

COUNTRY REPORT: BELGIUM

**Public Participation and Access to Justice in Large Scale
Infrastructure Projects: How Deep is the Gap
between Law and Reality?**

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The Legal Framework

International environmental law includes procedural rights with regard to environmental matters, such as rights to information, participation and access to justice. The most important documents for Europe in this regard are the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,¹ and corresponding European Union legislation.² From a theoretical perspective at least, the European legislation with regards to these procedural rights is probably one of the

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¹ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, Aarhus; Convention text at <http://www.unece.org/env/pp/treatytext.html>; approved in Flanders by Flemish Decree of 6 December 2002, *Belgian Official Journal*, 7 January 2003.

² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ L* 41, 14 February 2003; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission, *OJ L* 156, 25 June 2003; Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ L* 264, 25 September 2006.

most progressive. The question is how these procedural rights are implemented in practice. In this country report we will look at an ongoing development project in Flanders (Belgium), being the expansion of the railway station in the city of Ghent and project development around the railway station.³

Project Development in and around the Railway Station in Ghent: The ‘Construction Site of the Century’

In 2007, work started on modernising the railway station of ‘Gent-Sint-Pieters’ (the main railway station in Flanders).⁴ The railway station is situated in the southern part of the city, and is for the most part in a residential area with several primary and high schools, as well as the university college of Ghent.

The modernisation works aim to increase the number of passengers to 60 000 per year. The project includes the modernisation of all railway tracks, as well as the building of a new bus and tram station. The project not only modernises the railway station itself, but also includes project development in the immediate surroundings of the station. This encompasses plans for several high office and apartment blocks. It also includes the construction of the largest underground parking station in the Benelux, providing parking places for 2800 cars, and the construction of an access road to the parking station. The access road cuts through a nature area, destroying more than 14 000 square metres of the area. Although this might not seem much in absolute figures, the loss took place in a densely populated city environment where nature was already very scarce. As compensation for the loss, part of the remaining nature area was made accessible to the public and developed into a small nature park (6.8 hectares).⁵ The works on the railway station started in 2007 and were supposed to end in 2017. The last prognosis is that the works will end in 2024. The scale of the project and duration of the works lead people in Ghent to call this the ‘Construction site of the century’.

³ This report is based on a presentation given by An Cliquet at the European Environmental Law Forum, 10 September 2014, Brussels.

⁴ For a description of the project, see the project website (in Dutch): www.projectgentsintpieters.be; in English see: Tom Coppens, *Conflict and conflict management in strategic urban projects* (PhD, KUL, Leuven 2011) 118-134, <https://lirias.kuleuven.be/bitstream/123456789/312151/1/TC+KU+20110827+Doctoraat+TC.pdf>

⁵ The obligation to compensate follows from the standstill principle in Flemish nature conservation legislation, see article 8, Flemish Decree on nature conservation, 21 October 1997, see consolidated version at <http://codex.vlaanderen.be/>

Participation and Information

The project involves several partners, including the city of Ghent, the Flemish Region, the Belgian railway company (NMBS), the Belgian railway infrastructure manager (Infrabel), the station project developer (Eurostation) and the De Lijn bus company. At the beginning of the project there was often a lack of information and participation. In general, the strategy of the project partners was to ignore any protest against the project. The project partners did not intend to negotiate or enter into dialogue with the protesters.⁶ Only in a later phase did the project partners provide several mechanisms for information and participation. These included the establishment of an Information Centre ('Infopunt') and specific website for the project.⁷ At regular times, newsletters are sent to the whole neighbourhood.⁸ Several information meetings were organized where information was given and representatives of the project partners answered questions from citizens.⁹ Regular visits to the construction site are also organised.¹⁰ There are also legal obligations for public inquiries, such as within the procedures for environmental impact assessment,¹¹ the public inquiry for the spatial zoning plan for the Gent-Sint-Pieters area,¹² and the public inquiries for building permits.¹³

Probably the most innovative element of participation was the establishment in 2005 of a Feedback group ('Klankbordgroep'). The group consists of representatives from the project partners on the one hand, and representatives of certain groups such as bikers, local schools, environmental NGOs and interested citizens on the other hand.¹⁴ The City of Gent

⁶ See also: Tom Coppens, *Conflict and conflict management in strategic urban projects* (PhD, KUL 2011) 221-225.

⁷ <http://projectgentsintpieters.be/>

⁸ <http://projectgentsintpieters.be/nieuwsbrief1>

⁹ <http://projectgentsintpieters.be/communicatie/inspraak/info-en-inspraakmomenten>

¹⁰ <http://projectgentsintpieters.be/nieuwsarchief/p/categorie/info-en-inspraakmomenten>

¹¹ WES, *Milieu effectrapport. Masterplan Station Gent Sint-Pieters en omgeving* (Brugge 2005), http://www2.vlaanderen.be/ruimtelijk/grup/00150/00171_00001/data/212_00171_00001_MER_rapport.pdf

¹² Decision by the Flemish Government of 15 December 2006 (Besluit van de Vlaamse regering van 15 december 2006 houdende de definitieve vaststelling van het gewestelijk ruimtelijk uitvoeringsplan 'stationsomgeving Gent Sint-Pieters – Koningin Fabiolalaan'), <http://projectgentsintpieters.be/voorstelling-project/studies-en-bestuurlijke-documenten/rup>

¹³ For the different building permits that have already been given, see: <http://projectgentsintpieters.be/voorstelling-project/studies-en-bestuurlijke-documenten/bouwvergunningen>

¹⁴ <http://projectgentsintpieters.be/communicatie/inspraak/klankbordgroep>

received an international Civitas award for public participation in projects such as the railway project.¹⁵

However, most of the initiatives for information and participation have been taken after the establishment of the project plans. Negotiations between the project partners date back to 1998, and requests by the neighbourhood for information at this time were refused due to the 'embryonic' stage of the plans. This is not in accordance with the *Aarhus Convention*, which requires that the public concerned shall be informed early in the environmental decision-making procedure. When the information was finally released it seemed that the plans were well-advanced, and it was made clear that no changes were possible to the essential elements of the plan.¹⁶ It was even explicitly mentioned by the city that certain aspects of the project could not be discussed, including the car park, the access road and the project development near the station.¹⁷ These are exactly the aspects of the project that are contested by the neighbourhood.

Reactions from the Neighbourhood

From the very beginning, the project was confronted with concerns and protests from the neighbourhood. The modernisation of the railway station as such has not been contested, and is even appreciated. However, there have been some concerns about the impact of the works, such as heavy traffic, including trucks and tractors, on the residential area.

Most of the arguments brought forward by the neighbourhood relate to the scale of the project, the scale of the underground parking station and access road, and the impact this road and the additional buildings in the area will have on traffic and road safety. A major concern relates to the impact on health, especially that caused by the impact on local air quality. The limit values of particulate matter in the area are already exceeded. Another concern is how the increase of activities and traffic, and their environmental consequences, will affect quality of life in the residential area. Also criticised is the loss of part of the nature area and the negative effects of the development on the quality of the remaining nature area.

¹⁵ <http://www.civitas.eu/content/ghent-wins-european-civitas-award-public-participation-and-communication-mobility>

¹⁶ Piet Dedecker, 'Natuurpark Overmeers open voor het publiek' (2013) 4 *SNEP* 40, 41.

¹⁷ Tom Coppens, *Conflict and conflict management in strategic urban projects* (PhD, KUL 2011) 231 and 236.

From the very beginning, a local environmental group ('Sint-Pieters-Buiten') protested against construction of a road through the nature area.¹⁸ In the past, local politicians promised on several occasions that no road would be built through the nature area, going so far as to oppose previous plans for the construction of a tramway through the nature area.¹⁹ In spite of these promises, a contrary decision was taken.

In 2005, a new action group was created ('Buitensporig') specifically to gather citizens in their protest against some aspects of the project.²⁰ Buitensporig holds regular meetings with the neighbourhood, maintains a website, and informs people through newswatches.²¹ They have also published several press releases, making their objections towards the project more public. Also, legal steps were taken and court cases were initiated.²² Especially, the court cases led to some nervous reactions amongst the project partners. The protesters were described as people who suffer from the 'Not in My Back Yard' syndrome and act in their own interests.²³

Both NGOs and concerned citizens participate in the Feedback group. Once it became clear that the project itself could not be stopped, proposals have been made for mitigation measures during and after the works. According to an evaluation on the implementation of the mitigations measures, the assessment was mostly negative.²⁴

Legal Complaints

Some local inhabitants, as well as the NGO Buitensporig, started several legal proceedings. A complaint was submitted to the European Commission for not respecting the EU Directive

¹⁸ Formerly called the Milieugroep Sint-Pieters-Aaigem; 'Protest tegen autoweg door Schoonmeersen' *De Standaard* (28 April 2003).

¹⁹ Piet Dedecker, 'Natuurpark Overmeers open voor het publiek' (2013) 4 *SNEP* 40-43; see also Tom Coppens, *Conflict and conflict management in strategic urban project* (PhD, KUL 2011), 217-218.

²⁰ "Buitensporig" literally means 'excessive', but is at the same time a combination of the words 'buiten' (meaning 'outside') and 'sporig' (meaning 'the railway tracks').

²¹ www.buitensporig.be

²² See for a description of the protest: Tom Coppens, *Conflict and conflict management in strategic urban projects* (PhD, KUL 2011) 134-135.

²³ Interview with Jannie Haeck (NMBS) in 'Mondige burgers worden lastpakken' *De Standaard* (19 May 2009).

²⁴ http://projectgentsintpieters.be/userfiles/files/klankbord/KBG_20120313_eisen_antwoorden.pdf

on ambient air quality.²⁵ The Commission rejected that complaint in 2008.²⁶ According to the Commission, the mere fact that a project can lead to an exceedance of limit values is not as such in contradiction with the air quality rules. Member States have a wide discretionary margin when taking measures to reduce possible violations of air quality standards. The Commission was of the opinion that the EU rules on ambient air quality basically require Member States to opt for a programmatic approach to combatting air pollution, entailing that the air quality rules are not to be used as a strict standard of review in the context of permitting procedures for one specific source of pollution. A Member State need only consider halting a project if it would appear that the measures adopted to combat air pollution are insufficient to attain the limit values, and the operation of the project would lead to a further deterioration of air quality. At the time of the complaint, the Commission found that in spite of the continuous exceedance of the limit values in the Flemish Region, such evidence had not been presented to it.

Several cases were submitted to the Belgian Council of State for the suspension and annulment of the spatial zoning plan and the building permit for the access road.²⁷ The main arguments of the plaintiffs include the following:

- the project will lead to a further violation of the limit value for particulate matter;
- the building permit has been based on an incomplete environmental impact assessment with no research on the zero-alternative;
- no measures are taken against avoidable damage to nature;
- there is no quantitative compensation for the nature damage; and
- there is a lack of sufficient motivation for not taking into account the objections by the local inhabitants.

All the arguments were rejected by the Council of State, both in the suspension decision of 2008 and the annulment decision of 2010. It is outside the scope of this article to deal with all the arguments of the Court. However, we would like to point to one aspect, namely the argumentation on the air quality. According to the Court, the building of the parking station and access road have no direct link with air quality and thus, in line with the above

²⁵ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, *OJ L* 152, 11 June 2008.

²⁶ Letter from the European Commission, 10 December 2008 (ENV A.2/MV/sb Ares(08) 57921).

²⁷ Council of State, nr. 183.359, 26 May 2008 (case A. 181.445/X-13.199); Council of State, nr. 209.868, 20 December 2010 (case A. 181.445/X-13.199) and other similar cases; <http://www.raadvst-consetat.be/>

mentioned rationale of the European Commission, the air quality standards cannot serve as a benchmark throughout the permitting procedures. Spatial decisions also have no direct impact on air quality. Reaffirming that the EU rules on air quality are based on a purely programmatic approach under which Member States enjoy wide flexibility with regards to the choice of policy and measures, the Council ruled that, *in casu*, the exceedance of the limit values merely obliges authorities to draw up additional reduction plans. To that end, the Council of State, in line with recent case-law development at the Court of Justice,²⁸ acknowledged that the affected citizens might, whenever the inadequacy of the existing programmatic approach would be prevalent, enforce the adoption of additional reduction measures before the civilian Court. Such action has indeed been pursued by some of the affected inhabitants. However, following a settlement with the competent authorities, the legal proceedings came to an end in 2011 without any ruling on the merits of the case.

Conclusion

At the early stage of the project, there was insufficient information and participation, which was not in accordance with the *Aarhus Convention*. By the time the inhabitants were informed, the main decisions had been taken and there was no room to change them. Once the works started, several efforts were taken by the city and the other project partners to inform the neighbourhood. There are also opportunities to participate through public inquiries or public hearings. Access to justice is provided and has been used in several legal procedures. However, the project is largely being realised as planned: the access road has been built and part of the nature areas has been destroyed, the underground parking has been built, a large office building has been constructed and other project development near the station is being prepared.

One of the main possibilities to participate in the process is through the Feedback group. In spite of the efforts of both the city administration and representatives of the project, as well as the efforts of citizens in preparing and attending these meetings, the feeling remains that there is little capacity for citizens to actually change the project. At one point the 'association of bikers' withdrew from the Feedback group but later rejoined. Sometimes the question is asked if initiatives like these are meaningful participation or rather meant to keep citizens 'busy'.

On the substance of the court cases, and although several infringements of environmental legislation were invoked, one of the main arguments related to the effect on the air quality on

²⁸ Court of Justice, Case C-237/07, *Janecek*, 25 July 2008, ECR I-06221.

the neighbourhood. In spite of the European legislation on air quality, it seems that it has not enough 'legal teeth' to stop large infrastructure projects, even though more and more scientific evidence is presented on the impact of air pollution on human health,²⁹ as well as its high economic cost.³⁰ Furthermore, other project developments are being planned in the wider area (including a huge outlet center), which, if permitted by the authorities, will create additional traffic problems and will even further worsen the air quality of the area in Ghent. It seems that 'bigger' interests still outweigh the human health of the population. However, as illustrated by a recent (2014) judgment of the European Court of Justice in the UK air quality case, the tide may slowly be turning. Following this case, brought by environmental group Client Earth, individuals will now be able to sue the Member States for breaching EU pollution laws, while competent authorities will be forced to prepare and implement plans to improve the air quality 'as soon as possible'.³¹ While the Court did not go as far as specifying the exact content of these plans, this landmark ruling will, in the long run, undoubtedly compel Member States to take their commitments to combatting air pollution seriously. They will now have to come up with urgent plans to rid towns and cities of cancer-causing diesel fumes, which will, in turn, urge them to reconsider the issuance of permits for unsustainable project development prone to draw even more traffic into congested cities.

²⁹ See for example European Environmental Agency, *Air Quality in Europe – 2014 report* (EEA Report No 5/2014, Luxembourg 2014), <http://www.eea.europa.eu/publications/air-quality-in-europe-2014>

³⁰ European Environmental Agency, *Costs of air pollution from European industrial facilities 2008–2012 — an updated assessment* (EEA Technical Report No 20/2014, Luxembourg 2014); <http://www.eea.europa.eu/media/newsreleases/industrial-air-pollution-has-high>

³¹ Court of Justice, Case C-404/13, Client Earth, 19 November 2014 (not yet published).