

Directive IPPC

Réponse au questionnaire – Conférence annuelle de l'EUFJE - Stockholm 2009

The implementation of IPPC directive in the Walloon Region of Belgium.

- This text completes the report written by Prof.Dr.L.Lavrysen on The Implementation of IPPC directive in Belgium.
- It intends to focus on Wallonia and study a more practical aspect of the implementation. Consequently, some aspects of Lavrysen's report, and specially the legislatif informations will not be repeated here.

General questions about the implementation and application of the IPPC-directive and the role of the courts.

1.How many IPPC-plants are there in the country?

See Lavrysen's report.

- At present, there are 263 identified IPPC plants in the Walloon Region against 1.205 in Flemish Region.
- Part of Walloon Region, is mainly a post industrial area, coming from a period of prosperity with charcoal and steel; factories are old and in some places, soils are polluted: it implies some specific characteristics for managing them today in terms of implementation of the IPPC directive. This industry is by its nature a huge factor of pollution, the tool is generally old and it uses a lot of energy.(for example: cement factories, glassware factories,chemistry, iron and steel industry etc...)

2.In what way are questions concerning the application of the IPPC-directive brought to court (litigation, application of a permit, appeal of a permit decision, application for a summons, criminal offence)?

As said in Lavrysen's report, courts are not involved in the permitting process as such. However, the Act of 12 January 1993 on a Right of Action for the Protection of Environment allows environmental organizations, following some criteria, the prosecutor or administrative authorities to bring before the President of the Court of First instance a civil action for cessation of acts that constitute a breach of the protection of the environment. This act anticipates the Aarhus Convention, adopted on 25 June 1998.

There is also always a possibility for a citizen to sue before a civil court to claim damages if a factory generates a damage to him through faulty behaviour, or, in case of accident, the prosecutor can sue the responsible person, in case of death or injuries, before the criminal court. (It's the case for example in AZF Toulouse, in France).

That means that next to the Council of State (judge of appeal in last level in the administrative pyramid) ordinary judges may be confronted with IPPC-related cases.

Litigation may not be specific to IPPC directive, and one can come to the court through waste, environmental permit cases, for example.

3. Which authority (authorities) issues permits according to the IPPC-directive? How far has the integration according to the directive reached? Can, in your country, one authority issue an IPPC-permit comprising the total environmental impact of the polluting activity (water, land, air, waste, etc) or does the company (the applicant) have to send applications to different authorities?

The environmental permit is an integrated permit, and as stressed in Lavrysen's report, the integration is pushed even further, in the Walloon Region, in that sense that there is a unique permit (permis unique) when the applicant wants both an environmental permit and a building permit, with consequence that in this case, one public participant procedure is applied, and one decision will result: a combined permit.

The principle of the directive is auto control (through authorizations) and surveillance.

- For authorizations, the proceedings is described shortly in p.5 of the report. The permit is delivered by the municipality (but there are exceptions, for example if the applicant is situated on several municipalities). The municipality asks an advice from the "technical civil servant" (who is a delegate from the administration and who realizes a synthesis of the technical notices of the different administrative sectors concerned with environment (waste, water, air, land). Usually, there is a code of good practice (specially with more important establishments): the applicant meets the delegate of the administration and checks all the needed enquiries about all environmental impact, and all the conditions that will be demanded. This may be combined with the public enquiry in the case of class 1 establishments (the more harmful ones).
- This proceedings induces a real revolution into the administration. Before the implementation of the IPPC-directive, each sector was working separately and didn't take the others into account; there was not convergence of interests. Those different sections are now obliged to cooperate, to meet each other and to discuss about the balance of interest, between the objective of reducing pollution, using the best available techniques and the necessity of economic development (employment, for example).
- The proceeding is different if the establishment concerned belongs to class 1 or class 2. There are not IPPC concerns for class 3.
- Next to authorization's system, there is the process of compliance of the existing plants, on the initiative of the technical delegate (from the administration), who verifies if the permit is conform to the environmental situation of the plant and to the updated environmental laws He can add new conditions to the initial permit.
- Practically, to review a permit and change its conditions is not so easy, and there are many practical obstacles to it. Two examples: 1. It should be ideal to have separate sewer networks for evacuating different sorts of used waters (domestical use, industrial use or rain water); when the establishment is located down town or in a crowded agglomeration, the sewer network of the factory is the same than the one of the municipality and it's not possible (or it would be too costly) to build a new one. 2. In some places, like the town Seraing, near Liege, where Arcelor (ex -Cockerill is implanted), people is used to live in a polluted environment and prefers to keep it in order to save the employment; this paradox is observed in many historical industrial places, not only in Wallonia, but also in France, for example.
- Sometimes, the balance is made between saving the employment, or economy, and forcing a company to respect environment. It's a matter of fact, following my personal

enquiry, that a company who has economic problems will more easily have problems to respect environmental rules as well as fiscal and social prescriptions...

4. Which authority or court hears appeal against IPPC-permits? What competence does the authority or court have to change/amend the permit? Can it for example decide about new or changed conditions? Can it just withdraw the permit or parts of the permit?

See Lavrysen's report.

5. Who – in addition to the operator of the plant – can bring a case concerning IPPC-matters to court by appealing against an IPPC-permit? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What kind of obstacles are there for them to bring a case to court: for instance different kind of procedural costs?

In addition of what is said in Lavrysen's report, one should stress the report of compliance committee of Aarhus Convention.

Belgium is not well situated in the scale of good access to justice, for two main reasons: the cost of access to justice (since the implementation of loser pays principle, by act of 27 may 2007) and the restricted access to justice for associations: the case law followed by the Council of State being more or less the same as the one followed by the CJCE¹.

6. On what basis is decided what is considered to be the best available technique (BAT) in a certain case? What is the role of the BREF document?

The role of BREF document is central in the proceeding for according a permit. This document allows to evaluate the objectives required by the administration, by reference to what is possible regarding to the BAT.

Usually, the administration doesn't intervene in the choice of technologies, but set up a level of protection to be obtained, whatever the means used by the company (it can even be a management technique, to rationalize the use of energy, for example).

7. Is there a time limit for the IPPC-permit, or is the permit valid for ever? Is the permit holder obliged to apply for a new permit after a certain time period? Can a supervisory authority issue injunctions which go further than the conditions of the permit as regards environmental matters? Under what circumstances can a supervisory authority request a review of the permit and its conditions?

The maximum duration for a permit is 20 years, which is a bit long.

After that time, the company or the owner of the factory must apply for a renewal of the permit.

To counterbalance this problem, mechanisms of revision have been organized by the decree (11 mars 1999):

- Each year, at the anniversary date of the permit, the company must communicate to the supervisory authority the list of modifications that happened on its site during the

¹ Compliance by the European Community with its obligations on access to justice as a party to the Aarhus convention, Marc Pallemaerts, IEEP, June 2009; Inventory of EU Member States' measures on access to justice in environmental matters, Milieu Ltd Belgium, 2007.

year and the supervisory authority checks up if these modification must imply a review of the conditions of the permit.

- Following to articles 65-67 of the decree, the supervisory authority (delegate civil servant) can intervene at any time (following a proceeding defined in the decree). This tool is, in fact, difficult to use: the supervisory authority has to demonstrate that the permit has to be modified or completed.

8. Is the choice of the localisation of an IPPC-plant considered in the same process as the IPPC-permit and the conditions of the permit? Or is the localisation decided in a separate process according to another legislation? In that case; which comes first, the decision on the localisation or the IPPC-permit?

Normally the localisation depends on another legislation (planning and building legislation which determines specific sectors and zones, as agricultural, industrial and so one). But:

- In the case of a unique permit, the authorizations concern as well environmental legislation as planning and building legislation (cf Lavrysen's report.)
- Some of the conditions (terms) of the authorization can take into account the localisation of the plant: for instance Natura 2000 zones;
- The conditions (terms) of the authorization may also take into account, in certain sensitive areas, the legislations about air, water : in these cases, a certain level of quality must be respected and consequently, the conditions may be more severe than in another location for the same kind of establishment.

9. Are the EIA-directive (Council Directive of 27 June 1985 on the assessment of the effects of a certain public and private projects on the environment, 85/337/EEC) and the IPPC-directive implemented in the same legislation in your country, so that you in one single process get a permit that fulfils the demands of both directives ? If not so; how is the EIA-directive implemented? For example in a special legislation, in planning and building legislation or otherwise?

Yes. The EIA-directive is partly transposed in the decree on permit of environment, called "permis unique".

See Lavrysen's report, p.11.

In order to grant a maximum of legal security to the companies, the decree has created a deadline called "délai de rigueur", into which the decision must be taken by the permit authority to give or to refuse the permit, otherwise, the authority is supposed to have given tacitly the authorisation. This time runs from the moment the permit is decided admissible and complete.

For the permit authority, the exercise is not easy, because, as said before, different areas of the administration, ruling different matters (air, water, waste, land...) have to communicate between each other in a given time.

The EIA, assessment of the effect on projects on environment, when it's asked (class 1 establishments) takes time, but as it is necessary to make the file complete and admissible; the time will not begin to run until it has been realized.

Practically, as said before, there is a kind of partnership between the applicant and the delegate of the permit authority in order to complete the file in optimal conditions.

This method is successful: before the decree was implemented, the time needed to obtain a permit could be 3 years. Now, it has been reduced to 6 to 9 months maximum.

This collaboration induces also a positive message to the companies which is that environment is not only a cause of constraint, but that to respect the environmental laws can also have advantages, like sparing water, energy, for instance, through new technologies or new behaviours, and thus, making savings.

10. Suppose an existing IPPC-plant wants to double its production and that this will be done by duplicating most of the process equipment. The plant will thus consist of an old and new line of production, but some equipment that is necessary for environment protection will be parted so that it is used by both lines. The application concerns only the increase of production (the new line) and not the whole production (both old and new line). How does the permit authority handle this situation? Does it issue a permit concerning only the increased production (for new line)? Or does it demand a new application concerning the whole production (old and new line)? Or what? (See article 12.2) This question can be considered in light of the EIA-directive, which demands the assessment of a project as a whole (and not cutting of the salami_).

See Lavrysen's report.

As it is said, the delegate of the permit authority will take into account the whole establishment (both old and new line). The criterion is that of a unit of production, which means technical unit or geographical unit. The real situation is assessed, so that, for example, an applicant couldn't separate two different establishments because they would not be implanted at the same location, or they are not owned by the same person. This can of course be a subject of litigation between the permit authority and the applicant.

It doesn't mean that the delegate of the permit authority can do anything: he is limited in his assessment, by the limits of the application. But thanks to the EIA assessment (for class 1 establishments), the authority has to consider all the area concerned, and not only the plant planned.

For the class 2 establishments, an informal EIA is also required to complete the demand. So the permit authority has a large power of appreciation.

11. Can the permit authority decide on conditions based on BAT, even if the application only describes environment protection measures that are less strict? How does the authority handle applications that are not based on BAT?

The permit authority must base its decision, regarding to the decree, on the implementation of BAT.

12. If there are national general rules on emission standards that do not match BAT, how are they applied by the permit authority?

There are different regional Executive Orders setting general and sectoral environmental conditions for different categories of establishments subject to the environmental permitting system. National law doesn't intervene in this matter that has been mainly regionalized (article 6 of Act of 6 august 1980, about regionalization).

The panel is the following:

- general conditions are request to all establishments, class 1 or 2
*In class 3, there are not IPPC establishments, and they are only submit to “integral conditions”
- sectoral conditions (for special plants like cremation centers etc...)
- personal conditions, only for the concerned establishment. If general and sectorial conditions are not sufficient, it is required new conditions regarding to BAT.

13. How does existing industries meet the demand of the IPPC-directive in your country? Who has the responsibility to make sure that the requirements are met? Is it the supervisory authority, the operator of the plant or someone else? What are the consequences if an existing industry does not meet the requirements? Can it be closed? Or is a certain time period accepted before measures? How long? (see article 5).

As said in Lavrysen’s report, the obligation to review and update the environmental permit is imposed by article 97bis of the Executive Order of 4 July 2002. An update is also necessary in the circumstances indicated in article 13 of the IPPC Directive.

Practically, they are two kinds of companies: 1) the first kind wants to anticipate the law and collaborate to its implementation; 2) the second kind prefers to wait and see. In this second case, the supervisory authority takes the initiative of modifying the permit and allows a certain time period to respect the new conditions. Usually these periods of time are decided on a common basis with the responsible person of the company.

The DPC (environmental police) checks if the conditions have been respected in time allowed. If not, penalties may be enforced, for example, warning and injunctions, the last and more severe one being the closing of the establishment. In practice, the closing will only be ordered if the establishment represents a danger for the population.

It must also be taken into account, the new RW decree of 5 June 2009, about criminal penalties in case of infringement to environmental laws.

The mayor of the municipality where the establishment is settled has also into his competences, according to Communal law, the right to stop the activities of an establishment which may be harmful for the population.(article 135§2 of the New Communal Law)

14. Which authority is supervising IPPC-plants? How often do inspections take place? What enforcement policy do they have (warnings, injunctions, sanctions and so on)? Which type of sanctions can be applied in case of violations?

See Lavrysen’s report.

Inspection take place at least every three years.

The decree “sanction” (5 June 2009) can be implemented, as said in the report. In this case, the penal judge can be competent if the prosecutor decides to prosecute the establishment which doesn’t respect the environmental law. There is also, regarding to the law of 4 may 1999 possibility to prosecute the moral person (the company) at the same time as the private person (chief executive manager, for example, or any other person).

Through the law, good tools have been created. The question is of the effectivity of those tool.

The main problem, as well for the administration (supervisory authority) as for the judiciary system (prosecutors and judges) is a question of human means. In very practical way, it may be said that “we don’t always have the means of our ambitions”.

It’s a matter of fact that all the establishments cannot be supervised, far from that, and that all the companies are not ready to cooperate. In the best case, some of them “wait and see”, hoping to be forgotten by the administration. Some others simply are not aware of the necessity to ask or complete a permit.

This is a huge problem. Maybe the States, or Regional Governments should decide to invest more in people in charge to supervise the respect of the law, and to enforce effective sanctions if needed.

The second (and maybe first)level of action would be to educate and sensibelize the public to the necessity of respecting the environment, and of knowing the environmental legislation which is very poor, in fact, at present.

Practical case: an example from Region wallonne.
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A new tannery is going to be build in the Region Wallonne. The tannery will have a production that exceeds 12 tonnes per day and is thus an IPPC-plant.

They are not tanneries that exceed 12 tonnes in Region Wallonne.
The case considered will only be the capacity of 12 tonnes.

Q.1. The municipality

Q.2 Yes, if it is a class 1 establishment.

Q.3 Yes, in certain cases: see answer to question 8, before.

Q.4 Yes. The cost of the EIA may be very expensive. Otherwise, the costs asked by the Walloon Region are on a scale from 0 to 500 € (permit is for free for class 3 permit, 125 € for class 2 permit and 500 € for class 1 permit). This doesn’t include the cost for EIA and other costs that may be asked by the townhall.

Q.5 Yes. As said before, all the sectors of administration concerned by environment must cooperate, which is a revolution in their way of working. Now they have to coordinate. The maximum of involved sectors or people are asked their opinion like for example, firemen, Fluxys (gazoduc) etc...

Q.6 If EIA (class 1), the author of the project must organize a meeting to inform the public. For the class 1 and 2 establishment, the permit authority must, when the demand is admissible and completed, organize a public enquiry, and organize the advertizing towards the public, including the possibility to consult the file at the Public Hall.

Q.7 The permitting authority will issue the permit on certain conditions. Mark with an X the in the table what kind of conditions that might be laid down. And please make good use of the “remark”-column, with for instance examples of conditions!

Kind of condition	Yes	No	Remark
conditions concerning the tanning technology itself (clean production)			

conditions concerning the cleaning technology (end of pipe solutions)	X		An objectif to be obtained following the BAT
limit values for water pollutants	X		
limit values for air pollutants	X		
conditions concerning solid wastes	X		
limit values for noise	X		
limit values for energy consumption		X	
conditions concerning transports to and from the plant	X		
conditions about what chemicals that are not to be used in the production		X	Depends on federal law " Normes de produits"
conditions concerning the control of discharges	X		

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Other questions	Yes	No	Remark
can the setting of conditions be postponed in the permit?	X		
can stricter conditions than what is stated in the BREF-document be set?	X		

Q.8 The maximum level of emission authorized will take into account:

- performances that can be performed regarding to BAT
- capacities of the receptive milieu. For example, if it is saturated of a certain substance, this substance must be eradicated.

Q.9 Any concerned person can appeal.

Within (during) the proceedings of authorization, appeal can be done against the authorization in front the competent authority (Government of RW, and after, Council of State).

When the delivered authorization is valid, the plaintiff or injured part may appeal to police or to court, following different proceeding, as said above (question 2) : complain to penal court, civil action to the civil judge according to the act of 12 January 1993, or any other civil complains based mainly on article 1381 and following of civil law, and concerning the liability; in this case, as well the authority, as the polluting industry, as well as any other recipient can be taken to Court . This is not exhaustive.

Françoise Thonet
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President of the “Pool de réflexion sur l’environnement » at Mons.

