Bierset, 87 dB(A) shall be the maximum noise limit created on the ground, expressed in L_{max}, in zone B of the noise exposure plan.

Moreover, the decree authorizes the Government to establish noise limits expressed in L_{max} that must not be exceeded by aircraft using the airports of the Walloon Region between 10 pm and 7 am.

*During the parliamentary debates that preceded the adoption of the Decree of 8 June 2001, it was said, "defining zones without taking into account the L_{max} value would have been a tenuous measure. For the neighbourhood it is not only important that account is taken of the average noise level that is determined using a large number of correction factors, but also that the noise peaks are taken into consideration" (*Parl. St., *Walloon Parliament, 2000-2001, no. 184/5, p. 4).*

*The L_{max} was intended to allow the exclusion of the noisiest aircraft, as was recalled during the debates preceding the adoption of the Decree of 25 October 2001. Moreover, the L_{max} was designed to constitute an additional guarantee, since "if just the L_{DN} indicator is used, it is possible that ten aircraft which carry out very noisy night flights and are most certain to wake up the neighbourhood (even if their houses are soundproofed) will not exceed the L_{DN} limit [70 dB(A)]" (*Parl. St., *Walloon Parliament, 2000-2001, no. 257/2, p. 10).*

*B.5.13. With regard to the establishment of the 87 dB(A) limit for zone B, this limit was justified by the circumstance that, from the perspective of economic development, it was necessary to accept long-distance flights to other continents (*Parl. St., *Walloon Parliament, 2000-2001, no. 184/5, p. 4).*

The decree also provided for the application of sanctions in case of failure to observe those maximum noise limits on the ground.

B.5.14 It ensues from the above that the challenged decrees are not discriminatory insofar as they make use of the L_{DN} noise indicator to define zone B of the noise exposure plan.

B.6.1. Furthermore, the challenged decrees are criticized for calling into existence a form of discrimination against the neighbours included in zone B of the noise exposure plan, since some of them undergo noise nuisance that is identical to that which neighbours included in zone A undergo, without them being eligible for a procedure to have their homes repurchased by the Government, as is the case for buildings situated in zone A of the noise exposure plan.

*B.6.2. During the debates that preceded the adoption of the Decree of 8 June 2001, the legislator had repeatedly expressed its concern that the principle of fairness should be observed as much as possible towards the neighbours of zone A and those of zone B (*Parl. St., *Walloon Parliament, 2000-2001, no. 184/5, p. 10;* Hand., *2000-2001, no. 22, p. 23).*

*B.6.3. It is precisely in reply to the objection that was raised by the appellants that the Walloon Region adopted the Decree of 25 October 2001. According to the explanatory memorandum, the objective of that decree was to "prevent the division of the zones of the noise exposure plan, which is based on the definition of perimeters, from holding the risk that situations involving a noise nuisance that is equal to or greater than that acknowledged within one of the said zones are misjudged, without the measures intended by the implementing orders being able to be applied" (*Parl. St., *Walloon Parliament, 2000-2001, no. 257/1, p. 2). This intention has been translated in those provisions of the decree which stipulate that neighbours in zone B qualify for the measure to repurchase their homes if it is demonstrated that they undergo noise levels with an L_{DN} indicator equal to or higher than 70 dB(A).*

The legislator has therefore seen to it that, on a case-by-case basis, account can be taken of the situations in which the automatic application of the adopted criteria would prove inappropriate.

B.7. This argument is unfounded.

Regarding the second argument in case no. 2303, the first argument and the second part of the second argument in cases nos. 2304 and 2431, the third argument in case no. 2304, as well as the second argument in case no. 2432, jointly

B.8.1 The appellants in the four cases that have been submitted to the Court cite the lack of relevance of the limit fixed at 70 dB(A) to demarcate zone A, with regard to zone B of the noise exposure plan. It is adduced that

scientific studies carried out by experts demonstrate that noise nuisance is defined as unbearable above the level of 66 dB(A) according to the L_{DN} indicator. This is said to result in discrimination between the neighbours of zone A and those of zone B, since the latter do not qualify for the favourable measures enjoyed by the former, whereas they are shown to be exposed to a noise level that is just as harmful to their health.

The appellants in case no. 2304 also complain that the soundproofing measures for the buildings that are situated in zone B of the noise exposure plan are not adequate because of the noise level which they undergo and because those measures deny the occupants of the buildings the full and complete enjoyment of their home, since they will have to remain locked up inside, without them being able to use their garden or terrace on account of the serious and even unbearable noise which they would otherwise have to undergo.

B.8.2. The challenged decrees define zone B of the noise exposure plan as the zone for which the L_{DN} indicator is equal to or higher than 65 dB(A) and lower than 70 dB(A).

As the Court has already pointed out in B.5.12, the legislator has established an upper limit for the noise that is generated on the ground, which has been fixed at 87 dB(A) and is expressed in L_{max} for aircraft that fly over at night and at 93 dB(A) for aircraft that fly over between 7 am and 10 pm.

The decree of 8 June 2001 provides that soundproofing works should be carried out in the night-time quarters of the homes situated in zone B, using appropriate methods, guaranteeing a noise reduction by 42 dB(A). The noise reduction in the main daytime quarters of the homes has been fixed at 38 dB(A).

*B.8.3. It emerges from the parliamentary preparation of the decree of 8 June 2001 that those measures were introduced in order to comply with the standards issued by the World Health Organization, which is 55 dB(A) by day and 45 dB(A) at night: no person is thought to wake up due to a noise level equal to or below that limit (*Parl. St., *Walloon Parliament, 2000-2001, no. 184/5, pp. 5 and 6). During the parliamentary preparation of the decree of 25 October 2001 it was specified that it concerned an obligation to guarantee a certain result (*Parl. St., *Walloon Parliament, 2000-2001, no. 257/2, p. 4).*

*The 70 dB(A) limit that demarcates zone A of the noise exposure plan was justified as follows: "[…] medical tests have shown that noise levels that correspond to an L_{DN} indicator of 70 dB(A) and higher are not suitable for residential areas" (*Parl. St., *Walloon Parliament, 1998-1999, no. 485/4 and no. 403/2, p. 6).*

*This limit was called into question during the parliamentary debates preceding the adoption of the Decree of 25 October 2001. Surprise was expressed at the fact that the draft decree had abandoned the Bradley standards, which clearly showed that above L_{DN} 66 it was not possible to consider a reasonable extension of the airport in a residential area, whereas those standards served as a reference for the previous Government (*Parl. St., *Walloon Parliament, 2000-2001, no. 257/2, p. 9). It was pointed out that most scientific, technical or administrative reports were not in favour of the L_{DN} 70 criterion for residential areas. It was replied that "the 70 L_{DN} standard, combined with the equality principle and with substantial measures for homes that are exposed to noise levels below 70 L_{DN}, would get the approval of the judicial authorities that will have to pass judgment on this" (*Parl. St., *Walloon Parliament, 2000-2001, no. 257/2, p. 10).*

B.8.4. The Court is not empowered to substitute its assessment for that of the legislator in order to establish the appropriate criterion on the basis of which the latter can achieve the objective it has set forth. On the other hand, the Court has to examine whether the choice made by the legislator is not patently arbitrary or unreasonable.

B.8.5. The appellants in cases nos. 2303 and 2432 have submitted several noise research reports in annex to their petition.

That of the Brussels Institute of Environmental Management points out that, as regards the noise that is measured on the outside of the homes, a noise level between 65 and 70 dB(A) is unbearable and harmful to health and that it is usually accepted that no person can live in an area exposed to aircraft noise exceeding 65 dB(A) (pp. 30-1 and 30-3 of the report).

An impact study carried out by the firm POLY'ART indicates that the solution consisting of soundproofing the existing homes, in order that the 45 dB(A) limit in the bedrooms is not exceeded, would oblige the occupants to live in unbearable conditions (p. 17 of the report). The same firm also stressed that noise levels in excess of L_{DN} = 66 dB(A) are not suitable for residential areas (pp. 17 and 45 of the report). This viewpoint was also confirmed by the A-Tech (Acoustic Technologies) working group, which was set up by the Walloon Region (point 1.2., fourth

paragraph), as well as by the expert J.-S. Bradley, who was referred to in the parliamentary preparation of the challenged decrees.

B.8.6. The Walloon Government argues in its explanatory memorandum that the conclusions of the Bradley report were wrongly translated. In this report it was made clear that it was impossible to extend residential areas exposed to noise levels of 66 dB(A) and higher, but not to maintain them. The Government also emphasizes that the conclusions of this report are based on the Canadian residential situation, where houses are built in wood, which are less soundproof than the houses that are built in Belgium, which would explain the fact that the maximum noise level that is permitted outdoors in Canada is fixed at 66 dB(A).

As regards the 70 dB(A) limit, which distinguishes zone A from zone B, the Government refers to the report by A-Tech to explain that this is a limit above which soundproofing works would prove technically difficult and expensive, even impossible, if they are not accompanied by a reinforcement of the actual structure of the buildings.

B.8.7. It is not for the Court to give an assessment of the conclusions of the various reports that have been written by the experts. The Court observes, however, that none of those reports permits it to conclude that the people living near Bierset airport will be able to live in their homes without their right to private life being inordinately affected as they are exposed to noise levels between 65 and 70 dB(A).

*B.8.8. Probably the assignment to zone B of the homes whose occupants are exposed to such nuisance is justified by the technical possibility of soundproofing them, whereas for noise levels above 70 dB(A) such soundproofing would necessitate a structural reinforcement of the buildings. It emerges from all the reports, however, that those soundproofing works would make it possible to diminish the nuisance to such a degree that the health of the neighbours is no longer threatened, on condition however that they keep all their doors and windows closed, which was confirmed during the parliamentary preparation of the decree of 25 October 2001 (*Parl. St., *Walloon Parliament, 2000-2001, 184/5, pp. 12-14;* Parl. St., *Walloon Parliament, 2000-2001, no. 21, p. 8;* Parl. St., *Walloon Parliament, 2001-2002, no. 22, p. 16).*

B.8.9. It follows from this that the residents of zone B, in terms of the right to respect for their private and family life, do not find themselves in an essentially different situation from that in which the residents of zone A live, which means that the criticized difference in treatment is not reasonably justified.

B.9. The argument that is derived from the violation of Articles 10 and 11, read in conjunction with Article 22 of the Constitution, is valid.

(…)

For those reasons,

The Court

*1. Annuls in Article 1*b *of the Act of 18 July 1973 on combating noise nuisance, inserted by the decree of the Walloon Region of 1 April 1999, and by the decrees of the Walloon Region of 8 June 2001 and 25 October 2001:*

a) paragraph 2, third last indent, which reads as follows: "The second zone of the noise exposure plan, called zone B, has a noise indicator L_{dn} of at least 65 dB(A) which is less than 70 dB(A)";

b) paragraph 3, second indent, 2°, which reads as follows: "2° every real property, built on or not, exposed to noise nuisance with a noise indicator L_{DN} of 65 dB(A) or more and less than 70 dB(A), is deemed to form part of zone B";

2. Dismisses the actions for the rest.

(…)

VI. Conclusion

We see how Belgian environmental case law increasingly makes reference to the environmental principles in European law and to the interpretation given by the European Court of Human Rights to Article 8 of the European Convention on Human Rights.

The question that arises is of course whether this is a positive or a negative development. I believe I may conclude from the foregoing that it is a positive development. Let us, for the sake of argument, imagine that those principles did not exist. Would the courts have come to the same conclusion? Although we cannot prove this with laboratory tests, I believe that reference to those principles has given a decisive turn to all the cases that have been discussed. Where existing positive law does not offer a cut-and-dried solution to a particular dispute and the judge therefore has discretionary power, the environmental principles of European law urge the judge to use this discretionary power in a way that is consistent with the basic options of common environmental policy. This seems to me to be the essential contribution of those principles to jurisdiction.