

Environmental Impact Assessment in Belgium

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“Impact Assessments – Preventive Measures against Significant Environmental Impacts in the 21st Century”

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Legal Framework

1. How is the EIA Directive (Directive 2011/92/EU) transposed in your country? Please provide a list of your national pieces of legislation transposing the EIA Directive.

Environmental policy in Belgium falls largely within the remit of the three autonomous regions: the Flemish Region, the Walloon Region and the Brussels Capital Region. This is particularly the case for *environmental protection* and *nature conservation* (Art. 6(1), III, of the Special Act of 8 August 1980 on institutional reform)¹. As a result, three different regional legislations exist in the field that constitutes the subject of the annual EUFJE conference in Budapest. In addition, the regions have no authority over the Belgian maritime areas and for nuclear projects. The implementation of the EIA Directive in the maritime areas and for nuclear projects is the responsibility of the federal government. This means that, in total, 4 different sets of regulations apply in Belgium with respect to EIA.

The main pieces of legislation are:

a) Flemish Region:

- Decree of 5 April 1995 “*houdende algemene bepalingen inzake milieubeleid*” (containing general provisions concerning environmental policy) – Title IV “*Milieu-effect en veiligheidsrapportage*” (Environmental Assessment and Safety Reporting) – In particular, Chapters I (general provisions), III (EIA) and VI (Quality assurance);
- Executive Order of the Flemish Government of 10 December 2004 “*houdende vaststelling van de categorieën van projecten onderworpen aan milieueffectrapportage*” (concerning the categories of projects subject to EIA);
- Various provisions in the regulations concerning environmental and building permits.

b) Walloon Region²

- Decree of 11 September 1985 “*organisant l'évaluation des incidences sur l'environnement dans la Région wallonne* » (organising EIA in the Walloon Region)
- Walloon Environmental Code – Part V- Chapter III « *Système d'évaluations des incidences de projet sur l'environnement* » (EIA) + Partie réglementaire – Part V- Chapter III
- Executive Order of the Walloon Government of 4 July 2002 « *arrêtant la liste des projets*

¹ E. DE PUE, L. LAVRYSEN & P. STRYCKERS, *Milieuzakboekje 2014*, Wolters Kluwer Belgium, Mechelen, p. 20-27.

² We will not discuss the particular – an meanwhile annulled – system of “regional permits” (DAR); see on this issue L. LAVRYSEN, *EUFJE 2013 Vienna Conference – Report on Belgium*, www.eufje.org, p. 2-3.

soumis à étude d'incidences et des installations et activités classées » (list of projects subject to EIA and environmental permit or notification)

c) *Brussels Capital Region*

- Ordinance of 5 June 1997 “*betreffende de milieuvergunningen*” (concerning environmental permits) – Various articles, in particular articles 21-26;
- Brussels Code on Land Use Planning – Various articles, in particular Articles 127-148;
- Various provisions in the regulations concerning environmental and planning permits.

d) *Federal*³

- Royal Decree of 20 July 2001 “*houdende algemeen reglement op de bescherming van de bevolking, van de werknemers en het leefmilieu tegen het gevaar van de ioniserende stralingen*” (the general regulation concerning the protection of the population, the workers and the environment against the danger of ionizing radiations) – Art. 6
- Act of 22 January 1999 “*ter bescherming van het mariene milieu en ter organisatie van de mariene ruimtelijke planning in de zeegebieden onder de rechtsbevoegdheid van België*” (concerning the protection of the marine environment and spatial planning in the sea areas under Belgian jurisdiction)
- Royal Decree of 9 September 2003 “*houdende de regels betreffende de milieueffectenbeoordeling in toepassing van de wet van 20 januari 1999 ter bescherming van het mariene milieu in de zeegebieden onder de rechtsbevoegdheid van België*” (regulation on EIA in the context of the Act concerning the protection of the marine environment and spatial planning in the sea areas under Belgian jurisdiction)

2. Are the EIA Directive and the IPPC Directive transposed in your country through the same legislation?

From the answer to the first question flows that the answer is no, although there are some pieces of legislation in which some aspects of both directives are dealt with.

3. What procedure is set up to determine whether a project (listed in Annex II) shall be made subject to an assessment, case by case examination, thresholds or criteria or a combination of these procedures?

The situation is different in the various regions.

In the *Flemish region*, there is, on the one hand, a list of projects with thresholds and criteria⁴, that in principle are subject to EIA, except when the developer can show to the satisfaction of the EIA Service, that in a given case no significant environmental impacts will occur, and on the other hand, the same list of projects, but that do not reach the said thresholds and criteria⁵, for which a case by case examination by the competent authority has to decide if significant environmental impacts may occur in a given case on the basis of a „screening notice”. This second list of projects was introduced by an Executive Order of the Flemish Government of 1 March 2013 after the ECJ, in its Judgment of 24 March 2011, Case C-435/09, *European Commission v Kingdom of Belgium*, (paras 29-67) ruled⁶ that the Flemish Region by excluding systematically from EIA a series of projects of

³ View the limited scope of these two forms of EIA on the federal level, they will not be discussed further in this report.

⁴ Annex II of the Executive Order of the Flemish Government of 10 December 2004.

⁵ Annex III of the same Executive Order, as added by Executive Order of 1 March 2013.

⁶ « Il s’ensuit que, dans la mesure où la réglementation de la Région flamande fixe des seuils et des critères de sélection qui ne tiennent compte que de la dimension du projet en cause, le Royaume de Belgique ne satisfait pas aux exigences énoncées à l’article 4, paragraphes 2 et 3, de ladite directive, lu en combinaison avec les annexes II et III de celle-ci. Par suite, cet État membre a outrepassé les limites de la marge d’appréciation dont il dispose pour fixer lesdits seuils et critères. »

Annex II on the basis of thresholds solely based on their size, was not acting in conformity with the Directive⁷.

In the *Walloon Region* a „*notice d'évaluation des incidences sur l'environnement*” (a kind of mini-EIA – see Art. D. 67 and Annex VI of the Walloon Environmental Code) is necessary for those projects which on the basis of a positive list fixed by the Walloon Government⁸, are not *ex officio* subject to an „*étude d'incidences environnementale*” (a full EIA, Annex VII of the Walloon Environmental Code). It's up to the competent authority to decide if such a project is likely to cause significant environmental impacts or not and if a full EIA is necessary or not (art. D. 68 of the Walloon Environmental Code). This decision should be well reasoned and those reasons should be found at least in the final decision on the application for the permit⁹.

In the *Brussels Capital Region* the relevant projects of Annex II of the Directive are included in Annex B of the Brussels Code on Land Use Planning¹⁰. For some of these projects thresholds were added. The same is true for projects subject to environmental permit (Executive Order of 4 March 1999). The projects are subject to an “*effectenverslag*” a sort mini-EIA that can be produced by the developer itself. Only in “exceptional circumstances” a full EIA (“*effectenstudie*”) will be necessary for those projects, based on a reasoned decision of the Brussels Capital Government, after having received the reasoned opinion of the so-called “Consultation Commission” (Art. 42 of the Ordinance of 5 June 1997; Art. 148 of the Brussels Code on Land Use Planning). Both the ECJ (Judgment of 24 March 2011, Case C-435/09, *European Commission v Kingdom of Belgium*, paras 96-107) and the Constitutional Court (Judgement n° 46/2012, 15 March 2012) found that in this respect the Brussels legislation was not in conformity with the Directive because it was not secured that every project that, on the basis of the criteria contained in Annex III of the Directive, should be considered to have significant impacts on the environment, is subject to EIA. This flaw in the legislation has not been repaired yet.

EIA Procedural Provisions

4. Is the environmental impact assessment procedure considered in a separate administrative procedure (e.g. - different from the development consent procedure) by the competent authority? If yes, please provide a short description of the applicable arrangements for the implementation of the Directive (including what administrative act is considered development consent).

Although there is a clear link between the EIA legislation and the development consent (planning or building permit or environmental permit) procedures, one can say that EIA is to a certain extent, and with variations between the regions, a separate procedure in the different regions of Belgium.

⁷ The Council of State annulled an environmental permit for such a project that had not been screened: Council of State, nr. 226.271, 30 January 2014, *Marc Van Rompaey and Another v. Flemish Region*. The Council for Permit disputes annulled for the same reason some planning permits: Council for Permit Disputes, A/2012/0216, 30 May 2012, *City of Antwerp v. Provincial Government of Antwerp*; Council for Permit Disputes, A/2012/0217, 30 May 2012, *City of Antwerp v. Provincial Government of Antwerp*; Council for Permit Disputes, A/2013/0567, 1 October 2013, *X. v. Gewestelijk Stedenbouwkundig Ambtenaar*. The fact that the former situation was not in conformity with the EIA Directive can also influence the legality of SEA for plans and programs. See: Council of State, nr. 218.458, 14 March 2012, *vzw Milieufrent Omer Watez v. Flemish Region and Province of East-Flanders*.

⁸ Annex I of the Executive Order of the Walloon Government of 4 July 2002.

⁹ Council of State, n° 224.461, 6 August 2013, *S. Caballo and Others v. Walloon Region*.

¹⁰ Some of the projects of Annex I of the Directive were included in Annex A of the Code. For those projects a full EIA or “*effectenstudie*” will be necessary (see: Constitutional Court, n° 46/2012, 15 March 2012, *M. De Muylder and Others v. city of Brussels and Others*, B.5.4).

In the *Flemish Region* the ordinary EIA procedure¹¹ is for the moment a procedure that precedes the permitting procedure. It starts with a notification of the developer that he is intending to prepare an EIA (or that he is seeking an exemption of that obligation¹²). That notification is sent to the EIA Service of the Flemish Government; it is circulated amongst other competent environmental authorities and is published. Competent authorities and the public at large can introduce suggestions on the scoping of the EIA within 30 days. The EIA Service will take a screening and scoping decision within 60 days (80 days in case of transboundary consultation) and approve the team that will produce the EIA (chosen by the developer amongst accredited experts). The EIA team has to consult regularly the EIA Service while preparing the Environmental Impact Report (EIR) and has to submit the EIR for approval to the EIA Service. Both the scoping decision and the (non-) approval decision can be the subject of an administrative review procedure and challenged in Court. When the EIR is approved, the developer can start the permitting procedures. The approved EIR will be part of the application for a planning (building) permit (for the building activities necessary to realise the project) and/or of the environmental permit (necessary for the operation of certain activities that can cause environmental harm). These two permits are thus considered as the “development consent” in the sense of Art. 1 (2) (c) of the Directive. The Council of State has decided that a permit to modify a water course has also to be considered as such a consent¹³. However the procedure will change considerably in the future (probably from 1 January 2017 onwards), when the Decree on the “*omgevingsvergunning*” (Integrated planning and environmental permit), adopted recently¹⁴, will become operational. This Decree will bring the integration of planning and environmental permits in one new, integrated permit. As the idea is also to speed up decision-making on investments projects of all kinds, to boost the economy, the EIA procedure would no longer be a procedure that precedes the permitting procedure, but would be integrated, at least partially, in it. So there would not anymore be a scoping procedure with public participation – only the obligation for the developer to seek approval of the EIA team before starting the work and a possibility (not an obligation) for the developer to seek guidance from the EIA Service on the scope of the EIA – nor an obligatory approval of the EIR by the EIA Service before introducing the permit application. The EIR will be part of the application of the integrated permit, subject to public participation and consultation together with that application. The quality check of the EIR will be done by the EIA Service, after closure of the public inquiry and before a decision on the permit application is taken, so while the permitting procedure is running.

Unlike in the Flemish Region, scoping is not mandatory in the *Walloon Region*. Nevertheless, the developer may ask beforehand an opinion of the competent authority on the content of the “*étude d’incidences*” (EIR). The developer may indeed ask the competent authority to deliver a scoping decision. Before doing so, the competent authority will consult the environmental administration and, depending on the type of project, the Walloon Council for the Environment and Sustainable Development, the Local Consultative Commission for Land Use Planning or the Regional Commission for Land Use Planning, which are multi-stakeholder advisory bodies. They have 30 days to give their input and the competent authority must deliver its scoping decision within 45 days from the date of request. The developer appoints one or more accredited experts to draw up the EIA and notifies his choice to the Walloon Government and the designated authorities. Within a period of 15 days the Minister may reject the choice of the developer, in particular if he fails to offer sufficient guarantees for his independence in the exercise of his function. The EIA Report is attached to the application for the relevant permit (environmental permit, building permit or integrated permit). If the competent authority is of the opinion that the application is complete and admissible, the EIR will be sent for review to the Walloon Council for the Environment and

¹¹ The procedure for the “below threshold” projects of Annex II of the Directive (Annex III of the Executive Order of the Flemish Government of 10 December 2004) is different and more integrated in the permitting procedure itself.

¹² Only the EIA Service can grant an exemption via the screening/scoping procedure: Council of State, nr. 215.076, 12 September 2011, *nv Kurica and Another v. Flemish Government*.

¹³ Council of State, nr. 189.870, 29 January 2009, *M. Massange de Colombs and Another v. Flemish Region*.

¹⁴ Ontwerp van decreet betreffende de omgevingsvergunning, aangenomen in plenaire vergadering op 23 april 2014, *Gedr. St. Vlaams Parlement*, 2013-2014, nr. 2334/10, <http://docs.vlaamsparlement.be/docs/stukken/2013-2014/g2334-10.pdf>

Sustainable Development or to the Local Consultative Commission for Land Use Planning or the Regional Commission for Land Use Planning, depending on the subject. These bodies must deliver an opinion on the quality of the EIR. They may require additional information from the developer and may ask to revise a Report that is of poor quality. In case of a positive opinion, the permitting procedure can go ahead. The planning permit, the environmental permit, the integrated permit, and other similar permits¹⁵ (see Art. D.49 and R.52 of the Walloon Environmental Code) are thus considered as the “development consent” in the sense of Art. 1 (2) (c) of the Directive.

In the *Brussels Capital Region* the procedure starts with a preparatory note drafted by the developer and introduced – together with the application of the relevant permit or permits - with the competent authority, that charges the Regional Environmental Agency (in case of an environmental permit application) or the Regional Planning Authority (in case of a planning permit application)¹⁶ with drafting specifications and conditions of the EIR within 30 days after the file has been declared complete and decides on the composition of a guidance committee (composed of civil servants of the competent authorities). The draft specifications and conditions are submitted to a public inquiry of 15 days, followed by final guidelines issued by the guidance committee concerning the scope of the EIR and the author(s) of it. It is the developer who proposes an author, chosen out of accredited experts. The author submits the draft EIR for approval to the guidance committee. That committee shall decide within 30 days if the EIR is approved or not. Decisions of the guidance committee are subject of administrative appeal with the Brussels Capital Government. When the EIR is approved, the permitting procedure can go on, after modification of the application as the case may be in the light of the conclusions of the EIR. The planning permit and the environmental permit are thus considered as the “development consent” in the sense of Art. 1 (2) (c) of the Directive.

5. Is the EIA process part of a permitting procedure in your legal system? How are the results of the consultations with environmental authorities and the public and environmental information taken into consideration in the development consent procedure? To what extent does an EIA influence the final decision, i.e. its approval or refusal and attached conditions?

As follows from the answer to the previous question, there is a clear link between EIA and the permitting procedures. Under the current system in the *Flemish Region* the developer needs to dispose of an approved EIR, before he can introduce an application for a planning and/or environmental permit. According art. 4.1.7 of the Decree of 5 April 1995, the competent authority has to take into account the approved EIR and the comments and observations on it, received during the consultation and public participation process on the application for the related permit or permits. The decision on the project shall be reasoned, especially on the following points: the choice of the alternative, the acceptability of impacts for man and the environment of the chosen alternative, the mitigating and compensating measures proposed in the EIR¹⁷. Both the environmental permitting procedure and the planning permit procedure provide for a public inquiry concerning the application of the permit, together with the approved EIR, and the consultation of specialised environmental agencies, that deliver a reasoned opinion to the competent authority. That authority has to give reasons for its decision, taking into account the results of the public inquiry and the opinions received from the specialised environmental agencies.

¹⁵ The approval of different plans concerning a land consolidation project is also such a consent: Council of State, n° 223.316, 29 April 2013, *sa La compagnie de Ripain and Another v. Comité d'échange Rebecq-Tubize*.

¹⁶ In case of “mixed projects” that require both a planning and an environmental permit, the procedures are co-ordinated (see Art. 12 of the Ordinance of 5 June 1997).

¹⁷ The Council of State seems to become more demanding while checking this obligation. See e.g. (in relation with SEA): Council of State, nr. 215.768, 14 October 2011, *D. Vanmassenhove and Others v. Flemish Region*; Council of State, nr. 224.750, 20 September 2013, *D. Vanmassenhove and Others v. Flemish Region* (the obligation to give reasons seems to be more strict when one chooses the least environmental friendly alternative).

Similar provisions apply in the *Walloon Region*¹⁸ and in the *Brussels Capital Region*, with that difference that the EIR procedure is started there while the application for the relevant permit has already been introduced. So the permit procedure is so to speak suspended, while the EIA procedure is going on. When the EIR is approved by the relevant body, the permit procedure can resume, as the case maybe after the application of the permit has been modified to take into consideration the conclusions of the EIR (Art. D.73 of the Walloon Environmental Code¹⁹; Art. 29 Ordinance of 5 June 1997).

6. In case of a multi-stage development consent procedure (e.g. combination of several distinct decisions), at what stage does the environmental impact assessment procedure take place during the development consent procedure in your country?

As has been explained, in the *Flemish Region*, currently the EIA precedes the different permitting procedures that are necessary to be able to construct and operate a project. As both a planning and an environmental permit are necessary, the EIR will be part of both procedures. The EIA Service of the Flemish Government may exempt a particular project from the EIA obligation, when there has already been done an SEA in which a project with similar effects has been assessed²⁰ or an EIA has been approved of which the current project is a repetition, a continuation or an alternative and a new EIA would reasonably not contain new or additional data on significant impacts. In those cases the previous EIR or SEA Report will be part of the permitting procedure.

A similar situation can be found in the other regions. As has been mentioned above, in the *Brussels Capital Regional* a co-ordinated procedure will be applied in case of “mixed projects” that requires both a planning and an environmental permit. When a project falls within an allotment permit or a specific land use plan for which a SEA has been done, the EIR shall be limited to those aspects not already covered by the previous assessments (Art. 20, § 3, Ordinance of 5 June 1997; Art. 128, § 2, Brussels Code on Land Use Planning). If an EIR has been done in view of obtaining a planning certificate, no EIR has to be done for the subsequent planning or allotment permit that is conform the valid certificate (Art. 128, § 2, Brussels Code on Land Use Planning). In the Walloon Region, the integrated permit (*permis unique*), combines the planning and the environmental permit for projects that are subject to both. In such a situation also one EIA will be produced. In a case were more than one permit is necessary for the realisation of the project, EIA will be applied one’s, covering all impacts of the project (Art. D. 62 of the Walloon Environmental Code). The EIR will be part of the different permit applications (Art. D. 65). Relevant results of earlier assessments maybe integrated in an new EIR if pertinent and topical (Art. D. 66).

7. What kind of authority (local, regional, central) is responsible for making decisions on EIA and/or to grant/refuse development consent?

As the scoping and content of the EIA is concerned, regional authorities are in charge. The EIA Service²¹ of the Flemish Government in the *Flemish Region*, the Brussels Environmental Agency²², the

¹⁸ Council of State, n° 193.753, 2 June 2009, *asbl Ligue Royale belge pour la protection des oiseaux and Others v. Walloon Region*.

¹⁹ That provides that, when the author of the EIR suggests modifications to the project and the developer is not willing to do that, he has to give reasons for that.

²⁰ If in the framework of the SEA the environmental impacts of the project have not been studied in sufficient detail, this combined SEA/EIA approach cannot be followed: Council of State, nr. 210.478, 18 January 2011, *G. De Cloedt v. Flemish Region*

²¹ <http://www.lne.be/themas/milieueffectrapportage>

²² <http://www.leefmilieubrussel.be/Template/Professionnels/informer.aspx?id=32316>;

<http://www.bruxellesenvironnement.be/Template/Professionnels/informer.aspx?id=32316&langtype=2060>

Brussels Planning Authority²³ and the particular guidance committees in het *Brussels Capital Region* and the Walloon Council for the Environment and Sustainable Development²⁴ and the Regional Commission for Land Use Planning in het *Walloon Region*.

As the permitting of those projects is concerned, there is a division of competence according to the type of projects and permits. In the *Flemish Region* local government or, in some cases the Flemish Government or the authorized official, are competent for planning permits, provincial governments for appeals regarding local planning permits and for environmental permits for the bigger projects and the Flemish Environmental Minister for appeals concerning those environmental permits. In the *Walloon Region* the situation is, with some variations, similar. In the *Brussels Capital Region* the environmental permit will be delivered by the Brussels Environmental Agency. The decision can be appealed before the independent Environmental College of the Brussels Capital Region and furthermore to the Government. As planning permits are concerned, they are delivered by the municipality (there are 19 municipalities within the Brussels Capital Region) or the authorized official and they can be appealed with the Brussels Capital Government.

8. *Is the decision resulting from the environmental impact assessment a pre-condition to grant development consent? In case of a multi-stage development consent procedure, at what stage are the results of the consultations with environmental authorities and the public and environmental information taken into consideration?*

As has been indicated above, the approval of the EIR (quality control), is in the 3 regions a precondition to grant development consent. The results of the consultations with environmental authorities and the public are taken into consideration when the public authorities have to decide on the permit applications in the subsequent permitting procedure, after public consultation and consultations with environmental authorities.

9. *In case of projects for which the obligation to carry out environmental impact assessment arises simultaneously from the EIA Directive and other Union legislation, does your country ensure a coordinated or joint (e.g. single) procedure (“one stop shop”)? If yes, please provide a list of the Directives covered.*

In the *Flemish Region* there are two main permitting procedures for which EIA can be necessary: planning permits, to construct a project, and environmental permits, to operate some classified activities. Generally speaking, for these activities, both permits will be necessary. In the future, when the integrated permit (*omgevingsvergunning*) becomes effective, there will be a single procedure, covering in principle all relevant EU Environmental Directives belonging to the regional sphere of competence. One has to wait for the Executive Orders to be able to provide for a list of those Directives.

In the *Walloon Region* exist already the single procedure of the integrated permit (*permis unique*). It covers the Industrial Emissions Directive, the permitting aspects of the various Waste and Water Directives, the ETS Directive and the Seveso Directive.

In the *Brussels Capital Region* there are also two main permitting procedures for which EIA can be necessary: planning permits, to construct a project, and environmental permits, to operate some

²³ <http://www.brussel.irisnet.be/over-het-gewest/ministerie-van-het-brussels-hoofdstedelijk-gewest/ruimtelijke-ordening-en-huisvesting/directie-stedenbouw>
http://www.bruxelles.irisnet.be/a-propos-de-la-region/le-ministere-de-la-region-de-bruxelles-capitale/amenagement-du-territoire-logement/direction-de-l-urbanisme?set_language=fr

²⁴ <http://www.cwedd.be/avis/avis-en-matiere-d-evaluation-des-incidences-sur-l-environnement.html>
<http://www.wallonie.be/fr/guide/guide-services/1480>

classified activities. Like in the other regions, for these activities, both permits will be as a rule necessary. The procedure will however be coordinated in case of “mixed projects” (*gemengd project – projet mixte*). It covers basically the same directives as is the case with the *permis unique* in the *Walloon Region*.

10. Is it possible to carry out joint or coordinated environmental assessments, fulfilling the requirements of the EIA Directive, and Directive 92/32/EEC and/or Directive 2009/147/EC? Is there a legal basis for carrying out such assessments?

In the *Flemish Region*, art. 36ter of the Decree of 21 October 1997 on Nature Conservation and the Natural Environment provides that the proper assessment (according to the Birds and Habitats Directives) for an activity that requires a planning or environmental permit and that is a project in the sense of the EIA legislation, will be integrated in the EIR.

In het *Walloon Region* a similar provision applies (art. 28bis § 2 of the Act of 12 July 1973 on Nature Conservation); that is also truth for the *Brussels Capital Region* (art. 26 of the Ordinance of 5 June 1997; art. 127 of the Brussels Land Use Planning Code).

11. What arrangements are established with neighbouring Member States for exchange of information and consultation?

In the different regions transboundary consultation, as required by the Espoo Convention and art. 7 of Directive 2011/92/EU is mandatory. What is interesting to note is that the provisions not only apply when the project is likely to affect significantly the environment of another Member State of the EU or another party to the Espoo Convention, but also when the environment *of another region in Belgium is concerned*. See in this respect art. 4.3.4, § 5, of the Decree of the Flemish region of 5 April 1995²⁵; art. 13, § 2, of the Ordinance of the Brussels Capital Region of 5 June 1997; art. 127, § 4, of the Brussels Land Use Planning Code; art. D.29 -11 and R.41-7 to R.41-9²⁶ of the Walloon Environmental Code.

EIA Content

12. Is the developer obliged by national legislation to consider specified alternatives to the proposed project?

In the *Flemish Region* an EIR should sketch the “available alternatives” in terms of objectives, design, locations and mitigating measures and compare the project chosen by the developer with the alternatives that reasonably are to be examined, indicating the reasons of the selection made (art. 4.3.7, § 1, d) and e) of the Decree of 5 April 1995). The zero option serves as a point of comparison (art. 4.3.7, § 1, g). The environmental impacts of those alternatives should be assessed and compared with those of the chosen project and the zero option. What should be considered as reasonable alternatives to be examined is decided during the scoping phase and reflected in the scoping guidelines of the EIA Service²⁷.

In the *Brussels Capital Region* an EIR should contain a comparison of the proposed project with alternatives that reasonably are to be taken into consideration, including the zero option, the assessment of the most important impacts of these alternatives and the main reasons behind the

²⁵ Council of State, nr. 191.924, 26 March 2009, *E. Laga and Others v. Flemish Region*.

²⁶ As amended by the Executive Order of the Walloon Government of 20 July 2011 following up: ECJ, 24 March 2011, Case C-435/09, *European Commission v Kingdom of Belgium*, paras 89-93.

²⁷ Council of State, n°224.669, 17 September 2013, *J. Van Den Audenaerde and Others v. Flemish Region*.

choice of the developer (art. 26, 8°, Ordinance of 5 June 1997; art. 135 ,7° Brussels Land Use Planning Code). The guidelines issued by the guidance committee will detail the alternatives to take into account.

In the *Walloon Region* an EIR has to contain a “sketch of alternatives” examined by the developer and an indication of the main reasons of the choice of the developer in the light of the environmental impacts (Art. D. 67, § 3, 4° of the Walloon Environmental Code). The Council of State annulled a planning permit for a roadway, because an alternative suggested during the public participation was set aside because that would require the revision of a land use plan, while alternatives suggested by the population can relate to the localisation of the project²⁸ .

13. *Is scoping (e.g. scope of information to be provided by the developer) a mandatory step in the EIA procedure?*

It is mandatory in the *Flemish* and *Brussels Capital Region* and optional in the *Walloon Region*. It will become optional in the Flemish region too, in the future, when the integrated permit Decree will be operational.

14. *Are there any provisions to ensure the quality of the EIA report prepared by the developer?*²⁹

In the *Flemish Region* different measures have been taken to assure the quality of EIAs, namely obligatory scoping, with public participation³⁰, the accreditation of authors of EIA’s and quality review of the EIR.

According to Art. 4.3.4 of the Decree of 5 April 1995 the developer informs the competent administration (“the EIA Service”)³¹ of the proposed EIA project in good time. The notification contains at least: a) description and clarification of the project including its town and country planning situation, and where applicable the operating address of the establishment; the town and country planning description contains at least an extract from the land-use implementation plans or the applicable municipal land use plans and the topographical maps of the surrounding land; b) the licences that must be applied for, and where appropriate the existing licensing situation for the operation of the plant; c) where appropriate, the information needed by the administration for commencing the cross-border exchange of information referred to in Art. 4.3.4,§ 5; d) where appropriate, the relevant information from previous assessments and from the resulting approved reports; e) a document containing the content, approach and methodology of the EIA, based on the requirements of Art. 4.3.7 and of the EIA manual; f) a brief description of the alternatives for the project or for parts of them that the developer has considered and, concisely described, his considerations about the advantages and disadvantages of the different alternatives; g) the relevant information on the proposed accredited EIA coordinator and the team of accredited EIA experts referred to in Art. 4.3.6 and the division of tasks between the experts; h) where appropriate, the grounds for the application to keep the notification or parts of it confidential. The EIA Service decides on the completeness of the notification. The decision lists all points of incompleteness of the notification. The notification is incomplete if information or documents are lacking which are required under Art. 4.3.4, § 2. The procedure can only be continued if the notification is complete. The EIA service notifies its

²⁸ Council of State, n° 98.088, 3 July 2001, *J.J. Salesse and Another v. Walloon Region*.

²⁹ This section is taken from: L. LAVRYSEN, Accreditation of EIA Experts and other Tools for Assuring Quality Control, to be published in the Proceedings of the elni Conference 2013 "EU Environmental Impact Assessment Directive - challenges and perspectives in the light of the past experiences and the recent proposal for amendment", 23-24 May 2013, Wrocław University, Law Faculty Building, Poland.

³⁰ The scoping will become optional in the future and without public participation, when the integrated permit will become operational.

³¹ *Departement Leefmilieu, Natuur en Energie, Dienst Milieueffectrapportagebeheer* (Environmental Impact Assessment Service of the Department of the Environment, Nature and Energy)

decision to the developer immediately and at the latest within a period of twenty days of receipt of its notification. The developer simultaneously brings a copy of the notification and of the decision of the EIA Service, within a period of ten days of receipt, to the notice of the authority which, where appropriate, will decide in the first instance on the licence application for the project; the Mayor and Aldermen of the municipality or municipalities where the project is to be implemented; the administrations, public bodies and public administrations which may deliver an opinion on the EIA approach and, where appropriate, the Works Council and the Workplace Health and Safety Committee of the company of the developer, or in the absence of those bodies, the trade union representatives and the environmental coordinator of that company. The municipality or municipalities concerned make a copy of the notification available for perusal by the public within a period of ten days of its receipt.

With the announcement or making available for perusal, it is clearly indicated that any remarks about the content of the proposed EIA project must be submitted within a period of thirty days of the announcement or making available for perusal, either through the municipality or to the administration. The notification is also made public on the website of the EIA Service³². If the project is likely to cause a significant adverse transboundary impact in other Member States of the European Union and/or parties to the Espoo Convention or in other regions of Belgium, or if the competent authorities of these Member States, parties to the Treaty and/or regions so request, the EIA Service supplies the following information to their competent authorities: a copy of the notification declared complete, a description of the EIA procedure applicable to the proposed project; the indication of the licensing obligation to which the proposed project is subject, and a description of its purpose, as well as of the applicable licensing procedure(s). These authorities may forward their remarks to the EIA Service within forty days of sending the copy. In practice the number of remarks received is varying considerably from one EIA to another. According to the EIA Service in general the remarks received from specialized agencies are more useful than those from the public at large and contribute to enhance the quality of the EIAs.

The EIA Service decides immediately, and at the latest within a period of sixty days of the declaration of completeness of the notification by the developer, on the scoping of the EIA and the approach of the assessment, including the methodology, the specific guidelines for drawing up the EIA and the appointment of the authors of the EIA. Where appropriate, this decision supplements art. 4.3.7, § 2, which details the general content of an environmental impact assessment report, and contains provisions relating to those aspects that may be treated in a concise way or may be left out altogether because those environmental effects are less or not relevant. In its decision the EIA Service takes account of the remarks and comments of the authorities and the public relating to the scoping of the proposed EIA project and in particular the remarks and comments concerning effects to be examined, alternatives or mitigating measures. The EIA Service makes its decision known and announces it within a period of seventy days of the declaration of completeness of the notification to the developer, the authorities referred to in art. 4.3.4, § 4, first paragraph and, where appropriate, to the competent authorities referred to in art. 4.3.4, § 5. If art. 4.3.4, § 5 is applicable and cross-border consultation should take place, the periods referred to are extended to eighty and ninety days respectively.

A reasoned request for the reconsideration of this decision may be introduced by the developer to the EIA Service. Art. 4.6.4 is similarly applicable. This means that an Advisory Committee composed of 3 to 5 independent experts has to review the decision and deliver an opinion to the EIA Service within 40 days. The opinion of the Advisory Committee is binding if it is unanimous. In practice this possibility has not been used yet.

The scoping decision, together with the general³³ and specific guidelines, is a very important tool for the authors of the environmental impact assessment reports. The decision will also indicate which types of alternatives have to be taken into consideration.

According to art. 4.3.6 of the Decree, the EIA is drawn up under the responsibility and at the

³² <http://www.lne.be/themas/milieueffectrapportage/inspraak/lopende-inspraakprocedures>

³³ Various general, thematic (water, air...) and activity based guidelines have been worked out over time: <http://www.lne.be/themas/milieueffectrapportage/deskundigen/richtlijnenboeken>
<http://www.lne.be/themas/milieueffectrapportage/deskundigen/handleidingen-1>

expense of the developer. For this the developer must use the services of a team of accredited EIA experts under the supervision of an accredited EIA coordinator. The developer makes all the relevant information available to the EIA coordinator. He provides all the necessary cooperation in order to enable the EIA coordinator to carry out his task satisfactorily. The accredited EIA coordinator and the accredited EIA experts must have no interest in the proposed project or the alternatives, or in the subsequent execution of the project. They carry out their task fully independently. The composition of the team of accredited EIA experts ensures that the EIA project is drawn up in compliance with the EIA guideline manual and the special guidelines and the scoping decision. It's the developer who chooses the team of accredited EIA experts. During the compilation of the EIA, the EIA coordinator and, where appropriate, the EIA experts are obliged to consult with the EIA Service. The EIA coordinator and his team must, where appropriate, respect the written guidelines of the EIA Service, in addition to the defined content and special provisions referred to in art. 4.3.5, § 1, of the Decree.

EIA experts can be accredited by the Flemish Environment Minister in the following “environmental disciplines”: impact on humans (toxicology, psychosomatic aspects, mobility and spatial aspects); fauna and flora; soil (pedology and geology); water (geohydrology, fresh waters, sewage, sea waters); air (odour and air pollution), lighting, heat and electromagnetic waves; noise and vibrations; climate; landscape, built heritage and archaeology. For each discipline is has been determined which degrees the expert must hold (Master or Bachelor), the work experience he must have (3 to 5 years in assisting in writing EIAs), and the additional training he must have followed (50 hours of specialist additional training and the obligation to follow yearly update trainings). Applications for accreditation have to be sent to the Environmental Permitting Division of the Department, which shall consult the EIA Service. This division will deliver an opinion to the Minister, who will decide on the application³⁴. The lists of accredited experts are available on the website of the Division³⁵. The accreditation may be suspended or withdrawn in case of serious failures³⁶.

The EIA is drawn up under the responsibility and at the expense of the developer. For this the developer must hire the services of a team of accredited EIA experts under the supervision of an accredited EIA coordinator. He makes all the relevant information in his possession available to the EIA coordinator. He provides all the necessary cooperation in order to enable the EIA coordinator to carry out his task satisfactorily.

The developer must send the completed EIA to the EIA Service. The administration checks the content of the EIA with regard to the scoping decision and, where appropriate, its supplementary specific guidelines and the information required in accordance with art. 4.3.7 of the Decree. The result of the review of the EIA by the EIA Service is included in an EIA report and leads to the approval or rejection of the EIA. If the EIA Service rejects the EIA, the EIA report contains all points in which the EIA is believed to have shortcomings. In practice in around 8 % of the cases the EIA Service decided that it was necessary to rework the EIR. This number can be kept relatively low because most developers prefer to hand over a draft EIR and to take into consideration the suggestions of the EIA Service in the final version of the EIR. The EIA Service approves or rejects the EIA at the latest within a period of thirty days of its receipt. The EIA Service may take a reasoned decision to extend this period to fifty days. The EIA Service notifies its decision concerning the approval or rejection of the EIA within a period, after receipt of the EIA, of forty days or sixty days in the case of an extension. The decision also contains a copy of the EIA report and specifies that the developer may introduce a reasoned request for reconsideration of the decision within a period of twenty days. This request will be treated in the same way as the requests for reconsideration of a scoping decision. In practice also this possibility has been used extremely seldom: 1 case on 652 EIA's realised in the period 2004-2014. Only EIAs that have been approved by the EIA Service may be used in the subsequent permitting procedure.

³⁴ See for refusals upheld by the Council of State: Council of State, N° 189.878, 29 January 2009, *H. Van Moorsel v. Flemish Region* and n° 223.538, 21 May 2013, *P. Arts v. Flemish Region*, www.raadvst-consetat.be

³⁵ <http://www.lne.be/themas/erkenningen/mer/mer-deskundigen>

³⁶ See for such a case: Council of State, n° 222.500, 14 February 2013, *W. Mondt v. Flemish Region*, www.raadvst-consetat.be. According to the competent authority each year one or two accreditations are not prolonged due to serious failures.

The various decisions related to EIA (and SEA) as well as the summaries of EIAs and SEAs are included in an Internet database³⁷.

In the *Walloon Region* too, different measures have been taken to assure the quality of EIAs. Unlike in the Flemish Region, scoping is not mandatory in the Walloon Region. Nevertheless, the developer may ask beforehand an opinion of the competent authority on the content of the “*notice d’évaluation*” (simplified EIA for smaller projects) or the “*etude d’incidences*” (a full EIA for bigger projects). The developer may indeed ask the competent authority to deliver a scoping decision. Before doing so, the competent authority will consult the environmental administration and, depending on the type of project, the Walloon Council for the Environment and Sustainable Development, or the Local Consultative Commission for Land Use Planning or the Regional Commission for Land Use Planning, which are multi-stakeholder advisory bodies. They have 30 days to give their input and the competent authority must deliver its scoping decision within 45 days from the date of request.

The developer appoints one or more accredited experts to draw up the EIA and notifies his choice to the Walloon Government and the designated authorities. Within a period of 15 days the Minister may reject the choice of the developer, in particular if he fails to offer sufficient guarantees for his independence³⁸ in the exercise of his function. The accreditation of EIA experts is done by the Walloon Environment Minister. Unlike in the Flemish system, the categories for which an expert may be accredited are not based on “environmental disciplines” but on categories of projects: land use related projects, commercial and recreational activities; infrastructural projects; mines and quarries; industrial energy projects; industrial material transformation projects; waste management projects; water management projects and agricultural projects. Applicants for accreditation must meet general and specific conditions relating to qualification, expertise and experience. In case of a request for renewal they must prove that they coordinated or contributed to EIAs in the preceding period. Both natural and legal persons may be accredited. Applications for accreditation are submitted to the opinion of the Walloon Council for the Environment and Sustainable Development, the Regional Commission for Land Use Planning, the Land Use Planning Administration and the Environmental Administration. The final decision is taken by the Walloon Environment Minister. The accreditation is valid for 5 years, but may be extended. In case of shortcomings in one or more EIAs the accreditation may be suspended or withdrawn.

The EIA Report is attached to the application for the relevant permit (environmental permit, building permit or integrated permit). If the competent authority is of the opinion that the application is complete and admissible, the EIA Report will be sent for review to the Walloon Council for the Environment and Sustainable Development or to the Local Consultative Commission for Land Use Planning or the Regional Commission for Land Use Planning, depending on the subject. These bodies must deliver an opinion on the quality of the EIA Report. They may require additional information from the developer and may ask to revise a Report that is of poor quality.

In the *Brussels Capital Region* quality control is assured through the guidelines that, on the basis of a draft of the competent agencies, are issued by the guidance committee established for each EIA, through the obligation that authors of EIAs should be accredited by the government, that the guidance committee has to agree with the author chosen by the developer and by the need to have the EIR approved by the guidance committee.

15. *How is the cumulation with other existing and/or approved/already proposed projects considered? Please illustrate your answer by referring to examples of national case law!*

There are no specific provisions on this issue, except the fact that in the Flemish region art. 4.3.7, §

³⁷ <http://www.lne.be/themas/milieueffectrapportage/raadplegen-milieueffectrapportages/dossierdatbank>

³⁸ Independence and impartiality has been found essential characteristics of an EIA author by the Council of State: e.g. Council of State, n° 77.161, 24 November 1998, *Ph. Russel and Others v. Walloon Region*; Council of State, n° 221.857, 20 December 2012, *B. Waels and Others v. Walloon Region*.

1, 2°, b) of the Decree of 5 April 1995 provides explicitly that cumulative effects should be described and assessed, while all regional legislation are imposing to describe the existing situation of the environment that can be impacted by the proposed project, including the existing projects.

16. How is it ensured that the purpose of the EIA Directive is not circumvented by splitting of projects – e.g. ‘salami slicing’ of projects (i.e. the assessment and permitting of large-scale, usually linear infrastructure projects by pieces)? Please illustrate your answer by referring to examples of national case law!

There are no specific provisions that tend to prevent salami slicing, except in the Brussels Capital Region: art. 11 of the Ordinance of 5 June 1997 provide that installations that form a technical and geographical unity should be subject to one permit, and thus one EIA. There is case law that tends to combat slicing in the EIA³⁹ and in the permitting procedure⁴⁰.

See for a particular example, the Brussels Airport EIA Case.

17. Can the screening decision be appealed? If yes, who can lodge an appeal?

In the *Flemish Region* the developer can ask for an internal review (reconsideration) of the screening decision of the EIA Service. The Service takes a decision after having asked the opinion of an *ad hoc* advisory committee composed of experts (art. 4.6.4, §1, 1°, a), of the Decree of 5 April 1995). Furthermore any interested party can appeal the decision before the Council of State. After a certain hesitation, the Council of State accepts now that such a decision can be challenged before the supreme administrative court, not only by the developer⁴¹, but also by interested third parties, be it (only⁴²) together with the permit that has been granted without an EIA⁴³.

In het *Brussels Capital Region* the decision of the Government, on proposal of the consultation commission, to oblige the developer to draft a full EIA for smaller projects (art. 42 of the Ordinance of 5 June 1997; art. 148 of the Brussels Land Use Planning Code) can be appealed by any interested party with the Council of State.

In het *Walloon region* the decision of the competent authority that for a smaller project a full EIA is necessary (art. D 68 of the Walloon Environmental Code) can be the object of a demand for reconsideration by the developer. A permitting decision delivered in violation of the screening

³⁹ Council of State, nr. 212.265, 28 March 2011, *A. Seghers and Others v. Provincial government of Antwerp and Flemish Region*; Council of State, nr. 216.731, 8 December 2011, *Erik Jansen*; Council of State, n° 207.013, 26 August 2010, *sa Arcoma v. Walloon Region*; Council of State, n° 208.660, 4 November 2010, *P. Hacherelle v. Walloon Region and City of Arlon*; Council of State, n° 223.191, 17 April 2013, *P.E. Cassart and Others v. Walloon Region*.

⁴⁰ E.g. : Council of State, nr. 104.996, 21 March 2002, *J.M. D’Huys v. Walloon Region and Municipality of Awans* ; Council of State, 5 February 2013, n° 222.393, *s.p.r.l. Property & Advice & s.p.r.l. Bureau d’architecture et d’engineering Caelen*: “Un projet urbanistique doit être tenu pour indissociable lorsqu’entre ses différentes parties, il existe un lien d’interdépendance tel qu’elles seraient incomplètes l’une sans l’autre. Ce lien n’est pas établi quand les deux parties peuvent être mises en oeuvre indépendamment l’une de l’autre (..) En l’espèce, il apparaît que le projet consiste en la construction d’un complexe commercial avec la création d’un rond-point sur la voirie publique, étant une route régionale, que le rond-point qui doit permettre l’accès au centre commercial est situé à cheval sur l’actuelle route et sur une propriété privée, la partie de propriété privée servant d’assiette à une partie du rond-point devant être rétrocédée à l’autorité publique et, enfin, que l’autorité elle-même admet le caractère indissociable du projet, ce qui n’est contesté par aucune partie. Eu égard à ces divers éléments, une seule demande de permis d’urbanisme devait être introduite auprès du fonctionnaire délégué. »

⁴¹ Council of State, n° 195.232, 14 July 2009, *nv Brussels International Airport Company*.

⁴² Council of State, n° 183.799, 4 June 2008, *E. Lauwers v. Flemish Region*; Council of State, n° 212.825, 28 April 2011, *E. Lauwers v. Flemish Region*.

⁴³ Council of State, n° 212.825, 28 April 2011, *E. Lauwers v. Flemish Region*; Council of State, nr. 215.076, 12 September 2011, *nv Kurica and Another v. Flemish Government*.

obligation can also be challenged by any interested party before the Council of State⁴⁴.

18. *Is there a time limit for the validity of the EIA-decision and the development consent? Is the permit holder obliged to apply for a new permit after a certain period of time?*

Decisions approving an EIR do not have a limit of validity. As permits are concerned, while planning permits in Belgium have an unlimited time of validity (although exceptions are possible), environmental permits on the contrary have a maximum limit of validity. For the moment this is 20 years in the *Flemish Region* (art. 18, § 2, of the Decree of 28 June 1985 on the Environmental Permit) and in the *Walloon Region* (art. 50, § 1, Decree of 11 March 1999 on Environmental Permits). In the *Brussels Capital Region* environmental permits are valid for max 15 years. In all regions the holder of the expiring permit can apply for a new one. In that case a new EIA will be necessary (see e.g. the definition of project in art. 4.1.1.,^{5°}, of the Decree of the Flemish Region of 5 April 1995). In the future, when the integrated permit will become effective in the Flemish Region, these permits will be in principle valid without time limitation (exceptions can however be made), so that no new EIA will be necessary in the life span of a facility.

See for a particular example, the Brussels Airport EIA Case.

Access to Information Provisions

19. *How is the public informed about the project and the EIA? When is the public informed about a project requiring an EIA and about a pertaining administrative procedure? Where can the information be accessed? What does the information contain? Who gets access to this information?*

In the *Flemish Region* the notification of the developer indicating that he will start an EIA⁴⁵ procedure is made locally available by the concerned local governments for perusal by the public during a period of 30 days in which it can contribute to the scoping process. They are obliged to inform the public in an appropriate way on this public inquiry. The notifications are also published on the website of the EIA Service of the Flemish Government⁴⁶ (see answer to question 14). Another possibility to participate will occur during the permitting procedure(s).

In the *Walloon Region* the public will be informed about the EIA via an information meeting that is held before the application of the permit is introduced. The public can make suggestions concerning scoping and alternatives to examine. The public is informed of the meeting through notice in two local journals, a house-to-house publication (in an area of 3 km around the proposed project) or through a similar medium. Furthermore a notice will be put on the official announcement boards of the municipality and on 4 places around the proposed project (art. D. 29-5 of the Walloon Environmental Code). In the subsequent permit procedure the whole EIA shall be submitted, together with the permit application to an inquiry of 30 days (art. D.29-13 and D. 29-14).

In the *Brussels Capital Region* the municipality organises a public inquiry of 15 days (art. 21 of the Ordinance of 5 June 1997; art. 130 of the Brussels Land Use Planning Code) at the beginning of the procedure on the basis of the draft specifications and conditions of the EIR proposed by the Regional Environmental Agency (in case of an environmental permit application) or the Regional

⁴⁴ Council of State, n° 174.128, 27 August 2007, *M. Collinge v. Municipality of Braine-l'Allued and Walloon Region*; Council of State, n° 208.572, 28 October 2010, *asbl Grez-Doiceau, Urbanisme et Environnement and Others v. Walloon Region*; Council of State, n° 211.342, 12 February 2011, *Y. Dethier and Others v. Walloon Region*.

⁴⁵ See for the content of the notification: art. 4.3.4 of the Decree of 5 April 1995.

⁴⁶ <http://www.lne.be/themas/milieueffectrapportage/inspraak/lopemde-inspraakprocedures>

Planning Authority (in case of a planning permit application) or both in case of a mixed project. The results are taken into account for the formulation of the guidance by the guidance committee. There is a second opportunity for public participation during 30 days after the EIR has been worked out, approved and the permitting procedure is going further.

20. *How does the authority ensure public access to environmental information in the procedures based on the EIA Directive? To what extent is this provision of information user-friendly (easy to find, free of charge, searchable, online, downloadable, etc.)?*

See the answer to question 19. In addition, in the *Flemish Region* there is a database of running and completed EIAs (and SEAs) that can be consulted any time, containing all relevant notifications and decisions, including the summaries of the reports⁴⁷. Similar databases don't exist in the other regions.

Public Participation Provisions

21. *What are the criteria for taking part in an environmental impact assessment procedure, besides the project developer and the competent authority? What rights can people living in the neighbourhood, NGOs, authorities invoke in the procedure? What legal rights do participants of the proceeding have? What happens if the competent authority denies someone's legal standing? Please illustrate your answer by referring to examples of national case law!*

There is broad access to the public participation procedure dealing with EIA. In the *Flemish Region* anyone, without the need to show a particular interest, can participate in the scoping procedure, that is indeed open to the "public" (art. 4.3.4, § 4 of the Decree of 5 April 1995), being "one or more natural or legal persons and their associations, organisations or groups" (art. 4.1.1, 18°). In the future, this mandatory and public scoping procedure will however disappear. Furthermore in the subsequent procedure, the rules on public participation in the permitting procedure are applicable. Public participation in the planning and environmental permitting procedure is also open to the public at large. Administrative appeals are however only open to "natural or legal persons who can experience nuisances due to the realisation and operation of the facility" and "legal persons that are aiming to protect the environment according to their by-laws, have acquired for at least 5 years legal personality and have circumscribed their geographical area of activity (art. 24, § 1, 5° and 6°, Decree of 28 June 1985 on the Environmental Permit). However in the Executive Order of 6 February 1991 the condition that the NGO has at least 5 years legal personality and has described its area of activity in its by-laws, has not been imposed again (art. 49, § 1, 4°). To appeal planning permits organisations should have "legal personality, defend a collective interest that is threatened or harmed by the decision at stake, provided that they have a durable and effective activity in conformity with their by-laws" (art. 4.7.21, § 2, 3°, of the Flemish Land Use Planning Code). To appeal the decision further before the specialised administrative Court (Council for Permit Disputes) a third party should be "a natural or legal person that will undergo directly or indirectly nuisance or prejudice from the permitting decision" or "organisations having legal personality, defend a collective interest that is threatened or harmed by the decision at stake, provided that they have a durable and effective activity in conformity with their by-laws" (art. 4.8.11, 3° and 4°, Flemish Land Use Planning Code). Final decisions on environmental permits can be challenged before the Council of State by interested third parties⁴⁸. In the future, final decisions regarding the

⁴⁷ <http://www.lne.be/themas/milieueffectrapportage/raadplegen-milieueffectrapportages/dossierdatabank>

⁴⁸ See for the standing requirements before the Council of State (Supreme Administrative Court), the Report on Belgium for the EUFJE 2013 Vienna Conference: <http://www.eufje.org/uploads/documentenbank/dd0265b9d40e11d6c2da3beaafc1d102.pdf>

integrated permit, can be challenged before the Council of Permit Disputes by the “public concerned”, being “natural or legal persons, including associations, organisations or groups with legal personality, affected or likely to be affected by, or having an interest in the decision-making regarding the permit, including non-governmental organizations promoting environmental protection” (art. 2, 1° and 105, 2° of the Decree on the Integrated Permit).

In the *Walloon Region* the preliminary meeting is open to the public at large (art. D. 6, 17° and D.29-5 of the Walloon Environmental Code. The public participation procedure on the permit application is also open to the public at large. As access to information is concerned the legislation provides that “anyone” can ask for further explanations from the municipality (art. D.29-17) A particular feature of the Walloon legislation is that public inquiries are suspended between 16 July and 15 August and between 24 December and 1 January and that there is a possibility to install a guidance committee, once the permit has been approved, composed of the developer, the competent authorities and representatives of the public and experts, to follow up the project (art. D-29-25 to D.29-28). Administrative appeals are open for natural or legal persons that “prove an interest in the case” (art. 40 Decree of 11 March 1999 on Environmental Permits). Planning permit decisions cannot be appealed by third parties in the administrative track. Final environmental permitting, integrated permitting and planning permitting decisions can be challenged before the Council of State by any interested party.

In the *Brussels Capital Region* public participation on the scoping decision is also open to the public at large (art. 21 of the Ordinance of 5 June 1997; art. 130 and 150-151 of the Brussels Land Use Planning Code). The same in truth for the public participation on the permit application (art. 30 of the Ordinance of 5 June 1997 and art. 141 151 of the Brussels Land Use Planning Code). Appeals with the Environmental College and the Government by third parties are reserved to “members of the public concerned” (art. 80 and 81 of the Ordinance of 5 June 1997), being “natural or legal persons, including associations, organisations or groups with legal personality, affected or likely to be affected by, or having an interest in appealing the permit, including non-governmental organizations promoting environmental protection, provided that they are constituted in the form of a non-profit association (*vzw/asbl*), with the aim to protect the environment, existing already the date that the application for the permit has been introduced and that here is a the harmed interest can be encompassed in the statutory goal of the association” (art. 3, 20°, of the Ordinance of 5 June 1997). Planning permit decisions cannot be appealed by third parties in the administrative track. Final environmental permitting and planning permitting decisions can be challenged before the Council of State by any interested party.

Administrative and Judicial Review & Enforcement Provisions

22. Can the decisions of the authority (local, regional, central) responsible for making decisions on EIA be appealed? Who is the superior authority deciding over the appeal?

As explained earlier, the screening and scoping decisions of the EIA Service in the *Flemish Region* can be the object of a demand for reconsideration of the developer by that same service, with the involvement of an expert advisory commission. In the *Walloon Region* the developer may ask also the competent authority to reconsider a screening decision. In the *Brussels Capital Region* some of the decisions of the guidance committee can be appealed by the developer with the Brussels Capital Government. Those procedures are thus not open to third parties.

As has been explained in the answer to question 21, the EIA will be part of the application for a planning, environmental or integrated permit. In that procedure, third parties can appeal to the higher administrative authorities against permitting decisions, being, depending of the type of project or decision, the provincial government, the regional government or an individual regional

minister, or the Environmental College as environmental permits in the Brussels Capital Region are concerned. Planning permit decisions in the Walloon and the Brussels Capital Region however cannot be appealed by third parties in the administrative track.

See for examples the Brussels Airport EIA Case and the Spa-Francorchamps Circuit Case.

23. *Is there a judicial review against decisions made in EIA procedures? If yes, what matters can be challenged and what decisions can the court take?*

After exhaustion of the administrative appeals – if available - one can appeal against screening and permit decisions taken in last instance by the administrative/political authorities before the Council of State (Supreme Administrative Court)⁴⁹, which can review the legality of the decision, both from a procedural as from a substantive point of view, including the compliance of the challenged decisions with relevant European Directives. The Administrative Jurisdiction Division of the Council of State protects the citizen against unlawful government decisions (individual decisions, but also administrative regulations). Insofar as there are no other competent courts, all natural and legal persons can bring an action for annulment before the Council of State against unlawful administrative acts that have caused them detriment⁵⁰. As the highest administrative court, the Council of State acts as a cassation judge against judgments of lower administrative courts deciding on certain matters, as is the case in the Flemish Region with the Council of Permit Disputes⁵¹, that is competent to hear cases concerning planning permits, and in the future, integrated permits. The rulings of the Council of State are not open to appeal. The Council of State is empowered to suspend the implementation of a challenged administrative decision. An action for cessation may be brought along with the action for annulment⁵². The Council of State was competent to suspend the challenged decision if the grounds for annulment were found at first sight to be valid, if there was an urgent necessity and if the immediate implementation of the challenged act or regulation might cause detriment that is difficult to remedy. Recently the conditions under which a challenged administrative can be suspended, have been eased: there should be at least one serious argument that *prima facie* can justify the annulment and the case is too urgent to deal with as an ordinary demand for annulment. Recently, apart from annulment and suspension of the challenged administrative act, the Council of State has received some additional remedies⁵³: awarding a financial compensation, upholding (some of) the legal effects of the annulled act for a certain period of time or in a definitive way or inviting the authority to make use of an “administrative loop”⁵⁴.

24. *What are the criteria of legal standing against decisions based on EIA? Who (individuals, NGOs, others) is entitled to challenge the EIA decision at the court? Do individuals need to be affected? If yes, in what way do individuals need to be affected by the decisions in order to have standing?*

The procedure for judicial review of administrative decisions by the Council of State is laid down in the Organic Act. According to Art. 19 an action for annulment of an administrative act can be brought by any party (any natural or legal person) which has been "harmed" or has an "interest" at stake. Meeting this requirement does not pose particular problems for individual claimants in envi-

⁴⁹ www.raadvst-consetat.be

⁵⁰ The same competence resides with the Council of Permit Disputes in the Flemish Region are concerned.

⁵¹ <https://www.rwo.be/Home/RaadvoorVergunningsbetwistingen>.

⁵² The same competence resides with the Council of Permit Disputes as planning permits in the Flemish Region are concerned. In the future that will also be the case with integrated permits.

⁵³ Furthermore it has been clarified that procedural flaws that do not influence the content of the act, that do not take away a guaranty from the interested party or that has no influence on the power of the authority that issued the act, cannot lead to annulment of the act.

⁵⁴ In particular this last innovation is currently challenged before the Constitutional Court, that recently annulled a similar framed “administrative loop” before the Flemish Council of Permit Disputes (Constitutional Court, n° 74/2014, 8 May 2014, *I. Thielemans and Others and vzw Straatego and Others*).

ronmental cases. Proof of actual harm is not required; a legitimate interest in the contested act is sufficient. This interest need not necessarily be based on a legally recognised subjective right. Whether a natural person has the interest required to seek judicial review of an administrative decision affecting his or her environment is essentially a factual matter, which will be judged by the Council of State based on the specific circumstances of the case. Although the notion "public concerned" within the meaning of the Aarhus Convention is not actually used, the case law on the criteria for standing for individual members of the public in substance comes very close to the definition of this notion in the Convention. The Council will examine whether the claimant will or may be affected by the environmental effects of the implementation of the decision. The nature and range of those effects will be taken into account. In the event of uncertainties, the decision on standing tends to be in favour of the claimant. The distance between the claimant's home and the activity that is the subject of the contested decision is an important consideration, but it is not necessarily decisive. In planning cases, e.g., the settled case-law is that any "inhabitant of the neighbourhood" has a legitimate interest to seek review of planning decisions affecting its aspect and development. There is also case-law in which the Council held that a person using a forest area for recreational purposes (e.g. walking) can challenge the legality of an administrative act which will result in the deterioration of that area. Since the mid-1980s, the Council of State also acknowledged that environmental groups could take action against government acts in order to protect collective environmental interests. The Council of State does require, however, that the organization be 'representative' of the group of people whose collective interests are threatened or damaged, and it will verify whether: "the organization has such a level of support among the members of that group that it may be reasonably assumed that the positions adopted by the organization coincide with those of the interested parties themselves".⁵⁵ This approach is or was not without its problems, in particular for umbrella organizations. In a number of cases the Council, for example, ruled that an environmental umbrella organization does not have the authority to defend the specific interests of the constituent organizations, or even that a national environmental organization has no specific interest in taking action with regard to a local environmental issue. Local environmental groups, for their part, sometimes have difficulty proving that they have sufficient local support. All of this led to inconsistent case law, with at times widely divergent views between different chambers of the Council of State on the same issue. There was a distinct impression that the Council of State had gradually become more restrictive in the assessment of the interest requirement, probably in view of the growing number of cases that had to be considered. The Aarhus Compliance Committee, which was requested to rule on a complaint lodged by the Flemish environmental umbrella organization *Bond Beter Leefmilieu Vlaanderen* regarding the restrictive case law of the Council of State in town and country planning matters, was of the opinion that this case-law was not in line with the Aarhus Convention.⁵⁶

For the moment it seems that the jurisprudence of the Council of State is subject to evolution. In a judgment of the general assembly of the Council of State⁵⁷, the Council used the usual formula of the Constitutional Court concerning standing requirements for NGO's, in stating that a non-profit organization that has legal personality (*association sans but lucrative*) has standing if its statutory objective is of a particular nature, and thus different from that of general interest, that she is defending a collective interest, that the statutory aim can be affected by the challenged act and that it is obvious that she is pursuing her statutory objective in an active way (para 28.2.3.2). A similar formula was used in later judgments⁵⁸. Since the creation of particular administrative courts dealing with immigration law (on the federal level) and building permits and alike in the Flemish region, the caseload is indeed becoming more manageable and the backlog is gradually disappearing. To-

⁵⁵ See, for instance: Council of State, *Vzw Bond Beter Leefmilieu-Interenvironnement*, N° 20.882-20.885, 20 January 1981.

⁵⁶ Aarhus Compliance Committee, *Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in the case of access to justice for Environmental organizations to challenge decisions in court (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))*

⁵⁷ Council of State, n° 187.998, 17 November 2008, *Coomans et al.*, TMR 2009, 64-94.

⁵⁸ Council of State, n° 192.085, 31 March 2009, *vzw Natuurpunt and Others*; Council of State, n° 211.533, 24 February 2011, *vzw Milieufrent Omer Wattez*.

gether with pressures from the ECtHR⁵⁹, the Constitutional Court⁶⁰ and the Aarhus Compliance Committee⁶¹, it can be expected that the Council will become more lenient again. For the moment there is however no clear picture. Triggered by the Aarhus Convention, some judgments can be welcomed⁶², while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention⁶³. In the latter case law the Council of State is of the opinion that although environmental NGO's are presumed to have an interest by virtue of Art. 9 (2) of the Aarhus Convention, they must also show "capacity" or "quality" ("*hoedanigheid*" "*capaciteit*"), a somewhat unclear concept in this context that is interpreted in that sense that there should be a clear match between the statutory objective of the NGO and the contested project. A regional organisation can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, or bigger projects that are of *supra* regional interest. Sometimes also "representativity" ("*representativité*" "*representativiteit*") is requested, meaning that the association should have sufficient support of the people living in the area that is affected by the contested decision.⁶⁴

25. Does an administrative appeal or an application for judicial review have suspensive effect on the decision? Under which conditions can the EIA decision be suspended by the court?

In the *administrative appeal procedures* for e.g. environmental or planning permits, in general only appeals lodged by authorities have suspensory effect, not appeals lodged by the applicant or third parties. However in the Flemish region, planning permits appealed by third parties will be suspended (Art. 4.7.21 Flemish Land Use Planning Code). Suspension by the administrative courts is dealt with in the answer to question 23.

26. Does the court have the competence to change/amend an EIA decision? Can it decide on a new condition or change the conditions of the EIA decision?

No. This is considered to be in violation of the separation of powers, as discretionary decisions are at stake⁶⁵. After annulment, the administrative authority has to take a new decision taking into account the ruling.

27. In general, is it required to include monitoring of environmental impacts in the EIA? How is compliance with the monitoring conditions being checked? Is the public informed about the results of monitoring and if yes, how?

In the *Flemish Region* an EIA should contain "a description of the measures that reasonably can be taken for a sound monitoring and evaluation of the effects of the proposed project" (art. 4.3.7, § 1, 2°, d, of the Decree of 4 April 1995). Furthermore, the EIA Service may organise monitoring for a project or a category of projects for which an EIA has been done in the past. (art. 4.6.3). However, monitoring is in practice mainly organised in the framework of the environmental permit system (including environmental reporting and PRTR-requirements), in the form of self-surveillance and

⁵⁹ ECtHR, 24 February 2009, *L'Erablière ASBL v. Belgium*.

⁶⁰ Constitutional Court, n° 109/210, 30 September 2010, *Christel Demerlier*.

⁶¹ Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW*.

⁶² E.g. Council of State n° 166.889, 15 February 2007, *VZW Milieufrent Omer Watez*. See in the same sense: Council of State, n° 193.593, 28 May 2009, *vzw Milieufrent Omer Watez*; Council of State, n° 197.598, 3 November 2009, *vzw Stichting Omer Watez*; Council of State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*.

⁶³ E.g. Council of State, n° 197.509, 3 November 2009, *vzw Milieufrent Omer Watez* and more than 20 other judgments in the same sense.

⁶⁴ L. LAVRYSEN, *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium*, July 2012, p. 19-21.

⁶⁵ See in relation to the "administrative loop": Constitutional Court, n° 74/2014, 8 May 2014, *I. Thielemans and Others and vzw Straatego and Others*, B.7.3.

reporting for the larger industrial installations and periodical environmental inspections by the competent inspectorate, without a direct link with what has been laid down in the EIA.

In the other Regions there are no explicit requirements to include monitoring in the EIA. In these regions monitoring is also essentially done in the framework of the environmental permit system. We already mentioned the possibility in the Walloon Region to set up a guidance committee, that is monitoring the project in some sense (see answer to question 21).

28. Who controls compliance with EIA decisions in your country? Are there specialized inspectorates checking compliance? How often do inspections take place? What enforcement policy do the authorities have (warnings, injunctions, sanctions and so on) in case of detected non-compliance? Has information on the results of inspections and related enforcement actions been disseminated to the wider public, and if yes, how?

In the Flemish Region the inspectors of the Environmental Inspectorate⁶⁶ of the Department of the Environment, Nature and Energy are in charge of checking compliance with the EIA legislation (art. 21, 1°, Executive Order of 12 December 2008), while another Section of the same Department is in charge of surveillance of the accredited experts (art. 23, 1°)⁶⁷. Referring to the latest *Environmental Enforcement Report*⁶⁸ one can say the EIA is not a priority at all. The word is only used ones, in relation to a particular training activity, not in terms of enforcement policy. Also in the latest *Environmental Enforcement Programme*⁶⁹ EIA is absent.

In the Walloon Region the officers of the inspectorate division of the directorate general “agriculture, ressources naturelles et environnement (D.G.A.R.N.E.)”⁷⁰ are in charge of surveillance.

In the Brussels Capital Region inspection is a competence of the inspectors of the Brussels Environmental Agency and officers of the municipality designated by that municipality (art. 4 Ordinance of 25 March 1999).

Flaws in the EIA can give rise to the application of a claim in application of the Act of 12 January 1993 on a right of action for the protection of the environment⁷¹. Also in liability cases EIA can play a role: see the *Liège Airport EIA Case*.

29. If EIA decisions are infringed, what types of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and are they considered to be effective? Can those sanctions be applied on legal persons? Please illustrate your answer by referring to examples of national case law!

In the Flemish Region some minor infringements regarding duties of the author of an EIA are considered as “administrative infringements” (see Annex I of the Executive Order of 12 December 2008) for which only an administrative fine of max. 50.000 (x 6) € can be imposed. All other infringements can be sanctioned through the penal track, with criminal sanctions ranging from 100

⁶⁶ <http://www.lne.be/organisatie/structuur/afdeling-milieu-inspectie>

⁶⁷ <http://www.lne.be/themas/erkenningen>

⁶⁸ <http://www.vhrm.be/documenten/milieuhandhavingsrapport/mhr-2013-de-web.pdf>

⁶⁹ <http://www.vhrm.be/documenten/milieuhandhavingsprogramma/mhr-11.1.40002-de-mhp2011-webversie.pdf>

⁷⁰ <http://environnement.wallonie.be/administration/dpc.htm>

⁷¹ See: L. LAVRYSEN, *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium*, July 2012, p. 11 & 15; Court of Appeal, Brussels, 31 March 2006, *T. Aenspeck and Others v. Flemish Region*, TMR 2006, 353-365.

(x 6) to 250.000 (x 6) € and/or imprisonment of 1 month to 2 years (art. 16.6.1 Decree of 5 April 1995), or, when there is no prosecution, by an alternative administrative sanction of max. 250.000 (x 6) €. The accreditation of EIA Experts can be suspended or withdrawn by way of sanction if they do not comply with their legal duties, as has been explained in answer to question 14.

In the *Walloon Region* the competent inspectors can propose a settlement (of 150 €) or impose an administrative fine between 50 (x 6) and 10.000 (x 6) €, unless the public prosecutor decides to prosecute the case. Criminal sanctions can in that case vary between 100 (x 6) € and 100.000 (x 6) € and /or imprisonment of 8 days to 6 months. The accreditation of EIA Experts can be suspended or withdrawn by way of sanction if they do not comply with their legal duties (art. R. 71 Walloon Environmental Code).

In the *Brussels Capital Region* violations of duties imposed to accredited experts can be punished by criminal sanctions of 8 days to 12 months or imprisonment and/or with a fine of 2,5 (x 6) € to 2.500 (x 6) € (art. 96 of the Ordinance of 5 June 1997). The accreditation of EIA Expert can be suspended or withdrawn by way of sanction if they do not comply with their legal duties (art. 77 of the Ordinance of 5 June 1997).

All these sanctions can be applied to legal persons.

In practice they seem to be imposed very seldom. The proper application of the permitting procedures by the competent authorities is much more effective. As has been explained before, one should dispose of an approved EIR before starting (in the Flemish Region) or continuing (in the other Regions) a permitting procedure. When the obligations regarding EIA are not observed, the procedure can simply not go ahead. If, notwithstanding some flaws, the permitting procedure goes ahead, the permitting decisions may be attached with an illegality, and appealed before the higher administrative authority, and furthermore challenged in court, as has been explained in answer to question 23.

30. *If a given activity falls under the provisions of the EIA legislation, but the developer started the activity without the required authorization, what kind of measures can be taken by the competent authority?*

In the *Walloon Region*, regarding the environmental and integrated permit, the Mayor may, on proposal of the competent inspector, order the whole shutdown of the operation, seal the machinery and close down the installation (Art. D. 149 of the Walloon Environmental Code). As the planning permit is concerned suspension of building activities can be ordered by the inspectors (art 158 of the Walloon Land Use Planning Code). The situation is very similar in the *Brussels Capital Region* (art. 9 Ordinance of 25 March 1999; art. 203 Brussels Land Use Planning Code) and the *Flemish Region* (art. 16.4.7. of the Decree of 5 April 1995; art. 6.1.47 Flemish Land Use Planning Code).

31. *Are there any penalties applicable to infringements of the national provisions adopted pursuant to the EIA Directive?*

See the answer to question 29.

Jurisprudence

EIA is abundantly present in the case law. In 18 judgements of the Constitutional Court EIA, SEA or both are mentioned. A search (per August 15th 2014) in the internet database of the Council of State⁷² learns that the notion “*étude d’incidences sur l’environnement + Région wallonne*” (the Environmental Impact Study in the Walloon Region) results in 1.000 judgments found. That is the maximum result the database can show. This means that there are probably more judgments containing those terms. A search on the notion “*project-MER*” (the Environmental Impact Study in the framework of EIA according to Flemish legislation) results in 143 judgements shown, while the notion “*plan-MER*” (term used in the Flemish Region for an Environmental Impact Report in the framework of SEA) results in 271 judgements, and the term “*MER*” (can be used for both EIA and SEA) results in 856 judgements. The term “*effectenstudie*” (the Dutch term for an EIR in the Brussels Capital Region) delivers 28 judgements, while a search on “*étude d’incidences + Région Bruxelles-Capitale*” (the French terms) result in 129 judgements. Furthermore a search on the terms “*milieueffectenbeoordeling + mariene milieu*”, to capture EIA in the maritime areas, delivers 6 judgements. So one can safely say that the instrument is mentioned in more than 1.700 judgements of the Council of State. As this result is obtained on the basis of a full text search it can off course be that the notion is only mentioned in the description of the facts or in the arguments of the parties, without EIA being the main object of the ruling by the Council.

Hereafter we will present only a few cases that could be of interest to an international audience.

The Brussels Airport EIA Case⁷³

Brussels Airport is situated in the Flemish Region, close to the Brussels Capital Region (11 km from the city centre). It has 3 runways, that each can be used in both directions. It was opened in 1948. It has been enlarged and renewed several times since. It serves now around 20 million passengers a year. Building activities were already from the beginning subject to planning permit and the operation of some of the installations on the airport required also an environmental permit (or “exploitation” permit as it was called before 1991). Due to an amendment of the environmental permitting legislation⁷⁴, the operation of an airport as such became subject to an environmental permit, with effect from 1 May 1999 onwards. According header 57.2°, of the Annex I to the (Amended) Executive Order of 6 February 1991 containing the Flemish Regulation on the Environmental Permit (“VLAREM I”) the operation of an airport site with a runway of at least 1.900 meter is subject to an environmental permit of class I, which means that it is delivered in first instance by the provincial government. As Brussels Airport was of course already long time in operation on the 1th of May 1999 it is an existing facility for which there is a transitional provision: the operator of such a facility has 6 months the time from the date this activity become subject to a permit, to introduce an application with the competent authority (art. 16 of the Decree of 28 June 1985 on the Environmental Permit). So in this particular case, on 31 October 1999 at the latest. The procedure is, compared with the regular one, simplified: there is no public inquiry and the operator may continue his operations as long no final decision has been taken on its application. That application is also simplified and shall not contain an Environmental Impact Report (EIA), but in exchange such a permit will be valid only for 5 years (art. 38 VLAREM I). Off course, before the permit expires, a new one for max 20 years can be applied for according the regular procedure.

The amendment was clearly designed to try to mitigate the noise produced by the airport. That becomes clear if one looks at the sectoral conditions for the operation of airports introduced with the same Executive Order in the Executive Order of 1 June 1995 containing general and sectoral envi-

⁷² <http://www.raadvst-consetat.be/?page=caselaw&lang=en>

⁷³ The environmental problems caused by Brussels Airport – mainly the noise produced by the incoming and departing aircraft – has given rise to abundant jurisprudence of various courts in Belgium (Constitutional Court, Supreme Court, Council of State, Courts of First Instance and Appeal Courts), but the cases in which EIA is an issue are very limited.

⁷⁴ Executive Order of the Flemish Government of 15 February 1999, BS 11 March 1999.

ronmental conditions (VLAREM II, Chapter 5.57). Around the airports of class I, different noise contours have to be designated within 18 months that the permit is issued, that will indicate noise zones and within these zones the number of persons hindered should be determined. In the environmental permit restrictions can be imposed on the number of incoming and outgoing aircraft in function of their noise level category and the proportionality principle (in relation with the Brussels Capital Region) should be observed.

The environmental permit for Brussels Airport has been issued by the provincial government on 1 February 2000, imposing restrictions of noise at night and introducing a cap of 25.000 night flights per year. The permit is slightly amended by the same government on 29 September 2000 and 26 July 2001. The permit will expire on 31 January 2005. An application for the renewal of the permit for 20 years has been introduced on 5 January 2004, without an EIA. The permit, with additional conditions on daytime noise, is issued by the provincial government on 8 July 2004. The decision is appealed with the Flemish Environment Minister by the operator, the Brussels Capital Region, 10 municipalities, 4 local environmental organisations and a lot of individuals from the neighbourhood. An important element in the appeal that was already brought for in the public inquiry and the consultation process in first instance was the question if an EIA was needed are not. The Flemish Minister delivers the permit on appeal, on 30 December 2004.

That decision was appealed before the Council of State by the Brussels Capital Government, some municipalities, some local groups and individuals. The main issue was if an EIA was necessary or not. The Council is of the opinion that Flemish legislation at that time did not oblige the operator to produce an EIA for the mere renewal of the permit, without any changes to the airport or its runways, because an EIA was only necessary for the “construction or thorough change” of an airport or for “displacing or extending the runways of it”. The question arose however if the Flemish legislation was in conformity with the EIA Directive. The Council decided to refer the case for a preliminary ruling to the ECJ⁷⁵.

The ECJ received the following questions for a preliminary ruling:

‘(1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term ‘construction’, referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?’

(2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?’

(3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?’

The ECJ answered those questions as follows⁷⁶:

“19 In order to answer those questions, which it is appropriate to consider together, it is necessary to ascertain whether the operation of an airport may constitute a ‘project’ within the meaning of Article 1(2) of Directive 85/337 and, if so, whether such a project falls within those listed in Annexes I and II to the directive.

⁷⁵ Council of State, 14 July 2009, nr. 195.230, *Brussels Capital Government an Others v. Flemish Region*.

⁷⁶ ECJ, 17 March 2011, C-275/09, *Brussels Hoofdstedelijk Gewest and Others*.

20 As the Court observed at paragraph 23 of its judgment in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, it is apparent from the very wording of Article 1(2) of Directive 85/337 that the term ‘project’ refers to works or physical interventions.

21 It is expressly stated in the order for reference that the measure at issue in the main proceedings is limited to the renewal of the existing consent to operate Bruxelles-National Airport and does not entail works or interventions which alter the physical aspect of the site.

22 However, some of the applicants in the main proceedings have argued that the concept of physical intervention must be broadly construed as encompassing any intervention in the natural surroundings. They rely on paragraphs 24 and 25 of the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, in which the Court held that an activity such as mechanical cockle fishing is within the concept of ‘project’ as defined in the second indent of Article 1(2) of Directive 85/337.

23 That argument cannot be accepted. As the Advocate General points out at point 22 of his Opinion, the activity at issue in the case which gave rise to that judgment was comparable with the extraction of mineral resources, an activity which is specifically referred to in the second indent of Article 1(2) of Directive 85/337 and entails genuine physical changes to the sea bed.

24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ within the meaning of the second indent of Article 1(2) of Directive 85/337.

25 It should be added that Article 2(1) of Directive 85/337 does not, in any event, require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive (order in Case C-156/07 *Aiello and Others* [2008] ECR I-5215, paragraph 34).

26 It should be noted in that connection, as pointed out by the Advocate General at point 26 of his Opinion, that the term ‘construction’ used at point 7(a) of Annex I to Directive 85/337 is not in any way ambiguous and is to be understood as having its normal meaning, namely as referring to the carrying out of works not previously existing or of physical alterations to existing installations.

27 It is true that, in its case-law, the Court has given a broad interpretation of the concept of ‘construction’, accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36). Similarly, the Court has interpreted point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337 as also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).

28 However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State.

29 As the Advocate General points out at point 28 of his Opinion, while it is established case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, inter alia, *Abraham and Others*, paragraph 32, and *Ecologistas en Acción-CODA*, paragraph 28), a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.

30 It follows that, in any event, the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘construction’ within the meaning of point 7(a) of Annex I to Directive 85/337.

31 It should nevertheless be pointed out that in the proceedings before the Court, in particular at the hearing, some of the applicants in the main proceedings submitted that, since the expiry of the period for transpo-

sition of Directive 85/337, the infrastructure of Bruxelles-National Airport has undergone alteration works without an environmental impact assessment being carried out.

32 In that context, it should be noted that, according to the established case-law of the Court, in a case involving a permit, such as that at issue in the main proceedings, which does not formally concern an activity subject to an environmental impact assessment for the purposes of Annexes I and II to Directive 85/337, it may nevertheless be necessary for such an assessment to be carried out where that measure constitutes a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of Article 2(1) of the directive (see, to that effect, *Abraham and Others*, paragraph 25).

33 According to that same line of authority, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53, and *Abraham and Others*, paragraph 26). It has also been held that a national measure which provides that an environmental impact assessment may be carried out only at the initial stage of the consent procedure, and not at a later stage in the procedure, would be incompatible with Directive 85/337 (see, to that effect, Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraphs 105 and 106).

34 In the present case, it is therefore necessary to point out to the Raad van State that it is for it to determine, in the light of the case-law cited at paragraphs 27, 32 and 33 above and on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be regarded as a stage in a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.

35 For the purposes of examining the facts, it is appropriate to remind the national court that the Court has already held that works to alter the infrastructure of an existing airport, without extension of the runway, are covered by point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).

36 The Court has also stated that the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/337 (*Abraham and Others*, paragraph 27).

37 If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.

38 The answer to the questions referred is, therefore, that the second indent of Article 1(2) of Directive 85/337 and point 7 of Annex I to the directive are to be interpreted as meaning that:

- the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ or ‘construction’, respectively, within the meaning of those provisions;
- however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the di-

rective to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage of the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

(...)

The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:

- **the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ or ‘construction’, respectively, within the meaning of those provisions;**
- **however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.”⁷⁷**

In its final judgment the Council of State of State is of the opinion that the challenged permit do not tend to change the material situation of the existing airport, but only to permit to continue the existing operation of it. The Council of State is also of the opinion that the permit forms no part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. The appeals have been rejected⁷⁸.

The Liège Airport EIA Case

The individuals who live near Liège-Bierset Airport complained of noise pollution, often at night, resulting from the restructuring of the former military airport and its use since 1996 by air freight companies. An agreement signed on 26 February 1996 between the Region of Wallonia, *Société de développement et de promotion de l’aéroport de Liège-Bierset* and TNT Express Worldwide provided for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened. A control tower, new runway exits and aprons were also constructed. The length of the runway of 3.

⁷⁷ See in a similar sense: ECJ, 19 April 2012, C-121/11, *Pro-Braine ASBL and Others v The Commune of Braine-le-Château*:

“The definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, does not constitute a ‘consent’ within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, *unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment* within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a ‘project’ within the meaning of Article 1(2) of that Directive”.

⁷⁸ Council of State, nr. 222.678, 28 February 2013, *Brussels Hoofdstedelijk Gewest and Others v. Vlaamse Gewest*.

297 meters was not altered however. Planning consents and operational authorizations were also granted so that the works could be carried out. The dispute pending before the Belgian national court concerns liability: the claimants in the main proceedings have sought compensation for the harm suffered, in their view, by them as a result of the nuisance – which they claim to be serious – linked to the restructuring of the airport. It is in that context that an appeal on a point of law was brought before the Court of Cassation against a judgment delivered on 29 June 2004 by the Court of Appeal of Liège. Considering that the dispute before it raised questions of interpretation of EU law, the Court of cassation decided to stay the proceedings and to refer some questions to the Court of Justice for a preliminary ruling.

The ECJ answered the questions as follows in its judgment of 28 February 2008⁷⁹:

“1. While an agreement such as the one at issue in the main proceedings is not a project within the meaning of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.

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

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

The Court of Cassation subsequently quashed the appealed judgment for inter alia violation of Directive 85/337/EEC and has sent the case to the Court of Appeal of Brussels for reconsideration⁸⁰. It seems that the case is not settled yet.

The Spa-Francorchamps Race Circuit Case

The *Spa-Francorchamps Race Circuit* exists since 1920. It organizes various motorized sport events, including the 24 Hours of Spa, an endurance racing event held annually since 1924. The actual shape of the circuit dates back from the 1970s. Since the year 2000 the volume of activities has increased considerably, with 210 days of activity in 2005. On 8 August 2006 the operator applies for an integrated permit for the operation of the circuit and its attached installations and to modify them⁸¹. An EIA has been prepared. A public inquiry is held in the two concerned municipalities resulting in nearly 100 complaints. The main complaints deal with noise nuisances and negative impacts on Natura 2000 sites and their buffer areas. Various opinions are delivered by competent environmental authorities, most of them favourable under conditions. The public service dealing with noise nuisances however has a negative opinion due to failures in the EIA Report. On the basis of that report one cannot have a reliable idea of the noise impacts, the Service says. They ask a Uni-

⁷⁹ ECJ, 28 February 2008, Case C-2/07, *Paul Abraham and Others v Région wallonne and Others*.

⁸⁰ Court of Cassation, 4 December 2008, *A. and others*, Arr. Cass., 2008, n° 696.

⁸¹ Before the circuit itself consisted completely of public roads. From 2003 onwards this, that was no longer the case so that the circuit was becoming subject the environmental permit system.

versity professor to review the EIR and the author of the EIR is asked to revise his report on that basis. He only sends a new presentation of the results of his measurements to the authority. On 10 November 2006 the integrated permit is issued by the competent officials under certain conditions. Part of the application (a new parking and the renewal of the F1 Tribunes⁸²) has been rejected. The permit has been appealed with the competent Walloon Minister, by third parties, criticizing the noise standard, considered to be too lenient, and the too high number of days the circuit may be used, and by the operator, criticizing some of the imposed conditions and the refusal of the additional parking's. After a new acoustic study the competent authority for noise abatement delivers a favourable opinion under certain conditions. On 12 April 2007 the integrated permit is issued by the Minister, confirming the first decision, but refusing also the permit for an additional heliport. The Minister charges the operator to do a new study on the noise issues, so that before the end of 2009 appropriate conditions can be attached to the permit (meanwhile some transitional measures are taken), the composition of the guidance committee is modified, a parking, initially refused, may however be built under certain conditions.

The permit delivered by the Minister is challenged before the Council of State, by a local environmental group and some neighbours. In their demand for suspension of 15 June 2007, one of the arguments deals with the flaws in the EIR concerning the noise nuisances. Referring to the relevant Walloon legislation and the provisions of the EIA Directive, the Council reveals that the authorities should dispose of all relevant information concerning environmental impacts of the project, before deciding on the permit application, and that the competent authority is entitled to ask for complementary information of the operator and author of the EIR, if on the basis of the EIR, the public inquiry and the consultations held, it has no sufficient information. In case it has to do with lacunas, it should take the form of a complementary EIA, subject to procedural guaranties, including public participation and consultation, the Council says. After a lengthy reasoning on the basis of a thorough inspection of all relevant documents (p. 40 – 57 of the judgment), the Council comes to the conclusion that the EIA Report had so many flows that a complementary EIA was necessary. So the integrated permit, that has been is delivered on the basis of such a lacunar EIA, is illegal, and the permit is suspended by the Council⁸³.

The Council of State had not to deliver judgment on the appeal for annulment, because the integrated permit was withdrawn meanwhile by the (new) Walloon Minister on 24 September 2009⁸⁴. A new integrated permit has been delivered later on ⁸⁵, and a new EIA⁸⁶ realized. This permit more restrictive seems not to have been challenged again.

⁸² The F1 Grand Prix in this circuit was left out of the 2003 calendar as a response to the internal tobacco legislation in Belgium. The event was tagged as a World Class event within the national senate, and thus it was saved for the 2004 Formula One season. Spa was dropped from the Formula One calendar in 2006. The organizer of the event went bankrupt in late 2005, and therefore the planned improvements to the race track and paddock had not yet been made. The Wallonia government stepped in and provided the necessary funds, but too late for the 2006 race to take place. With a new financial backer, the renovation started on 6 November 2006 and finished in May 2007, costing around €19 million. Formula 1 returned to Spa for 2007

⁸³ Council of State, nr. 196.196, 18 September 2009, *l'asbl Sourdin and Others v. Walloon Region*.

⁸⁴ Council of State, nr. 199.556, 15 January 2010, *l'asbl Sourdin and Others v. Walloon Region*.

⁸⁵ <http://www.cwedd.be/uploads/Avis%20EIE%20-%202011/11.572%20Circuit%20Spa-Francorchamps.pdf> :

<http://gouvernement.wallonie.be/spa-francorchamps-nouvel-arrete-et-une-meilleure-prise-en-compte-des-riverains>

⁸⁶ http://sites.uclouvain.be/creat-loci/images/stories/communication/fiche_17_francorchamps.pdf