

2016 EU Forum of Judges for the Environment Conference

The ECHR, ICCPR and EU-Charter as beacons in environmental prosecution and adjudication

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BELGIAN REPORT

Dr. Carole M. Billiet & Prof. Dr. L. Lavrysen ¹

1. The right to be tried within a reasonable time

Questions

- 1.1. What usually triggers, in your country, the opening of a file on an environmental offence at the public prosecutor's office? The reception of a notice of violation recording the offence? Other triggers?
- 1.2. What is on average the time required in your country in criminal proceedings to go from a citation to a first instance judgment and to an appeal judgment?
- 1.3. What procedural steps can take time?
- 1.4. Are you aware of difficulties with this guarantee?
- 1.5. What are the legal consequences of undue delay in your legal system?

Please illustrate your answer with case-law examples

1.1/ In the vast majority of cases (95%+) the judicial file on an environmental offence is opened at the public prosecutor's office following the reception of a *notice of violation* ('NOV') recording it. Third parties (private persons, public authorities, NGO's, legal persons) claiming to have suffered damages because of (a behaviour they consider to be) an environmental offence have ways to bypass the public prosecutor's office ². The preferentially used one is direct citation before the criminal court, observed nowadays in maximum 2% (classical environmental cases – pollution, nuisance) to 3%, (building permit cases) of the caseload reaching the criminal sanctioning track. Direct citation offers certainty about the case reaching the court. The other option is a complaint in the hands of an investigation judge. This approach doesn't guarantee that the case will reach the court; the Judges' Council Chamber

¹ The information collection was closed on 21 October 2016.

² C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerpen – Apeldoorn, Maklu, 2011, 837.

(Investigation Court) can decide to drop it. Its use is very limited: descriptive statistics with regard to the work of the public prosecution mention numbers beneath 0,5% ³.

The *Milieuhandhavingsrapport 2013* [Environmental Enforcement Report 2013] ⁴, which gathers data from 2009 to 2013 regarding environmental law enforcement in the Flemish Region, sketches the following picture of the intake of environmental crime files by public prosecutor's offices.

File source	2009	2010	2011	2012	2013	%
NOV Police (federal and local)	4,131	4,147	3,910	3,237	2,899	65%
NOV Environmental inspectorates	1,657	1,860	1,853	1,570	1,551	30%
Third parties	67	69	67	36	48	1%
Other (with NOV local inspectors)	307	291	172	178	123	4%
Total intake	6,162	6,367	6,002	5,021	4,621	100%

The category 'Other' mainly concerns cases send through by other public prosecutors offices and courts from the same judicial resort, leading to the opening of a new file. It however also includes NOV's send in by local environmental inspectors. ⁵

1.2/ The following descriptive statistics based on data from the registries of the five Belgian courts of appeal, sketch an variated picture of the time between *citation* and final judgment in *appeal* ⁶. The years covered are 2008 to 2014. The caseload under consideration relates to building permit offences. *Two to three years* are needed to reach a judgment in appeal. Whether or not the first instance judgment stands in appeal, influences processing speed.

Criminal justice, practice	2014	2013	2012	2011	2010	2009	2008
Average time in days	959	685	992	1045	796	812	806
- First instance confirmed	525	556	393	687	348	487	468
- First instance reformed	1405	947	1202	1299	977	774	1098
- First instance partially reformed	673	563	609	857	785	849	719

With regard to the first instance level, simple environmental cases get a judgment in one to four months after hearings. A simple case is a case that can immediately be taken into deliberation. Case characteristics halting an immediate taking into deliberation are most commonly the following ones: the need of whatever expertise; the necessity to appoint a representative *ad hoc* (legal person as defendant); the defence's request of concluding periods, a request that cannot be refused; a control of the actual local situation and its eventual reparation.

It is interesting to compare to administrative fining delays: see immediately below, *sub* 1.3/.

³ See, for instance, VANDERBEKEN, T. & BALCAEN, A., *Strafrechtelijke sanctionering van milieurecht: stroomschema van PV tot vonnis*, Lawforce Working Paper 2007/2, p. 40, www.environmental-lawforce.be

⁴ VLAAMSE HOGE RAAD VOOR DE MILIEUHANDHAVING, *Milieuhandhavingsrapport 2013. 5 jaar Milieuhandhavingsdecreet*, Brussel, VHRM, 2014, p. 144-145 (hereafter 'Milieuhandhavingsrapport 2013'). See www.vhrm.be

⁵ *Ibid.*, 145

⁶ Data processed by P. LEFRANC, unpublished working note.

1.3/ As far as we know, there isn't a specific procedural step that can be pointed out as 'making' the time needed to render a judgment or that influences in a dominant way the time the public prosecutor's office and the bench need to reach a judgment. Delays are mainly made by the capacity in terms of manpower available to handle the workload.

This dependency on sufficient manpower to achieve reasonably fast sanctioning responses to environmental offences is of course equally present in administrative sanctioning. Thus, for instance, the Flemish administration competent to impose administrative fines to punish environmental offences is supposed to take such decisions within a periode of 90 or 180 days, depending of the seriousness of the offence. Because of a severe understaffing that lasted until late 2012 ⁷, files commonly took two years or more to be handled. An eventual appeal at the Flemish Environmental Enforcement Court then added on average a six-seven months to this delay ⁸, bringing the sum of a first instance and an appeal level near to some three years, pretty much as in the criminal sanctioning track.

1.4/ The ECtHR judgment in *Hamer v. Belgium* (27 November 2007) created a problem with regard to remedial sanctions. See immediately below, *sub* 1.5/.

1.5/ In the wake of the ECtHR case-law pertaining to the legal consequences of undue delay in trying judicial cases, the (criminal chambers of the) Belgian Supreme Court developed the position that such delay could justify penalties beneath the legal minimum and, in more extreme cases, even a simple declaration of guilt without any punishment. This judicial solution has been codified in 2000 in article 21^{ter} Preliminary Title (PT) of the Criminal Procedure Code (CPC) ⁹. Article 21^{ter} PT CPC applies to cases where the undue delay didn't damage the rights of the defence, only brought the defendant a too long-lasting uncertainty with regard to the outcome of the case. Indeed, whenever the delay damaged the rights of the defence in a severe and irreversible way, the case against the defendant will be considered non receivable ¹⁰.

Interestingly, the Council of State upholds a similar (but not identical) position regarding the legal consequences of undue delay when imposing administrative fines. In two judgments of 7 November 2013 it ruled that the legal consequence of the violation, by the fining administration, of the requirement to decide within a reasonable delay, is not the loss of fining competence. Its legal consequence is that the fining administration, and the administrative judge controlling it, can impose a milder fine to mitigate the discomfort caused by the delay or can decide to impose no fine whenever the delay brought along the loss of evidence. ¹¹ A leading author stresses the lack of coherence in the Council of State case law regarding the legal consequences of the violation of the requirement to decide within a reasonable delay.

⁷ *Milieuhandhavingsrapport 2013*, 182.

⁸ MILIEUHANDHAVINGSCOLLEGE, *Werkingsverslag 2013*, Brussels, MHHC, 2014, 16.

⁹ Law 20 June 2000, *Belgian Moniteur* 2 December 2000.

¹⁰ Constitutional Court, 16/2010, 18 February 2010; Constitutional Court 51/2010, 29 April 2010.

¹¹ Council of State (cass.) nr. 225.367, 7 November 2013; Council of State (cass.) nr. 225.368, 7 November 2013.

Indeed, other judgements conclude to a *de facto* loss of the possibility to exercise the decision competence involved.¹²

In the *Hamer* case a residence was built in 1967 in a forest area without any building permit. In appeal, the Court of Appeal of Antwerp, using article 21^{ter} VT CPC, pronounced a simple declaration of guilt completed with a remedial sanction, namely an order to restore the place in its original state, a sanction implying the destruction of the illegally build house. The Belgian Supreme Court upheld this decision, stressing that the remedial sanction was not a penalty.

The ECtHR did not follow this view. Stressing the unbreakable bond between the public prosecution and the demolition order and mentioning the severity of the sanction, it labelled the order given as a punitive sanction.

The *Hamer* judgement, severely criticized in Belgian doctrine for its negation of the non-punitive remedial nature of the demolition order, has been creating havoc ever since with regard to the qualification of remedial sanctions at large under the ECHR and with regard to the coexistence of punitive and remedial sanctioning spread over the criminal and the administrative track¹³. The higher courts as well as the majority of doctrine, however, confine the relevance of the judgment to the very specific situation and sanction (demolition) it handled.

2. The right to a fair trial as including the right to respect of judgments/ implementation of judgments

2.1. What do you know about the implementation of judgments in your country? Are punitive sanctions (prison sentences, fines, other) implemented? Are remedial sanctions (reinstatement of the environment, compensatory action, other) implemented? Who is in charge? What goes well, wrong?

2.2. Can criminal courts also impose remedial sanctions in your country? If so, can they do so *ex officio* or only on request by the prosecution or a civil party?

2.3. Worldwide NGO's play a significant role in the prosecution of environmental offences. Can they be a civil party in criminal proceedings under the law of your country? Do they have an easy access to criminal proceedings or are there severe conditions to meet? Can they obtain damages? Can they request remedial action?

Please illustrate your answers with case-law examples.

2.1/ Belgian criminal law distinguishes main and additional sanctions. The main sanctions applying to the quasi-totality of environmental offences are prison sentence, fine and community service. As a rule – a rule knowing limited exceptions – additional sanctions can only be imposed together with a main sanction.

¹² I. OPDEBEEK, “De sanctie voor schending van de redelijke termijn bij het opleggen van bestuurlijke boetes in het milieurecht: geen zwart-wit verhaal maar wel een verhaal van 50 tinten grijs...”, *MER* 2015, 158-165.

¹³ See, for instance, recently, DEBERSAQUES, G. & DE BACKER, A., “Het decreet betreffende de handhaving van de omgevingsvergunning: een eerste verkennende analyse”, *TROS* 2015, 21-59.

The main sanction criminal courts nearly always impose in environmental cases is the fine (99% of judgements carrying a conviction). The actual paying of fines isn't that brilliant. Empirical research finds that payment occurs for some 69% of environmental convictions¹⁴. In other words: one out of each three fines isn't paid. To appreciate this finding, however, one has to know that in the country the payment level of criminal fines, all categories of offences considered, is lower. An auditing report of the Court of Accounts of 2007 mentions percentages ranging between 25% and 52%.

Interestingly, payment levels of administrative fines sanctioning environmental offences tend to be similar to better. A payment level of 65%¹⁵ is bottom. Some strands of fining activity, such as the fines regarding waste littering in the Brussels-Capital Region, have payment levels up to 85%¹⁶. Noteworthy too is that administrative fines get paid faster than criminal fines. The Environmental LawForce research finds payment of 2 on 5 administrative fines within 60 days after the communication of the fining decision¹⁷, whereas only 1 in 10 criminal fines gets paid that quickly. As time is a factor in the perception of punishment by the offender, this finding is worth further thought.

Imprisonment is a penalty used for environmental offences. The Environmental LawForce research project learned us that in the years 2003-2007 imprisonment was imposed in 10% of the environmental case convictions in the judicial resort of the Court of Appeal of Gent¹⁸. The implementation issue, however, did not arise in most of these cases because most of imprisonments were imposed as a fully suspended sanction (76% of imprisonments in first instance). The remainder, including a fraction of partially suspended imprisonments, did barely get execution. Since 2005, effective prison sentences up to 6 months were not executed at all. Moreover, effective prison sentences from 6 months to maximum 3 years were only partially executed due to insufficient place in prison facilities. As a result, only a handful of all prison sentenced inflicted in the case-load studied did get some implementation.¹⁹

The Belgian Constitutional Court ruled for respect for judicial decisions in a specific setting where an administrative organ was given discretion with regard to the implementation of a judgment. In the Flemish Region of Belgium, an administrative organ, called the "Supreme

¹⁴ Environmental LawForce research project, *unpublished data*.

This research project ran from 2007 to 2011 (see www.environmental-lawforce.be), studying (1) prosecution and sanctioning practices regarding environmental offences in the years 2003-2007 in the resort of the Court of Appeal of Gent and (2) administrative fining practices in those same years in the Brussels Capital Region. Unpublished data regarding criminal fines imposed by the then while courts of first instance of Gent, Ieper and Kortrijk.

¹⁵ Environmental LawForce project, unpublished data regarding administrative fines imposed by the Brussels Environmental Agency.

¹⁶ C.M. BILLIET, *Bestuurlijke sanctienering van milieurecht. Wetgeving en praktijk*, Antwerpen-Oxford, Intersentia, 2008, nr. 751 (hereafter 'BILLIET (2008)').

¹⁷ See also BILLIET (2008), nr. 750: payment of 2 out of 5 administrative fines happens readily and an additional 1 out of 5 gets paid with only a rather short delay.

¹⁸ See C.M. BILLIET & S. ROUSSEAU, "How real is the threat of imprisonment for environmental crime?", *European Journal of Law and Economics* 2014, vol. 37(2), 183-198 especially 191-195.

¹⁹ *Ibid.*

Council for Enforcement” had been given the competence to decide on a reasoned request that a penalty imposed by a judge to enforce a remedial order for a criminal violation of land use planning law (Art. 6.1.41, § 3, of the Land Use Planning Code) is recovered only partially, or that the recovery should be temporarily suspended. The Constitutional Court held that by giving such power to that Council it can obstruct the execution of judgments, which is contrary both to the fundamental principle of Belgian law under which court decisions can only be changed by the use of judicial remedies, as to division of competences between the federation and the regions. The rules concerning penalties are indeed laid down in Articles 1385*bis* to 1385*nonies* of the Judicial Code and are in principle within the jurisdiction of the federal legislature. Under Article 1385*quater*, first paragraph, of the Judicial Code, the penalty as soon as it is forfeited belongs in full to the party that has obtained the conviction. Although that party may abandon its implementation on the basis of that provision, the regional legislator cannot determine, without violating both the principle of *res judicata* of the judicial decision to which the penalty was imposed as to the rules concerning the division of powers, that an administrative body can prevent its recovery. The provisions at issue were as a consequence found incompatible with the rules established by or under the Constitution to determine the respective powers of the State, the communities and regions and not compatible with Articles 10 and 11 of the Constitution. For that reason it was not necessary for the Court to check its compatibility with Art. 6 ECHR, Art 1 First Additional Protocol ECHR or Art. 14 ICCPR²⁰

2.2/ Belgian criminal courts can impose remedial sanctions when dealing with environmental offences. As a rule, remedial sanctions (‘maatregelen’) can only be inflicted as an annex to a main punitive sanction.

a/ Each region enacted enforcement legislation including specific provisions for the criminal sanctioning of environmental offences. The criminal sanctioning possibilities include remedial sanctions.

The most flexible sanctioning possibilities are provided for in the Flemish legislation. Article 16.6.6 *Decreet 1995 Algemene bepalingen milieubeleid* (‘DABM’) [Decree General Environmental Policy Provisions]²¹ gives criminal courts the competence to issue remedial orders as a sanction in annex to a punishment, namely the order to restore a place in its original state, the order to end an illegal use and the order to realize adaptive works. The court sets a time limit to implement the order. The court can issue the order *ex officio*, on request of the public prosecutor or on request of a civil party. If a mandated public officer of the environmental administration requested remedial action, the order will be based on this request. Additionally, Article 16.4.4 DABM prescribes mandatory remedial action against illegally abandoned waste. Whenever convicting for the illegal abandonment of waste, the criminal court condemns the offender to collect, transport and process the illegally abandoned

²⁰ Constitutional Court, n° 113/2015, 17 September 2015, *Vermer and Others*.

²¹ The main part of the DABM regulating environmental law enforcement is its Title XVI. Hence, we will often refer hereafter to ‘Title XVI DABM’.

waste or to pay back the costs that the local authorities or the regional waste administration contracted to do so.²²

The Environmental LawForce research found that criminal courts use the remedial sanctions. An interesting example of such remedial action is to be found in the following appeal judgment of 2014 regarding the illegal destruction of historic permanent grasslands by draining them and sowing winter wheat. Following the claim of the Flemish *Agentschap voor Natuur en Bos* [Nature and Forest Agency], the Gent Court of Appeal condemned the offenders to eight precise measures that would undo the draining and restore grassland and humidity. The sanction had to be implemented within one year; each day delay would give rise to a penalty payment of 100 €.²³

In the Brussels-Capital Region, the most relevant provisions are to be found nowadays in the *Wetboek van inspectie, preventie, vaststelling en bestraffing van milieumisdrijven* [Code regarding inspection, prevention, recording and punishment of environmental offences] (hereafter 'Environmental Enforcement Code'), a code that amended previous enforcement legislation and entered into force on January 1st 2015. Thus, for instance, Article 37 Environmental Enforcement Code. Echoing article 16.6.6 DABM, this Article gives the courts the competence to order the restauration of a place in its original state, or a state representing no danger or hindrance any more for the environment and public health, and the competence to order the realisation of adaptive works. The judge can issue the orders on request of the Brussels environmental agencies (Brussels Institute for Environmental Policy and Brussels Waste Agency); he cannot do so *ex officio*.

In the Brussels-Capital Region, prosecution rates of environmental offences are lower than in Flanders and the Walloon Region. No information is available on the rate of convictions imposing remedial sanctions.

For the Walloon Region, the most relevant provisions are the Articles D.156 to D.158 of Book I, Part VIII of the *Code de l'Environnement* (hereafter 'Environmental Code'). Article D.157, §1 Environmental Code gives the courts a competence rather similar to Article 16.6.6 DABM (Flanders) and Article 37 Environmental Enforcement Code (Brussels). These sanctions cannot be imposed *ex officio*. Interesting are the remedial sanctions provided for by Article D.157, §2 Environmental Code: the judge can, *ex officio*, order the offender (a) to make a study to determine appropriate remedial and security measures, (b) to take each action fit to protect the population or the environment against the nuisances caused, or to reduce or end such nuisances, or to close the place concerned from access, and (c) to stop all exploitation, for a given time he sets, on the sport where the offence was committed.

To our knowledge, no information is available on the use of remedial sanctions in the criminal sanctioning track in the Walloon part of the country.

²² Remedial action that classifies as a security measure, not requiring a conviction, is the interdiction to exploit the installations that caused the offence for a given delay set by the court. Such prohibitions can be issued *ex officio* based on Article 16.6.5 DABM.

²³ Hof van Beroep Gent, 27 juni 2014, O.M. t. V.J., *unpublished*.

b/ Article 44 of the Belgian Criminal Code gives the criminal courts a general possibility to order, *ex officio*, a *restitutio at integrum*. This Article has been used with regard to building permits, to order the restoration of a place in its original state.

2.3/ NGO's can be a civil party in criminal proceedings. The law regulating this is the general criminal procedure law regarding civil parties. Civil parties can join a pending case by a simple declaration (the public prosecutor has a duty to alert "all known victims" of a case he is prosecuting). They can also start the criminal proceedings, through a direct summoning with the court or through a complaint with the investigation judge. If doing so, the civil party has to pay a bail. If a conviction is pronounced, the civil party recovers her bail.

Civil parties have pre-trial and trial rights. The pre-trial rights (e.g. ask for additional investigation access, access to the criminal file, right to attend hearings of the investigation tribunal) allow them to function as watchdogs to keep the investigation progressing.

Standing as a civil party typically aims at restitution, *in natura* wherever possible, in damages where or insofar restitution *in natura* is not possible. Damages include material and moral damages.

So yes, NGO's can obtain remedial action by claiming restitution. See also article 16.6.6 DABM, which gives the civil party a specific access to remedial action.

In a very interesting judgment of January 2016, the Belgian Constitutional Court clarified the moral damages NGO's are entitled to. The Constitutional Court held that the provision of the Civil Code (Art. 1382) concerning fault based liability is violating the Articles 10 and 11 of the Constitution if interpreted in such a way so that Environmental NGO's can only claim one symbolic euro as compensation for moral damages. The Articles 10 and 11 of the Constitution enshrine the fundamental rights to equality and non-discrimination.

The Court argued that the moral disadvantage an environmental NGO may suffer due to the degradation of the collective interest in the defence of which it is established is, in several respects, special. In the first place, that disadvantage does not coincide with the ecological damage caused, since ecological damage constitutes damage to nature, so that the whole of society is harmed. The damage concerns goods such as wildlife, water and air, belonging to the category of *res nullius* or *res communes*. Furthermore, the damage to non-appropriated environmental components can as a rule not be estimated with mathematical precision, because it involves non-economic losses. In terms of the rules governing civil liability, judges must assess the damage *in concreto* and they may base it on equity if there are no other means to determine it. The compensation must, as far as possible, reflect reality even in the case of moral damage. It should be possible that in the case of moral damage to an environmental NGO, the judge can estimate the damage *in concreto*. In these circumstances, s/he should take into consideration the statutory objectives of the NGO, the extent of its activities, its efforts to realise its objectives and the seriousness of the environmental damage at stake. Limiting the moral damage to one symbolic euro is in that respect not justified. It would disproportionality harm the interests of environmental NGOs that play an important role in guaranteeing the constitutional right of the protection of the environment. Therefore, the Constitutional Court promoted another interpretation, concluding that "*Article 1382 of the Civil Code does not infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 23 and 27 of the Constitution and Article 1 of the First Additional Protocol of the European Human Rights Convention in that the interpretation does not preclude the granting to a legal entity pursuing a collective interest, such as the*

protection of the environment or specific components of it, compensation for moral damages to that collective interest, that goes beyond the symbolic sum of one euro.”²⁴

3. The right to be presumed innocent

3.1. What are the basic principles of evidence in the criminal law of your country? Are the means of proof free or restricted? What evidence is most often used in environmental cases? What type of evidence creates troubles (too costly, too difficult to obtain, too easily mismanaged by environmental inspectorates, ...)

3.2. How do you see the impact of the principle of innocence on the prosecution policy? Do you feel it has an overly restrictive impact, in general, for some type of cases?

3.3. How do you see the impact of the principle on the assessment of facts and guilt (intentional / negligence) in the conviction decision? Do you feel it has an overly restrictive impact, in general, for some type of cases?

3.4. How do you see the impact of the principle on the sanctioning decision? Do you feel it has an overly restrictive impact for some type of sanctions?

Please illustrate your answer with case-law examples.

3.1/ The basic principles of evidence in criminal law are the following ones:

- The burden of proof is on the prosecution.
- The constitutive elements of the offence and the accountability of the defendant for the offence have to be proven beyond reasonable doubt (standard of proof).
- As a rule, the assessment of evidence is a factual matter left to the sovereign discretion of the criminal court. It is up to the discretion of the judge to determine whether, given the evidence, there has been a breach of law and, if so, whether this breach of law is imputable to the defendant charged with it.
- There are a limited number of exceptions to the principle of discretionary assessment of evidence where the legislator specifies the probative value of certain forms of evidence. One of those exceptions is significant in the process of proving environmental offences. It concerns the probative value of notices of violation. A notice of violation drawn up by a competent civil servant is an official document which aims at providing evidence in criminal proceedings. Notices of violation constitute the basis for the vast majority of environmental case-load entering the criminal sanctioning track. A notice of violation usually has the probative value of simple information, which the criminal court evaluates at its own discretion. However, with regard to environmental offences the legislator nearly always confers a special probative value to notices of violation drawn by specialised inspectorates: these notices of violation have probative value until proof of the contrary, limited to what the reporting official has personally established (seen, heard, smelt, etc.) (as opposed to deductions he makes, e.g.). The criminal court must in principle accept these findings as true. It can only dismiss or contradict them if proof of the contrary has indeed been provided. Such proof can be provided by all means.
- The means of proof are free.

²⁴ Constitutional Court, n° 7/2016, 21 January 2016, *Vogelbescherming Vlaanderen*.

- Doubt benefits the accused, be it doubt on the existence of (one or more of the constitutive elements of) the offence, or doubt of the accountability of the defendant for the offence, or doubt on the existence of an element that could influence the sentencing severity to the disadvantage of an offender.

Notices of violation are nearly always the backbone of environmental files.

The evidence provided by the personal observations of the public officer who drafted the notice of violation is very often crucial, especially when the notice of violation has probative value until proof of the contrary. In water pollution cases, notices of violation rather typically include laboratory analyses of the water. The laboratories are formally recognized for such types of analyses. In noise hindrance cases noise measurements play a part. Pictures taken on the setting of the offence, nowadays pictures in colours, are extremely useful to help to establish the facts. Cheap, easy to provide and efficient: a good practice to encourage. This is especially true for 'green offences': habitat destruction, illegal bird capture and holding, ... Such cases benefit a lot from pictures. Comments by the defendant and other people present when detecting the offence, if heard and next recorded by the public officer drafting the notice of violation, additionally carry some weight. So do complaints by neighbours, especially if repeated.

Air pollution seems to pose a problem in terms of collection of evidence. Dust and odour hindrance cases excepted, few air pollution cases reach the courts. Dust and odour hindrance cases can -- simply, cheaply and effectively -- be proven through personal observations of the public officer who made the notice of violation. Often such observations add up with (repeated) complaints from the neighbourhood.

All in all, however, the proof of environmental crime does not appear to raise a problem. The vast majority of cases brought to criminal courts and fining administrations gets evidenced without major technical problems and costs. The *mens rea* aspect of accountability of a defendant seldom raises difficulties neither. The guilt required for environmental offences is, as a rule, *dolus generalis* or negligence. *Dolus generalis* is present whenever the defendant has knowingly and willingly committed the illegal facts. The knowing and willing relates to that facts as such, not their illegal character. Negligence is a factual issue, appreciated by the court, most often using the standard of what a reasonable person would have done under the same circumstances.

Exceptionally guilt is presumed by law. Thus, for instance, Article 31, §2, of the Brussels Environmental Enforcement Code. According to that provision and unless proven otherwise, the fact to cause or perpetuate directly or indirectly (aircraft) noise that exceeds the allowable standards is deemed to have been committed due to a negligence of the perpetrator thereof and is hence a criminal offense punishable by the penalties provided for in Article 31, §1, of the Code. The Constitutional Court, checking the constitutionality of this provision as regards the constitutional principles of equality and non-discrimination, reasoned as follows.

Article. 6 (2) ECHR does not prohibit the use of presumptions in criminal law. When employing presumptions in criminal law, the legislator is however required to strike a balance between the importance of what is at stake and the rights of the defence. In other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved (ECtHR, 23 July 2002, *Janosevic v. Sweden*, § 101). Since the airlines and their staff are professionals who can be expected to know the existence and content of the noise limits set by the Brussels Capital Region it is not unreasonable to presume negligence on their part in case of non-compliance with those standards. Article 31, §2, of the Code allows to provide proof to the contrary, so that the presumed offender has the possibility to prove that no negligence was committed. Moreover, he may also rely on the justifications contained in Book I of the Penal Code, such as the state of emergency or compulsion. In the absence of contrary evidence, the conclusion of the prosecuting authorities is considered sufficient to meet the requirements of proof, which rest on the prosecuting authority. The contested provision is justified by the need to ensure the effectiveness of the noise standards, since, in the absence thereof, it would be extremely difficult or impossible in practice to provide proof of an infringement.

The Court concluded that the contested provision does not unjustifiably undermine the presumption of innocence guaranteed by Article 6.2 of the European Convention on Human Rights.²⁵

3.2/ Prosecutors tend to prosecute cases they consider they will win. There are indications that the presumption of innocence creates a bias in the prosecuted case-load and offences. The prosecuted offences concentrate to a large extent on offences that are easy to prove, such as not having the legally required environmental permit or common law offences such as forgery. The bias seems more related to *the efforts needed* to make the case than to evidence problems as such. Note that we have a predominance of non-specialized judges handling those cases.

3.3/ We are not aware of any overly restrictive impact of the presumption of innocence on the assessment of facts and guilt by the courts.

3.4/ We are not aware of any overly restrictive impact of the presumption of innocence on the sanctioning decision. When imposing a forfeiture of illegal benefits, the courts tend to determine the forfeited amount on the safe side of what is proven, but this cannot be labelled as an overly restrictive impact.

4. The privilege against self-incrimination

4.1. Does the environmental law in your country make (an extensive) use of self-monitoring and -reporting obligations? Does it provide in inspection rights to ask for information, sanctioned when not complied with?

4.2. If so, are you aware of prosecution difficulties caused by the privilege against self-incrimination? Is it easy to draw the boundaries between evidence that can be used and evidence that cannot be used because of this privilege? *Please illustrate your answer by case-law.*

²⁵ Constitutional Court, n° 25/2016, 18 February 2016, *European Air Transport Leipzig GmbH v. Brussels Capital Region Government*.

4.1/ All environmental law in the country (federal and regional) makes extensive use of self-monitoring and –reporting obligations, most typically for air emissions, wastewater emissions and groundwater use. The picture with regard to sanctioned interrogation rights, however, is uneven. In Flanders, such rights used to be present in older environmental legislation, written three to more decades ago, but have not been included in more recent legislation. The possibility of difficulties of with the privilege against self-incrimination combined with their very limited added value – asking for information remains possible – contributed to this legislative evolution. Thus, for instance, such right is not provided by the Flemish Title XVI DABM. A sanctioned interrogation right, however, is provided by Article 11, §1, 1° *juncto* Article 31, §1, 1° of the Brussels-Capital Environmental Enforcement Code and Article D.146, 1°, a) *juncto* Article D.154, 2° of the Walloon Environmental Code. At the federal level, the Articles 15, §2, 3° and 17, §1, 6° of the law on product regulation ²⁶ introduce a sanctioned inspection right to be given “all information” required to fulfil the inspection duties, which is different from a right to interrogate persons such as provided by the Brussels-Capital and Walloon legislations but could nonetheless also lead to problems with regard to the privilege against self-incrimination.

4.2/ In view of the above information, eventual difficulties could only arise for breaches of Walloon, Brussels or federal product standards legislation.

We have no knowledge of a single published criminal court judgement where a breach of the federal product standards legislation was at stake. Therefore we obviously are not in position to detect whatever difficulty with the privilege against self-incrimination in this strand of environmental law enforcement. The lack of court data most probably has its roots in compliance monitoring and control practices with limited drafting of notices of violation.

For similar reasons, we are not able to comment on difficulties with the privilege against self-incrimination with regard to the prosecution of breaches of the Walloon and Brussels-Capital Region. Published criminal court judgements documenting the environmental sanctioning policy with regard to both these regions are very scarce. Thus, for instance, *Aménagement-Environnement*, the leading environmental law journal for the Walloon and Brussels-Capital Region, published in 2013 and 2014 considered together but five judgements in criminal cases, from which four concerned building permit offences and one a hunting offence ²⁷.

5. The protection against double jeopardy

5.1. Are criminal courts in your country confronted with double jeopardy when dealing with environmental offences? If so, what is the typical case-set: a combination with

²⁶ Wet 21 december 1998 betreffende de productnormen ter bevordering van duurzame productie- en consumptiepatronen en ter bescherming van het leefmilieu, de volksgezondheid en de werknemers, as modified.

²⁷ *Aménagement-Environnement*, Index 2013-2014, 5-7.

administrative fines, with penalties from other policy areas such as for instance agricultural policies?

5.2. Are there discussions with regard to the scope of the guarantee? Areas of doubt, vagueness? What, for instance, about EU-regulations regarding extensive farming and mandatory cuts in the income support to farmers when infringing the cross-compliance conditions?

Please provide a case from your country to discuss this guarantee.

5.1/ When dealing with environmental offences our criminal courts are occasionally confronted with double jeopardy. Administrative fining systems aiming to punish environmental offences exist at all state levels – federal and regional. At all state levels, parliaments have designed them in a way to exclude, or at the least restrict severely, the possibility of a double prosecution / trial and punishment as regards the criminal sanctioning of the same environmental offences. They contain explicit provisions to this effect. As a result, double jeopardy including a criminal case and an administrative fining case with regard to one same environmental offence are scarce. An case where it occurred, a case with a rather unusual set of facts, was judged by the Court of First Instance of East-Flanders, division Oudenaarde. The offence had been chronically stretching through time. The incriminated period prosecuted with the court was more recent than the incriminated period punished by an administrative fine. However, the motivation of the administrative fine considered the relapse the criminal court subsequently had to deal with as aggravating the severity of the facts under consideration for administrative fining: the relapse motivated a more severe fine. The severity of the administrative fine and its motivation were confirmed with the competent administrative court. The Court of First Instance judged that, by including the relapse as an aggravating factor in the sentencing of the older facts, the “grass had been mowed under its feet”: by punishing the more recent facts it would breach the *Non bis in idem* principle.²⁸

Note that the legislative solution to double jeopardy regarding environmental law enforcement, a general feature of our environmental enforcement law today, did not systematically exist some fifteen years ago. Our Supreme Court has been very slow in picking up the Strasburg-jurisprudence on the punitive character of administrative fines, starting to acknowledge it properly but fifteen years ago. This slowness has been nurturing undue confusion in legal practice at all levels until some ten-twelve years ago. Typical for this past is the following case judged by our Constitutional Court.

The administrative penalties laid down in Article 25 of the Decree of the Flemish Region of 23 January 1991 on the protection of the environment against pollution by fertilizers are applicable on violations committed by the farmers that infringe the obligations of the Decree. They have therefore essentially a repressive character and are criminal within the meaning of Article 6 ECHR and Article 14 ICCPR, says the Court. The principle of *non bis in idem* is violated when the same person, after previously already have been convicted or acquitted, is prosecuted again for the same conduct for offenses with the same essential components (ECtHR, May 29, 2001, *Fischer v. Austria*, §§ 5-27; ECtHR, December 7, 2006, *Hauser-Sporn t. Austria*, §§ 42-46)²⁹. In the case referred to the Court the prosecuted party was not condemned yet by a final judgment, but had paid an

²⁸ Court of First Instance of East Flanders, division Oudenaarde, 18 November 2014, *Tijdschrift voor Milieurecht* 2016, 268-269.

²⁹ In later cases, the Court is referring to ECtHR, grand chamber, 10 February 2009, *Zolotoukhine v. Russia*, § 82; see judgments n° 91/2010, 28/2012, 112/2012, 181/2013, 61/2014, 86/2015.

administrative fine. That circumstance, which means that the administrative fine by the administration can be imposed without prior review of a judge, does not prevent that the principle of *non bis in idem* applies, since the contested decree allows that a person is punished twice in a row for the same acts³⁰.

Insofar a typical case-set can be detected, it is debate regarding the 'bis'-element of double jeopardy. Defendants tend to consider other measures that hurt their purse to be punitive sanctions. Thus, for instance, environmental taxes, subsidy cuts, bills for remedial action pre-financed by local authorities or environmental administrations (such as waste disposal measures against illegal waste dumps), ... On average the courts deal quite effortlessly with those recriminations, making the difference with monetary punishment.

Case Law: a few examples

The Constitutional Court was of the opinion that a tax on waste for which a take back obligation exists, cannot be considered as a criminal sanction, so that there could not be a violation of the *non bis in idem* principle when those taxes are combined with the criminal sanctions provided for in the same Decree³¹.

A regional administrative court ruled that cleaning up costs for an illegal waste dump are no administrative fine as provided for by Title XVI DABM nor an administrative fine imposed by any other authority. Such cleaning costs indeed do not aim to punish the offender but to put an end to the consequences of the environmental offence. Therefore the argument of the defendant that the administrative fine would be a *Bis in idem* as he already payed cleaning up costs, is not valid. These facts contain no breach of the *Non bis in idem* principle.³²

Curiously, even the additional sanctions that typically complete main sanctions in criminal sentencing did raise some debate too. The Constitutional Court disposed with it as follows.

The special confiscation provided for in Article 42 of the Penal Code is an additional sanction and aims to add suffering or to provide for compensation. In both cases, it can be ordered only if the defendant has been convicted to a primary sanction. The forfeiture may be imposed by the court in cases of crimes in general, under the conditions laid down in Articles 42 and following of the Criminal Code. Providing an additional sanction imposed in conjunction with a primary sanction as such is not in breach of the principle of *non bis in idem*. An additional sanction can also be imposed by a separate decision if the decision is made following the final conviction by a criminal court without a new procedure being opened and provided there is a close link between the two penalties (ECtHR *Maszni v . Romania*, September 21 2006, §§ 68 to 70)³³.

5.2/ Some judicial hesitations can be detected regarding mandatory cuts in the EU-funded income support to farmers who breach the cross-compliance conditions that are part of the CAP-policy on extensive farming. See the following case-law.

a/ In a judgment of August 2015 a Flemish regional administrative court had to consider a case where a farmer, acting on land zoned as a nature area, had converted grasslands to a cornfield without the permit required. Previously to the administrative fining, a subsidy cut of 649 € based on Regulation (EC) 73/2009 as

³⁰ Constitutional Court, n° 67/2007, 26 April 2007, *C.L.*

³¹ Constitutional Court, n° 106/2008, 17 July 2008, *Febelauto*.

³² MHHC-12/5-VK, 16 February 2012.

³³ Constitutional Court, n° 67/2007, 26 April 2007, *C.L.*

implemented by Regulation (EC) 1122/2009³⁴ had been imposed to the farmer. Indeed, his illegal action qualified as a breach of the cross-compliance conditions that are part of the CAP. In court, the farmer argued that the administrative fine imposed to him breached *Non bis in idem* as he had already been punished previously by the subsidy cut. The court agreed with the argument. It qualified the subsidy cut as a monetary penalty. The fact that Regulation (EC) 1122/2009 linked the percentage of the subsidy cut to negligence (Article 71, 3% standard subsidy cut) *versus* intent (Article 72, 20% standard subsidy cut), further modulated the level of the subsidy cut through criteria as the seriousness and the extent of the infringement, and also considered more severe cuts for repeat infringements, was an important element in the motivation of the verdict.³⁵ The judgment was appealed (cassation appeal). In a judgment that came as a rather painful anti-climax, the Council of State rejected the appeal by lack of interest of the appellant in the case. The lack of interest was deduced by law of the procedural circumstance that the appellant hadn't introduced a timely brief in response to the defendants brief.³⁶

In a case of June 2016, however, the same court, be it in a different composition, held that subsidy cuts were administrative sanctions without any repressive nature that only addressed persons who freely opted to adhere to the CAP income support system instituted by the aforementioned EU regulations.³⁷

b/ Similar hesitations exist in the criminal sanctioning track, as is illustrated by the very recent judgment of the Court of Appeal of Antwerp. In a judgment of 12 October 2016 the Court reformed a judgment of the Court of First Instance of Antwerp, Division Turnhout, of 2 June 2015 that declared a prosecution non receivable for breaching the *Non bis in idem* principle as the offences prosecuted had already been “punished” by subsidy cuts.³⁸ The Court of Appeal didn't agree with the First Instance judgement. Not only did the subsidy cut involve but one of the several parcels of farmland involved in the case, at a more fundamental level it considered, rightly, that a subsidy cut, even if being a sanction, is not a punitive sanction (“straf”) leading to the applicability of *Non bis in idem*. To reach this viewpoint it analyzed the legal grounds for the subsidy allowance, stressing the free choice of the farmer to contract the obligations that next were sanctioned by the subsidy cut.

It is noteworthy that similar doubts can be observed in recent Dutch case law. Two Dutch appeal judgments of November 2015 and February 2016 adopted the different positions observed in the aforementioned case law.

a/ In its judgment of 25 November 2015, the Appeal Court of Arnhem-Leeuwarden decided that the prosecution of facts that had already given rise to a subsidy cut based on Article 72 of Regulation (EC) 1122/2009, in the case under consideration more precisely a subsidy cut of 100%, breached the *Non bis in idem* principle. Interestingly, the court referred to the principle as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, equally mentioning Article 51 and Article 52.3 of the Charter. As with the Flemish judgment, the circumstance that Regulation (EC) 1122/2009 modulated the rates of the subsidy cuts along criteria “characteristic for criminal punishment, such as intent” played a part in the motivation of the decision. An appeal (cassation appeal) against the judgment was lodged by the prosecutor's office. This appeal case is still pending.³⁹

³⁴ Council Regulation (EC) 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003; Commission Regulation (EC) no 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) no 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for by that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector.

³⁵ MHC-15/26-K6, 13 August 2015.

³⁶ Council of State n°. 234.452, 21 April 2016.

³⁷ MHC/M/1516/0142, 30 June 2016.

³⁸ Court of Appeal of Antwerp, XIIth Chamber, 12 October 2016, unpublished.

³⁹ Gerechtshof Arnhem-Leeuwarden, 25 November 2015, GHARL:2015:8975.

b/ The Appeal Court of 's Hertogenbosch judgment of 10 February 2016 took the other view. It qualified the subsidy cut as a remedial reaction to a situation that, boiled down to its essence, could be summarized as a farmer having enjoyed a subsidy he simply was not entitled to. This remedial reaction served the proper financial management of the public funds of the Union. Therefore, starting a criminal prosecution subsequent to a subsidy cut constituted no breach of *Non bis in idem*. To reach its decision, the court made ample reference to case law of the ECJ regarding the nature of subsidy cuts: Bonda (C-489/10) and, additionally, Akerberg Fransson (C-617/10). It framed the modulation of the percentages of the subsidy cut through criteria as negligence and intent as a way to achieve proportionality without arbitrariness.⁴⁰

6. The right to proportional penalties

6.1. Have you noticed, in your practice, environmental cases where the penalties inflicted were too severe?

6.2. If so, could you elaborate and tell why you felt the penalty was too severe?

6.3. At the level of the Council of Europe, Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing states, in its point B.7.a: "*As a matter of principle, every fine should be within the means of the offender on whom it is imposed.*" Do you consider that proportionality in punishment requires to have consideration for the extent to which the penalty hurts the offender, implying, for instance, that for identical offences a firm with healthy finances should be punished with quite higher fines than an individual with a low income? What is the punishing practice in this regard in your country?

6.1/ Yes, we have observed two strands of case law where there obviously was a problem with the severity of a penalty imposed: the administrative fining of offenders with limited financial means and the forfeiture of illegal benefits by criminal courts where the benefit consists in illegal income (as opposed to avoided or delayed costs) generated by the exploitation of a plant without environmental permit.

We feel it should be added that, on average, sanction levels, especially fine levels, tend to be situated at the lower end of the margin between the minimum and maximum levels stated by the law. Curiously, there is little evolution in those levels since some 20 years.⁴¹

6.2/ a/ With regard to the administrative fining, the Flemish fining administration, which was created when the new enforcement legislation entered into force in 2009, has been sentencing without consideration for the financial means of the offender. As the motivation of its sentencing decisions made apparent, it based its sentencing policy solely on three criteria provided for by Article 16.4.29 Title XVI DABM: the seriousness of the offence, the frequency in offending and the circumstances under which the offences were committed or

⁴⁰ Gerechtshof 's Hertogenbosch, 10 February 2016, GHSHE:2016:375.

⁴¹ With empirical data: C.M. BILLIET, "Bestraffing van milieucriminaliteit: de beboetingsambtenaar als derde speler op het veld", in L. LAVRYSEN (ed.), *Het Milieuhandhavingsdecreet in de praktijk. Een jaar nieuwe milieuhandhavingspraktijk onder de loep*, Brugge, die Keure, 2010, (83) 123-125; C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit: verbeurdverklaring van wederrechtelijk verworven vermogensvoordelen in cijfers", *Tijdschrift voor Strafrecht* 2012, (195) nr. 12.

ended. Proportionality with regard to the means of the offender hadn't a place in the sanctioning practice. This led to a correction in appeal, by the Environmental Enforcement Court of Flanders. The first case leading to a correction was judged in 2012. The offender was an elder man, living alone of a retirement pay of less than 600 euro a month, less than the monthly minimum income guaranteed by the state. He gave proof of his income. He was fined 429 euro for a minor waste management offence: burning the remains of a doghouse and, meanwhile, unguardedly burning some 50x50 meter of meadowland. The court invoked Article 16.4.4 Title XVI DABM, a provision requiring proportionality for all types of sanctioning, punitive and remedial. It held: "Because of the punitive nature of administrative fines, with inflicting pain as first sanctioning goal, reasonably it has to be accepted that the requirement of proportionality between the facts on the one hand, and the fine imposed for those facts on the other hand, imposes a proportionality requirement where, when assessing the severity of the fine, under case-specific circumstances not only the fine amount as such is to consider but also the extent to which this amount hurts the offender in view of his financial capacity. There is manifestly reason for such proportionality assessment when the offender has a very limited financial capacity."⁴². The court annulled the fine on grounds of manifest disproportionality and lowered it to 137,50 euro. Through time it extended its requirement of such refined proportionality to two other categories of offenders: offenders with a socially vulnerable family situation and offenders in needy circumstances, applying the first extension for the first time to an offender who was a single mother with proven health problems and three children of schooling age, including one in college⁴³, and the second extension once to an offender, husband and father of small children, who one month before committing the offence, a waste related offence, had suffered the loss of the house the family rented, with most of the family's belongings, in a fire⁴⁴.

b/ In Flanders, criminal courts use the sanction of forfeiture of illegal benefits in environmental cases. They appear to handle most easily the cases where the benefit consists in avoided costs. Cases where it consists in illegal income generate more and more successful appeals.⁴⁵ Especially the illegal income generated by the exploitation of plants without environmental permit has given rise to very substantial forfeited sums in first instance that were deemed to be too high by the court of appeal. This was especially so in the years where gross benefits were forfeited, an approach that came to an end around 2004. The prosecution too appears to have difficult with this kind of benefit. There is an issue with the valuation of such illegal benefits.⁴⁶

⁴² MHHC-12/12-VK, 22 March 2012.

⁴³ MHHC-14/24-VK, 3 April 2014.

⁴⁴ MHHC-13/93-VK, 7 November 2014.

⁴⁵ C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit: verbeurdverklaring van wederrechtelijk verworven vermogensvoordelen in cijfers", *Tijdschrift voor Strafrecht* 2012, (195) 203-204; C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit: waardering van wederrechtelijk verworven vermogensvoordelen", *Rechtskundig Weekblad* 2012-13, (483) 493-496 and 498-499.

⁴⁶ C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit: waardering van wederrechtelijk verworven vermogensvoordelen", *Rechtskundig Weekblad* 2012-13, (483) 493-496 and 498-499.

6.3. Yes, we feel proportionality in punishment has to consider the extent to which the penalty hurts the offender. And indeed, this assessment of proportionality should also pay attention to the offender with deep pockets, taking along his financial capacity in the determination of fine levels. As proportionality in sentencing takes along a blend of factors, we cannot foresee a straightforward standard outcome. Yet, reasonably, an assessment of proportionality taking along in a systematic way the financial capacity of offenders, would lead in a fraction of the caseload to a higher fine for offenders with deep pockets than for offenders with shallow pockets when punishing identical facts. The punishing practice in this regard in our country mainly pays attention to the situation of offenders with limited means. However, when punishing a legal person together with a natural person professionally involved with it for the same facts, the legal person is punished more severely⁴⁷. In this specific case setting, there is some discounting of the deeper pockets of the firm.

The Belgian Constitutional Court acknowledges the importance of proportionality in punishment, for criminal as well as administrative penalties. A recent judgment made an interesting observation relating to the importance of discretion in sentencing to achieve proportionality.

The Constitutional Court held, to start with, that the principle of proportionality of criminal or administrative penalties implies that there is a reasonable relationship between the sanction imposed by the judiciary or the administration and the seriousness of the punishable infringement, taking into account all the elements of the case. The principle could be violated by the legislator if he provides too narrow limits to the discretion of the court or the administrative authority, so that it would not be possible to take into account all the relevant aspects of the case or if he provides a single penalty that is manifestly disproportionate to the seriousness of the behaviour he wants to punish. The explanatory memorandum of the contested provisions of the Brussels Environmental Enforcement Code shows that the choice of fairly large margins between the upper and lower limits of the penalties, both with regard to criminal penalties and to alternative administrative fines, which consequently leaves wide discretion for the court or the authority by whom the sanction is imposed, is the result of taking into account the specificities of environmental criminal law. Unlike infringements on property and persons to which the traditional penal code relates, the seriousness of environmental violations can vary widely. For violations of the environment it is much more difficult *a priori* to determine the precise impact and severity of an act. Thus hampering surveillance could, depending on the case, have no impact on the environment, or just have big consequences. The Court held that the magnitude of the difference between the minimum punishment and the maximum punishment provides the court or the administration precisely with the possibility to impose the penalty which is most appropriate in relation to the infringement and its impact on the environment, and therefore promotes observance of the principle of proportionality of penalties⁴⁸.

7. The right to respect for private and family life

7.1. Have you noticed an impact of the right to respect for private of family life on the environmental adjudication in your country? If yes, could you please provide examples

⁴⁷ C.M. BILLIET, T. BLONDIAU & S. ROUSSEAU, "Punishing environmental crimes: an empirical study from lower courts to the court of appeal", *Regulation & Governance* 2014(8), 472-496.

⁴⁸ Constitutional Court, N° 25/2016, 18 February 2016, *European Air Transport Leipzig GmbH v. Brussels Capital Region Government*.

form the case-law illustrating this influence?

7.2. Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

7.1/ Article 22 of the Belgian Constitution is nearly a copy of article 8 of the ECHR. It has been introduced in the Belgian Constitution by the constitutional amendment of 31 January 1994. The Constitutional Court has held consistently, since its judgment n° 50/2013⁴⁹, that the constitutional legislator has sought to make that article consistent with Article 8 ECHR, and that it should be interpreted in conformity with the jurisprudence of the ECtHR. In that first case, concerning a demand for annulment of a Decree (Act of the Regional Parliament) of the Walloon Region of 8 June 2011, amending a Decree of 23 April 1994 on the establishment and operation of regional airports, it referred to the ECtHR Judgment of 21 February 1990 in *Powell and Rayner v. United Kingdom* and to the Chamber Judgment of 2 October 2001 in *Hatton v. United Kingdom*.⁵⁰ The Constitutional Court held that when noise from aircraft is reaching intolerable levels, that nuisance undermines the rights conferred on residents in the vicinity of an airport by Article 22 of the Constitution. Although the right to the protection of a healthy environment is contained in Article 23 of the Constitution, it cannot be inferred from that fact, that Article 22 could not be invoked when noise could prejudice the respect for private and family life, guaranteed by that provision. While the demand for annulment was rejected in that case⁵¹, in a Judgement of the same day⁵², the Constitutional Court partially annulled a provision of the Decrees of the Walloon Region of 8 June 2001 and 25 October 2011 amending the Act of 18 July 1973 on noise abatement. That provision provided for a delimitation of noise-exposure zones around regional airports in function of the level of noise exposure from the operation of the airport. In the zone A the land owners had the right to sell their homes to the government, while those situated in the zone B were only entitled to a financial intervention for noise insulation measures. The appellants challenged the relevance of the 70 dB (A) maximum set for distinguishing zone A from zone B in the noise-exposure plan, given that specialist scientific studies described as unbearable any noise exceeding 66 dB (A) when "Ldn" was used as the indicator. The Court noted that none of the reports by the different experts established that residents living in that zone could occupy their houses without unreasonable disturbance to their private lives. Soundproofing could reduce the noise levels sufficiently to remove the danger to residents' health but they would still be unable to leave doors or windows open. Consequently, in the Court's view, residents in zone B, in terms of their right to respect for private and family life, were essentially in exactly the same predicament as those in zone A, with the result that the

⁴⁹ Constitutional Court, n° 50/2003, 30 April 2003, *Van Caekenberghe and Others and asbl Net Sky and Others v. Walloon Government*

⁵⁰ The Grand Chamber Judgment, *Hatton v. United Kingdom* of 8 July 2003, that reformed the Chamber Judgment came thus some months later.

⁵¹ Other cases in which a violation of Art. 22 of the Constitution has been alleged without success, are the following: Constitutional Court, n° 151/2003, 26 November 2003, *gemeente Beveren and Others v. Flemish Government*; Constitutional Court, n° 56/2006, 19 April 2006, *gemeente Beveren and Others v. Flemish Government* (concerning a Decree ratifying some planning permissions for projects for which imperative reasons of overriding public interest are at stake).

⁵² Constitutional Court, n° 51/2003, 30 April 2003, *Beckers and Others and asbl Net Sky and Others v. Walloon Government*

difference in treatment which the appellants had complained of could not reasonably be justified. In a judgment on the amended version of the said provision⁵³, by which similar rights were given to landowners of both (somewhat adapted) exposure zones, the Court referred also to the Grand Chamber judgment of the ECtHR *Hatton (II) v. United Kingdom* of 8 July 2003. The Court found in that case no violation of Art. 22 of the Constitution, read in the light of the case law of the ECtHR on art. 8 ECHR. However, the Court found a violation of Art. 22 of the Constitution in another case in which the said provisions had been eased on another aspect⁵⁴.

With reference to the decision of the ECtHR of 17 January 2006 in the case *Luginbühl v. Switzerland* the Constitutional Court found no violation of Art. 22 of the Constitution in a case where an Amendment had been challenged, by which the (very strict) standards of the Brussels Capital Region concerning radiation of Mobile Phone Network Antennas had been lowered down⁵⁵.

The Constitutional Court referred also several times⁵⁶ to the judgment of the ECtHR in the case of *Kyrtatos v. Greece*⁵⁷ confirming that article 22 of the Belgian Constitution can only be relied upon in cases of severe environmental pollution that may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

The Council of State suspended the decision to modify the use of the various runways at Brussels International Airport, resulting in much more flights over the Brussels agglomeration from a runway that has been used before only exceptionally, because, referring to art. 22 of the Constitution and art. 8 ECHR, it was of the opinion that the serious nuisances caused by that decision, should be recognized as a serious detriment difficult to remedy, that justifies that the challenged decision, against which serious arguments concerning the legality of the

⁵³ Constitutional Court, n° 189/2005, 14 December 2005, *asbl Net Sky and Others and Deneye and Others v. Walloon Government*

⁵⁴ Constitutional Court, n° 101/2005, 1 June 2005, *Thiry and Others v. Walloon Government*; see also Council of State, 2 December 2008, n° 188.442, *Thiry and Others* (no violation in that case).

⁵⁵ Constitutional Court, n° 12/2006, 27 January 2016, *Galand and asbl Inter Environnement Bruxelles and Others v. Brussels Capital Region Government*

⁵⁶ Constitutional Court, n° 170/2014, 27 November 2014, *vzw Federatie van Belgische Parkings and Another v. Brussels Capital Region Government*; Constitutional Court, n° 132/2015, 1 October 2015, *vzw Koninklijke Vereniging der Historische Woonsteden en Tuinen van België and Others v. Flemish Government*; Constitutional Court, n° 57/2016, 28 April 2016, *Passchyn and Others v. Flemish Government*

⁵⁷ The ECtHR held in that case:

“53. In the present case, even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants.

54. As regards the second limb of the complaint, the Court is of the opinion **that the disturbances coming from the applicants' neighbourhood as a result of the urban development of the area (noises, night-lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.**”

decision are raised, is suspended.⁵⁸ A slightly modified decision has been suspended and a penalty per day of infringement imposed by the Court of Appeal in Brussels on similar grounds.⁵⁹ This was followed by a suspension by the Council of State of an again modified decision, because of the violation of Art. 23 of the Constitution and art. 8 ECHR⁶⁰. An earlier decision to use another runway more intensively, resulting in more flights North of Brussels, had been quashed by the Court of Appeal of Brussels⁶¹. But that judgment was on its turn quashed by the Supreme Court because of the violation of the principle of separation of powers, due to the fact that the Court of Appeal of Brussels had imposed itself a rather detailed model of how to use the various runways in view of an equal repartition of the noise burdens over the different areas around the airport⁶².

The first instance Criminal Court of Gent judged, with reference to the right to respect for private and family life that a long lasting and serious violation of that right due to unlawful environmental nuisances should result in a compensation that is significant higher than the traditional symbolic 1 euro for moral damages.⁶³ A couple of recent judgments of the Court of First Instance of East-Flanders, Division Gent, judging in criminal matters, refers to Article 8 ECHR as interpreted by the ECtHR when acknowledging claims for damages made by civil parties who suffered hindrance (smells, noise, dust) due to the offences the court was convicting. The link with this fundamental right is explicitly made, preceding in the motivation the attribution of damages.⁶⁴ This type of explicit motivation, however, seems not to have been followed yet throughout the Belgian criminal case law in environmental matters, remains exceptional.

7.2/ It can be derived from the Belgian case law that similar thresholds of the seriousness of the negative impact of environmental nuisance on private and family are used as those used by the ECtHR in the relevant case law based on art. 8 ECHR. That limitation seems to be justified given the objective and wording of art. 22 of the Constitution, which is not to combat any environmental degradation.

8. The right to life

8.1. Have you noticed an impact of the right life on the environmental adjudication in your country? If yes, could you please provide examples from the case-law illustrating this influence?

⁵⁸ Council of State, 19 December 2003, n° 126.669, *Commune de Woluwé-Saint-Pierre and Others*.

⁵⁹ Court of Appeal, Brussels, 17 March 2005, *Amén*. 2005, 308.

⁶⁰ Council of State, 11 May 2015, N° 144.320, *Van Doren and Others*.

⁶¹ Court of Appeal, Brussels, 10 June 2013; confirmed by Court of Appeal, Brussels, 18 November 2013.

⁶² Cour de cassation, 4 March 2014.

⁶³ Corr. Gent 4 June 2007, *NjW* 2007, afl. 173, note L. Lavrysen; *TMR* 2008, 70; see in the same sense: Corr. Turnhout, 2 December 2002; Corr. Turnhout, 4 February 2003; Corr. Gent 11 May 2004; Corr. Gent, 7 February 2005; Corr. Gent, 3 January 2008; Corr. Ieper, 8 November 2010;

⁶⁴ Court of First Instance of East-Flanders, Division Gent, Criminal Chamber, 10 May 2016, *unpublished*; Court of First Instance of East-Flanders, Division Gent, Criminal Chamber, 14 June 2016, *unpublished*. See in the same sense Criminal Court Gent, XXIst Chamber, 21 April 2009, *unpublished*.

8.2. Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

8.1/ There is no such case law in Belgium.

8.2/ As there is no equivalent of Art. 2 ECHR in the Belgian Constitution, such cases should be brought to the courts on the basis of Art. 2 ECHR and it can be expected that the Belgian judiciary would apply that provision under circumstances that are similar to those accepted in the relevant ECtHR case law.

9. The right to environmental protection⁶⁵

9.1. Do you consider this right to have impact on environmental adjudication?

9.2. Do you agree with the proposition that, in environmental adjudication, it is only fit to impact on the sanctioning policy, meaning choice and level of sanctions inflicted?

In the Belgian Constitution, there currently is reference to environmental protection in two different provisions. Article 7b, the single provision of Title Ib 'General Policy objectives of Federal Belgium, the Communities and the Regions' of the Belgian Constitution, introduced by the Constitutional Amendment of 25 April 2007, states that:

In the exercise of their respective competencies the Federal State, the Communities and the Regions foster the objectives of sustainable development in their social, economic and environmental aspects, taking into account the solidarity between generations.

This provision is the only Constitutional provision that sets policy objectives for the different authorities, since it calls for integration of sustainable development concerns in the different policies of the authorities concerned.⁶⁶

The fundamental rights are contained in Title II of the Constitution. One of the provisions of that title deals with the so-called social, economic and cultural rights. Article 23 of the Constitution, introduced by the Constitutional Amendment of 31 January 1994, provides in this respect that:

Everyone has the right to lead a life in conformity with human dignity. To this end, the laws, decrees [...] guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them. These rights include notably: [...] the right to enjoy the protection of a healthy environment [...].

⁶⁵ This part is partly based on L. Lavrysen, "Chapter 2. Belgium." in *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, J. Kotzé and A. R. Paterson (eds.), Kluwer Law International (Alphen aan den Rijn, 2009), 85–122.

⁶⁶ B. Jadot, 'Pour une meilleure prise en compte de l'environnement et les enjeux environnementaux dans la Constitution', in *En hommage à Francis Delpérée: Itinéraires d'un constitutionnaliste*, ed. Bruylant (Brussels: Bruylant, 2007), 668.

This article of the Constitution was extensively debated by the constitutional legislator, yet the right to the protection of a healthy environment was given relatively little thought. What is certain, though, is that the term 'healthy environment' is broadly interpreted. As appears from the parliamentary preparations, every person has 'the right to a decent, healthy and ecologically balanced environment',⁶⁷ and:

[t]he government has a special responsibility to ensure that future generations still have a liveable environment. Its task in this respect is a very broad one. It not only covers conservation, but also the controlling of water, air and soil pollution, a proper planning of the available space and of farming and stockbreeding activities, and the promotion of environmentally-friendly technologies in industry and communications.⁶⁸

It was however repeatedly (“*mille fois répétée*”⁶⁹”) emphasized that since the rights mentioned in that article have no direct effect, no subjective rights can be derived from them.⁷⁰ They are primarily meant to serve *as guiding principles for government policy and to instruct the legislature*.⁷¹

However, the provision also has other legal effects. First, the parliamentary preparation of Article 23 of the Constitution suggests that the fundamental economic, social and cultural rights are supposed to produce a *standstill* effect.⁷² This is also known as *the principle of non-regression*. Environmental policy should pursue not only a healthy environment, but also an environment with a standard of health no lower than the existing one. The *standstill* principle is an intrinsic element of fundamental social rights.⁷³ The government has a wide margin of appreciation, though only in a certain direction. An impairment of the existing level of protection can be penalized by the courts. The Constitutional Court is quiet often invited to check the conformity of Acts of the Federal or regional Parliaments with that provision⁷⁴. The Court is consistently holding that Art. 23 of the Constitution implies a *standstill obligation*

⁶⁷ *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/3, 20; *Parl. St.* [House of Representatives] BZ 1991-1992, n. 391/1, 12.

⁶⁸ *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/1, 10.

⁶⁹ P. Martens, 'L'insertion des droits économiques, sociaux et culturels dans la *Constitution*', *RBDC* 1 (1995): 7.

⁷⁰ See *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/1, n. 100-2/3, 4 and 11, and n. 100-2/4, 5, 14, 20, 70-74, e.g., at 5: 'The fundamental social rights, on the other hand, must not have direct effect, and the working party felt that this had to emerge unequivocally and explicitly from the text of the proposal, and it will be repeated whenever necessary.'

⁷¹ *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/3, 13. See also *Parl. St.* [Senate] n. 100-2/4, 13 and 41, and *Parl. St.* [House of Representatives] BZ 1991-1992, n. 381/1, 9; see also: Constitutional Court, 27 November 2014, n° 170/2014, *vzw Federatie van de Belgische Parkings and Beroepsvereniging van de Vastgoedsector*; Council of State, 26 May 2008, n° 183.356, *Peirs and Others*; Court of Appeal, Antwerp, 28 March 2012; Court of Appeal, Antwerp, 28 June 2005

⁷² *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/3, 13. See also *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/4, 85-87, and *Parl. St.* [House of Representatives] BZ 1991-1992, n. 381/1, 8. On *standstill*, see I. Hachez, 'L'effet de *standstill*: Le pari des droits économiques, sociaux et culturels', *APT* 24 (2000): 30-57, and G. Maes, 'Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming', *RW* 69 (2005-2006): 1081-1094.

⁷³ Maes, *supra* n. 21, 464.

⁷⁴ It did so in its judgments n° 78/2001, 50/2003, 51/2003, 130/2004, 150/2004, 56/2006, 74/2006, 135/2006, 145/2006, 87/2007, 114/2008, 121/2008, 114/2009, 30/2010, 94/2010, 113/2010, 120/2010, 133/2010, 151/2010, 2/2011, 22/2011, 75/2011, 102/2011, 58/2012, 144/2012, 159/2012, 44/2013, 108/2013; 114/2013, 177/2013, 118/2015, 119/2015, 170/2014, 12/2016, 94/2016.

regarding the protection of the environment that precludes the competent legislator *to reduce significantly the protection afforded by the applicable legislation* in the absence of *reasons related to the public interest*. In most of the cases the Court comes to the conclusion that there is no reduction⁷⁵ or no significant reduction⁷⁶ of the level of protection. In some cases it is admitted that there is or could be a significant reduction, but that this reduction is justified by other reasons of public interest⁷⁷. In a few cases the Court found the significant reduction of the environmental protection not justified by reasons of public interest⁷⁸.

The case-law of the Council of State also offers some illustrations. While a judgment of 18 December 2003 confirmed that the economic and social rights contained in Article 23 of the Constitution do not “in principle” have direct effect, the following day an argument was found valid that was derived from Article 23 of the Constitution, in conjunction with Article 8 ECHR, since the challenged decision on flying routes around Brussels Airport disproportionately and without compelling reason infringed the right to health and to a healthy environment. In a subsequent judgment, the Council of State ruled that the government has the obligation to “guarantee the right to health and the right to the protection of a healthy environment equally for all citizens, as enacted in Article 23, third paragraph, 2° and 4°, of the Constitution”. Furthermore the Council of State does accept also the standstill effect of Article 23 of the Constitution in the same terms as the Constitutional Court⁷⁹. The (constitutional) right to (the protection of) a healthy environment also featured prominently in a number of judgments and rulings of the ordinary courts and tribunals.⁸⁰

⁷⁵ E.g. Constitutional Court, N° 50/2003, 30 April 2003, *Van Caekenberghe and Others and asbl Net Sky and Others v. Walloon Government*.

⁷⁶ E.g. Constitutional Court, N° 130/2004, 14 July 2004, *asbl Net Sky and Others v. Walloon Government*; n° 150/2004, 15 September 2004, *asbl Ardennes liégeoises and Others*; Constitutional Court, n° 135/2006, 14 September 2006, *d'Arripe and Others v. Walloon Government*; Constitutional Court, n° 87/2007, 20 June 2007, *asbl Inter-Environnement Wallonie v. Walloon Government*; Constitutional Court, n° 114/2008, 31 July 2008, *Gilissen and Others*; Constitutional Court, n° 114/2009, 9 July 2009, *asbl l'Erablière*; Constitutional Court, n° 113/2010, 25 November 2010, *asbl Inter-Environnement Bruxelles v. Brussels Capital Region Government*.

⁷⁷ Constitutional Court, n° 94/2010, 29 July 2010, *OM and Gewestelijk Stedenbouwkundig Inspecteur*; Constitutional Court, N° 12/2006, 27 January 2016, *Galand and asbl Inter Environnement Bruxelles and Others v. Brussels Capital Region Government*.

⁷⁸ E.g. Constitutional Court, n° 137/2006, 14 September 2006, *asbl Inter-Environnement Wallonie v. Walloon Government* (in which the Court found that the challenged provisions were also violating the EIA Directive and Art. 7 of the Aarhus Convention).

⁷⁹ E.g. Council of State, 29 April 1999, n° 80.018, *Jacobs* (suspension of lowering down regulations to combat noise from a racecar circuit); Council of State, 17 November 2008, n° 187.998, *Comans and Others* (no violation of the stand-still obligation by changing the model of using runways at Brussels Airport); Council of State, 9 March 2009, n° 191.204, *Schweren and Ploumen* (no violation by reframing a provision of the Walloon Land Use Code); Council of State, 2 December 2008, n° 188.442, *Thiry and Others* (no violation); Council of State, 25 November 2011, n° 216.494, *Coussement and Others*; Council of State, 14 August 2012, N° 220.463, *asbl Ligue Royale belge pour la protection des oiseaux* (no violation of the stand-still obligation by lifting a ban on hunting when there is snow); Council of State, 29 April 2014, N° 227.231, *asbl Ligue Royale belge pour la protection des oiseaux*; Council of State, 16 May 2014, N° 227.424, *Spaepen and Others*; Council of State, 7 November 2014, N° 229.097, *asbl Association régionale environnementale and De Cock* (no violation of stand-still by increasing the threshold for mandatory EIA for pig farms); Council of State, 11 December 2014, N° 229.527, *asbl Ligue Royale belge pour la protection des oiseaux*.

⁸⁰ E.g.: President District Court, Brussels, 14 December 2004 (concerning Brussels Airport); Court of Appeal, Brussels 9 June 2005 (concerning Brussels Airport); Court of Appeal, Ghent, 14 February 2000 (concerning a noisy feast hall).

A second meaning in positive law (to a certain extent similar to the *standstill* effect), lies in a combination of the economic, social and cultural rights with the principles of equality and non-discrimination, which are guaranteed by Articles 10 and 11 of the Constitution. Under these articles, the recognition of socio-economic rights must be ensured without discrimination. According to the parliamentary preparation, an infringement of these provisions by a legislative rule qualifies for review by the Constitutional Court.⁸¹ Even though the rule protects a healthy environment for two distinct categories of persons, it must not unwarrantedly offer a lesser degree of protection to one category than to the other. In this respect the Constitutional Court found a system of tacit building permits in violation of said provisions⁸² and annulled a provision of a Decree validating some land use plans that had been adopted after an EIA procedure that had been found discriminatory by the Council of State⁸³. The Council of State suspended a modification of the use of runways at Brussels Airport that was very detrimental for inhabitants north of Brussels⁸⁴.

A third legal meaning of the economic, social and cultural rights, according to the parliamentary preparation, lies in a Constitution-compliant interpretation of laws, decrees and other rules. Where they are open to several interpretations, a court of law is obliged to follow the interpretation that is compatible with the Constitution.⁸⁵ This means that, in case of doubt, an environmentally-friendly interpretation is recommended in principle: *in dubio pro natura*. This rule of interpretation is also capable of reducing the public authorities' margin of appreciation in the granting of licenses for activities that are a potential threat to the environment⁸⁶. The Council of State referred to art. 23 of the Constitution to reject a demand for annulment of a strict, on the precautionary principle based, standard imposed on an operator of GSM Antenna's⁸⁷, while in another case the Council of State justified a suspension of such a permit because the, on the precautionary principle based health standards, would not be met.⁸⁸ The Council referred also to art. 23 of the Constitution to give a broad interpretation of the notion of third parties that should have access to a hearing in an administrative appeal of an environmental permit⁸⁹. The Council referred to art. 23 of the Constitution to substantiate that the prejudice invoked by a plaintiff against the delivery of a building permit for a piece of highway should be considered as serious and difficult to remedy and justifies a suspension of the decision⁹⁰, that any risk for a healthy environment should be taken into consideration while checking the conformity of a project for which a building

⁸¹ *Parl. St.* [House of Representatives] BZ 1991-1992, n. 381/1, 9. See also *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/4, 39, and *Parl. St.* [House of Representatives] BZ 1991-1992, n. 218/3, 18.

⁸² Constitutional Court, n° 78/2001, 7 June 2001, *Marchini-Carnia and Others*.

⁸³ Constitutional Court, n° 114/2013, 31 July 2013, *nv Recover Energy and gemeente Lebbeke*.

⁸⁴ Council of State, 13 June 2005, n° 145.837, *De Becker and Others*.

⁸⁵ *Parl. St.* [Senate] BZ 1991-1992, n. 100-2/3, 13, and *Parl. St.* [House of Representatives] BZ 1991-1992, n. 381/1, 9.

⁸⁶ B. Jadot, 'Le droit à l'environnement', in *Les droits économiques, sociaux et culturels dans la Constitution*, ed. R. Ergéc (Brussels: Bruylant, 1995), 263.

⁸⁷ Council of State, 4 November 2008, n° 187.717, *sa KNP Orange Belgium (sa Base)*

⁸⁸ Council of State, 23 November 2012, n° 221.496, *Chenoy*; see in the same sense: Council of State, 20 August 1999, n° 82.130, *Venter*.

⁸⁹ Council of State, 18 September 2003, n° 123.057, *Vanderputten*.

⁹⁰ Council of State, 1 April 1999, n° 79.736, *Salesse and Bonmassar*; in the same sense: Council of State, 16 June 1999, n° 81.001, *Halleux and Lejeune*.

permit is applied for, with the surroundings and the assigned function of the area⁹¹ and that the decision is explicitly reasoned on that aspect⁹².

⁹¹ Council of State, 10 April 2003, n° 118.214, *sa Mobistar*.

⁹² Council of State, 15 May 2008, n° 182.964, *Commune de Beloeil*; see also: Corr Gent, 3 January 1995.