

# Belgium

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## List of Abbreviations

ADR	Treaty on the international transport of dangerous goods
AMINAL	Department for environment, nature and land development of the Ministry of the Flemish Community
B.S.	<i>Belgisch Staatsblad / Moniteur belge</i> (the Belgian Official Gazette)
BAT	Best Available Technology
BATNEEC	Best Available Technology Not Entailing Excessive Costs
BEF	Belgian franc
BELCERT	Belgian accreditation system for bodies operating certification of products, quality systems or persons
CAP	Common Agricultural Policy (EC)
CC	Civil Code
CITES	1973 Washington Convention on the Trade in Endangered Species
CLC	Brussels Convention on Civil Liability for Oil Pollution
COTIF	Treaty on International Railway Transport
DABM	Decreet houdende Algemene Bepalingen Milieubeleid (Flemish Decree of 5 April 1995 on General Provisions of Environmental Policy)
DLUN	Developing Large Units of Nature
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	<i>European Court Reports</i>
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMAS	(European) Environmental Management and Audit System
EPA	Environmental Policy Agreement
EU	European Union
GDP	Gross Domestic Product
GMO	genetically modified organism
IEEL	International Encyclopaedia of Environmental Law
ILO	International Labour Organization
IRCEL	Inter-Regional Task Force for the Environment
IUCN	The World Conservation Union
IVC	Interregional Packaging Commission
IVON	Integral Acquisition and Supporting Network
LUN	Large Units of Nature
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal of the European Community

### **List of Abbreviations**

OVAM	Openbare Afvalstoffenmaatschappij voor het Vlaamse Gewest (Flemish Public Waste Agency)
RID	International Regulation on the transport of dangerous goods by rail
R.G.P.T.	Règlement Général pour la Protection du Travail (also ARAB: Algemeen Reglement Arbeidsbescherming) – General Regulation on Labour Protection
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
VEN	Flemish Ecological Network
VLAREA	Flemish regulation on the prevention and management of waste
VLAREBO	Flemish Regulation on Soil Clean-up
VLAREM I	Executive Decree of the Flemish Government containing the Flemish regulation relating to the environmental permit
VLAREM II	Executive Decree of the Flemish Government containing general and sectoral environmental conditions
VMM	Vlaamse Milieumaatschappij (Flemish Environmental Agency)
VOS	volatile organic substances

# Introduction

## § 1. GENERAL INFORMATION

### I. Geography and Population

#### A. Geography

1. Belgium is a small country situated in Western Europe, with a surface of 30,528 sq.km. (30,278 sq.km. of land and 250 sq.km. of water). It is geographically divided into three regions: Wallonia, Flanders and the Brussels Region. Belgium's border countries are France (620 km), Germany (167 km), Luxembourg (148 km) and the Netherlands (450 km). In the West, the country has a 65 km coastline.

Three geographical parts can be distinguished: lower Belgium (with an altitude from 0 to 100 metres above sea level) from the polders in the West to the Campine in the East, central Belgium (100–200 metres above sea level) and upper Belgium in the Southeast (the country's highest point is Signal de Botrange, 694 metres). The country enjoys a moderate maritime climate.

The country lies in the basins of the Scheldt and the Meuse. These rivers add about 5 billion cubic metres to the 12 billion cubic metres of net rainfall. However, taking into account its population density, Belgium is relatively poor in water resources.

2. Almost 46.4 per cent of the land is dedicated to agriculture (29 per cent arable and permanent crop land, 17.6 per cent permanent grassland), forests account for about 20 per cent of the country's surface, while 17 per cent is built-up land. The dense network of roads, railways and navigation canals<sup>1</sup> occupy a considerable surface as well.

Various ecosystems of the Atlantic, meridional and septentrional types can be distinguished.

1. 144,000, 3,400 and 2,000 kilometres respectively.

3. Belgium has few mineral resources: all coal mines have been closed, but a small amount of natural gas is still extracted. Nuclear power provides 55 per cent of electricity and Belgium relies on imports of fossil fuels for three quarters of its energy needs (almost no use is made of hydropower or renewable energy resources).

*B. Population*

4. About 10,174,922 (July 1998 est.) people live in the country (of whom slightly over 900,000 foreigners), giving it a population density among Europe's highest: 333 inhabitants per sq.km.. The distribution over the three regions is as follows: Flanders has 5.9 million inhabitants (434 per sq.km.), Wallonia has 3.3 million inhabitants (196 per sq.km.) and Brussels about 1 million inhabitants (6,250 per sq.km.). The population growth rate was around 0.09% in 1998. Life expectancy at birth is 77.35 years (around 74 for men and 81 for women).

The active population is around 4.25 million, of which approx. 400,000 are unemployed (not including approx. 140,000 unemployed persons older than 50).

**II. Legal and Political Structure<sup>1</sup>***A. General*

5. Belgium is a constitutional monarchy. According to the new coordinated Constitution of 17 February 1994, 'Belgium is a Federal State constituted of Communities and Regions.'<sup>2</sup>

The Communities are the Flemish Community, the French Community and the German-speaking Community. The Regions are the Flemish Region, the Walloon Region and the Brussels Capital Region.

Moreover, there are four language areas (the Dutch, French and German language areas and the bilingual area of Brussels-Capital) and 10 provinces (Antwerp, Flemish Brabant, West Flanders, East Flanders, Limburg, Walloon Brabant, Hainaut, Liège, Luxembourg and Namur).

1. The structure and principles of the Federal State of Belgium are far too complex to be dealt with in detail here. A brief comprehensive overview, as well as the English text of the 1994 Constitution, can be found in Alen, A. and Ergec, R., *Federal Belgium after the Fourth State Reform of 1993*, Brussels, Ministry of Foreign Affairs, External Trade and Co-operation for development, 1998, 80 p.
2. Article 1.

*B. Decision-Making Power and Competencies*

6. The federal authority, the Communities and the Regions all have decision-making power. Communities and Regions are authorities on the same level as the federal authority.<sup>1</sup> All have their own system of organs (legislative assemblies and executives<sup>2</sup>)<sup>3</sup> and laws and have financial autonomy. Concurrent jurisdiction (e.g. the power of taxation) is the exception to the rule of exclusive jurisdiction on matters falling within the authority's competence.

The law-making instrument of the federal authority is the *law*. Regions and Communities legislate by way of *decree* (the Brussels Capital Region legislates

through *ordinances*). These instruments have force of statute throughout the territory for which the authority is competent.<sup>4</sup>

1. See Alen, A. and Ergec, R., *o.c.*, p. 18 *et seq.*
2. The legislative assembly and executive for the Flemish Community and Region are the same entity. Nonetheless there are in total 6 parliaments and 6 executives in Belgium.
3. At the federal level, the King is part of both the legislative and executive branches.
4. There exists a certain judicial degree for ordinances, however. See Alen, A. and Ergec, R., *o.c.*, p. 21.

7. Laws, decrees and ordinances can be controlled by the Court of Arbitration (*Arbitragehof – Cour d'Arbitrage*), a quasi-constitutional court.<sup>1</sup>

The courts and tribunals are all federal.

1. 'Quasi' because it can only rule on compatibility with a limited number of constitutional provisions (conflicts of competence between the federal authority and the Communities and Regions and among Communities and Regions; equality and non-discrimination and freedom of education). Through a wide interpretation of these provisions, the Court has significantly widened its jurisdiction.

8. For the time being, Regions and Communities have the competencies attributed to them in the Constitution or special majority laws. They also have implied powers, according to Article 10 of the Special Institutional Reform Law of 8 August 1980: they can enter the federal domain where this is necessary for the exercise of their own powers.<sup>1</sup> The Constitution contains some provisions on Community competencies, but states that a special majority law must determine the Regions' competencies. The Special Institutional Reform Law of 8 August 1980 lists competencies of the Regions and spells out more specifically those of the Communities.

1. The Court of Arbitration has made the exercise of such implied powers subject to three conditions: (i) the exercise must be really necessary, (ii) differential arrangements must be possible and (iii) the impact of the differentiated regime on the federal matter must not be more than marginal. See Allan, A. and Ergec, R., *o.c.*, p. 26.

9. Generally speaking, the following matters are the responsibility of the Communities:<sup>1</sup> cultural affairs, education (with some exceptions that remain federal), personal services and the use of languages in certain matters. Regions have competence in land use and planning, the environment and water policy, rural development and nature conservation, housing, agricultural policy, economic policy,<sup>2</sup> energy policy, supervision of local authorities, employment policy, public works and transport.<sup>3</sup> In a number of matters (e.g. energy) the different authorities have an obligation to mutually consult each other.

When Article 35 of the Constitution will have entered into force, the Regions and Communities will have residual jurisdiction and the Federal Government will only have power 'in the matters that are formally attributed to it by the Constitution and the laws adopted in pursuance of the Constitution itself.' This provision, however, has not yet entered into force and doubt exists whether it soon will.

1. See Alen, A. and Ergec, R., *o.c.*, pp. 21–22.
2. Respecting Belgium's 'economic and monetary union.'
3. For competences regarding the environment, see in detail § 4 of this introduction, *infra*.

10. To end this brief sketch of the Belgian institutional structure, something must be said about international co-operation. Since the fourth State Reform of 1993, Communities and Regions have the power to conclude treaties in the matters pertaining to their exclusive competences. Specific rules regulate co-operation with and interference<sup>1</sup> by the federal authorities. Provision is also made for so-called mixed treaties which concern areas of competence of different authorities.

1. On strictly limited grounds.

### III. Economic Characteristics<sup>1</sup>

11. Belgium has a very open economy. Exports and imports of goods and services constitute about 70 per cent of GDP. GDP in 1997 was BEF 8,650.6 billion (214.44 billion euros). The service sector accounts for more than 52 per cent thereof and manufacturing for 22 per cent.<sup>2</sup> Agriculture, hunting, forestry and fishing together contribute 2.1 per cent.

Belgium is the world's ninth largest exporter. Export goods are mainly machinery and transport equipment, other manufactured goods and chemicals. The country's main assets are its location, the highly developed transport network, a diversified industry and services market and a highly skilled work force.

1. Source: OECD, *o.c.*, p. 37 *et seq.*
2. Belgium counts many small and medium-sized enterprises.

12. Around 60 per cent of the active population works in the tertiary sector, around 20 per cent in the secondary sector and around 2 per cent in the primary sector. The unemployment rate lies around 8.4 per cent.

General government disbursements amount to about 53 per cent of GDP. Net general government debt is 126.9 per cent of GDP. The country has been making serious efforts to reduce annual budget deficits and public debt (around 10,000 billion BEF, or 248 billion euro).

### IV. Social and Cultural Characteristics

13. Belgium has three official languages: Dutch, French and German. The federalization of most cultural and language matters has given the three populations a strong cultural identity. Immigration during the last decades and more recently the large number of officials of the European Communities and international organizations, make especially the Brussels Region a culturally rich and cosmopolitan area.

14. Belgium is a social welfare state with a broad social security system, founded in 1944.

The education system is well developed, basic education is free and higher education is not expensive. School attendance is compulsory until the age of 18. The literacy rate is 99 per cent.<sup>1</sup>

1. Of people over 15 years old.

15. The Belgian population is mainly catholic: 75 per cent of the people call themselves catholic (but only 23 per cent are regular churchgoers), 12 per cent are latitudinarians, 10 per cent are undecided or have no opinion, 1.5 per cent is Muslim, 1 per cent protestant and around 0.3 per cent Jewish.

## **V. Main Environmental Problems**

16. In a small country like Belgium, it is obvious that the dense population, the fragmentation of the land and urbanization<sup>1</sup> put a high pressure on the environment in general and on habitats and ecosystems in particular.

Specifically hazardous human activities are industry and intensive cattle breeding and agriculture.

The main problems are the following:<sup>2</sup>

- water pollution from various sources of surface water, rivers and the North Sea; only 28 per cent of urban waste water is treated;
- air pollution from industry and traffic; ozone limits are often exceeded in summer;
- ammonia from animal husbandry is the main soil pollution problem caused by agriculture;
- transport;
- use of renewable energy sources is very limited;
- waste management facilities (land fill sites) do not always comply with applicable regulations whereas plans for new facilities meet with public protest;
- the ecotaxes system was a good initiative but its impact proved very limited in practice.

A specific problem is the clean-up of contaminated land where it is difficult to pinpoint the owner or responsible person. The Government has only limited funds for clean-up. A new liability system with corresponding financing techniques is being developed.

1. One fourth of the territory is made up of built-up areas and dense road, railway, and navigation networks; *see* OECD, *o.c.*, p. 19.
2. *See* OECD, *o.c.*, pp. 22–32.

17. A non-physical problem is efficiency. European Directives are not always transposed into national law within the prescribed time-limit; the large number of sources of legislation have made some parts of environmental law extremely complex; environmental policy is not always co-ordinated among the

three Regions, resulting in divergent regulatory frameworks; the administrations demand more personnel and more money to tackle environmental problems.

*18.* Many environmental problems are caused by industry and consumption. Nature conservation gets relatively little attention. Only 2.6 per cent of the national territory is protected in terms of the IUCN protected areas classification.

The biggest challenge for Belgium is to make development environmentally sustainable, not an easy task given the country's context described above.

## § 2. BASIC PRINCIPLES OF ENVIRONMENTAL LAW

19. In accordance with Article 23 of the co-ordinated Constitution, every citizen of Belgium has, apart from other rights, the right to the protection of a healthy environment. The reverse side of this right is the obligation for the governments (federal, regional and local) to protect the environment. The incorporation in the Constitution of this right confirms the increasing awareness of environmental problems and provides a permanent constitutional guarantee.

The practical scope and impact of this basic right should not be overrated, but neither should it be underrated: the value of such constitutional recognition is also determined by its capacity to orient governmental policy and instruct the legislator. The Government will unmistakably be obliged to promote the rights laid down in, and to implement in practice the principles of, the Constitution.<sup>1</sup>

1. *Gedr.St.*, Kamer, 1991-92, No. 381/1, 9.

20. Under the influence of European and international examples, the development of a legal framework on sustainable development is also beginning to take shape. It was initiated in Belgium, at the federal level, in 1993. In the aftermath of UNCED, a 'National Council for Sustainable Development' was established by Royal Decision of 12 October 1993, now repealed by Article 21 of the Law of 5 May 1997 concerning the co-ordination of federal policy on sustainable development.

At present the Law of 5 May 1997 concerning the co-ordination of federal policy on sustainable development<sup>1</sup> is the most important federal legal framework for sustainable development. As its title suggests, the purpose of the Law is to organize and co-ordinate federal policy on sustainable development.

In conformity with commitments made by the State of Belgium, and respecting the division of competences, the federal Government may prepare a federal plan for sustainable development involving various departments. A constructive dialogue with the Regions and Communities is imperative. The proposed four-year plan will contain the policies to be conducted and the measures to be taken.

A basis for preparing the federal plan will be provided by two-yearly reports on sustainable development. These reports outline the prevailing situation, the policies conducted and the expected results.

The Law is also intended to clarify the extent of logistic and scientific tools assigned to the Federal Council for Sustainable Development, which will enhance the Council's ability to advise the Government.

1. B.S., 18 June 1997.

21. The Flemish and Walloon authorities have also taken initiatives in favour of sustainable development. In the Flemish Region, sustainable development is being dealt with in various ways: through environmental policy objectives, principles of environmental policy, environmental policy planning and obligations with respect to environmental care for companies.

In the Walloon Region, sustainable development has been an issue since 1994, when the Walloon Regional Parliament adopted the Decree of 21 April 1994 concerning environmental planning within the framework of sustainable development.<sup>1</sup> The Brussels Capital Region remains behind in this matter.

1. B.S., 23 April 1994, modified by Decrees of 19 December 1996 (B.S., 31 December 1996) and 22 January 1998 (B. S., 19 February 1998).

22. The objectives to be pursued by environmental policy are formulated explicitly in a binding legal text only in the Flemish Region. According to Article 1.2.1. para. 1 of the Decree of the Flemish Parliament of 5 April 1995 concerning general regulations in the matter of environmental policy, environmental policy in the Flemish Region – for the benefit of the current and future generations – aims at:

- effective management of the environment through sustainable use of resources and nature;
- protection against pollution and resource depletion of man and the environment, and particularly of ecosystems of crucial importance to the functioning of the biosphere and to the food supply, health and other aspects of human life;
- nature preservation and the promotion of biological and landscape diversity by means of preservation, restoration and development of natural habitats, ecosystems and landscapes of ecological value and the conservation of wild species, particularly those which are endangered, vulnerable, rare or endemic.

23. In the Flemish Region most of the environmental policy principles are embedded in Article 1.2.1. paras. 2 and 3 of the Decree of the Flemish Parliament of 5 April 1995 which enumerates a non-limitative list<sup>1</sup> of principles:

- the principle that environmental policy should aim at a high level of protection;
- the principle of precaution;
- the principle of preventive action;
- the principle of action at the source of the pollution;
- the standstill-principle;
- the polluter-pays principle;
- the integration principle.

The explicit formulation of these environmental policy principles was completely new and definitely inspired by the principles of environmental policy as laid down in different international<sup>2</sup> and European treaties.<sup>3</sup>

The insertion of these principles in a binding legal text, a decree, has as a consequence that they become legal principles. The Flemish Government and the subordinated governments have to take them into account their policy. According to Article 159 of the Constitution and Article 14 of the Law on the

Council of State, these legal principles may be subject to judicial review. Since the principles are quite general and judicial review is only marginal, only obvious violations of these principles will be sanctioned by the judge.

1. 'The Flemish environmental policy rests *among others* on...'
2. Rio Declaration on environment and development, U.N. Doc A/CONF.151/5/Rev. 1, 13 June 1992, reprinted at 31 I.L.M. 874 (1992). Also worth mentioning is the elaboration by the World Commission on Environment and Development (Brundtland Commission) of the General Principles concerning natural resources and environmental interference (World Commission on Environment and Development, *Environmental Protection and Sustainable Development. Legal principles and recommendations*, Graham Trotman/Martinus Nyhoff, London/Dordrecht/Boston, 1987).
3. Article 130 R(2) EC Treaty, O.J. 1992, C 191.

24. The principle of participation and access to information concerning the environment is laid down in several legal texts. In the first place, Article 32 of the co-ordinated Constitution stipulates that everybody has the right to consult every government document and to have a copy of it. A Decree of the Flemish Parliament of 23 October 1991 regulates the publicity of government documents in the services and institutions of the Flemish Region (e.g. concerning the environment).

The opportunity to participate in decision-making is laid down in Article 33 of the Decision of the Flemish Government of 6 February 1991 concerning the Flemish regulation of the environmental permit. According to Article 11 of the Decree of the Flemish Parliament of 28 June 1985 concerning the environmental permit, a public inquiry must be organized by the communes for every permit demand.

In the Walloon and Brussels Capital Region only the right of access to information concerning the environment is laid down in a binding legal text.<sup>1</sup>

1. For the Walloon Region in the Decree of 13 June 1991 concerning the right of access to information concerning the environment (B.S., 11 October 1991), modified by Decree of 19 December 1996 (B.S., 31 December 1996) and for the Brussels Capital Region in the Ordinance of 29 August 1991 concerning the access to information concerning the environment in the Brussels Capital Region (B.S., 1 October 1991).

§ 3. HISTORICAL BACKGROUND<sup>1</sup>

25. Belgian environmental law developed, as in most countries, not as ‘environmental law.’ Indeed, the first instruments dealt with nuisance caused by factories.<sup>2</sup> Protection of citizens’ private property was the first goal. Already then, government control of emissions, techniques and exploitation was established. Later legislation concerned the protection of workers, public health and public safety. The environment as such has only been subject of specific legislation since a few decennia.<sup>3</sup> Pollution control and nature conservation and management started to develop as two distinct branches of environmental law.

1. See Suetens, L., ‘Het recht op de bescherming van een gezond leefmilieu (artikel 23 van de Grondwet)’ in X., *Prof. Dr. Louis Paul Baron Suetens. Op de grens van het ideaal denkbare en het praktisch haalbare*, Bruges, Die Keure, 1998, pp. 503–514.
2. See Suetens, L., *l.c.*, p. 503, who mentions a French imperial decree as far back as 1810.
3. Suetens, L., *l.c.*, p. 503.

26. Pollution control legislation in general establishes emission norms, quality objectives etc. It is often organized in a sectoral way, approaching the various components of the environment (water, air, soil, etc.). A scientific approach and long-term planning are essential.

27. A similar evolution took place in the law of nature management, conservation and spatial planning. Individual and specific measures have been replaced by plans, zoning and a global approach. Suetens summarizes this evolution as one from nature *protection to positive nature management*.<sup>1</sup>

Recently, many other branches of the law are being ‘greened.’ On the one hand, environmental considerations are taken into account in new policy areas (e.g. energy law). Simultaneously, other legal areas are more and more used to reach environmental goals (e.g. tax law).

1. Suetens, L., *l.c.*, p. 504.

28. Since 1994, the Belgian Constitution contains a right ‘to the protection of a healthy environment.’<sup>1</sup>

1. See § 4 of Chapter 1 of Part I, Pollution Control, *infra*.

29. Lambrechts describes how since the 1980s a purely sectoral approach was abandoned in favour of a thematical grouping of national and international environmental problems. Use is being made of the so-called ‘pressure-impact-response model.’<sup>1</sup> The *pressure* is caused by a number of trends and activities in society (e.g. demography, industry, transport). The *impacts* of those forms of pressure are then categorized into a number of themes. Finally, the *response* of Government and others forms the environmental policy.

In recent years, there has been a truly explosive growth of environmental legislation, making it a very complex and broad field of law.

1. Lambrechts, W., *Overzicht van het Belgisch Milieurecht*, Antwerp, Kluwer Rechtswetenschappen, 1997, p. 117.

30. An Inter-University Commission for the Reform of Environmental Law in the Flemish Region was created in 1989. The task of the Commission was to draft a more effective and efficient environmental legislation. Moreover, all legislation should be co-ordinated and brought together in one body of general rules that only need to be sectorally specified in some fields.<sup>1</sup> The results of the Commission's activities were presented to the Flemish Minister for the Environment in 1995. A number of general proposals (concerning planning, liability etc.) were formulated and new sectoral rules were drafted.<sup>2</sup>

Certain chapters of the Draft Decree on Environmental Policy<sup>3</sup> have since then been transformed into decrees. Examples are the Flemish Decree on Waste, Soil Clean-up and Environmental Policy Agreements. Other parts are being studied and adapted for legislative purposes in the near future. An example is Part 9 of the Draft Decree on liability for environmental damage.

1. Lambrechts, W., *o.c.*, p. 118.

2. Lambrechts, W., *o.c.*, p. 118.

3. Bocken, H. and Ryckbost, D. (eds.), *Codification of environmental law: draft decree on environmental policy*, London, Kluwer Law International, 1996.

31. Finally, another development must be mentioned. The Regions' environmental competences have been expanded during every state reform. Environmental legislation in all three Regions keeps on expanding. The Regions can now also conclude treaties and international agreements in the fields of their competence. At the same time, some federal competences are closely linked to environmental matters (e.g. product regulation, taxation). To co-ordinate all this, a number of co-operation agreements among the Regions and between the Regions and the federal authority have been concluded.

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# Part I. Pollution Control

## Chapter 1. General Law

### § 1. ENVIRONMENTAL IMPACT ASSESSMENT AND SAFETY REPORTING IN BELGIUM

82. In Belgium, environmental and safety issues have been addressed for many years by one piece of legislation: the General Regulations on Labour Protection.<sup>1</sup>

However, the successive constitutional reforms implemented by the laws of 1980, 1989 and 1993 and the revised Constitution of 17 February 1994, have transferred almost all competencies regarding environmental matters to the three Regions: Flanders, Brussels and Wallonia, which means that the federal authorities have been left a limited competence. Regarding safety issues, on the contrary, the Federal Government has kept a larger competence as the Regions are competent only regarding the so-called external or environment-related safety issues; the internal and labour-related safety issues remain within the federal competence. This means that the relevant Belgian legislation is fragmented.

1. L. Lavrysen, *De bevoegdheidsverdeling in het federale België*, deel 1 'Leefmilieu en waterbeleid,' Die Keure, Bruges, 1999.

### I. International Law

83. Belgium is a signatory of two UN-ECE Conventions: the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), and the Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992).

For the Espoo Convention, the national approval procedure is almost finalized.

Furthermore the ILO-Treaty No. 174 on the Prevention of Major Industrial Accidents of 22 June 1993 has been approved by Law of 6 September 1996 (B.S., 15 February 1997).

## II. European Law

84. Environmental impact assessment and safety reporting are required by several European directives which Belgium was obliged to transpose into national law:

- Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities;
- Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances;
- Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment;
- Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

As of June 1999, the Directives 96/82/EC and 97/11/EC have not yet been completely transposed at the different governmental levels.

## III. Belgian Federal Legislation

85. As the above-mentioned institutional reforms reserved the competence for certain environmental matters to the national government, this has consequences for the environmental impact assessment (EIA). In addition to the specification of standards for products, the transit of waste products and the protection of the marine environment, the national government remains competent for the protection against ionizing radiation, including radioactive waste.

86. The basic legislation regarding the protection against ionizing radiation is the Law of 29 March 1958 on the Protection of the Population against Dangers from Ionizing Radiation and the Royal Decree of 28 February 1963 which introduced detailed regulations. The 1958 Law has been replaced by the Law of 15 April 1994 on the Protection of the Population and the Environment against Dangers from Ionizing Radiation and on the Federal Agency for Nuclear Control.

The Royal Decree of 1963 was modified by the Royal Decree of 23 December 1993 (B.S., 2 February 1994) in order to comply with the Directive 85/337/EEC, because the several licensing procedures for the categories of installations in the original royal decree only implicitly provided for EIA. The modifications included *inter alia* the introduction of an obligatory environmental impact statement (EIS) for certain installations (category I) and the requirement that the EIS contain the information required by Article 37 of the Euratom-treaty as specified by the recommendations of 7 December 1990 of the Commission.

Up to now, only a few EIA's have been performed for rather limited modifications of nuclear power plants (buildings for storage of used steam generators, dry or wet temporary storage of spent fuel). No EIA's for new installations have been performed.

87. A recent federal Law of 20 January 1999 (B.S., 12 March 1999) on the protection of the marine environment in the sea territories within the Belgian jurisdiction includes a chapter on environmental impact assessment.

88. The transposition of Directive 82/501/EEC on the major-accident hazards of certain industrial activities was difficult due to the Belgian institutional context.<sup>1</sup> The first attempt was the Royal Decree of 1 February 1985 which amended the General Regulations on Labour Protection. The Law of 21 January 1987 (B.S., 10 March 1987) – and its ministerial implementing orders – on the major-accident hazards of certain industrial activities aimed unsuccessfully to transpose the above-mentioned Directive in a co-ordinated manner. However, a number of federal – rather frequently amended – regulations regarding disaster planning have to be taken into account, as well as environmental regulations at the regional levels. Furthermore, new constitutional developments in the beginning of the 1990s required the adoption of an interregional agreement on this issue. Only in 1999 was such an agreement reached between the Federal Government and the three Regions. This agreement has to be approved by the different parliaments and will lead to amended regional regulations.

1. E. De Pue, L. Lavrysen, P. Stryckers, *Milieuzakboekje 1999*, Kluwer, Antwerp, 1999, p. 226.

#### IV. Regional Legislation

89. Each Region has promulgated its own EIA-regulations in order to comply with the provisions of the EEC Directives 85/337 and 97/11. The Walloon and Flemish Regions have different provisions regarding safety reporting.

90. In the Walloon region, EIA was introduced by the Decree of 11 September 1985 on the Assessment of the Impact of Public and Private Projects on the Environment. This legislation has been amended a number of times and recently the decree was replaced by a new Decree of 11 March 1999 (B.S., 8 June 1999) on the Environmental Permit.

The Walloon EIA mechanism was modified *inter alia* with the aim: to encourage the assessment of environmental impact at an earlier stage of the procedure; to make it more clear which projects must be submitted to an extended assessment; to avoid excessive delays in the procedure, and to transpose the requirements of Directive 97/11/EC.

The new decree (Article 17) also covers – at least in principle – the transposition of Directive 96/82/EC. Previously, some executive orders had amended the General Regulations on Labour Protection (by introducing the requirement of a safety report) which in the Walloon Region still constituted the basic environmental permit regulations.<sup>1</sup>

As a public inquiry was already part of the initial Walloon EIA mechanism, it is obvious that EIS's and environmental decisions in this Region – as compared to the Flemish approach – are more likely to be disputed before the Council of State (*Conseil d'Etat*).<sup>2</sup>

1. A. Lebrun, *Mémento de l'environnement, 1996–97*, Kluwer, Bruxelles, 1997, p. 218.

2. See *ASBL Les amis de la terre v. Région Wallonne*, 10 June 1994, in *Aménagement-Environnement*, 1994/2, p. 133.

91. In Flanders, EIA became operational on 23 March 1989 (B.S., 17 May 1989) through six administrative orders of the Regional Government of Flanders. The legal basis for these administrative orders relating to industrial installations is the Environmental Licence Decree of 28 June 1985 (B.S., 17 September 1985). In this decree, EIA as well as safety reporting are integrated within the licensing procedures for industrial installations.<sup>1</sup> In order to implement this decree, two administrative orders (VLAREM I and VLAREM II) became effective respectively from 1 September 1991 and 1 January 1993. These orders have been modified numerous times. VLAREM I contains a number of provisions which elaborate the procedure on safety reporting, while VLAREM II contains more technical aspects regarding safety requirements. For non-industrial projects, the applicable administrative orders supplement the basic Town and Country Planning Law of 1962 which was replaced by the Decree of 18 May 1999 on the Organization of Town and Country Planning (B.S., 8 June 1999). Some minor aspects of the Flemish EIA-regulations have been modified a number of times in order to transpose Directive 85/337/EEC in a correct and complete way, especially after the European Court of Justice ruling of 2 May 1996.

In May 1999 the Flemish Government approved in principle a draft decree which aims to integrate EIA and safety reporting in a more comprehensive way and which transposes Directives 96/82/EC and 97/11/EC. This proposal also introduces EIA for plans and programmes.

1. J. De Mulder, 'Milieu-effect- en veiligheidsrapportage,' in: K. Deketelaere, *Milieurecht in België*, Die Keure, Bruges, 1997, p. 165.

92. In Brussels, the legal basis for EIA is provided for by the two Ordinances of 5 June 1997 (B.S., 26 June 1997): the Ordinance on Environmental Permits and the Ordinance amending the Ordinance on Urban Land Uses of 29 August 1991 and revoking the Ordinance of 30 July 1992 on EIA.

In the Brussels Region there no regulations regarding safety reporting.<sup>1</sup>

1. In Belgium there are 79 so-called Seveso-plants of which 62 in Flanders and one in Brussels.

93. Each of the three regional EIA regulations contains lists of activities requiring an EIA. In Flanders two lists exist: one for industrial installations and another for non-industrial projects (infrastructure) which includes land use plans. In the Walloon Region a wide range of projects is submitted to environmental assessment, while only the most important projects are submitted to an extended assessment made by an authorized consulting firm. Such an extended assessment is mandatory for the projects listed in an annex of the regulation, but can also be required by the licensing authority. The Brussels regulations have two lists for which a different EIA-procedure and content of the EIS is required.

The Walloon and Brussels regulations are more detailed regarding the time-frames for the various phases of the EIA process. Unlike the Walloon and Brussels regulations, public participation is not incorporated in the Flemish EIA procedure. None of the regional regulations require post-project analysis. In each of the three Regions, an EIA can only be made by an expert accredited by the regional government where the project is executed.

#### V. 'Transboundary' Arrangements

94. It is obvious that these different regional EIA regulations may cause problems when applied in the Belgian regional transboundary context (e.g. when a project crosses the regional borders or has significant adverse effects on another Region). Therefore, the regional governments concluded a Co-operation Agreement concluded within the existing constitutional framework, which came into force on 4 September 1994. It has been called a 'minimum' agreement and offers general procedural provisions based on the different regional requirements:

- The agreement can be applied to every project for which an EIA is required according to a regional EIA regulation or a decision by a competent authority (Article 2).
- The notification of the potentially affected Region by the Region of origin that a licence application for a project for which an EIA is required, having possible transboundary effects, has been received (Article 3).
- When there may be transboundary effects according to the Region of origin or on request by the possibly affected Region, the final EIS is sent by the Region of origin to the affected Region before the organization of the public consultation process provided for by the EIA-procedure (Article 4).
- The Region of origin notifies the possibly affected Region about the start and duration of the public consultation process before organizing the latter.

Concerning the public consultation, interested inhabitants of the potentially affected Region can participate in the same way as inhabitants of the Region of origin. The government of the possibly affected Region may also organize a public consultation on its own territory and inform the Region of origin of the results. However, the application of these provisions may not lead to a

prolongation of the duration of the public consultation process provided for by the EIA regulation of the Region of origin (Article 5).

95. In the five years since the coming into force of this co-operation agreement, it has been applied in only a few cases. It seems that, taking into account the new Walloon and Brussels legislations and the expected Flemish decree, more detailed arrangements may be necessary in order to make the co-operation agreement more effective.

96. On 12 December 1994 an agreement was signed between Flanders and the Netherlands regarding EIA in a transboundary context. This agreement is in force since September 1995.<sup>1</sup>

1. J. De Mulder, 'Welke rechten hebben burgers en verenigingen in het geval van grensoverschrijdende milieueffectrapportage,' in: M. Paques & P. Van Pelt, *Rechten van de burgers en de verenigingen in het Europees Milieurecht*, Kluwer, 1998, Antwerp, p. 81.

## § 2. ENVIRONMENTAL POLICY AGREEMENTS

### I. Introduction

97. In this section, the history of environmental policy agreements and its place within the instruments of environmental policy will briefly be given. A second part will deal with the Flemish, Walloon and Brussels regional legislation on environmental policy agreements.

#### A. A Brief History

98. The development of EPAs in Belgium, and in particular in the Flemish region, is in fact a consequence of the developments in the Netherlands in 1986–1987.<sup>1</sup> The Dutch example proved that EPAs were an ideal instrument to make agreements between sectors of industry and the national Government.

The first EPA entered into force on 1 January 1988. In the next five years, 15 more EPAs were made. Some of them contained unilateral contractual obligations, while others were mere 'gentlemen's agreements.' Some of these EPAs were also time-limited.

The differences between these EPAs, the lack of parliamentary supervision and the lack of a legal framework gave rise to a social discussion on the opportunity of the use of this new policy instrument. As a consequence of this discussion, a regulation was made concerning the establishment of EPAs and their legal implications within the Flemish Region.

1. In 1986–1987 the Dutch Minister for Environmental Issues started with the idea of 'internalization.' In the action plan of 1986–1990 it was formulated as follows: 'To obtain a good environmental quality, it is of great importance that the target groups acknowledge the need to change their behaviour and try to find possibilities to make environmental care one of their main priorities...'

*B. The Relationship with Other Environmental Policy Instruments*

99. The different policy instruments through which a government can execute its environmental goals, can be categorized as follows:

- instruments of social regulation;
- instruments of financial aid;
- instruments of planning;
- instruments of direct regulation;
- instruments of market regulation.

Normally environmental policy agreements are considered to be instruments of social regulation.

‘Instruments of social regulation can be defined as instruments aiming at the internalization of environmental consciousness and environmental responsibility in the personal decision-making of the citizen in general and the consumer and/or producer in particular, through pressure and/or conviction.’<sup>1</sup>

1. See Encyclopaedia of Laws – *European Environmental Law*, p. 214.

*C. A Definition of EPAs*

100. An EPAs can be defined as:

‘An agreement between the government and a private person or a group of private persons to bring about a certain environmental policy or to accomplish certain environmental goals. Usually the government takes the obligation to abstain itself from regulation concerning the subject of the EPA during the duration of this EPA.’

Because of this wide definition a great number of governmental instruments can be considered as EPAs, despite the many differences between them. This situation created much uncertainty and the need for regulation was strongly felt.

**II. The Regional Regulations on EPAs**

101. The Kingdom of Belgium is a Federal State. Within the Belgian constitutional framework, most environmental competences are attributed to the Regions. Only the Flemish Region has established specific legislation with regard to the EPA instrument. Hereafter the Flemish legislation will be described.

102. The Flemish Decree of 15 June 1994 relative to the environmental policy agreements<sup>1</sup> is one of the many fruitful results of the Inter-University Commission for the Reform of the Flemish Environmental Legislation.

The Decree aims to give a legal framework for EPAs in the Flemish Region. As a consequence of this Decree, each EPA concluded in the Flemish Region since 18 July 1994 has the same legal consequences for the contracting parties and follows the same and identical procedure. The advantage of the Decree is clear: no favouritism is possible *vis-à-vis* one or another economic sector.

1. B.S., 6 July 1994.

#### A. Requirements Relative to the Contracting Parties

103. The Flemish Government is the only public authority competent to conclude an EPA.<sup>1</sup> The centralized or decentralized administrative bodies cannot conclude an EPA in the form and under the conditions set forth in the Decree of 15 June 1994.

1. Article 2 of the Decree of 15 June 1994.

104. The private parties which can conclude an EPA are limited to representative organizations of companies. These organizations need to fulfil the following criteria in order to be eligible to conclude an EPA:

- they must have legal personality;
- they must be representative for the companies which involved in the same kind of activities and having in common a specific environmental problem or located in the same area;
- they must have a mandate of their members to conclude an EPA which will be binding for the members with the Flemish Region.

Due to these stringent conditions, it follows that it is no longer possible for an individual company to conclude an EPA. Of course, individual companies still can conclude other forms of agreement with the authority or even with the Flemish Government.

These conditions also give rise to specific questions such as, for instance, when a professional organization is sufficiently 'representative' to conclude an EPA. The preparatory work of the Decree indicates that the Flemish Government has a certain discretion due to the broad definition of the condition of representativeness. The Flemish Government has to make an evaluation in each case, taking into account the purpose of the EPA, of the proof of representativeness it will require of the specific organization.<sup>1</sup>

1. *Gedr. St.*, VI. Parl., 1992–93, No. 401/1, 3–4.

*B. Legal Consequences of the EPA for the Authority*

105. Once an EPA has been concluded, the Flemish Government is bound to refrain, during the term of the EPA, from making decisions that could be considered to modify the EPA or impose more stringent conditions. Although this commitment might seem very interesting for the private contracting parties, the Government still has the possibility to take executive decisions in urgent cases or where necessary to implement European or international agreements. Before using these powers, however, the Region must consult the parties of the EPA regarding all deviations from the EPA.

*C. Legal Consequences of the EPA for the Private Contracting Party*

106. Article 5 of the Decree of 15 June 1994 prescribes that the EPA is binding on the parties. Depending on the content of the EPA, the binding clauses will create rights and duties for the representative organization and for its members. Companies which become member of an organization which concluded an EPA, have the rights and obligations set forth in the EPA. A company which resigns as a member of a representative organization which concluded an EPA, still is bound by the EPA.

*D. Requirements as to the Procedure to be Followed*

107. The EPA procedure is very strict, formal and – as a consequence – time-consuming. Once the negotiations between the competent administrative body and one or several representative organizations of companies is finished, the formal procedure starts. This procedure consists of the following steps:<sup>1</sup>

- A summary of the draft EPA is, on the initiative of the Flemish Region, published in the *Belgisch Staatsblad – Moniteur Belge* (the Belgian Official Gazette) and in the other media as determined by a decision of the Flemish Government. This summary describes the object and the general content of the EPA. The entire draft of the EPA is available during a period of 30 days at the place mentioned in the Belgian Official Gazette.
- All remarks and objections can be addressed to the competent authority of the Flemish Government during a period of 30 days following the publication of the summary in the Belgian Official Gazette. The competent administration of the Flemish Government will analyze the objections and remarks and communicate them to the professional organization.
- At the latest on the publication date in the Belgian Official Gazette of the draft EPA, the draft is sent to the so-called ‘*Sociaal-Economische Raad van Vlaanderen*’ (Social-Economic Council of Flanders) and the ‘*Milieu- en Natuurraad van Vlaanderen*’ (Environmental and Nature Council of Flanders). These consultative bodies are composed of representatives from

social, economic and environmental organizations. They are required to give non-binding opinion within a period of 30 days following reception of the draft EPA. If one of the above-mentioned consultative bodies gives a negative opinion, the Flemish Government must motivate the reasons why it decides to conclude the EPA.

- The draft of the EPA is transmitted, together with the opinions of the above-mentioned consultative bodies, to the President of the Flemish Parliament. In case the Flemish Parliament, within a period of 45 days following reception of the draft, opposes the EPA by means of a motivated resolution or motion, the EPA may not be signed by the Flemish Government.
- Each EPA, after being signed, is published in the Belgian Official Gazette. It enters into force ten days after publication in the Belgian Official Gazette except if the EPA provides otherwise.

1. Article 6 of the Decree of 15 June 1994.

*108.* Due to this rather extensive procedure in which also the Flemish Parliament can analyze the content of the EPA, few EPAs were concluded between 1994 and 1997. Since 1997, however, the EPA instrument has been actively used to regulate take-back duties for different wastes like paper,<sup>1</sup> car wrecks,<sup>2</sup> and old or unused medicines.<sup>3</sup> Negotiations are still going on with regard to fertilizers and with regard to car tyres.

1. EPA on paper of 17 April 1998, Belgian Official Gazette, 24 April 1998.
2. EPA on car wrecks of 13 April 1999, B.S., 19 May 1999.
3. EPA on old and non-used medicines of 17 April 1998, B.S., 24 April 1998.

#### *E. Term of the EPA*

*109.* Article 8 of the Decree of 15 June 1994 prescribes that the term of an EPA may not exceed five years. However, all parties to an EPA can agree to extend the term of the EPA. In that event, the Flemish Government is required to inform the above-mentioned consultative bodies of its intention at least three months before the termination of the EPA. The consultative bodies are required to give their advice within a period of one month. In case an opinion is negative, the Flemish Government must motivate why it persists in extending the EPA. At least two months before the termination of the EPA, the President of the Flemish Parliament must receive all the opinions. Once again, the Flemish Parliament may oppose the extension of the EPA by a motion or by a resolution within 45 days.

The parties also have the possibility to change the provisions of the EPA. Such changes are subjected to the same procedure as the acceptance of the EPA itself.

*F. Termination of the EPA*

110. Both parties, the Flemish Government and the professional organizations which concluded an EPA, have the possibility to terminate the EPA. Notice thereof must be given at least one year before the termination.<sup>1</sup> The Flemish Government can, in the event that the professional organizations decide to terminate the EPA, change the EPA into a decision of the Flemish Government which will, in that event, be applicable in the sector in which the professional organizations are active.

1. Article 9 of the Decree of 15 June 1994.

*G. Monitoring of the EPA*

111. Article 10 of the Decree of 15 June 1994 prescribes that the EPA must contain specific provisions on monitoring. Article 12 of the Decree prescribes that the parties to the EPA need to provide the Flemish Government with an annual report on the implementation of the EPA. This report is transmitted to the Flemish Parliament which may make objections against the EPA within 45 days after its receipt. The Flemish Government is required to terminate the agreement in the event that the Flemish Parliament opposes the EPA.

112. Finally, it should be mentioned that all provisions of the Decree of 15 June 1994 are compulsory. A breach of the rules of the Decree in establishing an EPA could lead to the declaration that the EPA is null and void.

## § 3. ENVIRONMENTAL PERMITS

**I. Environmental Permits in the Flemish Region***A. Basic Legislation*

113. The system of environmental permits in the Flemish Region is regulated by the Decree of 28 July 1985, as amended (hereafter: the 1985 Law). This Law came into force on 1 September 1991, together with the first implementing regulation, by governmental decree of February 1991, better known under its acronym, VLAREM I. A second general implementing regulation was adopted on 1 July 1995, and contains environmental norms and prescriptions that are directly applicable to all regulated installations. It is known as VLAREM II. The 1985 Law and both general regulations have been amended a number of times.

*B. Scope of Application*

114. The 1985 Law applies to classified ‘installations.’ Art. 2, 1° of the 1985 Law defines installations as ‘factories, workplaces, storage facilities, machines, installations, apparatus and activities listed by the government.’ Annex I of VLAREM I contains the list of classified installations.

*C. Categories of Installations*

115. The 1985 Law recognizes three categories, or classes of installations (1985 Law, Art. 4). Class 1 and class 2 installations require an environmental permit, class 3 installations must only be notified to the competent authority, i.e. the municipal council of the municipality where the installation is located.

*D. The Notification*

116. Installations listed in annex I to VLAREM I under the number ‘3,’ must be notified to the municipal executive board (1985 Law, Art. 4 § 2; VLAREM I, Art. 2 § 1). Notification is done by means of a form that can be obtained at the municipality, and which must be sent by registered mail or handed over against receipt (VLAREM I, Art. 2 § 2). The municipal executive board takes notice of the notification and enters it on a public register (VLAREM I, Art. 4 § 1).

This procedure does not require any decision by the municipality; its role is purely passive. Hence, the ‘taking of notice’ does not constitute an administrative decision and cannot be annulled by the Council of State (*Conseil d’Etat*).<sup>1</sup>

1. Council of State, *Van de Sompel en Moerman*, No. 57.591, 18 January 1996.

*E. The Administrative Procedure for Class 1 and 2 Installations*

## 1. Introduction of the Application

117. The municipal executive board is competent for class 2 installations, and the provincial executive board for class 1 installations (1985 Law, Art. 9 §§ 2 and 3). Annex 1 to VLAREM I indicates the class of each installation. When a project is ‘mixed,’ i.e. it contains installations of different classes, the authority competent for the highest class has jurisdiction over the whole project (1985 Law, Art. 9 § 4).

118. The 1985 Law does not impose specific conditions to who may apply for an environmental permit. In view of the fact that environmental permits are granted to installations and not persons, it follows that anybody can apply for a environmental permit.

119. Art. 14 § 1 of the 1985 Law authorizes the government to determine the rules concerning applications for an environmental permit. Annex 4 to VLAREM I contains the form to be used for applications. This form lists the information and documents required from the applicant. For projects mentioned in the decision of the Government of 29 March 1989, an environmental impact study (EIS), approved by the Ministry of the Environment, must be added to the file. For the projects mentioned in annex 5 to VLAREM I, an approved safety report must be added (1985 Law, Art. 7; VLAREM I, Art. 7–16).

120. The receiving authority first checks whether the application is admissible and complete (1985 Law, Art. 9 §§ 5 and 6). Admissibility mainly concerns the question whether the application is lodged with the competent authority (the municipal board for class 2 application, the provincial board for class 2 installations). Secondly, the administration checks whether the file is complete. If documents and/or information is missing, the administration will ask the applicant to complete the file.

The administration must give notice whether or not the file is admissible and complete, by registered mail within 14 days after the introduction of the application. Failure to do so constitutes implicit recognition that the application is admissible and complete. The date of the implicit or explicit declaration of admissibility and completeness is the starting point for the subsequent time limits, and hence is of crucial importance.

## 2. Examination of the Application

121. As a rule, each application is submitted to a public consultation process which lasts 30 days and which is organized by the municipal board, also for class 1 installations (1985 Law, Art. 11 § 1; VLAREM I, Art. 17–19). Applications for temporary installations are exempted from this requirement (1985 Law, Art. 15 § 2).<sup>1</sup> Any person can formulate written or oral remarks and objections, which are incorporated in the file (VLAREM I, Art. 19).

1. A temporary permit can be applied for those installations where in annex 1 to VLAREM I, the letter T is mentioned. The permit is valid for three months maximum, except for construction sites, where the limit is one year: VLAREM I, Art. 1, 8.

122. For class 1 installations requiring an EIS or safety report, at least one public hearing is organized (1985 Law, Art. 11 § 2; VLAREM I, Art. 18).

123. Before deciding on a class 2 permit application, the municipal executive board requests the advice of the municipal environmental service and of those other (regional) services listed in annex 1 of VLAREM I for the type of installation. The provincial executive board is advised by the provincial environmental commission, which consists of representatives of all (provincial and regional) services concerned by the application.

### 3. Decision by the Board

124. The municipal board decides within three months after the date when the application has been declared admissible and complete; the provincial board decides within four months. Both bodies can extend this limit by half the prescribed periods, provided they so decide before the expiry of the original time-limit and notify the applicant.

125. If no decision is made within the original or extended time-limit, the application is deemed to be denied (1985 Law, Art. 9 §§ 2 and 3 and Art. 10).

126. Decisions must be notified by registered mail to the applicant and the concerned services, and all decisions (also those of the provincial board) are made public by the mayor of the municipality concerned (VLAREM I, Art. 35 § 5 and 36 § 5).

### 4. Appeals

127. Decisions of the municipal board can be appealed to the provincial board (1985 Law, Art. 23 § 1). Decisions of the provincial board can be appealed to the Flemish Government (1985 Law, Art. 23 § 2). When the provincial board has made a decision on appeal, there is no appeal to the Government.

128. Appeal is open to the applicant, the municipal board, the governor of the province, the services which advised on the application, any person who can experience direct nuisance from the establishment and exploitation of the installation, and any non-profit organization which aims to protect the environment (1985 Law, Art. 24 § 1).

129. The appeal must be sent by registered mail to the appellate body within 30 days after the decision was made public, or for those parties to whom the decision was notified, within 30 days upon receipt of the notification. If no timely decision has been made and the application is deemed to be denied, the appeal must be made within 30 days after the expiry of the time-limit for deciding on the original application (1985 Law, Art. 23 § 3).

It must be remembered that in Belgian administrative law, time-limits are not extended when the last day happens to be a Sunday or official holiday.<sup>1</sup> Further, a fee must be paid (the amounts are mentioned in Art. 19*bis* of the 1985 Law) and proof of payment must be included with the appeal. A notice of the mayor indicating when the appealed decision was made public must also be included with the appeal (VLAREM I, Art. 49 § 2 and 51 § 2).

1. Council of State, *N.V. Heima*, No. 50.365, 24 November 1994, T.M.R. 1996, 85, note W. Lambrechts; Council of State, *Leyens*, No. 66.155, 6 May 1997.

130. The appeal lodged by a public authority against a decision granting a permit suspends the permit; appeals by private persons do not suspend the permit (1985 Law, Art. 24 § 3). This means that an applicant who obtained a permit may use it in spite of an appeal by a private person.

131. The provincial environmental commission gives its opinion as to the appeal to the provincial board. The regional environmental commission gives its advice to the government.

132. The provincial board has to decide within four months after the appeal has been received. If more than one appeal has been made, the reception of the first appeal counts determines the time-limit (1985 Law, Art. 23 § 1). The Flemish Government must decide on appeals within five months (1985 Law, Art. 23 § 2). Both authorities can extend the respective period by one month, provided they make a reasoned decision to that effect and notify this decision to the applicant before the original period expires (1985 Law, Art. 23bis).

133. Art. 25 of the 1985 Law determines that when no timely decision is made, in principle the permit is deemed to be granted. In practice, since the authority has ten days to send a copy of its decision (VLAREM I, Art. 50, 4° and 52, 4°), it means that the applicant has to wait ten days after the expiry of the normal or extended time-limits before he can assume that the permit is granted. Due to the ambiguous language of Article 25, the Council of State (*Conseil d'Etat*) has created an important exception to the system of mandatory time-limits. It held that when the appeal was made by a private person, and hence is not suspensive, the appellate body is not bound by the time-limits and may make a valid decision after their expiry, provided its decision is made within a 'reasonable' period.<sup>1</sup>

1. Council of State, *N.V. Maes*, No. 43.177, 3 June 1993, T.M.R., 1993, 237, note L. Lavrysen and No. 45.332, 16 December 1993, R.W., 853, 1993–94, note W. Lambrechts; Council of State, *B.V.B.A. De Pijl*, No. 43.462, 24 June 1993.

## 5. Duration of the Validity of the Permit

134. The permit can be granted for a maximum period of 20 years (1985 Law, Art. 18 § 2). Further, the installation must be operational within the period mentioned in the permit, with a maximum of 3 years; otherwise, the permit lapses (1985 Law, Art. 17).

## 6. Transfer of the Permit

135. A permit can be transferred by its holder to another person. The transfer must be notified to the authority that granted the permit (1985 Law, Art. 19, 2°).

## II. Environmental Permits in the Walloon Region

### A. *The General Regulation for the Protection of Labour*

136. In the Walloon Region, the system introduced by the General Regulation for the Protection of Labour, approved by Decree of the Regent of 11 February 1946 (hereafter: the General Regulation) still applies. This General Regulation is rather sketchy on procedural questions, and should shortly be updated.

### B. *Installations Requiring an Environmental Permit*

137. The permit system of the General Regulation is contained in Title I. Chapter 2 of this title lists the installations requiring a permit. The list consists of two parts. Part A contains those installations where the primary potential victims are the workforce, part B concerns installations where public health is a primary concern. In each list, any installation is categorized as class 1 or class 2. The class determines the competent authority.

### C. *The Administrative Procedure for Class 1 and 2 Activities*

#### 1. Introduction of the Application

138. Application for class 1 installations must be addressed to the provincial executive board; applications for class 2 installations to the municipal board (General Regulation, Art. 2 and 4).

139. Since the permit is not granted to persons but to installations, in principle any person can apply for any permit.

140. Article 3 of the General Regulation states which information must be furnished by the applicant. There must also be an ‘environmental notice,’ and sometimes an ‘environmental study,’ as required by the Decree of 11 September 1985 concerning the Environmental Impact Assessment.

#### 2. Examination of the File

141. The municipality organizes a public consultation which lasts 15 days (General Regulation, Art. 4). During this period, any person can formulate, in writing, his observations and remarks; at the end of the inquiry, this can also be done orally (General Regulation, Art. 5).

*142.* The municipal board must ask the opinion of the official in charge of public health matters for installations figuring on the B list. The provincial board must ask the advice of a number of services, mentioned in Article 7 of the General Regulation. In addition, both boards can ask the advice of any other administration (General Regulation, Art. 9).

### 3. Decision by the Board

*143.* Article 10 of the General Regulation stipulates that a decision must be made within three months after the application has been filed. There is, however, no specific legal consequence if the deadline is not met. This means, first, that the public authority still can decide after the three months have elapsed, and second, that there is no appeal available for the applicant. It is true that Article 10 also states that the appellate authority can remove the application from the lower authority if it fails to make a timely decision, but it has no legal duty to do so. In practice, when no timely decision is made, the applicant can either wait or ask the civil courts, by way of interim relief, to order the administration to make a decision.<sup>1</sup>

1. Court of Appeal Brussels, 17 April 1997, J.T., 1997, 543.

*144.* A copy of the decision is sent to the applicant and to a number of administrations, and made public at the municipal hall and at the site of the projected installation (General Regulation, Art. 12).

### 4. Appeal to the Provincial Board/Government

*145.* Any person who has an interest can appeal a decision on an application for an environmental permit to a higher authority. For decisions by the municipal board the appellate body is the provincial board, and for decisions of the provincial board it is the Government. However, appellate decisions by the provincial board cannot be further appealed to the Government.

An interested person in the sense of Article 13 is the applicant, any advising administration, and neighbours and other persons who can be adversely affected by the installation.

*146.* Appeal is made by registered mail, within ten days after the day on which the decision was made public.

*147.* The appeal has no suspensive force. The applicant may operate the installation in spite of an appeal introduced against the decision granting the permit.

*148.* There are no time-limits for decisions of the appellate authority. The decision should be made within a reasonable time, but it is not clear what that

means. Further, it is not always clear what the consequences are if a decision is made after a reasonable time has passed. When the permit has been granted by the lower authority, failure to decide within a reasonable time might result in the loss of the appellate authority's power to make a decision at all; in that case, the permit would become final.<sup>1</sup>

1. Council of State, *Royackers*, No. 45.999, 4 February 1994; De Brabandere, No. 67.981, 4 September 1997.

#### *D. Duration of the Validity of the Permit*

149. The permit can be granted for a maximum period of 30 years (General Regulation, Art. 11). The installation must be in operation within the time limit indicated in the permit, not exceeding a period of two years (General Regulation, Art. 11).

#### *E. Transfer of the Permit*

150. The General Regulation is mute on the question of transferability of the permit. However, in view of the installation-bound character of the permit, it is generally accepted that a permit can be transferred by its holder.

### **III. Environmental Permits in the Brussels Capital Region**

#### *A. The Ordinance of 5 June 1997 on Environmental Permits*

151. The regulation of environmental permits in the Brussels Region is contained in the Ordinance of 5 June 1997,<sup>1</sup> which replaces the Ordinance of 30 June 1992. It came into force on 7 July 1997.

1. Belgian Official Gazette, 26 June 1997.

#### *B. Installations Requiring a Permit or Notification*

152. There are four categories of installations: I A, I B, II and III. The list of installations belonging to category I A must be made by an ordinance; the lists of the other categories are made by a decision of the Government (Art. 4).

#### *C. Notification (Class III)*

153. The operator of a class III installation sends a duly completed form to the municipality by registered mail. If the notification is complete, the municipal board sends a receipt to the operator and a copy of the notification

to the Brussels Environmental Institute within 20 days. If the notification is not complete, the board must let the operator know what information is missing. Once the notification has been completed, the municipal board sends the appropriate receipt (Art. 66). After he has received the municipal receipt, the operator can start the installation (Art. 67).

In spite of the fact that the municipal board has no power to refuse to send a receipt if a complete notification is done (hence, there is no ‘decision’ by the board, merely a ‘taking notice’), the board may impose a number of conditions on the operator (Art. 68).

#### *D. The Administrative Procedure for Class I A, I B and II Installations*

##### 1. Introduction of the Application

154. All applications for environmental permits are to be filed with the municipality where the project, or the most important part thereof, is to be realized; the application can also be sent by registered mail (Art. 19 §§ 2 and 3; Art. 38 §§ 1 and 2; Art. 48).<sup>1</sup> A provisional receipt is immediately given or sent to the applicant.

1. The Brussels Environmental Institute is competent for deciding on applications for permits for class I A and I B installations; the municipal board is competent for class II installations.

155. When the file is complete, a receipt is sent to the applicant by registered mail; for class I A and I B installations, this receipt is sent by the Brussels Environmental Institute within 20 days after it received the application; for class II installations, the receipt is sent by the municipal board within 10 days after the introduction of the application (Art. 20, 39 and 49). If the file is not complete, the competent authority informs the applicant which information or documents are missing. The receipt is then sent after the application has been completed.

For class I A installations, an environmental impact study has to be made, in conformity with the instructions of the Institute (Art. 20 § 2). Class I B installations require an environmental impact report, which must be part of the file (Art. 37). The content of the application file is further partially described in Article 10; this article also empowers the government to set rules on the information which applications must contain.

##### 2. Examination of the Application

156. For class I A installation applications, a public consultation is organized by the municipality and lasts 30 days; if the installation will affect more than one municipality, each will organize a public consultation (Art. 30

§ 2). For class I B and II installations, the consultation process lasts 15 days (Art. 40 and 50).

157. The Government indicates which administrations must be consulted. For class I A and I B installations, these administrations must give their advice within 60 days after receipt of the file; for class II installations, the period is 40 days. If no timely advice is given, it is deemed to be in favour of the application (Art. 13).

158. The Brussels Environmental Institute decides on the application within 45 days after it has received the advice of the consultative commission; it can extend this period by another 45 days. However, the decision must in all cases be made within 450 days after the receipt of the application; otherwise, the application is deemed to be denied (Art. 32). For class I B installations, the period is 160 days (Art. 43). For class II installations, the period is 60 days (Art. 50).

159. All decisions have to be notified to the applicant and are inscribed in the registers of the Institute and the municipalities. All decisions granting, modifying, suspending or revoking a permit, must be posted at the installation by the operator (Arts. 86 and 87).

### 3. Appeal to the Environmental Board

160. Any person who can demonstrate an interest can appeal any explicit or implicit decision to the Environmental Board (a body consisting of six members appointed by the Government).

161. The appeal is sent by registered mail (Art. 9) within 30 days after the decision was notified or the lapse of the time-limit (for the applicant) or after publication of the decision (for all other persons) (Art. 83).

162. Appeal does not suspend the appealed decision, unless the appeal is made by the municipality, the Brussels Environmental Institute, or the delegated official for zoning matters, and the appeal explains why the operation of the installation will cause serious danger or irreparable damage to the environment. Five days prior to the introduction of such appeal, a copy must be sent to the applicant and the competent authority, after which the chairman of the Environmental Board decides, after having heard the parties, whether the appeal is suspensive or not (Art. 84).

163. Appellant and his counsel, the competent authority and the delegated official are heard upon their request by the Environmental Board. If one party asks to be heard, all parties are invited to the hearing (Art. 80 § 1).

*164.* If no decision is sent within 60 days after the date the appeal has been registered at the post office, the appealed decision, even if it was an implicit one, is deemed to be confirmed. The time limit is 75 days if a hearing has been held (Art. 80 §§ 2 and 3).

4. Appeal to the Government

*165.* Any, even implicit, decision of the Environmental Board can be appealed to the Government, with the exception of certification decisions as regulated by Articles 70–78. The procedure for the appeal to the Government is the same as the one before the Environmental Board (Art. 86). However, if no timely decision is sent (within 60 or 75 days after the appeal was registered with the post office), the applicant can send a reminder by registered mail to the Government, and if he does not receive a decision within 30 days, the appealed decision, even if it was an implicit one, is deemed to be confirmed (Art. 82).

5. Duration of Validity of the Permit

*166.* The permit is valid for a maximum period of 15 years. The competent authority can grant the permit for a shorter time, but must motivate why (Art. 61). The permit lapses if the operation has not clearly been started within the time span indicated in the permit. This time span may not exceed two years. The applicant can ask for an extension by a maximum period of one year; such a request must be introduced at least three months before the original period ends. If the authority that granted the permit does not make a timely decision, the extension is deemed to be granted (Art. 59).

6. Transfer of the Permit

*167.* Article 63 § 1, 6° makes it a duty for the holder of the permit to notify to the competent authority any change of permit holder, which implies that the permit can be transferred.

§ 4. THE RIGHT TO A HEALTHY ENVIRONMENT<sup>1</sup>

*168.* Since the fourth state reform in 1993–1994, the Belgian Constitution now contains a right to a healthy environment in its Article 23:

‘Everyone has the right to lead a life in conformity with human dignity. To this end the laws, decrees and rulings alluded to in Article 134<sup>2</sup> guarantee,<sup>3</sup> taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.

These rights include notably:

[. . .]

4° the right to enjoy the protection of a healthy environment.’

This wording is rather vague compared to the formulation of similar rights in other constitutions.<sup>4</sup>

1. See Suetens, L., ‘Het recht op de bescherming van een gezond leefmilieu (artikel 23 van de Grondwet)’ in X., *Prof. Dr. Louis Paul Baron Suetens. Op de grens van het ideaal denkbare en het praktisch haalbare*, Bruges, Die Keure, 1998, 503–514; Theunis, J. and Hubeau, B., ‘Het grondwettelijk recht op de bescherming van een gezond leefmilieu. Artikel 23, derde lid, 4° van de Grondwet: draagwijdte en belang voor een goede ordening van de ruimte,’ T.R.O.S., 1997, 329–345; Jadot, B., ‘Le droit à l’environnement,’ in Ergéc, R. (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussels, Bruylant, 1995, p. 257 *et seq.*
2. These rulings are the decrees and ordinances of the Regions.
3. It has been stressed that the inclusion of this right in the Federal Constitution does not change anything about competence for environmental matters. The environment is mainly a regional competence, *cf. supra* § 4 of the General Introduction.
4. Suetens, L., *l.c.*, p. 509.

## I. The Right to Enjoy the Protection of a Healthy Environment

169. The inclusion of so-called social and cultural rights in the Belgian Constitution had been on the political agenda for years until it actually took place in 1994.<sup>1</sup>

The wording is striking: not a healthy<sup>2</sup> environment is guaranteed, but its *protection*. This wording makes it clear that the authorities do not have a real obligation as to the result. Rather, they have to make the necessary efforts. Moreover, the right is explicitly placed in the framework of the basic right ‘to lead a life in conformity with human dignity.’

What then is the significance of this right?

It is the common opinion among scholars and in case-law that no direct effect should be attributed to this right (*cf.* also the role attributed to the regional authorities to make the rights more concrete).<sup>3</sup> It nevertheless has important legal consequences.<sup>4</sup>

Firstly, it has an important function as a principle guiding the authorities in their policy-making.

Second, it implies a standstill obligation: environmental and other policies must ensure at a minimum the maintenance of the present quality of the environment.<sup>5</sup>

Finally, it can guide judges in their interpretation and application of environmental and other legislation.<sup>6</sup> Moreover, it can be linked to the application of the equality principle and it can justify an interpretation conforming to the Constitution, also in environmental matters.<sup>7</sup>

1. Suetens, L., *l.c.*, p. 505.
2. Suetens calls this adjective ‘healthy’ somewhat misleading: the importance of a clean environment for human health is but one aspect. See Suetens, L., *l.c.*, p. 509.

3. This was also the intention of the drafters of the article. See Suetens, L., *l.c.*, p. 507 for references to the *travaux préparatoires*.
4. Theunis, J. and Hubeau, B., p. 336 *et seq.*
5. Jadot remarks that positive action from the authorities may be required where the current state of the environment does not allow people to ‘lead a life in conformity with human dignity.’ See Jadot, *l.c.*, p. 261.
6. Suetens remarks that no constitutional provision was needed to this end, since international instruments can have this result as well. He refers to the *López Ostra* case of the European Court of Human Rights where environmental nuisance was seen as infringing a person’s right to private and family life (ECHR, 9 December 1994, *López Ostra v. Spain*, Publ. Series A, vol. 303–C). See Suetens, L., *l.c.*, p. 513.
7. Theunis, J. and Hubeau, B., p. 337. In practice, an environment-friendly interpretation should prevail when a legal provision is not clear: *in dubio pro natura*.

## II. Belgian Case-Law

170. The emphasis placed on the ‘corresponding duties’ in Article 23 of the Constitution confirms the possibility of horizontal application of the right.<sup>1</sup>

However, the right to the protection of a healthy environment has not been recognized as an independent subjective right. It does play a role in judges’ motivations but will often be linked to ‘classic independent basic rights’ like the right to privacy etc.<sup>2</sup> In this way the right to a healthy environment is not often applied as a general social right, but rather protects citizens from environmental damage ‘in their own backyard.’<sup>3</sup>

1. See also Theunis, J. and Hubeau, B., *l.c.*, pp. 333 and 341.
2. Cf. *supra* for the *López Ostra* case of the ECHR.
3. Theunis, J. and Hubeau, B., p. 343.

171. The first case dealing with the new constitutional right was decided by the Council of State in 1994.<sup>1</sup> It accepted that a container park for waste collection could cause damage and nuisance to neighbours, thus infringing their constitutional rights.<sup>2</sup>

1. Council of State, No. 49.440, 5 October 1994, J.T., 1995, p. 107.
2. The Council accepted a violation of the Walloon Spatial Code in the first place.

172. The Council of State has decided a case in which a link was made between the *competence* of the authorities and Article 23 of the Constitution.<sup>1</sup> A citizen invoked the equality principle to protest against a permit for a private airport granted by the federal administration of air traffic, alleging that the Flemish Government should have put airfields on its list of classified installations.<sup>2</sup> The Council did not state on the direct applicability of the basic right but responded that the federal administration could not be held responsible for the Flemish environmental policy, since that policy field was explicitly allocated to the Regions.

1. Case No. 70.430 of 19 December 1997, T.M.R., 1998, p. 102.
2. He would be discriminated against compared to other citizens living near installations that do appear in the Flemish list.

173. The Brussels Court of Appeal has explicitly ruled that the right to the protection of a healthy environment is not directly applicable, but that it is merely a subjective right.<sup>1</sup> A different Chamber of the same Court stated in May 1997 that the subjective character of the right prevents citizens from claiming policy measures through courts. Only when their right is infringed through concrete measures can they react.<sup>2</sup>

1. Brussels Court of Appeal, 24 January 1997, T.R.O.S., 1997/8, p. 363.
2. Brussels Court of Appeal, 15 May 1997, *Aménagement-Environnement*, 1997/4, p. 321.

174. Other case law has touched upon the right in the context of spatial planning.<sup>1</sup>

Unfortunately, Belgium's quasi-constitutional court,<sup>2</sup> the Court of Arbitration (*Arbitragehof – Cour d'Arbitrage*), has not yet been asked to rule on the right to the protection of a healthy environment.

1. Theunis, J. and Hubeau, B., p. 341 *et seq.*
2. *Cf. supra* in § 1 of the General Introduction.

### III. Conclusion

175. Although the new constitutional right to the protection of a healthy environment has not caused a revolution in Belgian law, it is not a useless provision, were it only, as Suetens concludes, to bring Belgian law in line with the recognition of this right in international law.<sup>1</sup>

1. Suetens, L., *l.c.*, p. 514.

## § 5. ENVIRONMENTAL MANAGEMENT WITHIN COMPANIES

### I. Introduction – Legal Framework

176. The organization of environmental management within companies has become an important subject-matter of discussion in the Flemish Region.

This resulted in the Decree of 19 April 1995 on Environmental Management within Companies<sup>1</sup> which is an addendum to the Flemish Decree of 5 April 1995 on Principles of Environmental Policy.<sup>2</sup>

The Decree was based on a proposed draft decree prepared by the Inter-University Commission for the Reform of Environmental Law in the Flemish Region.<sup>3</sup>

1. Belgian Official Gazette, 4 July 1995.
2. B.S., 3 June 1995.
3. *See*: Interuniversitaire Commissie tot Herziening van het Milieurecht in het Vlaamse Gewest, *Voorontwerp Decreet Milieubeleid*, Brugge, Die Keure, 1995, 72–76 and 635–684; Bocken, H. and Ryckbost, D., *Codification of Environmental Law. Draft Decree on Environmental Policy, prepared by the Interuniversity Commission for the Revision of Environmental Law in the Flemish Region*, Kluwer Law International, 1996, pp. 80–84 and 196–198.

177. In the other Regions (Brussels Capital and Wallonia), no similar legislation has been adopted yet.

178. Environmental management within companies refers to the introduction of instruments in order to control and restrict the environmental impacts of the company's various activities. The Flemish legislator did not opt for a comprehensive obligatory environmental management system, considering the time was not yet ripe for such a system.

Therefore, the Decree of 19 April 1995 only lays down a partial environmental management system based on six principles considered desirable for the purpose of operating an effective environmental policy:

- the appointment of an environmental co-ordinator within certain categories of hazardous installations;
- the obligation to draw up an annual environmental report, to be communicated to the appropriate authorities;
- a compulsory environmental audit for certain categories of hazardous installations and/or activities;
- the obligation to measure, register or update certain environmental data;
- the possibility for the Flemish Government to designate those categories of classified installations which are obliged to adopt an industrial policy for the prevention of major accidents and for the purpose of limiting the consequences for man and the environment;
- the obligation for the operator of a classified installation or activity to inform environmental inspection authorities and third parties of accidental emissions.

179. The Decree of 19 April 1995 was further implemented by a decree of the Flemish Government of 26 June 1996,<sup>1</sup> completing the VLAREM I<sup>2</sup> and VLAREM II<sup>3</sup> regulations with provisions on environmental management within companies.

1. Belgian Official Gazette, 3 July 1996.
2. Executive Decree of the Flemish Government of 6 February 1991 containing the Flemish regulation relating to the environmental permit (B.S., 26 June 1991), known as Title I of VLAREM.
3. Executive Decree of the Flemish Government of 1 June 1995 containing general and sectoral environmental conditions (B.S., 31 July 1995), known as Title II of VLAREM.

## II. Environmental Co-ordinator

### A. Area of Application

180. The operators of all category 1 hazardous installations and/or activities must appoint an environmental co-ordinator. An exemption exists for certain category 1 activities/installations (*see* the list of hazardous facilities contained in Annex 1 of the VLAREM I regulation, indicated with the character 'N').<sup>1</sup>

Further, the obligation to appoint an environmental co-ordinator can be extended by the environmental permitting authority to other installations and/or activities (e.g. category 2 activities/installations), if the nature of the installation/activity or the environmental effects thereof justify so.<sup>2</sup>

With the approval of the Division of Permits of AMINAL (the department for environment, nature and land development of the Ministry of the Flemish Community), the operator may appoint one environmental co-ordinator for two or even more installations/activities together. Such approval is not required in case of the appointment of an environmental co-ordinator for different installations which form one business location under the control of one natural or legal person.<sup>3</sup>

If the environmental authority considers that various installations constitute one environmental technical unit, it may require the appointment of one joint environmental co-ordinator.<sup>4</sup>

1. Article 4.1.9.1.1. §§ 1 and 2 of VLAREM II.
2. Article 4.1.9.1.1. § 3 of VLAREM II.
3. Article 4.1.9.1.1. § 4 of VLAREM II.
4. Article 4.19.11. § 4 of VLAREM II.

#### *B. Who Can Be Appointed as an Environmental Co-ordinator?*

181. The environmental co-ordinator may be an employee (internal environmental co-ordinator) or a person who is not an employee of the operator (external environmental co-ordinator).<sup>1</sup>

Basically, only a natural person can be appointed as environmental co-ordinator, not a legal person. Further, the environmental co-ordinator is in principle someone different from the operator of the facility or its management.

The operator notifies the appointment of the environmental co-ordinator to the Division of Environmental Permits of AMINAL. If the environmental co-ordinator does not meet the prescribed qualifications, the Division of Environmental Permits may require the operator to appoint another person.<sup>2</sup>

1. Article 3.2.1. § 4 of the Decree on Principles of Environmental Policy and Article 4.1.9.1.2. § 4 of VLAREM II.
2. Article 4.1.9.1.4. § 2 of VLAREM II.

#### *C. Responsibilities of the Environmental Co-ordinator*

182. The environmental co-ordinator has the following responsibilities:<sup>1</sup>

- to contribute to the development and introduction of environmentally friendly methods of production and products;
- to supervise compliance with regular environmental legislation by making regular checks, reporting of deficiencies and proposing remedies;
- to supervise or attend to the carrying out of such environmental measurements as are prescribed, as well as the task of registering the results thereof;

- to ensure that the waste register is kept up to date, and that the notification to the Flemish Public Waste Agency is complied with;
- to contribute towards internal and external communication relating to the environmental policy of the company.

1. Article 3.2.2. of the Decree on Principles of Environmental Policy and Article 4.1.9.1.3. of VLAREM II.

183. The environmental co-ordinator is also expected to give his advise on planned investments which could be relevant from an environmental point of view. His opinion must be asked and submitted to the organ which takes the relevant decision. He must be heard whenever he so requests.

184. Every year, the environmental co-ordinator must draw up, for the benefit of the company management, the company council and the safety committee, a report on the manner in which he has performed his duties. This report contains, *inter alia*, a survey of his opinions and the action which was taken as a result.

#### *D. Requirements with Respect to Qualifications*

185. The Flemish Government also stipulated certain conditions regarding the required qualifications.

Since 4 July 1997 the environmental co-ordinator must meet requirements relating to:

- education and experience:
- sufficient knowledge of relevant environmental legislation and the necessary technical knowledge to handle environmental problems;
- for the installations/activities indicated with the character ‘A’ in the fifth column of the list of hazardous facilities, a university degree or an experience of at least five years in environmental management within companies;
- for the installations/activities indicated with the character ‘B’ in the fifth column of the list of hazardous facilities, a secondary education or an experience of at least three years in environmental management within companies;
- further training courses of at least thirty hours per year;
- other conditions, such as professional liability insurance cover, not being employed by public authorities, etc.

As from 1 January 2000, environmental co-ordinators appointed after that date must have obtained a certificate of an acknowledged additional training course of the first (co-ordinator type ‘A’) or second degree (co-ordinator type ‘B’).

*E. Protected Status of the (Internal) Environmental Co-ordinator*

186. The environmental co-ordinator enjoys a ‘protected status’ in existing social legislation. The environmental co-ordinator who is an employee of the operator must not encounter difficulties because of his task.<sup>1</sup>

In this respect, the appointment and the replacement of the environmental co-ordinator-employee, the expulsion from his position and the appointment of a temporary substitute can only be executed by the operator after preceding agreement of the Safety and Protection Committee, or in its absence, of the trade union representatives.

In case of enduring disagreement, the advice of the Division of Environmental Permits must be asked for.

1. Article 4.1.9.1.5. of VLAREM II.

*F. Support of the Environmental Co-ordinator by the Operator*

187. The operator must take all necessary measures to assist and support the environmental co-ordinator and to ensure that he can fulfil his duties properly. The operator must put personnel, rooms, material and means at the disposal of the environmental co-ordinator, to the extent required.<sup>1</sup>

1. Article 4.1.9.1.5. of VLAREM II.

**III. Annual Environmental Report***A. Area of application<sup>1</sup>*

188. The operators of category 1 and 2 hazardous activities and/or installations which are indicated with the character ‘J’ in Annex 1 of VLAREM I, are obliged to draw up an annual environmental report. The obligation also applies to all installations of an environmental technical unit, of which the total amount of emissions coming from all installations exceeds for at least one relevant polluting substance the threshold values in the concerned year.

The annual environmental report must be communicated to the appropriate authorities.

1. Article 4.1.8.1. of VLAREM II.

*B. Contents of the Environmental Annual Report*

189. The environmental annual report contains the following sections, as far as applicable to the concerned installation:<sup>1</sup>

- section ‘report of emissions’;

- section ‘waste register’;
- section ‘noise’;
- section ‘immission measurements.’

As far as applicable, the following annexes are added to the environmental annual report:

- a non-technical summary of the certified environmental impact assessment report(s) and safety report(s);
- notifications with respect to industrial activities which are able to cause serious accidents, according to the prescriptions of VLAREM I; and
- the EMAS audit.
  1. Article 4.1.8.3. of VLAREM II.

*C. Communication to the Authorities and Other Persons<sup>1</sup>*

190. The operators of the mentioned installations and/or activities are required to communicate the environmental annual report to the Division of Environmental Permits of AMINAL (in three copies) before 1 April of the year following the year the report refers to. The Division of Environmental permits delivers one copy to the OVAM (the Flemish Waste Agency) and one copy to the Flemish Environmental Agency (Vlaamse Milieumaatschappij).

The operator also delivers a copy of the report to the environmental coordinator, the chief and members of the safety committee of the company, and the company council.

The operator must keep the environmental report and its annexes for at least five years and make it available to the supervisory officials.<sup>2</sup>

1. Article 4.1.8.2. of VLAREM II.
2. Article 4.1.8.3. § 4 of VLAREM II.

**IV. Environmental Audits**

191. A distinction is made between the EC eco-management and audit scheme (with a view to implementing the EMAS Regulation No. 1836/93) and the compulsory environmental audit.

*A. The ‘EMAS’ Environmental Audit*

192. EC Regulation 1836/93<sup>1</sup> introduces a European environmental management and audit system in which industrial companies can participate on a voluntary basis.

The Federal State and the Regions signed a co-operation agreement on 30 March 1995 aiming at a co-ordinated application of this Regulation in Belgium.<sup>2</sup>

1. *EC Official Journal (L)*, No. 168 of 10 July 1993.
2. B.S., 3 October 1995.

193. The Flemish Government has the power to take the necessary measures to implement the EMAS Regulation, i.e. to certify independent environmental monitors, to register industrial sites which wish to take part in the system, and to promote the participation of small and medium-sized companies in EMAS.

For the application of EC Regulation 1836/93 in the Flemish Region, BELCERT is empowered to certify and to control environmental monitors. AMINAL (the department for environment, nature and land development of the Ministry of the Flemish Community) is responsible for the registration of sites participating in the EMAS audit scheme, as well as for notifications in this respect to the EC Commission.

#### *B. The Compulsory Environmental Audit*

##### 1. Area of Application

194. In the Flemish Region, certain categories of classified installations and/or activities are required to undergo once-only or regular environmental audits.

The following categories of classified installations and/or activities must undergo a three-yearly environmental audit:

- the categories of activities and or installations for which an environmental impact assessment report is required, according to the decree of the Flemish Government of 23 March 1989;
- the categories of installations and/or activities for which a safety report is required, according to VLAREM I;
- the installations and/or activities which are indicated in the list of hazardous facilities (Annex 1 of VLAREM I) with the character ‘P,’ as far as the permitting authority imposes this obligation.

Installations and/or activities which are indicated in the list of hazardous facilities (Annex 1 of VLAREM I) with the character ‘E,’ are obliged to undergo a once-only environmental audit, as far as the permitting authority imposes this obligation.

2. Contents of the Compulsory Environmental Audit<sup>1</sup>

195. The compulsory audit is a systematic, documented and objective evaluation of the management, organization and equipment of the installation and/or activity with respect to environmental protection. It concerns the following issues:

- emissions and immissions, as well as the implications thereof for the quality of the environment;
- energy management;
- the prevention and management of waste;
- production methods and product management;
- external safety;
- the information, training and participation of staff members in eco-management and audit;
- the information of the public;
- the advices and propositions of the environmental co-ordinator.

1. Article 4.1.9.2.5. of VLAREM II.

196. The environmental audit must be validated by a certified environmental monitor.

Most of the data incorporated in the audit must be communicated to the Division of Environmental Permits of AMINAL and to the Flemish Environmental Agency.<sup>1</sup>

The operator must keep the validated environmental audit for at least five years and hold it available for the supervisory officials.<sup>2</sup>

1. Article 4.1.9.2.6.§ 1 of VLAREM II.

2. Article 4.2.9.2.6. § 2 of VLAREM II.

## V. Measurement and Registration Duties

197. By means of general or sectoral regulations, or by means of conditions contained in the permit itself, the operator of a classified installation or activity whose emissions, both by their amount and by their nature, exceed certain thresholds, may be obliged to measure or calculate and to register the emission or immission values, either continuously or on a regular basis.

The operator will ensure that these data are available to the supervisory officials. He must keep them for a period of at least five years.<sup>1</sup>

1. Article 3.4.1.-3.4.3. of the Decree on Principles on Environmental Policy and Articles 4.1.4.1.-4.1.4.2. of VLAREM II.

198. By general or sectoral regulations, or by conditions contained in the permit itself, the operator of a classified installation or activity which carries risks of soil or ground water pollution may be obliged to construct measuring wells.

The operator of such an installation or activity may be obliged to measure and register the quality of the ground water at certain defined times. The operator must ensure that these data are available to the supervisory officials and must keep them for at least five years.<sup>1</sup>

The aforementioned provisions are elaborated in VLAREM II.

1. Article 3.4.2. of the Decree on Environmental Policy Principles.

*199.* Further, the obligation may be imposed on the operator to carry out the following duties:

- to keep a register of dangerous substances which are present at the site;
- to compile energy and material balances.<sup>1</sup>

1. Article 3.4.3. of the Decree on Environmental Policy Principles.

## **VI. Company Policy for the Prevention and Mitigation of Major Accidents<sup>1</sup>**

*200.* The Flemish Government may, by sectoral regulations, designate the categories of classified installations or activities whose operators must carry out a company policy for the prevention of major accidents and for the limitation of the consequences thereof.

The operator of such an activity or installation must adopt all such measures as are appropriate in order to prevent major accidents and to limit the consequences thereof for man and environment.

The operator must at all times be able to demonstrate to the supervisory officials that he has adopted these measures.

1. Article 3.6.1. and 3.6.2. of the Decree on Environmental Policy Principles.

*201.* The operator must draw up a document which contains a description of the plant policy for the prevention of serious accidents and for the limitation of the consequences thereof for humans and for the environment. The Flemish Government will stipulate the minimum data which must be described in the document.

The operator must make a notification to the authority which has been designated for this purpose. The Flemish Government will stipulate the minimum data which must be contained in this notification and the manner in which they must be updated.

## **VII. The Duty to Notify Accidental Emissions and Disruptions**

*202.* The operator of a classified installation or activity must take the necessary measures to prepare for accidental emissions capable of causing pollution. In the case of such an event, he must:

- inform the competent supervisory official immediately;
- give immediate warning to any third parties who could suffer harm as a result of the emission, specifying those measures which they could take to dispel or limit the danger; this provision will not apply where the federal authority has adopted measures in the context of civil defence;
- to limit as far as reasonably possible the consequences for man and the environment.

Where the emission constitutes a risk of damaging a waste water treatment plant, the operator must, in addition, immediately give warning to the director of the concerned installation.

203. Where the treatment measures fail because of disruption or some other cause, or where for whatever reason the applicable emission or immission standards are exceeded, the operator shall immediately inform the competent supervisory official hereof.<sup>1</sup>

It must be noticed that VLAREM II also contains a number of similar warning duties.

1. Article 3.7.1. of the Decree on Environmental Policy Principles.

## VIII. Supervision and Enforcement Measures

### A. Supervision<sup>1</sup>

204. Without prejudice to the powers of other supervisory officials, the supervisory officials supervise the application of the provisions relating to environmental management within companies.

In the execution of their duties the supervisory officials may, at any time of day or night, and without prior warning, enter all installations. They only have access to housing units between five o'clock in the morning and nine o'clock in the evening, and subject to prior approval from the examining magistrate.

In the case of infringements, they may make an official report, which has probative value until proof to the contrary.

In the execution of their duties, the supervisory officials may require the assistance of the municipal police force and the federal police (*Rijkswacht – Gendarmerie*).

1. Articles 3.8.1. and 3.8.2 of the Decree on Environmental Policy Principles.

### B. Criminal Provisions

205. Anyone who infringes the provisions of the Decree relating to environmental management within companies, may be punished by imprisonment of between one month and three years and by a fine of between BEF 100

(x 200<sup>1</sup>) – about 500 euro – and BEF 1,000,000 (x 200) – about 25,000 euro, or by only one of these sanctions.<sup>2</sup>

1. The multiplication factor has to be applied to every fine. It is an amount which is fixed by the legislator to account for inflation. Every fine which is provided in a decree or statute has to be multiplied by this factor, which is currently set at 200.
2. Article 3.8.3. of the Decree on Environmental Policy Principles.

## § 6. THE DECREE ON GENERAL PROVISIONS OF ENVIRONMENTAL POLICY

206. The Flemish Decree of 5 April 1995 on general provisions of environmental policy is the basic decree for Flemish environmental policy (we shall use the abbreviation DABM, referring to the Flemish title '*Decreet houdende Algemene Bepalingen Milieubeleid*'). Its origin lies in the activity of the Inter-University Commission for the Reform of Environmental Law in the Flemish Region<sup>1</sup> and its report, the Draft Decree on Environmental Policy.<sup>2</sup>

The task of this commission was to draft a more effective and efficient environmental legislation. All legislation should be co-ordinated and brought together in one body of general rules that only needs to be sectorally specified in some fields.<sup>3</sup>

1. Cf. *supra*, § 3 of the General Introduction.
2. Bocken, H. and Ryckbost, D. (eds.), *Codification of environmental law: draft decree on environmental policy*, London, Kluwer Law International, 1996.
3. Lambrechts, W., *Overzicht van het Belgisch Milieurecht*, Antwerpen, Kluwer Rechtswetenschappen, 1997, p. 118.

207. The DABM is the framework decree. Although some new decrees have been established as separate instruments, the intention was to incorporate new decrees as separate titles into the DABM. This can be seen in the decree's structure. Title I contains 'general provisions,' viz. definitions, aims and principles. Title II contains provisions on planning, decision-making and environmental quality values. Title III deals with environmental care at company level. New titles on water, environmental impact assessment, enforcement and liability for environmental damage may be added in the future.

### I. Title I

208. The definitions contained in the DABM tend to be quoted in other environmental legislation that will be discussed in other sections of this Part and they provide a set of basic concepts of Flemish environmental law. A brief look at some key elements is therefore justified:

- 'Environment' comprises the atmosphere, soil,<sup>1</sup> water,<sup>2</sup> flora, fauna and other organisms other than man, ecosystems, landscapes and climate.
- 'Pollution factors' are solid substances, liquids, gases, micro-organisms, energy including heat, radiation, light, noise and other vibrations.<sup>3</sup>

- Three kinds of actions are defined that have a potential effect on the environment: an ‘emission’ is the bringing by man of pollution factors into the atmosphere, soil or water; an ‘immission’ is a change in the presence of pollution factors in the atmosphere, soil or water near one or more pollution sources as a consequence of emissions from those sources;<sup>4</sup> ‘extraction’ is the taking away by man of soil, water, air or light that (really or potentially) directly or indirectly negatively influences man or the environment.
- It is remarkable that the definition of ‘to pollute’ only mentions an emission caused by man, whereas immissions or extractions could have been included as well. ‘Pollution’ does seem to cover immissions as well since it is defined as the presence, caused by man, of pollution factors in the atmosphere, soil or water, that (really or potentially) directly or indirectly negatively influences man or environment. Extraction plays a more important role in the context of liability for damage than as a cause of pollution.<sup>5</sup>
  1. For the purposes of this Decree, soil includes groundwater, micro-organisms and other components in the soil.
  2. But not drinking water nor groundwater (the latter is part of the soil).
  3. It is remarkable that pollution factors do not have to be noxious substances. This definition ensures that even innocent substances are covered, when they enter the environment in such quantities that they can be harmful (*cf.* the definitions of ‘to pollute’ and ‘pollution’).
  4. This concept covers e.g. cases where not one clear pollution source is known or no action of man can be shown.
  5. However, it can be argued that an excessive extraction of e.g. water could raise the concentration of certain substances in the remaining water, thus causing a kind of pollution. Extraction is mentioned as a danger against which man and the environment should be protected in the chapter on aims and principles of environmental policy.

209. The air in closed spaces has for the purpose of the DABM explicitly been excluded from the atmosphere. Ionizing radiation is excluded from ‘radiation.’ These exclusions refer to workers protection inside the factory and nuclear safety respectively, both federal competences.

210. The aims and principles listed are the general concepts found in any environmental legislation, with an emphasis on (a slightly anthropocentric form of) sustainability, ‘in the interest of present and future generations.’ These aims and principles must be integrated in Flemish policy in other fields.<sup>1</sup>

The aims listed are the following:

- environmental management through the sustainable use of resources and the environment;
- the protection from pollution and extraction of man, the environment and especially those ecosystems that are important for the biosphere and relate to food production, health and other aspects of human life;
- nature conservation and the protection of endangered species.
  1. Socio-economic aspects, the international dimension and available technical and scientific data must be taken into account.

211. Environmental policy rests on a non-limitative list of principles, of which the first is a high level of protection, ‘balancing the different activities in society.’ The European principles are listed as well: prevention, precaution, rectification at the source of pollution, standstill and the polluter pays.

## II. Title II

212. This title forms the most programmatic part of the DABM. It establishes a framework for environmental planning (at all levels of government) and environmental quality standards.

### A. *Environmental Planning*

213. The scope of this contribution does not allow us to discuss the similar framework for planning in the other Regions and at the federal level. The interested reader can find the relevant provisions in the following legislation: the Law of 5 May 1997 on the co-ordination of the federal policy regarding sustainable development (at the federal level);<sup>1</sup> the Walloon Decree of 21 April 1994 regarding environmental planning in the framework of sustainable development;<sup>2</sup> and finally the Brussels Ordinance of 4 June 1992 on the drafting of a report regarding ‘the state of the environment in Brussels.’<sup>3</sup>

1. B.S., 18 June 1997.
2. B.S., 23 April 1994.
3. B.S., 18 July 1992.

214. In the Flemish Region, environmental planning is mandatory at the regional level. It involves the making of an environmental report every two years, a policy plan every five years and environmental programmes every year.<sup>1</sup>

The environmental report, drafted by the Flemish Environmental Agency and a steering group,<sup>2</sup> contains an analysis and evaluation of the state of the environment and the existing environmental policy. Moreover, the future evolution is estimated taking into account the existing policy and possible changes. This report is communicated to the provinces and should be given wide publicity.

1. The drafting procedures are complicated. *See* Articles 2.1.3. through 2.2.8. of the DABM for a detailed description.
2. This steering group is composed of people with a scientific background and people appointed by the Flemish Environmental Council and by the Flemish Social and Economic Council.

215. The regional environmental policy plan is drafted by a team appointed by the Flemish Government, on the basis of the data contained in the environmental report. It outlines the main characteristics of the regional environmental policy.<sup>1</sup> It must take into account not only the general aims and

principles listed in Article 1.2.1. DABM, but also the expected financial, socio-economic and spatial consequences of the environmental policy and its possible long-term effects. It must establish an ‘action plan,’ containing at least the following elements:

- the planned quality of the various environmental components, and more specifically the environmental quality norms and the time-period within which they should be attained;
- a list of areas in which the environment or some of its elements require specific measures of protection or management;
- the required limitation of charges on the environment, clean-up or reparation;
- proposed means and measures, together with a time-frame and priorities for their use.

1. It also outlines the basics of the environmental policy that provinces and municipalities must follow in matters of regional relevance.

216. The Flemish Government indicates which elements of this action plan are binding upon the Flemish authorities and on all public and private legal persons exercising public tasks regarding the environment. The other provisions of the environmental policy plan are merely indicative.

217. Before the plan is adopted, it must be given wide publicity and everybody must be able to make their comments. More specifically, written remarks can be made at the town hall, information meetings are organized at the provincial level, and municipalities and provinces as well as the Flemish Parliament, the Flemish Environmental Council and the Flemish Social and Economic Council are invited to communicate their comments to the planning team.<sup>1</sup>

The team takes all remarks into account and drafts the final version of the plan. The plan is then adopted by a decision of the Flemish Government and communicated to the municipalities and provinces as well as the Flemish Parliament, the Flemish Environmental Council and the Flemish Social and Economic Council. An extract will be published in the Belgian Official Gazette and the plan is available for consultation at municipal and provincial administrations.

1. Various time-limits apply. *See* in detail Article 2.1.9. DABM.

218. The environmental policy plan is valid for five years or until its replacement by a new plan. The Flemish Government can at any time review the plan, making use of the same procedure as for the adoption.

219. The (yearly) environmental programme aims at executing the environmental policy plan. It must contain, *inter alia*, a report on the implementation of the policy plan and on the transposition of European and international instruments. In addition, it contains the activities and budget for the coming year. It is drafted by the Flemish Government and presented to the Parliament

together with the draft budget. It is communicated to the Flemish Environmental Council and the Flemish Social and Economic Council, which must pass their comments directly to the Parliament within the period of time established by the Government.

220. At the provincial level, provision is made for a policy plan and a yearly programme, both optional. The policy plan must be drafted by the provincial authorities within one year of the entering into force of a new regional plan. It must in any case respect the provisions of the regional plans. A procedure similar to the one at regional level is laid out in the decree. The programme is optional as well<sup>1</sup> and is similar to the regional programme.

1. It can however be made obligatory by the Flemish Government.

221. Finally, similar provisions exist regarding planning at the municipal level. The policy plan and programme are optional here as well.<sup>1</sup> They must conform to the provisions of the regional and provincial (if the latter exists) plans.

1. It can however be made obligatory by the Flemish Government.

#### B. *Environmental Limit Values ('Quality Norms')*

222. The second chapter of Title II contains general provisions on 'environmental quality norms,' which are limit values. In a negative way, they determine the maximally admissible quantities of pollution factors in the environment. In a positive way, they can determine which natural elements should be present in the environment in view of the protection of ecosystems and the promotion of biodiversity. So-called 'basic environmental quality norms' apply to the whole Flemish Region, while 'specific environmental quality norms' apply to certain areas. The most severe norm prevails.<sup>1</sup>

1. Since the Decree does not say that a specific norm always prevails, it seems possible that a basic norm can be more severe than a specific norm. This again seems to contradict with the saying in Article 2.2.3. § 1 that specific norms can be made for areas 'in need of special protection.'

223. The Flemish Government must determine these values for the various components of the environment and must establish a time frame within which they must be attained. Draft decisions establishing such values will be communicated to the Flemish Environmental Council and the Flemish Social and Economic Council<sup>1</sup> which have a maximum of two months to give their opinion. The limits must periodically be reviewed.

1. If the draft decision contains specific norms for areas bordering neighbouring States or regions, the Flemish Government must first consult with the competent authorities of those States or regions.

224. Norms can be established as limit values or directive values.<sup>1</sup> The former may not be exceeded, except in case of *force majeure*. The latter determine a quality level that must be ‘as much as possible’ attained or maintained. When in a certain area the quality of a component of the environment is higher than the applicable values, measures must be taken to maintain that quality.

1. Or as a combination of both.

225. The Flemish Government appoints the institutions charged with monitoring the quality and determines the procedures to be followed. The non-interpreted data are available to the public on request. A programme for reparation must be drafted when an exceeded value is not the consequence of coincidental or passing conditions or when there is a lasting negative effect on the environment.<sup>1</sup> Such a programme must contain a list of all sources of contamination, as well as their respective importance; the necessary reductions in emissions or other measures; the necessary policy instruments and the competent authorities; and finally, a time schedule.

Special measures are to be taken for temporary cases of air pollution due to meteorological circumstances, notably the ozone pollution in summer.

1. This does not apply to cases of soil contamination. These cases are regulated in the Flemish Decree of 22 February 1995.

### III. Title III – Corporate Environmental Management

226. This title has been added to the DABM by a Flemish Decree of 19 April 1995. Environmental management within enterprises aims at establishing a sustainable production pattern and at controlling and limiting an enterprise’s environmental nuisance. A company’s different entities can be considered as constituting one ‘environmental-technical unit’ for the purpose of this title when this is desirable because of the damage they can cause to man and environment.

The different obligations, sanctioned by severe punishments,<sup>1</sup> for the various categories of enterprises<sup>2</sup> are the following.

1. See Chapter VIII of this Title of the DABM.
2. The same categories are used as in the legislation on environmental permits, cf. the relevant chapter of this monograph.

#### A. *Environmental Co-ordinator*

227. In principle, the obligation to appoint an environmental co-ordinator only rests on enterprises in the first category of classified installations. The Flemish Government may, however, exempt companies of that obligation or oblige companies of other categories (through sectoral exploitation regulations) to appoint a co-ordinator. The authority issuing permits can also impose this obligation upon a specific installation, e.g. because of its activity or location.

The same authority can oblige the entities of an environmental-technical unit to appoint a joint co-ordinator.

228. Apart from advisory functions (e.g. the co-ordinator must give his opinion regarding planned investments that can be environmentally relevant), he also has a number of specific responsibilities:

- he must monitor compliance with environmental regulations, e.g. by checking waste streams, report faults to the management and make suggestions for repair;
- he must verify or perform the prescribed emission or immission measurements, and the registering of the results;
- he must monitor the keeping of the waste register and the notification duties under the waste legislation;
- he has the duty to make propositions and communicate to the public about the environmental consequences (policy, waste etc.) of the enterprise's activities;
- finally, he must make yearly reports on his activities, the opinions he gave and their effect.

229. The Flemish Government has established the criteria for persons to qualify as an environmental co-ordinator. An enterprise must notify the competent authority of the appointment of a co-ordinator. It must also guarantee that the co-ordinator can freely perform his functions.

#### *B. Environmental Audit*

230. The provisions on auditing transpose the European Regulation No. 1836/93 of 29 June 1993 (EMAS) into Flemish law and oblige the Flemish Government to appoint competent authorities for appointing and supervising 'environmental verifiers,' registration of enterprises and other tasks under the EMAS regime.

These provisions have been executed in subdivision 4.1.9.2. of VLAREM II. This subdivision distinguishes between the voluntary environmental audit under the EMAS regime<sup>1</sup> and a mandatory environmental audit under the Flemish regulation. The latter can, depending on the nature of the enterprise, be periodical or a one-time obligation.

The Flemish Government indicates (through sectoral exploitation regulations) which categories of installations will be subject to a periodical or single environmental audit. Such audit is a 'systematic, documented and objective evaluation of the management, organization and equipment of the installation concerned, in the field of environmental protection' that will be validated by a certified monitor. The audit relates, among other things, to emissions and immissions, energy management, waste prevention and management, safety and

personnel training. The Flemish Government can indicate elements of the audit that must be communicated to the relevant authority.

Costs of the audit must in principle be borne by the company, but the Flemish Government may grant subsidies.

1. See the monograph on the European Communities in this Encyclopaedia for more details on EMAS.

*C. Obligations to Measure and Register*

231. By general or sectoral regulations<sup>1</sup> or in individual cases,<sup>2</sup> an enterprise can be forced to measure and register its emissions or immissions when they exceed the limits established.<sup>3</sup> Enterprises can also be asked to keep a register of dangerous substances and an energy and raw materials chart.

Specific measurement obligations exist when there is a risk of groundwater or soil pollution.

The collected data must be kept available to inspectors during a period of five years.

1. By the Flemish Government.
2. By the authority granting the permit.
3. More severe limits can be established in areas with specific quality norms, *cf. supra*.

*D. Yearly Environmental Report*

232. The Flemish Government can through general or sectoral regulations oblige enterprises to send a yearly report to the appointed authority, containing emission and immission data and possibly data on waste, energy and raw materials.

*E. Company Policy for the Prevention and Mitigation of Major Accidents*

233. The Flemish Government lists in general or sectoral regulations the enterprises that must have a company policy for the prevention of major accidents and the limiting of their effect on man and environment. This policy must be described in a document and notified to the appointed authority. Management must be able at all times to prove that it has taken the necessary measures.

*F. Obligation of Notification and Warning*

234. Management must take the measures necessary to be able to notify, in case of an accidental emission, the competent inspector and third parties that

may suffer damage. It must also take the necessary measures to limit as much as possible the consequences for man and environment.

An enterprise must also immediately notify the competent inspector of a failure in the installation's filtering facilities or when for any other reason the emission or immission limits are exceeded.

## Part II. Nature Conservation and Management

### Chapter 1. Monuments and Landscapes

#### § 1. MONUMENTS, URBAN AND RURAL SITES

434. In the Flemish Region, the protection of monuments and of urban and rural sites is governed by a Decree of 3 March 1976. This Decree was amended a few times; the most important amendment dates from 22 February 1995.<sup>1</sup> Several implementing orders complete this Decree.<sup>2</sup>

1. B.S., 22 April 1976 and 5 May 1995.
2. The most important implementing orders concern preservation and maintenance obligations (Decree of the Flemish Government of 17 November 1993, B.S., 10 March 1994); maintenance premiums (Decree of the Flemish Government of 29 September 1994, B.S., 25 January 1995); restoration premiums (Decree of the Flemish Government of 5 April 1995 amended by the Decree of 15 October 1996, B.S., 30 June 1995 and 12 December 1996).

435. Monuments are immovable objects, works of man or of nature or combined works, including their fixtures and fittings, presenting a general interest due to an artistic, scientific, historical, folkloric, technical or other social/cultural value (Art. 2,2 Decree 1976).

The notion ‘urban or rural sites’ has a double meaning in the Flemish legislation: they are either a larger group of buildings – whether or not including individually protected monuments – and their surroundings which are of general interest because of their artistic value,<sup>1</sup> or the surroundings of a protected monument<sup>2</sup> having a function for its maintenance (Art. 2,3 Decree 1976).

The protection of this built heritage is based on a large inventory of valuable objects drawn up by the competent administration.<sup>3</sup>

1. Compare with the definition of a monument; the values that can lead to protection are identical.
2. Even if these surroundings do not have a proper value.
3. In this inventory, over 60,000 goods were described. Although the inventory has no legal value, it is followed by the administration when making the protection proposals.

436. The protection procedure for monuments and for urban or rural sites is almost identical. It consists of two phases: the listing project (protection proposal) and the definitive protection.

437. The protection proposal is communicated to many persons and institutions: the owners, usufructuaries, local and provincial communities, and city services are notified.

A public consultation (30 days) during which remarks, objections can be made by any interested person, is organized. Owners can send their remarks directly to the Monuments and Sites administration.

Local and provincial communities and city services have to give their opinion within a period of 30 days; if they fail to do so, their opinion is considered to be positive.

A final, motivated advice on the proposed protection is given by the Royal Commission of Monuments and Sites. This is an advisory board, composed of independent experts. The Royal Commission has to evaluate the value of the object proposed for protection, to comment on the given opinions especially when they are negative, and to answer any objections or remarks. The advice of the Commission is not binding for the Minister who decides on the definitive protection, but in practice, it is almost always followed.

438. The definitive protection is, like the protection proposal, ordered by a ministerial decree. Both decrees are published in the Belgian Official Gazette. The definitive protection must be realized within a period of one year, starting from the moment of the above-mentioned notifications of the listing projects to the local and provincial communities. When a final decision is not taken within this period, the legal consequences of the (provisional) protection come to an end. If the competent authorities want to protect the same object later on, the procedure has to be recommenced. The time-limit of one year can be extended once, for six months.<sup>1</sup>

1. The protection procedure is described in the Articles 5 to 9 of the 1976 Decree.

439. The legal consequences of a protection proposal and of a definitive protection are identical. However, they differ for owners, usufructuaries, notaries and local authorities.

Owners of protected monuments and of goods located in a protected urban or rural site must preserve and maintain them in a good condition; they may not disfigure or destroy them (Art. 11 Decree 1976). Maintenance obligations and easements are described more in detail in the governmental Decree of 1993. In the protection decision itself, individual obligations can be enumerated. Most easements are relative, and the acts they forbid at the moment of the protection can be later authorized by ministerial decree.

The 1976 Decree also contains some legal consequences for 'third parties,' in the first place for notaries: their task is to inform their clients (new owners or users) of the protected character of the object and its consequences. Public authorities delivering building permits can only do so for protected objects after having obtained a binding advice from the authorities competent for monument protection. When their advice is negative, the permit must be refused; when the advice contains conditions, these must be included in the building permit.

440. All goods having obtained a definitive protection are inscribed in a register that is kept by the competent administration. Copies can be found *inter alia* at the local community and at the city services.<sup>1</sup>

1. The register was created by a ministerial decree dated 7 December 1976, B.S., 21 December 1976.

441. Owners or administrators of definitively protected monuments<sup>1</sup> can obtain subsidies for maintenance and for restoration. These subsidies can be combined<sup>2</sup> with tax advantages.

Maintenance premiums aim to help owners and administrators to keep their protected monument in a good condition. They are supposed to encourage regular maintenance, so that restoration works can be avoided. Therefore, this premium can be asked for every year. It is limited to an absolute maximum of 390,000 BEF (9,667 euro). Restoration premiums can be obtained for more important works in the short or in the longer term. This premium is only granted when necessary and is not limited.<sup>3</sup>

Besides these premiums, tax incentives exist for owners of protected objects (monuments, but also objects located in urban and rural sites and even landscapes). Under specific conditions (the monument is not rented out and it is opened to the public a few times a year) they can deduct certain sums spent for maintenance or restoration works from their annual income tax return.<sup>4</sup>

1. Owners of goods located in urban or rural sites cannot obtain subsidies. This is quite unfair, taking into account that the legal consequences of protection for them are almost the same as for owners of monuments.
2. A double use is impossible.
3. For more details, *see* the implementing orders mentioned in footnote 2 to para. 434.
4. Royal Decree 27 August 1993, B.S., 13 September 1993.

442. In the 1976 decree, sanctions are prescribed for persons who do not respect a legal protection, e.g. for owners who carry out works without a permit, or notaries who fail to inform their clients that they are buying a protected monument. Besides fines and compensations, every condemnation contains the obligation to restore the good to its former condition (Arts. 13 to 15, Decree 1976).

Works carried out without permission can be stopped.

## § 2. LANDSCAPES

443. The protection of landscapes located in the Flemish Region is governed by a Decree of 16 April 1996.<sup>1</sup> This Decree was completed by several implementing orders.<sup>2</sup>

Landscapes are limited areas with very little construction and having a certain coherence. This coherence may be the result of natural processes or social developments.

Landscapes must present, like monuments, a general interest and have a scientific, historic, aesthetic or social/cultural value (Arts. 3 and 5 Decree 1996).

A certain protection can also be given to the surroundings of a landscape, if this is necessary for the maintenance of the landscape itself.

1. B.S., 21 May 1996.
2. The first governmental decree dated 3 June 1997 deals with maintenance obligations and easements, procedures and register, B.S., 1 October 1997; the second governmental decree of 5 May 1998 concerns management and control, B.S., 17 June 1998.

444. The procedure for protection of a landscape is similar to that for monument protection. It is, again, a two-step procedure: protection proposal and definitive protection. The protection proposal is notified to all persons and administrations involved, opinions are given, etc. The Royal Commission gives a final advice before the definitive protection is announced. Such proclamation must occur within a period of one year (18 months in the case of extension of the time-limit).<sup>1</sup>

1. For more information, *see* the Articles 5 to 13, Decree 1996.

445. The legal consequences of a protection proposal and of a definitive protection are identical to those for monument protection. However, they again differ for owners, notaries and local authorities.

Owners of a (part of a) protected landscape must keep it in good condition by carrying out, if necessary, maintenance and restoration works. They may not disfigure or destroy it (Art. 14 Decree 1996). Maintenance obligations and easements are inscribed in the 1997 implementing order and can be complemented by individual obligations, inscribed in the protection decision.

The obligations for notaries and local agencies are identical to those mentioned in § 1 above.

446. All landscapes proposed for protection and all definitively protected landscapes are inscribed in a register kept by the competent administration. Copies of this register can be consulted at the local and provincial levels.

447. For each protected landscape, a management commission is nominated. In this commission, the owners and tenants are represented, but also the local communities, several administrations and representatives of environmental organizations. This management commission must work out a management plan within a period of two years following the definitive protection. This plan must be approved by the competent services. It will be carried out voluntarily way (Art. 16 Decree 1996).<sup>1</sup>

Subsidies will be available for the making of the management plan, as well as for maintenance and restoration works. The implementing order organizing the granting of subsidies has not yet been passed, but its basic rules are laid down in Article 17 of the 1996 Decree.

1. *See* also the above-mentioned governmental decree of 1998.

448. When the owner of a protected landscape proves that, due to the protection, his property lost more than 50 per cent of its original value, he can oblige the Flemish Region to buy it (Art. 18 Decree 1996).

449. The 1996 Decree also contains sanctions for non-respect of the obligations listed in it or in protection decisions. Besides fines and compensations, every condemnation contains the obligation to restore the landscape to the previous condition. Work carried out in a protected landscape without the necessary previous permission, can be stopped by the competent authorities (Arts. 19 to 21 Decree 1996).

## Chapter 2. Parks and Reserves

§ 1. THE PHYSICAL CONTEXT<sup>1</sup>

450. In a small, densely populated country like Belgium<sup>2</sup> there is little space left for wild natural areas.<sup>3</sup> All natural areas can in fact be called ‘semi-natural.’<sup>4</sup> Nature conservation law did not get the importance it deserves since policy-makers gave priority to pollution control.<sup>5</sup> Since a few years the tide has turned and due attention is given to e.g. biodiversity.

A weak conservation policy has left Belgium with a rather poor record as regards natural areas and wildlife. Of the total area, only 2.6 per cent is protected in the sense of the IUCN classification. That is one of the lowest percentages in the OECD.<sup>6</sup>

On the positive side, it must be mentioned that 20 per cent of the surface of Belgium still consists of forests. Forestry is an important economic activity in the south-east of the country. This is extremely important for the future of biodiversity, since half of the Belgian species of birds, mammals, reptiles and amphibians depend on the presence of forests.<sup>7</sup>

The concern for what little there was left to protect has inspired policy-makers at the federal and the regional level to draft specific legislation. Nature protection has been a regional competence since 1980. However, the Federal Government has retained the competence over the maritime environment.

1. See OECD, *Environmental Performance Review – Belgium*, Paris, OECD, 1998, pp. 143 *et seq.* and 207.
2. See also § 1 of the General Introduction.
3. It is estimated that only 5 per cent of Belgian territory is not occupied by dense human habitation or production activities, see OECD, *o.c.*, p. 148.
4. OECD, *o.c.*, p. 27.
5. In 1996, only 5 per cent (BEF 3.8 billion, or 94 million euro) of the total public environmental expenditure was allocated to nature and forestry. See OECD, *o.c.*, p. 153.
6. Wildlife protection will be dealt with in the following chapter.
7. OECD, *o.c.*, p. 144.

## § 2. THE FEDERAL LEVEL

451. The only significant competence left to the federal authority in this field is the competence over the marine environment in marine areas under the jurisdiction of Belgium (see § 4 of the General Introduction, *supra*).<sup>1</sup> The recently adopted Law of 20 January 1999<sup>2</sup> comprehensively regulates the matter.<sup>3</sup> It applies the prevention and precautionary principles, together with the principle that the polluter pays (strict liability) and that if possible the damaged environment should

be repaired, to the marine environment. Attention is given to sustainable use as well. It contains some specific provisions on protected areas in its Chapter III.

The King can establish protected areas and take the necessary measures for their protection. An exception is made for military activities, but the military authorities should take all possible measures to prevent environmental damage and disturbance.

1. The other competences in the field of nature conservation have all become regional since 1980.
2. B.S., 12 March 1999 (ed. 2).
3. *See also* Chapter 3 of Part I of this monograph.

452. Five kinds of protected areas are distinguished:

- in ‘integral marine reserves,’ no human interference exists;
- ‘directed marine reserves’ are established to maintain, through a specific management, an existing condition or restore an area to the condition necessary for its ecological function;
- ‘special protection or conservation zones’ aim at the protection of specific habitats or species;
- in ‘closed zones,’ certain activities are prohibited during the whole year or part of it;
- ‘buffer zones’ where limitations on certain activities are less severe, provide additional protection for marine reserves.

453. In the integral and directed marine reserves, only limited activity is allowed:

- supervision and control;
- monitoring and scientific research by the authorities or authorized by them;
- navigation, to the extent allowed by specific protection measures;<sup>1</sup>
- professional fishery, unless it is limited or prohibited by the King upon joint suggestion by the competent minister and the Minister for Agriculture;
- (in directed reserves) specific measures for management, conservation, restoration, development or environmental education.

Other chapters regulate pollution control, liability and restoration.

1. These measures can only be imposed if approved by the International Maritime Organization.

454. The old federal law on nature conservation<sup>1</sup> still exists but has been amended or adopted by the regional governments within the areas of their competence. Provisions on area-related protection in this law have not been thoroughly implemented.<sup>2</sup>

1. Law on Nature Conservation of 12 July 1973, B.S., 11 September 1973.
2. De Pue, E., Lavrysen, L. en Stryckers, P., *Milieuzakboekje 1998*, Antwerp, Kluwer Rechtswetenschappen, 1998, p. 421. It obviously remains important for the then established reserves, *see* De Pue, E., Lavrysen, L. en Stryckers, P., *o.c.*, p. 444.

## § 3. THE FLEMISH REGION

## I. The Decree on Nature Conservation and the Natural Environment

## A. General

455. The basic legislative instrument for the Flemish Region is the Decree of 21 October 1997.<sup>1</sup> Before looking at area-related conservation, some attention must be paid to the general provisions.

On the institutional side, the Decree creates the Flemish High Council for Nature Conservation, an advisory body. The Institute for Nature Conservation is a scientific body that assists the Flemish Government and the High Council.

Planning is an important aspect of nature conservation policy. The planning instruments must be a linked to the instruments of environmental planning under the Decree ‘holding general provisions of environmental policy’<sup>2</sup> as described *supra*.<sup>3</sup> The ‘Nature Report’ is a ‘recognisable but distinguishable’ part of the environmental report described above. It is a scientific report that analyzes the situation, plans for the future and evaluates the previous policy.

The ‘Nature Policy Plan’ fits into the environmental policy plan of the Decree. It contains general provisions of environmental policy and includes several specific plans:

- the plan for area-linked policy;
- a plan concerning the relation between nature objectives and environmental quality in certain areas;
- a plan for species conservation;
- a plan for the policy regarding certain target-groups (e.g. regarding education);
- a plan supporting provincial and local authorities.

1. B.S., 10 October 1998.

2. Decree of 5 April 1995, B.S., 3 June 1995.

3. See § 6 of Chapter 1 of Part I.

456. Chapter IV lists a number of general measures that the Flemish Government can take (‘all necessary measures’ to reach a number of objectives, including the introduction of a system of permits that would be required for certain activities in protected areas or with consequences for one of the objectives of nature conservation). However, it has yet to a large extent to be implemented by the Government. Chapter VII contains some provisions on education and support for local authorities.

## B. Area-Related Policy

457. An important part of the Decree establishes an area-related policy system (chapter V).<sup>1</sup> The system is built around three concepts: the Flemish

Ecological Network (hereinafter ‘VEN’),<sup>2</sup> the Integral Acquisition and Supporting Network (hereinafter ‘IVON’)<sup>3</sup> and nature reserves.

1. This Chapter lists in its fourth paragraph a number of ‘general measures for the protection of the natural environment: acquisition of land, voluntary management agreements, nature organization projects and planning.’ These measures will not further be discussed here.
2. From the Dutch abbreviation ‘Vlaams Ecologisch Netwerk.’
3. From the Dutch abbreviation ‘ Integraal Verwervings- en Ondersteunend Netwerk.’

### 1. The Flemish Ecological Network

458. The VEN will be an organized and coherent collection of areas where a specific policy for nature conservation is in place. A total surface of 125,000 hectares must be listed within 5 years after the entry into force of the Decree (thus, before 20 January 2003) and protection plans must be established within 5 years after that date. Two sorts of areas can be part of the VEN:

- Large Units of Nature (hereinafter LUN): areas of which at least half of the surface contains nature in the sense of the Decree or a certain natural element with a high environmental quality;<sup>1</sup>
- Developing Large Units of Nature (hereinafter DLUN) are areas that either contain nature on less than 50 per cent of their surface, or where certain elements of fauna or flora must be supported, and terrains with a potential for nature development.
  1. Nature is defined as follows in Article 2: the living organisms, their habitats, the ecosystems of which they form part and the related independent ecological processes, whether or not these occur in connection to human activity. Not included are crops, cattle and domestic animals.

459. The Decree establishes conditions and detailed procedures for the establishment of LUNs and DLUNs. Within the VEN, special measures will be taken for the hydrological system and condition of the area.

Both within LUNs and DLUNs, a plan is drafted and all necessary measures<sup>1</sup> may be taken in order to conserve, repair and develop nature and the natural environment. In LUNs, these measures have priority over the area’s other functions, whereas in DLUNs, they must take those other functions into account.

1. The Decree refers to the general measures of Chapter IV and lists some specific ones.

### 2. The Integral Acquisition and Supporting Network

460. This network is a collection of areas in which the administration takes care of conservation of existing nature values, and adopts measures for the promotion and strengthening of those values and for the stimulation of biodiversity.

A total surface of 150,000 hectares must be indicated within 5 years after the entry into force of the Decree (thus, before 20 January 2003) and the plans

must be established within 5 years after that date. Two sorts of areas can be part of the IVON:

- nature acquisition areas, in which the administration protects and develops the existing nature, without ‘disproportionate consequences for the other functions of the area’; conservation of an existing situation and ‘stand-still’ are key concepts;
- nature linking areas, which are land strips important for the migration of plants and animals between the VEN areas or nature reserves.

### 3. Nature Reserves

461. The Flemish Government can recognize or establish as nature reserves those areas that are important for the conservation and development of nature or the natural environment. A distinction is made between Flemish reserves (on land that is owned by or rented to the Flemish authority or that is made available for that purpose) and ‘recognized’ reserves (protected areas that are recognized upon request by the owner or the person managing the area).

For both kinds of reserves, a plan must be drafted. A number of activities are prohibited.

The procedures for the recognition of reserves will be determined by the Flemish Government. A recognition is valid for a renewable period of 27 years. Subsidies can be granted for the management of recognized reserves.

## II. Other Legislation

462. The other sectors in which Flemish legislation regarding nature conservation has been adopted are dunes and forests. Moreover, a number of wetlands that have been protected under the Ramsar Convention,<sup>1</sup> are situated in Flemish territory.

1. See the list in the Royal Decree of 27 September 1984, B.S., 31 October 1984.

463. The federal Forest Code of 1854 has been largely abolished for the Flemish Region by the Flemish Forest Decree of 13 June 1990.<sup>1</sup> Whereas the Code concentrated on the economic function of forests, the Decree regulates various functions (economic, social, educational, ecological, scientific and screen-function).<sup>2</sup> These functions are described in detail in the Decree. Forests are defined as surfaces of which trees and woody shrub vegetation are the main component, containing a fauna and flora with one or more functions.

1. B.S., 28 September 1990, as amended by the Decree on nature conservation and the natural environment.
2. See, extensively, De Pue, E., Lavrysen, L. en Stryckers, P., *o.c.*, p. 542 *et seq.*

464. A Forest Division exists within the environmental administration. A scientific 'Institute for Forest and Wildlife Management' and an advisory Flemish High Council for Forests were established as well.

For every forest, management plans must be drafted and a protection regime is established.

465. A Flemish Decree of 14 July 1993<sup>1</sup> added a chapter on dune protection to the 1973 federal law on nature conservation. A little over 1,000 hectares have since then been designated as protected areas under the 'dune decree.' The protected status involves a complete prohibition of construction, with only some exceptions related to agriculture.

1. B.S., 31 August 1993 and (erratum) 12 October 1993.

#### § 4. THE WALLOON REGION<sup>1</sup>

466. For the Walloon Region the basic law is still the old federal law of 1973, already mentioned above, for nature and forest reserves, and a separate Decree of 16 July 1985 for nature parks.<sup>2</sup>

The same two types of nature reserves exist as described above: 'public' reserves on territory owned by the Region, and recognized reserves on private land.<sup>3</sup>

Private land must meet a number of conditions to be recognized, the most notable of which is that the land must have a recognized ecological and scientific value.<sup>4</sup> A set of procedural provisions are included as well.

A protection regime applies to nature reserves, similar to the one described above, and management plans must be drafted.

The regime applicable to forest reserves is similar.

1. See, extensively, De Sadeleer, N. and Misonne, D., 'Les mécanismes de conservation des habitats naturels et leur rapport au droit foncier en Région wallonne et en Région bruxelloise,' in Jadot, B. (ed.), *Het natuurbeschermingsrecht – Le droit de la conservation de la nature*, Ghent, Story Scientia, 1996, pp. 53–110.
2. B.S., 12 December 1985. This separate regulation for nature parks can be explained by the different idea and the different impact on property law in that a nature park can be established regardless of the assent of the owners or occupiers of the land concerned (see De Sadeleer, N. and Misonne, D., *o.c.*, p. 58).
3. See, for the latter, the executive decree of 17 July 1986 (B.S., 11 October 1986) as amended. De Sadeleer, N. and Misonne, D., *o.c.*, remark at p. 68 that the slow growth of protected area is mainly due to the high price of land in Belgium. Reserves tend to be created only in areas that are economically unattractive.
4. Other conditions relate to the title of the person occupying the land, management of the reserve etc.

467. The concept of nature park is used to indicate a large protected area, created by the public authorities and administered under a flexible regime. The focus is less on strict protection than on organized action directed at the development of the environment, in harmony with the population of the area

and its economic and social development.<sup>1</sup> Management plans must be drafted and certain activities are strictly regulated.

Other specific legislation exists for special areas like wetlands and caves.<sup>2</sup>

1. De Sadeleer, N. and Misonne, D., *o.c.*, pp. 72–73.
2. Decision of 8 June 1989 (B.S., 12 September 1989) and of 26 January 1995 (B.S., 18 March 1995) respectively. *See* De Sadeleer, N. and Misonne, D., *o.c.*, pp. 78–84 for a discussion.

#### § 5. THE BRUSSELS REGION<sup>1</sup>

468. The densely populated area of Brussels leaves little space for natural areas, although the ancient ‘Zoniën’ forest is located in the area. The policy consequently focused upon the development of green zones and upon improvement of the quality of urban life.<sup>2</sup>

There is nevertheless also legislation on reserves.<sup>3</sup> The principles and procedures are largely the same as in the Walloon Region. It is noteworthy that the basic ordinance has abolished the provisions on nature parks in the federal law of 1973 for the Brussels Region, without replacing them. The reason for this is that the concept of nature park is not relevant in an urban area.<sup>4</sup>

1. *See*, extensively, De Sadeleer, N. and Misonne, D., *o.c.*, pp. 53–110.
2. OECD, *o.c.*, p. 150.
3. Notably the Ordinance of 27 April 1995, B.S., 7 July 1995 and an Executive Decree of 25 October 1990, B.S., 4 December 1990 on the procedure for the recognition of private lands as nature reserves.
4. De Sadeleer, N. and Misonne, D., *o.c.*, p. 72.

## Part III. Zoning and Land-use Planning<sup>1</sup>

### § 1. JURISDICTION AND APPLICABLE LEGISLATION

527. By virtue of Article 6, § 1, I of the Special Law, zoning and land use planning are a matter of regional competence (*see* § 4 of the General Introduction, *supra*). The three Regions have their own legislation.

In the Flemish Region, the matter is regulated by the Decree of 18 May 1999.<sup>2</sup>

In the Walloon Region, there is the Decree of 27 November 1997 amended by the Decree of 23 July 1998 (Official Gazette, 9 September 1998) and by the Articles 7 and 8 of the Programme Decree of 16 December 1998 (Official Gazette, 30 December 1998).

Probably the most complicated legislation is to be found in the Brussels Capital Region. The original Decree of 29 August 1991 has been amended at least once a year, by the Decrees of 30 July 1992 (Belgian Official Gazette, 19 August 1992), 15 July 1993 (Belgian Official Gazette, 24 July 1993), 23 November 1993 (Belgian Official Gazette, 26 November 1993), 4 April 1996 (Belgian Official Gazette, 23 April 1996), 19 December 1996 (Belgian Official Gazette, 31 December 1996), 5 June 1997 (Belgian Official Gazette, 26 July 1997), 26 March 1998 (Belgian Official Gazette, 17 June 1998), and 16 July 1998 (Belgian Official Gazette, 14 August 1998).

1. This part only deals with the interaction between environmental law and spatial planning regulation. Spatial planning, land use and zoning are currently being reviewed and reformed in all three Regions. The new legislation will be discussed in an update to this monograph.
2. B.S., 8 June 1999.

528. The amendment of 26 March 1998 was enacted to bypass a judgment of the Council of State (*Conseil d'Etat*). The Council had held that a municipal zoning plan (being a 'lower' zoning plan), was automatically abrogated upon the entry into force of the regional zoning plan, insofar as the municipal plan was incompatible with the regional plan.<sup>1</sup>

The amendment was held illegal in a subsequent case decided by the Council of State. The Council held that reversing the hierarchy between the regional zoning plan and a municipal zoning plan was contrary to Article 159 of the Constitution; this article states that a court may apply general provincial and municipal regulations insofar as they are not in violation of acts of parliament. The Court found that this article established a hierarchy between general (in this case regional) regulations and 'lower' regulations that cannot be reversed, not even by the legislator.<sup>2</sup>

If this interpretation of Article 159 Constitution will become established law, this will have important consequences in the three Regions. Each regional land-use and zoning legislation accounts for land-use plans at at least two levels (regional and municipal; in the Flemish Region, also on the provincial level). Henceforward, a ‘lower’ plan could not replace a ‘higher’ plan, but only implement it, and support small modifications under very strict circumstances.

1. Council of State, *Front commun des groupements de défense de la nature*, No. 67.535, 18 July 1997; T.R.O.S., 1998, 526, note E. Brewaeyts.
2. Council of State, *Front commun de groupements de défense de la nature*, No. 75.710, 8 September 1998, J.T., 1999, 63.

## § 2. LINKS BETWEEN LAND-USE AND ZONING LAW AND ENVIRONMENTAL LAW

### I. Formal Links

#### A. The Flemish Region

529. Article 5 of the Environmental Permit Decree of 28 June 1985 links the environmental permit to the building permit. When an installation requiring an environmental permit (or which must be notified to the municipal board) also needs a building permit, and the environmental permit has been delivered, it is suspended as long as the building permit has not been obtained as well. If the building permit is finally denied, the environmental permit lapses automatically. *Vice versa*, if the building permit has been delivered but not the environmental permit, the building permit is suspended until the environmental permit has also been delivered; and if the environmental permit has been finally denied, the building permit lapses automatically.

#### B. The Walloon Region

530. In the Walloon Region, environmental permits are still regulated by the ‘old’ General Regulation for the Protection of Labour, which does not provide for any link with the building permit. Article 131 of the Decree of 27 November 1997 on Urban Zoning and Planning<sup>1</sup> holds that when a project requires also an environmental permit, the building permit will be granted in conformity with the co-ordinating rules contained in the environmental legislation. However, in the Decree that will replace the General Regulation but which is only in the draft stage, Articles 82–84 provide for this matter. Meanwhile, the two permit systems continue to coexist separately.

1. B.S., 12 February 1998.

*C. The Brussels Region*

531. Article 108 of the Decree on Urban Zoning and Planning, as amended by the Decrees of 30 July 1992 and 5 June 1997, imposes the following obligations when a project requires a building permit and an environmental permit:

- both applications must be introduced simultaneously;
- the application for the building permit is considered incomplete if the application for the environmental permit has not been introduced;
- both applications are submitted simultaneously to those administrations that must give advice in both cases;
- the two applications are submitted to a single public consultation procedure;
- if environmental impact studies, reports, etc. are required, both applications are to be considered (*see also* Art. 111);
- the competent authorities examine together both applications, under the rules to be established by the Government;
- a copy of all documents is sent to the Brussels Environmental Institute which has competence to grant environmental permits.

**II. Links Established by Case Law***A. The Basic Rule: The Independence of each Permit System*

532. When a permit system is organized by an act of parliament, it operates independently from other permit systems, unless provided otherwise by law. It follows that when a project requires more than one permit, each permit must be obtained separately, and the fact that one permit has been granted does not imply that the other permit(s) must also be granted, even if it is the same authority that has to decide on the other permit(s).<sup>1</sup> For instance, the Zoning and Land Use Law coexists with the law for the protection of monuments and sites, on the same hierarchic level, and their legal consequences are cumulative.<sup>2</sup>

1. Council of State, *Demoulin*, No. 18.793, 24 February 1978.

2. Council of State, *Spée c.s.*, No. 20.190, 13 March 1980.

*B. The Preponderance of Land Use Plans*

533. The importance of the distinction between regulatory administrative decisions and decisions in individual cases, has been well established in Belgian administrative law since 1949.<sup>1</sup>

Since land use plans are defined in the legislations of the three Regions as regulatory,<sup>2</sup> an administrative decision in an individual case may not contravene the prescriptions of a land use plan. This is true not only for decisions such as building permits made in pursuance of the land use and zoning laws as such,

but also for any other administrative decision, even if it is made in the framework of another legislation. Hence, an environmental permit cannot be delivered if the installation for which the permit is sought is not zoned appropriately.<sup>3</sup>

The following examples can illustrate this point:

- a factory for chocolate products cannot be allowed in a residential area (note: in the applicable legislation, factories can under limited circumstances be allowed in residential areas), even if only for a limited period in order to allow the relocation of the factory;
- in an area zoned as agricultural with scenic value, an environmental permit for expanding an existing installation from 130 to 960 pigs cannot be granted.<sup>4</sup>

1. Council of State, *François*, No. 115, 26 August 1949.
2. E.g., Council of State, *Coussement*, No. 45.979, 3 February 1994.
3. Council of State, *Stassin*, No. 73.238, 23 April 1998.
4. Council of State, *Lallemant*, No. 66.314, 20 May 1997.

## Part IV. Liability Questions

### Chapter 1. Introduction

534. In this Part we shall discuss substantive rules on liability for environmental matters. The most attention will be given to environmental liability based on the general law of torts and on specific soil pollution legislation. In addition, we shall discuss the main features of criminal liability under Belgium environmental law and, finally, we shall briefly discuss administrative liability. Obviously the liability questions we shall discuss in this Part relate to a large extent to other parts of this monograph. For instance, the contents of environmental liability are related to the soil pollution issue, discussed above in Part I, Chapter 5; and the norms of environmental criminal law can mostly be found in the specific sectoral legislations concerning pollution control, discussed in Part I. Indeed, environmental criminal law in Belgium mostly consists of criminal provisions which have been included at the end of administrative statutes regulating pollution control. The same is true for administrative liability. The most important aspects of administrative environmental law, for instance with respect to the licensing procedure and the remedies, have been discussed above. Specific administrative remedies will also be discussed in Part V, Chapter I. There are, however, specific administrative sanctions in some environmental statutes which shall be discussed in this Part.

535. As has been made clear in the other parts as well, sketching environmental liabilities in Belgium is not easy for a number of reasons. One reason is that environmental law in Belgium has to a large extent been decentralized and that important powers have been granted to the regions. Although environmental civil liability in Belgium still is largely based on the application of the traditional principles of tort and nuisance law, other areas, such as criminal liability, have been developed in a different way in the various Regions. Examples will mostly be given for the Flemish Region, but some attention will be given to the Walloon Region as well. A second reason why describing Belgian environmental liability is not easy at this stage, is that the domain of environmental law in Belgium is, as has been mentioned above, constantly undergoing important changes. In the Flemish Region, specific changes have been proposed as the result of the work of the Inter-University Commission for the Reform of Environmental Law in the Flemish Region. This commission made important proposals with respect to civil environmental liability and criminal liability. Some of the proposals of the commission, for instance with

respect to the liability for soil clean-up, have already been implemented into legislation through the Decree of 22 February 1995.<sup>1</sup> Some attention will be given to the proposals of the Inter-University Commission, although they only relate to the Flemish Region.

1. B.S., 29 April 1995.

536. This Part is subdivided as follows: after this introduction, environmental liability under civil law will be discussed (Chapter 2). Then criminal liability (Chapter 3) and administrative liability (Chapter 4) will be discussed. Some concluding remarks will be formulated (Chapter 5). The legislation, case law and legal doctrine in this Part have, as much as possible, been updated until 1 May 1999.

## Chapter 2. Civil Liability

### § 1. INTRODUCTION

537. In this Chapter, the basic features of environmental liability under civil law in Belgium will be presented. This sketch of civil environmental liability presents a mixture of the application of the traditional principles of tort and nuisance law to environmental pollution and the proposals of the Inter-University Commission. The traditional private law remedies find their legal basis in the Belgian Civil Code of 21 March 1804 and they will not be abrogated even if the proposals of the Inter-University Commission will be implemented in the Flemish region. In that case, the victim will be able to choose either for traditional private law remedies or for environmental liability as proposed by the Inter-University Commission. Hence, a discussion of traditional private law remedies remains worthwhile.

Environmental liability in Belgium is an area on which abundant legal literature exists.<sup>1</sup> In this chapter the main characteristics of civil environmental liability in Belgium will be presented and some cases will be discussed to illustrate these headlines. Only material environmental liability will be discussed, not the way in which these rights can be enforced in court. That issue will be discussed in Part V.

This Chapter is subdivided as follows: the basic conditions for tort liability according to Article 1382 of the Civil Code will be outlined (§ 2); then some cases of strict liability will be discussed (§ 3), as well as nuisance law (§ 4). The basic remedies will be presented (§ 5) and we shall then turn to the proposals of the Inter-University Commission on environmental liability (§ 6).<sup>2</sup>

1. For a summary of the '*status questionis*' with respect to environmental liability in Belgium, see M. Deketelaere, 'Milieuaansprakelijkheid, burgerrechtelijke aansprakelijkheid voor milieuschade, strafrechtelijke aansprakelijkheid voor milieumisdrijven, administratieve sancties en veiligheidsmaatregelen, en verzekering van milieuschade,' in: K. Deketelaere (ed.), *Milieurecht in België, Status Questionis Anno 1997* (Bruges, Die Keure, 1997), pp. 670–714 and X. Thunis 'Le droit de la responsabilité, instrument de protection de l'environnement. Réflexions sur quelques tendances récentes,' in: *L'actualité du droit de l'environnement* (Brussels, Bruylant, 1995), pp. 261–281.
2. The liability under the Flemish soil clean up decree will not be discussed in this chapter, since this has been dealt with in Part I, Chapter 5.

### § 2. LIABILITY FOR NEGLIGENCE

538. Article 1382 of the Belgian Civil Code provides that anyone who negligently causes damage to someone else, must pay compensation.<sup>1</sup> This is

traditional liability based on fault or negligence. The literature therefore claims that there are three basic requirements which the victim must meet in order to receive compensation: he must prove that he suffered damage, that the injurer was at fault and that there is a causal relationship between the fault and the damage.<sup>2</sup> Each of these requirements will be discussed in more detail below, specifically with respect to their applicability to environmental harm.

1. 'Any act by which a person causes damage to another person makes the person through whose fault the damage occurred liable to make reparation for such damage.'
2. See generally M. Faure and R. Van den Bergh, 'Negligence, Strict Liability and Regulation of Safety under Belgian Law: An Introductory Economic Analysis,' in: *Geneva Papers on Risk and Insurance* (1987), p. 98; J. Limpens, R. Kruithof and A. Meinertzhagen-Limpens, 'Liability for One's Own Act,' in: *International Encyclopaedia of Comparative Law, XI, Torts*, 2 (Tübingen, 1982), p. 2 *et seq.* and K. Deketelaere, 'Public Environmental Law in Belgium in General and in the Flemish Region in Particular,' in: R. Seerden en M. Heldeweg (eds.), *Comparative Environmental Law in Europe, an Introduction to Public Environmental Law in the EU Member States* (Antwerp, Maklu, 1996), pp. 67–68.

## I. Fault

### A. *Balancing of Interests and BATNEEC*

539. It is accepted that the injurer was at fault as soon as it is established that he either violated a general duty of care or a specific regulatory provision that prescribed or prohibited certain behaviour.<sup>1</sup> Regarding whether the injurer violated a general duty of care, the legal doctrine and case law generally hold that the question whether the injurer behaved as could be required from a *bonus pater familias* has to be examined. This means that the general criterion to establish whether the due care standard was violated, is whether the injurer acted as a reasonable person or not. With respect to the more precise contents of this vague norm, detailed case law has been developed. The question, of course, arises whether behaviour causing environmental pollution can be considered wrongful. Legal doctrine and case law in that respect usually hold that the various interests at stake have to be weighed against each other, e.g. the interests of a polluting enterprise which exercises a socially beneficial activity must be weighed against the interest of victims (such as the surrounding neighbours) in enjoying a pollution-free environment.<sup>2</sup> A criterion that sometimes plays a role in that respect is the possibility for the polluting firm to reduce the environmental harm by, for instance, investing in abatement technology. In that case the costs of such preventive measures must also be weighed against their capacity to reduce environmental harm.

1. See M. Deketelaere, 'Milieuaanprakelijkheid, burgerrechtelijke aansprakelijkheid voor milieuschade, strafrechtelijke aansprakelijkheid voor milieumisdrijven, administratieve sancties en veiligheidsmaatregelen, en verzekering van milieuschade,' in: K. Deketelaere (ed.), *Milieurecht in België, Status Questionis Anno 1997* (Bruges, Die Keure, 1997), pp. 670–714; A. van Oevelen 'Civielrechtelijke aansprakelijkheid voor milieuschade,' in: Centrum voor Beroepsvervolmaking in de rechten, *Rechtspraak en milieubescherming* (Antwerp, Kluwer rechtswetenschappen, 1991), pp. 130–150 and A. van Oevelen, 'De

civielrechtelijke aansprakelijkheid van kaderleden, andere werknemers en ambtenaren voor schade veroorzaakt door milieuverontreiniging,' T.P.R., 1992, 89–133.

2. See A. Carette, *Herstel en vergoeding voor aantasting aan niet-toegeëigende milieubestand-delen* (Antwerp, Intersentia, 1997), pp. 70–73.

540. In the Flemish Region this balancing process, taking into account the costs and benefits of preventive measures, has to some extent to be made explicit since the so-called 'BATNEEC'<sup>1</sup> principle was incorporated in an executive order of the Flemish Government known as VLAREM II. The 1985 Flemish Decree with respect to environmental licences contained in Article 22 (2) a general provision that the operator of an establishment must use all appropriate means to prevent environmental nuisance and pollution. The executive order VLAREM II subsequently incorporated the principle that the licensee must use the best available clean technologies not entailing excessive costs. VLAREM II moreover stipulated that the licence conditions should be in compliance with the BATNEEC principle.<sup>2</sup> This BATNEEC principle, being laid down in an implementing regulation, can never replace or amend the tort provision of Article 1382 of the Belgian Civil Code. Still, it may be argued that the acknowledgement of the BATNEEC principle implies a specification of the general due care norm of the tort provision.<sup>3</sup> A judge may be guided by that principle when specifying the vague due care norm. However, at present BATNEEC only gives an indication as to what interests should be taken into account when specifying the due care standard, since the criterion is still rather vague and leaves many questions open. Indeed, regarding the question when a technology is not or is no longer in accordance with the best available technology requirement, and especially when costs are assumed to be excessive under the general tort provision, case law does not seem to be consistent. Judges seem to avoid formulating a clear theoretical criterion and deal with the problem on an *ad hoc* basis.<sup>4</sup>

1. Best Available Technique Not Entailing Excessive Costs. Formally, the Best Available Technology (BAT) is required, but in practice the costs are taken into account as well.
2. For a short overview of the function of BATNEEC in VLAREM II, see H. Bocken and T. De Saegher, 'Aansprakelijkheid en financiële zekerheden na VLAREM II,' T.M.R., 1993, 84–85 and A. Carette, 'Op zoek naar de inhoud en de draagwijdte van BAT(NEEC),' T.M.R., 1996, 310–328.
3. See M. Faure and M.H.S. Ruegg, 'Environmental Standards Setting through General Principles of Environmental Law,' in: M. Faure, J. Vervaele and A. Weale (eds.), *Environmental Standards in the European Union in an Interdisciplinary Framework* (Antwerp, Maklu, 1994), pp. 39–60. For the contents of BATNEEC, see M. Faure and J.G.J. Lefevère 'The Draft Directive on Integrated Pollution, Prevention and Control: an Economic Perspective,' *European Law Review*, 1996, 112–122.
4. See H. Bocken and T. De Saegher, *o.c.*, p. 85 and see, for a more detailed analysis, H. Bocken, *Het aansprakelijkheidsrecht als sanctie tegen de verstoring van het leefmilieu* (Brussels, Bruylant, 1979), p. 42 *et seq.* and M. Deketelaere, *o.c.*, in: K. Deketelaere (ed.), *Milieurecht in België, Status Questionis Anno 1997* (Bruges, Die Keure, 1997), pp. 682–683. For an overview of case law, see also A. van Oevelen, *o.c.*, in: Centrum voor Beroepsvervolmaking in de rechten, *Rechtspraak en milieubescherming* (Antwerp, Kluwer Rechtswetenschappen, 1991), pp. 134–137.

541. It is, however, equally important to stress that Belgian case law regularly stresses the importance of the fault requirement. Hence, even recently there have been cases where it has been decided that the mere fact that victims claim that they suffer from environmental pollution does not fulfil the fault requirement since this fact alone does not make, for example, the operation of an industrial plant as such wrongful. The wrongfulness (fault or negligence) of the act or omission of the injurer must therefore still be proven by the victim. Nevertheless, Bocken states that the application of the fault concept in pollution cases has become increasingly stringent, so that the distinction from strict liability would often be quite theoretical.<sup>1</sup>

1. H. Bocken, 'The Compensation for Ecological Damage,' in: P. Wetterstein (ed.), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (Oxford, Clarendon Press, 1997), pp. 144.

#### B. Violation of a Regulatory Standard

542. It has already been mentioned that the fault may not only consist in a violation of the general duty of care, but also in an unjustified violation of a regulatory norm. As soon as the victim can prove that a regulatory norm has been violated and that this violation has a causal relationship with the damage, he can claim compensation without the necessity of further argument that this breach of regulations violated a due care standard. Under Belgian tort law, any violation of a regulatory standard constitutes a fault.<sup>1</sup> It is therefore not necessary for the victim to prove that it consisted of a violation of a statute that particularly aimed at protecting the victim's interest,<sup>2</sup> which is the case under German (and some Dutch) law. The so-called 'Schutznorm-theorie' is not accepted under Belgian tort law.<sup>3</sup> The rule that a violation of a regulatory standard is automatically considered as a fault under tort law and thus leads to the liability of the polluter, is of major importance in environmental cases. It means, for instance, that if an establishment operates without the required licence and this causes harm to the victim, compensation can be claimed. The same is true if, for instance, the emission standards specified in licences or other regulatory norms have been violated.

This system has several advantages. First, it makes the job of a judge in an environmental liability case easier. The weighing of costs and benefits and balancing of interests to find out whether the polluter violated the *bonus pater familias* standard can be a highly complex exercise. Regulations provide information to the judge who has to evaluate the behaviour of the injurer *ex post* in a liability case. A judge can therefore easily accept a finding of negligence as soon as the regulatory standard has been breached. Thus, the regulatory standards are applied to define negligence. Another advantage of this system is that it gives victims incentives to prove that the regulatory standard has been breached. This in fact makes the victim an enforcer of regulatory standards. He can claim compensation under the negligence rule as soon as a

causal relationship between the violation of the regulatory standard and his damage has been established.<sup>4</sup>

1. H. Bocken, *o.c.*, in: P. Wetterstein (ed.), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (Oxford, Clarendon Press, 1997), pp. 144; A. van Oevelen, *o.c.*, in: Centrum voor Beroepsvervolmaking in de rechten, *Rechtspraak en milieubescherming* (Antwerp, Kluwer rechtswetenschappen, 1991), pp. 132–134.
2. A so-called ‘Schutzgesetz.’
3. The reasons why are carefully explained by H. Vandenberghe, M. Van Quickenborne and P. Hamelink, ‘Overzicht van rechtspraak, aansprakelijkheid uit onrechtmatige daad 1964–1978,’ T.P.R., 1980, 1152 *et seq.*
4. See M. Faure and R. Van den Bergh, *o.c.*, 1987, in: *Geneva Papers on Risk and Insurance* (1987), pp. 110–111.

543. A consequence is that victims of environmental pollution will often try to prove that the environmental pollution that harmed them violated a criminal statute, since such a violation automatically constitutes a fault. Therefore, victims will often initiate or at least join in criminal proceedings, since this might enable an easier recovery of damages.<sup>1</sup> This explains why civil claims for apparently minor offences are sometimes brought before a criminal court. An interesting example is that of a victim of smoke who argued that the emission of smoke constitutes the illegal ‘throwing’ of objects which is penalized in Article 563 (3) of the Belgian Criminal Code. Although the sanctions for this crime are almost negligible, this case was tried up to the highest Belgian court (the *Cour de Cassation*), because a conviction by a criminal court would automatically open the possibility for the victim to claim compensation under Article 1382 of the Civil Code, without any further requirement to prove wrongful behaviour.<sup>2</sup>

1. The participation of victims of crimes in the criminal procedure will be further discussed below (see Chapter 3, § 2).
2. See, on the importance of this case from a civil law perspective, H. Bocken, ‘Luchtverontreiniging en het arrest van 12 april 1983,’ *Leefmilieu*, (1984), p. 89.

544. Given the increasing number of environmental regulations and regulatory standards, very often a case of environmental pollution will automatically constitute a fault, because a breach of a regulatory duty has occurred. The judge only has to engage in the balancing of interests between the freedom of industry and environmental protection, when there is no breach of a regulatory duty.<sup>1</sup>

1. See, on this balancing of interest in environmental cases, H. Bocken, ‘Aansprakelijkheid en milieubescherming,’ *Rechtskundig Weekblad*, 1973–74, 1125; H. Bocken, *Het aansprakelijkheidsrecht als sanctie tegen de verstoring van het leefmilieu* (Brussels, 1979), p. 37 *et seq.*; H. Bocken, ‘Aansprakelijkheid voor milieuschade,’ *De Verzekering*, (1981), p. 47 *et seq.* and see more specifically Court of Appeals Antwerp, 17 February 1988, R.W., 1989–90, 50.

## Part V. Juridical Actions of Individuals

### Chapter 1. Administrative Remedies

#### § 1. DEFINITION AND GENERAL CHARACTERISTICS

631. Administrative remedies consist of procedures whereby persons can ask an administrative authority to revoke, annul, or modify an administrative decision.

There is, in Belgium, no legislation addressing administrative remedies as such. There are, however, certain types of administrative remedies that are available, like the voluntary appeal, the hierarchical appeal, and the appeal to the central authority against decisions made by a decentralized authority: those are the so-called ‘non-organized remedies.’

In legislation concerning specific matters, the legislator can provide for administrative remedies which generally take the form of an appeal to a higher administrative authority (the so-called ‘organized remedies’).

632. The distinction between administrative remedies and judicial remedies is a crucial one.

First, a judge, when examining the legality of an administrative decision, may not annul a legal decision merely because his decision would have been a different one. By contrast, within the framework of an administrative appeal, a decision can be reviewed both on legal and discretionary grounds. Thus, a legal decision denying an environmental permit can nevertheless be reversed on administrative appeal if the appellate body takes a different policy view. This would not be the case in a judicial proceeding.

Second, a decision on administrative appeal, like all administrative decisions, is not binding on a judge as to its legality: it is precisely his role to verify the legality of the decision. By contrast, an issue decided by a judge is binding on the parties involved and cannot be relitigated (*res judicata*).

#### § 2. JURISDICTION

633. While judicial organization and judicial remedies are a matter for the federal legislator, the Communities and the Regions can themselves organize the administrative decision-making process in matters over which they have jurisdiction. Since protection of the environment and zoning law is a regional

matter, the Regions can organize administrative appeals as part of the decision-making process.

### § 3. NON-ORGANIZED ADMINISTRATIVE APPEAL

#### I. Voluntary Administrative Appeal

634. When a decision has been made, any interested person can ask the public authority that made the decision to revoke or modify it. Since there is no legislation concerning this kind of appeal, it follows that there are no rules as to formalities, time limits, etc.

Nevertheless, its use and utility is limited for the following reasons:

- when an administrative decision has resulted in the creation of a ‘vested right’ (like, for instance, the granting of a permit), it can only be revoked or modified to the detriment of those rights if the original decision was illegal, and even then only within 60 days after it has been made. This follows not from legislation, but from the principle of ‘legal security’ as applied by the Council of State;<sup>1</sup>
- since the public authority is under no legal duty to reconsider its decision, it is not inclined to do so;
- since there is no guarantee at all that a new decision will be forthcoming, the Council of State has held that a request to annul the original decision (insofar as no organized administrative appeal is available) must be introduced within the legal time limits (in general: 60 days after the decision has become known), notwithstanding the fact that a voluntary appeal has been made. Only in exceptional circumstances, when the appellant has brought forward new and relevant facts, and the authority in fact has accepted to review its decision, is the time limit suspended by the voluntary appeal.<sup>2</sup>

1. E.g., Council of State, *Henrard*, No. 46.457, 7 March 1994; Van Damme, M. and De Kegel, F., *Intrekking van de administratieve rechtshandeling* (Bruges, die Keure, 1994), 42–44.
2. Council of State, *Van de Sijpe*, No. 39.408, 18 May 1992; *Delrue*, No. 37.720, 24 September 1991.

#### II. Hierarchical Appeal

635. In some cases, a public authority delegates (part of) its decision-making powers to civil servants in its employ. In those cases, an appeal can be made to the public authority itself which, by virtue of its hierarchical authority, can revoke or modify decisions made by its subordinates.

Here again, there are no general rules concerning this kind of appeal. There are the same limitations as for the voluntary appeal: a decision giving vested ‘rights’ can only be revoked or modified if illegal, and then only within 60 days after it has been made. The time span for introducing a request for

annulment of the original decision is neither interrupted nor suspended by the hierarchical appeal.

### III. Appeal to the Central Authority

636. When an otherwise final decision is made by a decentralized authority (e.g., municipalities and provinces), the central authority can annul those decisions when they are illegal, or contrary to the ‘common interest.’ This type of control is organized in favour of the central authority, which is responsible for the overall policies, and hence must be able to act against decisions by decentralized authorities that are contrary to those policies.

While this control is not meant to protect private interests as such, there is nothing to prevent a person from trying to use it for his own benefit. Here again, there are no rules of general application. Usually, a letter is written to the central authority stating the reasons why the decision of the decentralized authority should be annulled. The central authority, if convinced that the decision is indeed illegal or contrary to the common interest, will then annul the decision.

637. When considering this kind of appeal, one has to bear in mind the following:

- while there are no general rules concerning this kind of appeal, each system of administrative control has its own rules concerning the time limits within which the central authority can act and which specific authority (minister, governor, etc.) exercises the control;
- since the central authority must act within a specific time span, it is up to the complainant to make sure whether the central authority has acted or not. This is important, since the 60-day period to send a request for annulment to the Council of State does not run during the procedure before the central authority. But when the time-limit expires without the central authority having acted, this is deemed to be a negative decision which must be appealed within 60 days.<sup>1</sup> If the complainant simply waits until the central authority writes him a letter to tell him it decided to do nothing, it may well be too late to start a procedure in annulment before the Council of State;
- this type of appeal is not always possible when an ‘organized appeal’ is available. For instance, the Council of State has held that the ‘organized appeal’ against a decision by a municipal council, on a building permit application, is the only one available; in this instance, the governor of the province, who generally has the power to annul or suspend municipal decisions, cannot exercise this power.<sup>2</sup>

1. Council of State, *Dewinter*, No. 59.886, 5 June 1996.

2. E.g., Council of State, *Cannaerts-Van Dessel*, No. 21.060, 24 March 1981.

## § 4. ORGANIZED ADMINISTRATIVE APPEAL

638. The main characteristic of the system of organized administrative appeal is that a decision must be made on the appeal: it is not within the discretionary power of the authority not to make a decision, as is the case with a non-organized administrative appeal. There is no general system of organized appeal; it is up to the legislator to decide whether there will be an organized appeal in a matter where he legislates. Prime examples of legislation where administrative appeal has been provided for are the environmental permit legislation and the land use legislation, discussed above.

Since each organized administrative appeal is specific for a given matter, it is not possible to put forward other common characteristics. That means that questions regarding standing, formalities, time-limits, etc., cannot be answered in general. For each of those questions, one has to consult the legislation applicable to the matter.

639. The existence of an organized administrative appeal has an important consequence for the procedure before the Council of State. Since the Council of State can only annul final administrative decisions, a request to annul an administrative decision is inadmissible if the applicant could have lodged an organized administrative appeal but failed to do so,<sup>1</sup> or failed to do so properly.<sup>2</sup>

The Council of State cannot even entertain a request for interim relief against a non-final decision,<sup>3</sup> which is a problem when the first administrative decision is not suspended by the administrative appeal. In those cases, the civil courts can order interim relief pending the final administrative decision.<sup>4</sup>

Of course, the rule that administrative remedies must be exhausted applies only to those persons for whom this remedy is available. It is possible that a decision is final for one person (who can then start a procedure before the Council of State), but not final for another person, who can lodge an administrative appeal.

1. E.g., Council of State, *Coppens*, No. 46.832, 31 March 1994.
2. E.g., Council of State, *Everaerts*, No. 50.170, 14 November 1994.
3. E.g., Council of State, *De Leeuw and Bronselaer*, No. 54.093, 28 June 1995.
4. Court of Appeal Brussel, 17 April 1997, J.T., 1997, 543.

640. Unlike judicial time-limits, those for administrative action are not extended to the next working day if the last day is a Saturday, Sunday or legal holiday.<sup>1</sup>

1. Council of State, *Heima*, No. 50.365, 24 November 1994; *Leyens*, No. 66.155, 6 May 1997.

## Chapter 2. Judicial Remedies

641. This Chapter discusses the judicial procedures to enforce substantive rules of environmental law. It must be stressed that the judicial procedures (administrative courts and courts of general jurisdiction) are not the only way by which substantive rules of environmental law can be enforced. Environmental law is for the greater part administrative law which means that public authorities play an important role in the environmental regulation.<sup>1</sup> Some examples can illustrate this: the municipal council and the provincial board are competent to grant environmental permits. Public authorities such as AMINAL are also charged with the supervision of the application of environmental law,<sup>2</sup> and appointed public servants or officers can impose safety measures and administrative sanctions.<sup>3</sup> For example, Article 31, § 1 of the Decree of the Flemish Parliament of 28 June 1985 on Environmental Permits states that the mayor can order to stop activities, to seal installations or impose the closure of an establishment, if the establishment is exploited without an environmental permit where one is required.

1. See Brussaard, W., Drupsteen, Th.G., Gilhuis, P.C., Koeman, N.S.J., *Milieurecht*, Deventer, W.E.J. Tjeenk Willink, 1996, 498 p.; Deketelaere, K., 'Evolutie en krachtlijnen van het milieurecht in het Vlaams Gewest,' in *Milieurecht in België. Status Quaestionis Anno 1997*, Deketelaere, K. (ed.), Bruges, Die Keure, 1997, 1–49.
2. Administratie Milieu-, Natuur-, Land- en Waterbeheer.
3. ICHM, *Voorontwerp Decreet Milieubeleid*, Bruges, Die Keure, 1995, 687–815 (Deel 7 Handhaving).

642. An administrative action certainly has some advantages: no decision of the court is needed for the authorities to react. As compared with judicial remedies, a quicker reaction is possible. Every individual person, even if no harm is done to him individually, can ask the (competent) authority to react against polluting activities. Nevertheless, judicial remedies are important because individual persons are more protected in a judicial procedure: the competent judge, as opposed to the public authorities, is obliged to investigate the case. Additionally, the public authorities can decide on the basis of opportunity reasons, which is not the case for the judge. For those and other reasons, the judicial remedies which individuals can use are important with respect to the enforcement of the substantive rules of environmental law.<sup>1</sup>

1. De Pue, E., Lavrysen, L., Stryckers, P., *Milieuzakboekje*, Antwerp, Kluwer Rechtswetenschappen België, 1998, 702–703.

643. A general distinction must be made between administrative courts and courts of general jurisdiction. From the perspective of environmental law, the

courts of general jurisdiction must be subdivided into criminal and civil courts. In many cases, a breach of environmental rules causes harm to an individual or to a group. The originator of the environmental pollution can be pursued under the general rule of tort liability contained in Article 1382 Civil Code: any act of a person which causes damage to another makes him liable for reparation of the damage. Almost every breach of an environmental rule qualifies as a criminal act. For that reason most of the substantive rules of environmental law can be enforced by the criminal courts. Next to the civil and criminal courts, the administrative courts play an important role in the enforcement of environmental law.

644. Judicial remedies must be distinguished from administrative remedies. Judicial remedies can be defined as juridical protection by the judge. The courts control if the decision of a public authority is in conformity with the principles of law. Judges (administrative courts and courts of general jurisdiction) cannot decide instead of the public authorities who have a certain discretion. Administrative remedies are those remedies by which a (higher) public authority can modify the first decision not only for legal reasons but also for opportunity reasons. But this distinction is getting rather vague: conformity with the principles of law includes the conformity with several principles of ‘decent’ government, such as the principle of care, the principle of formal motivation, the principle of reason, etc.<sup>1</sup>

1. See Suetens, L.P., ‘Algemene beginselen van behoorlijk bestuur in de rechtspraak van de Raad van State,’ T.B.P., 1981, 81–89 and Debaets, F., ‘De algemene rechtsbeginselen in het administratief recht,’ T.B.P., 1988, 641–652.

645. The control of the conformity with the principles of the law (legality control) before the courts of general jurisdiction is based on Article 159 of the Constitution which states that the courts can only apply national, provincial and local acts and regulations if they are in conformity with the principles of the law. It must be stressed that the adagium *actori incumbit probatio* which in ordinary court cases lays the burden of proof on the applicant, does not apply in procedures before the Council of State. In these procedures, the public authority must prove the regularity and legality of its decision.

## § 1. THE PROCEDURE BEFORE THE CIVIL COURT

646. In cases of environmental damage, a civil procedure can be instituted to claim compensation for the environmental damage and, in certain cases, direct measures such as restoration to the former situation. The claim for reparation for the damages requires proof of three elements: the damage, the fault and the causation. Following the Belgian jurisprudence, not only the breach of a rule of environmental law but also the breach of a ‘duty of care’ qualifies as a tort.<sup>1</sup> In the following paragraphs, the major procedural aspects of the civil action will be explained.

1. See Part IV *supra*.

## I. The Competent Court

647. The competence of the court is determined by two criteria: the place and the nature of the case.

### A. *The Competence Ratione materiae*

648. The Justice of the Peace is competent for all disputes where the value of the claim does not exceed 75,000 BEF (1,859 euro). The Justice of the Peace is also exclusively competent, notwithstanding the amount of the claim, for the following disputes: claims concerning easements, disputes between neighbours, damage to fields, fruits or harvests by animals or persons, urgent expropriations, etc.<sup>1</sup>

1. Articles 590–601 of the Judicial Code.

649. The Court of First Instance is the court that is competent for all matters that are not assigned to other courts. It will generally be competent for all disputes where the value of the claim exceeds 50,000 BEF (1,239 euro). The Court of First Instance also is the court of appeal for decisions of the Justice of the Peace.

### B. *The Competence Ratione loci*

650. Judges are competent only for the jurisdiction assigned to them by the law. Belgium is divided into judicial districts and cantons. A judicial district encompasses several judicial cantons. For every judicial canton, there is a Justice of the Peace and every judicial district has a Court of First Instance with a correctional chamber, a commercial court and a labour court. Courts of Appeal have jurisdiction over several judicial districts.

Cases must generally be brought before the court of the place where the opposing party lives. If the dispute concerns real estate, the competent court is the court of the place where the real estate is situated. One can also introduce a claim before the court of the place where the damage took place.

## II. The Reconciliation Procedure

651. In cases of minor environmental pollution, one can try to reach a settlement.<sup>1</sup> If the parties themselves do not succeed, one of the parties can ask the judge of the competent first instance court to try to settle the dispute. To that purpose, one has to apply to the office of the clerk of the court and explain the case (the amount of the claim, etc.). The parties will be summoned to appear before the judge, before whom they can explain their points of view. If an agreement is reached, an official report will be made. The parties are then

obliged to take into account the settlement. In case the dispute cannot be settled by means of the reconciliation procedure, the parties still can introduce a claim before the civil courts.

1. Article 1 of the Law of 12 January 1993 on the action concerning the protection of the environment imposes a settlement procedure before the court. Of course the settlement procedure is only imposed if the action before the court is based on the aforementioned law.

### III. The Procedure Before a Civil Court

652. In most cases a procedure before a civil court is instituted by summons. The complaining party has to address a lawyer or bailiff who will, in his turn, ask a lawyer to summon the opposing party. A summons must contain the following elements: the names, the professions and the addresses of the parties, the reason for the claim, the measures that are requested and the amount of the claim, the court and the day on which the case will be opened. Once the summons is served upon the opposing party, the original summons will be transferred to the office clerk of the court before which the case will be brought. That office clerk will then inscribe the case, i.e. number and register it.

653. Generally speaking, the case will be sent to the register after the first sitting. Then the parties will, through their lawyers and in writing, answer the arguments of the opposing party. There will be a new sitting if one of the parties asks for it. When the conclusions have been made, the office clerk will determine a day on which the case can be pleaded. At the next appearance before the court, the lawyers can defend the interests of their party orally. The judge will close the hearing and will give judgment at a new sitting.

### IV. The Procedure in Matters of Special Urgency

654. In some cases environmental pollution must be stopped immediately. The civil judge can take direct measures, but the procedure takes a long time. For this reason the Belgian judicial system allows summary proceedings. Article 584 of the Judicial Code states that the President of the Court of First Instance is competent to decide in all extremely urgent cases except for those matters that are reserved to the courts of general jurisdiction by law. The urgent character of a case is submitted to the sovereign judgment of the President of the Court of First Instance: it is based on the circumstances of the case and cannot be defined in abstract terms. In addition to the circumstances, the attitude of the plaintiff can be decisive: if the plaintiff himself provoked the urgency by delaying his judicial action, then he cannot invoke the urgent character of the case.<sup>1</sup>

If the President of the Court of First Instance accepts the urgent character of the case, then he judges ‘provisionally.’ The meaning of the word provisionally is further explained in Article 1039 of the Judicial Code which states that the decisions taken in summary proceedings may not harm the case. The President only decides on the claim from the perspective of urgency, which gives him a certain independence *vis-à-vis* the court that decides upon the original dispute. Therefore the decision on the original dispute cannot be seen as an appellate decision upon the judgment of the President. The advantages of this procedure can be summarized as follows: one very quickly can acquire a warrant and the President can take provisional measures of all kinds, e.g. prohibit an activity, appoint an expert, etc.

1. Lindemans, D., *Kort geding*, Antwerp, Kluwer Rechtswetenschappen, 1985, 68–92.

655. By the Law of 19 July 1991 the competencies of the judge in summary proceedings were limited: only the Council of State is competent to suspend an act, a permit or a regulation of a public authority whose revocation has been requested. However, the Council of State cannot take provisional measures by which the civil rights of the parties are affected. The aforementioned division of competences in matters of special urgency between the courts of general jurisdiction (civil courts) and the Council of State creates some complications. In some cases, it will be necessary to start a procedure before the Council of State simultaneously with a procedure before the civil court.<sup>1</sup>

1. De Pue, E., Lavrusen, L. en Stryckers, P., *Millieuzakboekje*, Antwerp, Kluwer Rechtswetenschappen België, 1998, 704–709.

## § 2. THE CRIMINAL COURTS

656. If a breach of a rule of environmental law qualifies as a criminal act, the perpetrator of the crime can be convicted by the criminal courts. Almost every environmental law contains a provision stating that everyone who violates the law or the regulations enacted on the basis of the law shall be punished with a specified sanction. In some cases it is specifically stated that anyone who operates without a licence or violates licence conditions is criminally liable. For that reason most of the rules of environmental law can be implemented through the criminal courts.<sup>1</sup>

1. See Faure, M., *Preadvies Milieustrafrecht*, Antwerp, Maklu, 1990, 19–58.

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