

# EU Forum of Judges for the Environment

## Climate Change and Adjudication

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### Belgian Report

Prof. Dr. L. Lavrysen

Justice Constitutional Court  
Centre for Environmental & Energy Law Ghent University

### Climate Change in Legislation

#### **1. How (if at all) has climate change and issues related to it been incorporated into legislation in your jurisdiction?**

Climate change as such is not mentioned in the Belgian Constitution. Article 7*b*, the single provision of Title I*b* “General Policy objectives of Federal Belgium, the Communities and the Regions” of the Belgian Constitution, introduced by the Constitutional Amendment of 25 April 2007, states, however: “In the exercise of their respective competencies the Federal State, the Communities and the Regions foster *the objectives of sustainable development* in their social, economic and environmental aspects, taking into account the solidarity between generations”. This provision is the only provision of the Constitution that sets policy objectives for the different authorities, since it calls for integration of sustainable development concerns in the different policies of the authorities concerned. The fundamental rights of the Belgians are established in Title II of the Constitution. One of the provisions of that Title deals with the so-called social, economic and cultural rights. Article 23 of the Constitution, introduced by the Constitutional Amendment of 31 January 1994, provides: “Everyone has the right to lead a life in conformity with human dignity. To this end, the laws, decrees [...] guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them. These rights include notably: [...] 4. *the right to enjoy the protection of a healthy environment*; [...]”.

Climate change policy in Belgium is a mixed competence of federal government and the regions (the Flemish, Walloon and Brussels Capital Region) (and to a far lesser extend the communities).<sup>1</sup> Those subdivisions of the Belgian State have in principle exclusive powers in

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<sup>1</sup> L.Lavrysen, “Climate Law” in E. Dirix and Y.-H. Leleu (eds.), *Belgische Rapporten voor het Congres van de “Académie internationale de droit comparé” te Washington/The Belgian Reports at the Congress of Washington of the International Academy of Comparative Law*, Brussels, Bruylant, 2011, 349–386, <http://hdl.handle.net/1854/LU-1944107>; L. Lavrysen, “Klimaatverandering en Zesde Staatshervorming”, *De bevoegdheden van de Gewesten*, Brussels, 2016, <http://hdl.handle.net/1854/LU-7248161>

the areas of competence entrusted to them, including in the field of climate change mitigation and adaptation. In a quasi-constitutional Act of Parliament (Special Act of 8 August 1980 on Institutional Reform), as Amended by a Special Act of 6 January 2014, a specific “Substitution Mechanism” (Art. 16, § 4) has been introduced taking effect July 1st 2014 in case that international obligations of Belgium would not have been met in the field of climate change when this is due to the policies of regions or communities. According to that provision Federal Government may substitute its action to that of the regions if it appears that Belgium is in breach of its international or European obligations in the framework of the UNFCCC (and it’s Protocols), due to an action or inaction of one or more of the regions or communities. Federal legislative or executive measures may substitute those of the region or community that have been found in breach of these International or European obligations, as soon as there is a decision of the UNFCCC Compliance Committee or a reasoned opinion of the European Commission on the basis of Art. 248 TFEU adducing that Belgium is in breach of its climate change commitments and this is due to one or another of the regions or communities. Art. 16, § 4, of the Special Act sets out the procedure to be followed. The substitute measures will cease to be applicable as soon the region or community concerned has taken the necessary measures to comply with the international obligations. The related costs are at the expense of the region or community concerned.<sup>2</sup>

Various so-called *Cooperation Agreements* have been concluded between federal government and the governments of the regions on Climate Change Policies.

A Cooperation Agreement of 14 November 2002 provides for the creation of a *National Climate Commission*, composed of representatives of the federal and the regional governments.<sup>3</sup> This Commission, that reports to the Inter-ministerial Conference for the Environment (ICL/CIE)<sup>4</sup>, is in charge of coordinating the climate change policies of federal government and the regions. It should also develop a *National Climate Change Policy Plan*<sup>5</sup>, that is to be updated on a regularly basis. Other bodies engaged in the co-ordination effort comprises the Coordination Commission for International Environmental Policy (CCIM/CCIEP), the Inter-regional Unit for the Environment (IRCEL/CELINE) and the Energy Policy Co-Ordination Group (ENOVER).<sup>6</sup>

Another Cooperation Agreement provides for a burden sharing of mitigation efforts between federal government and the regions for the period 2007-2012<sup>7</sup> and for the period 2013-2020<sup>8</sup>. The targets in terms of reduction of the emission of GHG, compared with 2005 are as follows: Flemish Region -15,7 %; Walloon Region: -14,7 %; Brussels Capital Region: -8,8 %.

(in kiloton CO2-eq.)	2005	2013	2014	2015	2016	2017	2018	2019	2020
Vlaams Gewest	47.950.276	48.048.531	46.959.027	45.869.526	44.780.029	43.690.536	42.601.068	41.511.563	40.422.083
Waals Gewest	27.189.028	26.029.033	25.623.785	25.218.534	24.813.281	24.408.026	24.002.753	23.597.506	23.192.241
Brussels Gewest	4.455.021	4.302.261	4.268.082	4.233.901	4.199.720	4.165.537	4.131.345	4.097.167	4.062.979
België	79.620.356	78.379.825	76.850.894	75.321.962	73.793.030	72.264.098	70.735.166	69.206.235	67.677.303

As the use of renewable energy is concerned, the share of that form of gross final energy consumption in Belgium should be 13 % in 2020, divided as follows: Federal: 0,718 Mtoe (mainly off shore wind farms); Flemish Region: 2,156 Mtoe; Walloon Region: 1,277 Mtoe;

<sup>2</sup> L. Lavrysen, *Handboek Milieurecht*, Mechelen, Wolters Kluwer Belgium, 2016, 218.

<sup>3</sup> <http://www.cnc-nkc.be/en>

<sup>4</sup> Composed of federal and regional Environment Ministers.

<sup>5</sup> Including a National Adaptation Plan: [http://www.cnc-nkc.be/sites/default/files/report/file/nap\\_en.pdf](http://www.cnc-nkc.be/sites/default/files/report/file/nap_en.pdf)

<sup>6</sup> <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/nationaal-beleid/beslissingsorganen>

<sup>7</sup> L. Lavrysen, *Handboek Milieurecht*, Mechelen, Wolters Kluwer Belgium, 2016, 668.

<sup>8</sup> *Ibid.*, 668-669

Brussels Capital Region: 0,073 Mtoe. Furthermore the proceeds of emission trading have been distributed also between the various governments, as is the case with the contribution to the international climate change policy funding.

Also in 2014 a “financial responsibility mechanism” has been introduced in the basic system for financing the regions. For each of the regions a path towards reduction of GHG emissions from the residential sectors has been put forward (Art. 65q of the Special Act concerning Financing of Regions and Communities; Act of 6 January 2014 concerning the responsibility mechanism for climate change). If a region would do better than the path set out in that Act, it will receive a financial bonus from the federal budget. A region that would not meet its target has to undergo a cutback of the financial means it receives from federal government.<sup>9</sup>

Other Co-operation Agreements concern very technical issues, like the application of the EU ETS system on aviation, auction of emission trading allowances, the use of flexible mechanism or the National Registry of GHG’s.<sup>10</sup>

In their domains of exclusive competences, those measures haven been complemented by federal and regional legislation.<sup>11</sup>

The main drivers of climate change legislation in Belgium are International and EU law.

## **2. How do the structures of government affect legislation related to climate change?**

As follows from the description above, the complex federal structure of Belgium, in which climate change policy is a mixed competence, has resulted also in a complex climate change governance system in Belgium that tries to bring some coordination between the main institutions involved. Due to the absence of a legal hierarchy between the federal level of government, the regions and communities, the system can only work on the basis of a consensus between those 4 major players. The fact that the National Climate Commission is relatively weak, and plans to extend its powers have not realized yet, although they are on the table since 2014, explains why it takes sometimes a lot of time to make progress. The intra Belgian burden sharing agreement for the period 2013-2020 was e.g. only reached on 4<sup>th</sup> of December 2015, during the COP 21 negotiations in Paris. The process of approval of the formal agreement by the various parliaments has not yet been finalized. It explains also why a new National Climate Plan, after the expiration of the 2009-2012 plan, has not been elaborated. It has now been decided to work towards an Integrated National Energy-Climate Plan 2021-2030 in the framework of EU Clean Energy Package.

A further complexity has to do with the separation of legislative and executive powers, that commands that all basic rules have to be approved by the relevant parliament, before executive matters can be regulated by the respective governments.

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<sup>9</sup> L. Lavrysen, Het leefmilieu en het waterbeleid, in B. Suetin & G. van Haegendoren (eds.), *De bevoegdheden van de gewesten*, Brugge, die Keure, 2016, 54-56.

<sup>10</sup> <http://www.cnc-nkc.be/nl/wetgevend-kader/samenwerkingsakkoorden-protocolakkoord-etc>

<sup>11</sup> L. Lavrysen, *Handboek Milieurecht*, Mechelen, Wolters Kluwer Belgium, 2016, 670-681.

As climate change policies that encompass both mitigation and adaptation is a very vast domain of action, a great variety of federal, regional and community institutions and their subdivisions are concerned, which make it very difficult to sketch in a nutshell a clear picture of whom is exactly competent for what in this matter.

## **Climate Change Litigation**

### **3. Can climate change laws in your jurisdiction serve as basis for judicial action?**

Climate change laws can indeed serve as a basis for judicial action, be it for the Constitutional Court, the Supreme Court, the Supreme Administrative Court, or the ordinary Courts and Tribunals, within the boundaries of their respective competences. As such that is not seen as legally novel.

The same holds true for direct applicable (Regulations..) are transposed (Directives, Decisions...) EU law. As appropriate the CJEU could be referred to for preliminary rulings concerning the interpretation or validity of those legal instruments.

### **4. Has climate change, and related issues, given rise to court cases in your jurisdictions?**

There have been some cases before different Courts.

#### ***Constitutional Court***

As the Constitutional Court is concerned there have been in the first place some cases concerning *Emission Trading*. Various judgments of the Constitutional Court concern *support mechanism to promote renewable energy* or to *limit activities that produce greenhouse gases*.

#### **Judgment n° 92/2006, 7 June 2006 – Walloon Regional Act – Transposition Directive 2003/87/EC – *sa Cockerill Sambre & sa Arcelor***

The Court found no discrimination of steel companies compared with the non-ferrous and the chemical industries. The Court ruled that in the first commitment period it was justified to start applying the ETS to the largest emitters first.<sup>12</sup> Climate change policies justify limitations on freedom of enterprise and property rights. There has not been a violation of the freedom of establishment.

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<sup>12</sup> Compare: ECJ, Case C-127/07, 16 December 2008, *Société Arcelor Atlantique and Others*.

**Judgment n° 33/2011, 2 March 2011 – Walloon and Flemish Acts Transposing ETS Amendment- Civil Aviation – Government of Brussels Capital Region<sup>13</sup>**

The Court found that Federal Government should be involved, because the system at stake has to do also with the regulation of civil aviation and navigation above territorial sea, matters of federal competence. The Regional Acts therefore are not respecting the territorial limitations of the regions. A Co-operation Agreement is necessary to regulate the matter properly. The Court reconfirmed its position in 2 subsequent judgments<sup>14</sup>. The Court upholds the effects of the annulled acts to allow for negotiation and conclusion of such an Agreement. Meanwhile such an agreement has been concluded.

**Judgment n° 193/2006, 5 December 2006 – Federal Act – Support for offshore windfarms – *vzw Edora***

The Court held that the development of off shore wind energy justifies higher support than land based because of the extra costs for this type of production.

**Judgment n° 8/2014, 23 January 2014 – Flemish Act – Reduction of State Aid for Renewable Energy – *nv Aspiravi and vzw Federatie Belgische Biogasininstallaties***

The Court recognized that there is a need to reduce greenhouse gas emissions. Support for the development of renewable energy fits in that purpose. There is a wide margin of appreciation of the legislator and techniques and the related economics are rapidly changing. There is also some room for trial-and-error, but the principle of legal certainty should be respected as regards investment decisions taken under previous schemes. Fixed administrative fines per missing green certificate are not unconstitutional. They are not only a sanction, but also an economic incentive and this has an impact on the proportionality test.<sup>15</sup>

**Judgments n° 149/2010, 22 December 2010 and n° 94/2013, 9 July 2014 – Federal Act - Obligation to blend fossil fuels with a growing percentage of biofuels - *Belgische Petroleum Unie VZW and Others***

After the Court had referred the case for a preliminary ruling to the ECJ<sup>16</sup> is held that the obligation to blend a growing percentage of biofuels into fuels for cars entailed no violation of the Freedom of Religion, various EU directives, the Freedom of Enterprise, nor of the Free Movement of Goods.<sup>17</sup>

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<sup>13</sup> See also Constitutional Court, n° 76/2012, 14 June 2012, *Council of Ministers*; Constitutional Court, n° 67/2014, 24 April 2014, *Belgian State v. Flemish Region*.

<sup>14</sup> Judgment n° 76/2012, 14 June 2012; Judgment n° 67/2014, 24 April 2014.

<sup>15</sup> The Court held also in its judgment n° 27/2014 of 13 February 2014, after having consulted the ECJ (Case C-195/12, 26 September 2013, *Industrie du bois de Vielsalm & Cie (IBV) SA v. Région wallonne*), that the exclusion of the sawing mill industry from the most favourable support mechanism for renewable energy production, was justified.

<sup>16</sup> ECJ, Case C-26/11, *Belgische Petroleum Unie VZW and Others*, 31 January 2013.

<sup>17</sup> With its judgment n° 52/2015, 7 May 2015, *Neste Oil Oyj* the Constitutional Court annulled, on demand of a Finnish State Owned Company, the exclusion of one particular type of biofuels (HVO) from a support scheme stimulating the use of sustainable biodiesel, because of a violation of the principle of non-discrimination, in combination with some EU law provisions.

**Judgment n° 170/2014, 27 November 2014 – Brussels Code on Air, Climate and Energy – Reduction of car parking places – *vzw Federatie van Belgische Parkings***

The Court held that the reduction or limitation of car parking places in the Brussels Capital Region in the framework of environmental permits is justified in the context of its climate change policies.

The Constitutional Court considers Climate Change Policy as an overriding public interest, that justifies restrictions of various rights and liberties. Differences in treatment can relatively easily be justified especially in the earlier stages of policy development. Emerging climate change law can thus be construed in a manner that is compatible with fundamental principles of the rule of law.<sup>18</sup>

***Council of State***

A search in the database of the Supreme Administrative Court using climate change (“*klimaatverandering*” in Dutch/ “*changements climatiques*” in French) as a keyword results in 14 and 46 hits respectively, so judgments in which the term is used in one or another way. However in only part of them the key words are used in the reasoning of the Council itself. The cases are very diverse, comprising permits for offshore windfarms<sup>19</sup>, regulations concerning the conditions under which green energy certificates are delivered<sup>20</sup>, the allocation of tradable emission permits<sup>21</sup> or EIA and environmental permits<sup>22</sup>. Although in some of these cases in the reasoning of the Court there is reference to the International and European commitments of Belgium relating to climate change and those commitments are one of the elements taken into account to justify most of the time projects that are beneficial for climate change mitigation or measures that have a negative impact on the free movement of goods, there is not any case in which climate change is at the heart of the case.

***Ordinary Judiciary – The Belgian Climate Case***

Inspired by the Dutch *Urgenda* Case some media figures have started the so called “Belgian Climate Case”, with support of Roger Cox, the lawyer behind the *Urgenda* case<sup>23</sup>. The claim is similar but at the same time different, because the defense do not consist of one party like in the *Urgenda* Case (the State of the Netherlands), but 4 Governments, one federal and 3 regional (the Flemish, Walloon, and Brussels Capital Governments) because, as has been explained above, climate change is a mixed competence in Belgium. The claimants, the non-profit foundation “*Klimaatzaak*” and their co-claimants, are claiming a joint reduction of those governments of GHG with 40 % towards 2020 (and at least 25 %), compared with the 15% reduction for non-ETS sectors under the EU Burden Sharing Decision. The claim is based on Art. 23(3), 2 and 4, of the Constitution (Rights to the Protection of Health and of a Healthy Environment), Art. 2, 8 and 13 ECHR (Right to Life, Right to the Protection of Private and Family Life; Right of an Effective Remedy) and Art. 1382 (Fault based

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<sup>18</sup> L. Lavrysen, *Climate Change Litigation Before the Belgian Constitutional Court, Adjudicating the Future: Climate Change and the Rule of Law*, London, 2015; <http://hdl.handle.net/1854/LU-6934181>

<sup>19</sup> Council of State, n° 147.047, 30 June 2005, *Soete/Knokke-Heist*.

<sup>20</sup> Council of State, n° 221.374, 13 November 2012, *nv Wattplus/nv Essent Belgium*, compare with Council of State, n° 204.108, 19 May 2010, *nv Wattplus*

<sup>21</sup> Council of State, n° 229.510, 10 December 2014, *sa ArcelorMittal Belgium/ Région wallonne*

<sup>22</sup> Council of State, n° 234.494, 22 April 2016, *Ville d'Ottignies-Louvain-la-Neuve and Others/ Région wallonne*

<sup>23</sup> <http://www.klimaatzaak.eu/nl/de-rechtszaak/#klimaatzaak>

Liability) and 714 of the Civil Code (Subjective right to the Use of non-privative Parts of the Environment). The case has been introduced by summons of 27 April 2015 before the French speaking District Court of Brussels, because 3 of 4 parties have French as their official language (as the federal government is concerned together with Dutch). The official language of Flemish Government is however Dutch and that government asked to send the case to the Dutch Speaking District Court, which was refused by the presiding judge and, on appeal by the Presidents of the Courts concerned. Against that decision Flemish Government filed a cassation appeal with the Supreme Court. The case is pending at time of writing.

## **Climate Change Adjudication**

### **5. How easily resolvable are the legal questions raised in these different cases?**

The cases the Constitutional Court had to handle, dealt with relative new legal tools like emission trading and green certificates and with sometimes very technical issues in the framework of support mechanism for renewable energy.

The pending “Belgian Climate Case” tries to apply conventional legal concepts (duty of care, fault based liability, reparation in kind, human and constitutional rights) on a vast and complex issue as climate change. Compared with the Dutch case there are additional institutional complexities. It remains to see if the Belgian judiciary will eventually come with solutions similar to that reached by the The Hague District Court or not.

As the Constitutional Court is concerned, it consulted twice the CJEU, while in one case it reached a similar conclusion than the CJEU reached much later (Case C-127/07, 16 December 2008, *Société Arcelor Atlantique and Others*), without referring the case, because while transposing the ETS Directive the legislator had the legal possibility to avoid the challenged solution so that it could be reviewed on the basis of the Belgian Constitution only.

### **6. How straightforward is the resolution of factual issues in cases on climate change?**

As the Constitutional Court is concerned the parties did so far not disagree about factual issues that would be of relevance for the constitutional review, so that the Court had sufficient insight in the cases on the basis of the submissions of the parties and no additional expertise proved to be necessary. In general the submissions before the Constitutional Court are well substantiated so that it is very rare that the Court need to look for expertise that would not have been provided and discussed by the parties. It can happen although that the Court ask the parties to submit additional information.

## Climate Change and Access to Justice

### **7. Who are the parties bringing climate change actions?**

Nearly all climate change related cases have been brought to the Constitutional Court or the Council of State by industry, that is unhappy with some climate change obligations or is seeking more support for their type of renewable energy production.

The pending “Belgian Climate Case” is an exception in which a foundation, supported by more than 30.000 individuals, is claiming a stronger climate change policy from the Belgian authorities.

### **8. How do legal rules in relation to the bringing of an action affect the ability to bring these cases?**

There has for the moment not been a particular impact of climate change litigation on how standing is conceived by the various courts. The same is true for costs rules. Even though litigation costs are “modest” compared with those in some other jurisdictions, there is a tendency to increase those costs by the introduction of VAT for lawyers, the reform of court fees and the introduction of a “moderated” loser pays principle. This seems to have at least a chilling effect<sup>24</sup>.

## Climate Change and Remedies

### **9. What is the range of remedies available to national courts in climate change cases?**

The Constitutional Court is a so called “negative” legislator. The room for positive law making by the Court is limited and there are no *Urgenda* type of remedies available to the Constitutional Court.<sup>25</sup>

In general one can say that the different courts dispose of sufficient remedies to provide for adequate and effective relief. However, in the past there have been a lot of cases delivering unsatisfactory results, mainly because of the delays in handling the cases due to the historical

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<sup>24</sup> L. Lavrysen, EUFJE 2013 Vienna Conference – Report on Belgium, p. 10-12, <http://hdl.handle.net/1854/LU-4260117>

<sup>25</sup> L. Lavrysen, Climate Change Litigation Before the Belgian Constitutional Court, Adjudicating the Future: Climate Change and the Rule of Law, London, 2015; <http://hdl.handle.net/1854/LU-6934181>



backlog with the Council of State and the Flemish Council for Permit Disputes and on the level of the Courts of Appeal, as civil (and penal) cases are concerned.<sup>26</sup> Recently both the Council of State and the Council for Permit Disputes are able to handle cases in a more expedient way but the question remains if the competence to provide for interim relief is used in the most effective manner to protect the environment.

## **10. What types of issues are raised about remedies in climate change cases?**

In the Belgian Climate Case similar questions as in the Dutch *Urgenda* case will arise, especially the question if the requested remedies respect the separation of power. Additionally the question will arise if a civil judge can issue a joint order towards 4 governments in a system that is based on exclusive competences of the federal state and the regions.

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<sup>26</sup> L. Lavrysen, EUFJE 2013 Vienna Conference – Report on Belgium, p. 10-12, <http://hdl.handle.net/1854/LU-4260117>