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Impact of *Natura* 2000 sites on Environmental Licensing

Belgian Report

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A. Natura 2000 sites

[Country or area]

1. Environmental policy in Belgium falls largely within the remit of the three autonomous regions: the Flemish Region, the Walloon Region and the Brussels-Capital Region. This is particularly the case for *environmental protection* and *nature conservation* (Art. 6(1), III, of the Special Act of 8 August 1980 on institutional reform)[1]. As a result, three different regional legislations exist in the field that constitutes the subject of the annual EUFJE conference in Helsinki. In addition, the regions have no authority over the Belgian maritime areas. The implementation of the Birds and Habitats Directives in the maritime areas is the responsibility of the federal government. This means that, in total, 4 different sets of regulations apply in Belgium with respect to *Natura 2000*.

Since the Brussels-Capital Region is an urban area, there is little point in involving the fairly limited nature reserves in that region[2] in our discussion. Conservation in the marine environment has specific features, so that we will not be going into that subject. We will restrict ourselves to the situation in the Flemish and Walloon Regions. The Flemish Region is more densely populated and (sub)urbanized than the Walloon Region, where larger nature reserves and woodlands can still be found. Those differing geographical and demographic circumstances must be taken into consideration when we interpret the information given below.

[1] E. DE PUE, L. LAVRYSEN and P. STRYCKERS, *Milieuzakboekje 2005*, Wolters Kluwer Belgium, Mechelen, 2005, p. 23.

[2] There are 3 Natura 2000 areas totalling 2,333 ha (i.e. 14% of the surface area of the region): G. VAN HOORICK in K. DEKETELAERE (ed.), *Milieu- en energierecht*, die Keure, Bruges, 2006, p. 1007. However, one has to acknowledge that the regional authorities carried out a very ambitious programme for an urban area. As regards wildlife, Brussels has several species of bats, which are listed under Annex IV of the Habitats Directive.

[Number and area of sites SCI/SAC SPA]

2. In the ***Flemish Region***, 23 special *bird protection areas* have been designated with a total surface area of around 100,000 ha (which is 7% of the total surface area). Seven zones are protected over their entire area. For 16 zones, only certain specific habitats in those zones are protected (e.g. heaths and fens, marshes, polder grasslands, the microrelief, previously designated nature reserves, nature reserves of scientific value, woodlands and woodlands of ecological interest)[3]. In addition, 40 *special habitat protection areas* with a total surface area of 102,000 ha (just over 7% of the total surface area) have been designated. However, 35% of the designated areas overlap the bird protection areas. Both types of areas together cover approximately 170,000 ha.[4]

In the ***Walloon Region***, 13 special *bird protection areas* have been designated with a total surface area of around 80,000 ha. Some 239 *habitat protection areas* have been designated by the Walloon government with a total surface area of approximately 220,827 ha[5]. Here, too, there is an overlap with the bird protection areas.

For the whole of Belgium, 12% of the territory is covered by the protection: 14% of the area of the Brussels-Capital Region; 13% of the area of the Walloon Region; 12% of the area of the Flemish Region and 9% of the Belgian part of the North Sea[6].

By Commission Decisions 2004/798/EC and 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region and the Continental biogeographical region respectively[7], the following number of sites of Community importance have been designated in Belgium: 94 belonging to the Atlantic region and 196 belonging to the Continental region, which means a total of 290 for the whole of Belgium.

[Which authority drafted the national Natura 2000 site list?]

3. The national *Natura 2000* site list combines 3 regional lists and one federal list (as regards the maritime areas). In the Flemish Region, the lists were drafted by the Flemish government on the proposal of the Instituut voor Natuurbehoud (Nature Conservation Agency), a scientific establishment set up by the Flemish government, on the basis of scientific criteria. A similar process was applied in the Walloon Region: the *Centre Nature et Forêts* drafted the Habitats lists in the light of genuine scientific considerations.

[3] *Ibid.*, p. 979.
[4] *Ibid.*, p. 980; see for the map: http://geo-vlaanderen.gisvlaanderen.be/geo-vlaanderen/natura2000/
[5] *Ibid.*, p. 1011-1012; see for the map: http://mrw.wallonie.be/dgrne/sibw/sites/Natura2000/home.html
[6] See: http://bch-cbd.naturalsciences.be/belgique/biodiversity/natura2000/natura2000.htm.
[7] *OJ L* 382 of 28 December 2005.

[How were the sites chosen? Was there a screening of possible sites and field surveys of competing site candidates? Were existing conservation areas designated as sites? Which authorities participated in the screening process? Did NGOs have a say? Was there a public debate on the criteria for choosing sites? Did (or does) the public have access to the biological data, on the basis of which decisions were made?]

4. In the ***Flemish Region*** the sites were chosen on the basis of preliminary studies by the Nature Conservation Agency. Those sites, which are usually larger than the already existing protected sites (nature reserves, nature reserves of scientific value, woodlands, woodlands of ecological interest, wildlife sanctuaries, etc), comprise areas that were already legally protected under conservation legislation, woodland legislation or town and country planning legislation. As far as the designation process is concerned, a distinction should be made in time. Before a legal framework existed with a view to the full implementation of the Birds and Habitats Directive, the Birds Directive sites were designated by the Flemish government without any public consultation (Flemish Government Decision of 17 October 1988), on the basis of a proposal made by the Nature Conservation Agency. The same happened with the Habitats Directive sites (Flemish Government Decision of 24 May 2002). Since then, however, a legal framework has been put in place by the Decree of 19 July 2002 amending the Decree of 21 October 1997 on conservation and the natural environment. Now it is provided that the Flemish government provisionally designates the special protection areas on the proposal of the Nature Conservation Agency. The provisional designation decision is open to public consultation over a period of 60 days. During that time, anyone can formulate comments and objections. Those comments and objections are brought together and co-ordinated by the government department responsible for conservation issues, which then delivers a reasoned opinion. The Flemish government then adopts a decision and definitively designates the sites that qualify as special protection areas. That decision is published in the *Belgisch Staatsblad (Official Journal).* The decision is sent to the European Commission. If the Commission declares the site of Community importance, the Flemish government designates the site as a special protection area, and the decision is republished. So far, this new procedure has only been followed once[8]. A transitional provision was adopted whereby the Birds and Habitats Directive sites that were previously designated by the Flemish government were definitively confirmed without having to follow the new legal arrangement. An action for annulment brought by an association of landowners against this definitive confirmation of previously designated areas without public consultation was dismissed by the Constitutional Court[9]. The Court ruled:

"*It is for the regional legislator to decide whether it will allow public consultation prior to the definitive designation of sites that qualify as special protection areas. The above-mentioned Directives impose no obligations in that regard. The regional legislater, however, must observe Articles 10 and 11 of the Constitution if it provides for public consultation. The sites that qualify as special protection areas are provisionally designated by the Flemish government. The provisional designation decision is then open to public consultation, whereupon the Flemish government definitively designates the sites.*

Certain sites, however, are exempted from this arrangement and are deemed to have been definitively designated. The sites in question are areas that have been designated as

[8] Flemish Government Decision of 22 July 2005 definitively designating the site "Kustbroedvogels te Zeebrugge-Heist" which qualifies as special protection area in pursuance of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *B.S.*, 16 September 2005.

[9] Court of Arbitration, No. 31/2004, 3 March 2004, www.arbitrage.be

special protection areas by the decisions of the Flemish government of 17 October 1988 and 24 May 2002 in pursuance of the Birds Directive and the Habitats Directive.

In the aforementioned decision of 17 October 1988, a number of special protection areas within the meaning of Article 4 of the Birds Directive were designated. This designation had not been preceded by any public consultation. In a judgement of 27 February 2003, the Court of Justice ruled that the decision of 17 October 1988 was a deficient implementation of Article 4 of the Birds Directive.

In the aforementioned decision of 24 May 2002, a number of sites within the meaning of Article 4 of the Habitats Directive were designated. This designation had not been preceded by any public consultation. Those sites were proposed to the Commission as special protection areas, but have not yet been declared of Community importance.

The sites referred to in the aforementioned decisions have in common that they had been designated as special protection areas before the challenged provisions came into effect. It is therefore not obviously unreasonable that, unlike the sites that had not yet been designated as special protection areas at the time when the challenged provisions became effective, those sites do not need to be made subject to public consultation.

The observation that, on the one hand, the designation of the special protection areas within the meaning of Article 4 of the Birds Directive had in the past been deficient and that, on the other hand, the special protection areas within the meaning of Article 4 of the Habitats Directive have not yet been declared of Community importance, is not such as to diminish the justifiability of the alleged difference in treatment."

Although this is not said in so many words in the judgement, the underlying idea was also that, in accordance with the case-law of the Court of Justice, the sites concerned must be designated on the basis of scientific (ornithological and biological) criteria, which means that adjustments made on the basis of the outcome of the public consultation must in any case be founded on verifiable scientific criteria, and that considerations of social and economic interest are not relevant at this stage[10]. The scope of public consultation is therefore always fairly limited. Nevertheless, owners and users can adduce data that might perhaps allow a more correct definition on scientific grounds[11].

In the ***Walloon Region*** a legal framework has also been put in place by the Decree of 6 December 2001 on the conservation of the *Natura 2000* sites and of the wild fauna and flora. The Decree requires the Walloon government to propose the list of sites of Community importance to the European Commission. This must be based on the criteria set out by the Habitats Directive and of the "relevant scientific information". As soon as those sites have been proposed, the Walloon government designates them as *Natura 2000 sites*[12]. The designation decision of the Natura 2000 sites also contains special prohibitive clauses, which apply within or outside the site, along with all the necessary preventive measures and the objectives of the "active management scheme, including the means to achieve those objectives". The designation decision must be published in full in the *Belgisch Staatsblad (Official Journal)*, and must be individually notified to the owners and users involved[13]. The designation of the sites concerned is not preceded by public consultation with the possibility

[10] E. DE PUE, L. LAVRYSEN and P. STRYCKERS, *o.c.*, 656.

[11] G. VAN HOORICK, "De implementatie van 'Natura 2000' in het Vlaamse Gewest", in F.C.M.A. MICHIELS and L. LAVRYSEN (ed.), *Milieurecht in de lage landen*, Boom Juridische Uitgevers, The Hague, 2004, p. 223.

[12] The Decree also contains an arrangement for sites that have been proposed to the European Commission by the Walloon government, but have not been approved by the Commission. The government may, on the recommendation of the relevant conservation commission, yet decide to maintain those sites as "Walloon" Natura 2000 sites or to scrap them as such.

[13] G. VAN HOORICK in K. DEKETELAERE (ed.), *l.c.*, 1012.

of raising objections. However, it is provided that, at the same time as the most recent list of sites is sent to the European Commission by the regional conservation commission (composed of officials from the relevant government department, representatives of the Walloon High Council for Nature Conservation, the High Council of Cities, Municipalities and Provinces of the Walloon Region, nature conservation groups, owners and farmers), an *information meeting* is held at which the following topics are raised: the principles of the *Natura 2000* network; the *Natura 2000* system set up by the Walloon Region; the objectives of the active management scheme; the details of the consultative meeting (consultation between the government and the owners and users regarding the appropriate resources for the active management scheme of the site); the financial resources earmarked for the implementation of the active management scheme and the role of the conservation commission. In practice NGO's were very much involved in the classification process of SPAs; they played a minor role as regards the classification of SCAs: they could intervene only at the biogeographical meetings organised by the EC Commission. Nonetheless, NGOS like *Ardennes et Gaume* and *Natagora* own already large tracks of marshlands and peatlands in Wallonia.

In both Regions, the respective general regulations governing access to environmental information apply to the data that served in the selection of the sites. The respective regional websites offer useful additional information.

[Which authority decided which sites were to be included in the Natura 2000 network?]

5. The lists were ultimately established by the Flemish and Walloon governments respectively.

[Appeals against the Natura 2000 national network decision. Which authority decided on the appeals, which parties had legal standing and on what grounds could appeals be lodged?]

6. In neither of the Regions does an administrative possibility of appeal exist against the designation decisions, since those decisions are taken by the highest administrative authority, namely the regional government. Such decisions, however, can be challenged by an action for annulment before the Council of State. Any party with a direct and current interest can bring such an action. Any infringement of rules of procedural or substantive law can be invoked, including the violation of European environmental law.

[Number and success of appeals]

7. The case-law of the Council of State in connection with disputes regarding the designation of areas as Natura 2000 sites is limited. The following cases are worth mentioning[14]:

[14] The judgments of the Council of State can be consulted at http://www.raadvst-consetat.be/

- Council of State, No. 97.221, 28 June 2001, *J. Acke c.s.*: dismissal of an action for annulment of the Flemish Government Decision of 17 July 2000 amending the Flemish Government Decision of 17 October 1988, removing an area of 282 hectares from the special protection area 'Poldercomplex' on the territory of the City of Bruges (port of Zeebrugge), and adding an area of 520 hectares situated elsewhere by way of compensation – the appellant farmers challenged this compensation;
- Council of State, No. 119.572, 20 May 2003, *l'asbl Groupement Cerexhe-Heuseux-Beaufays*: dismissal of an action for suspension by extremely urgent necessity of the Walloon Government Decisions of 26 September 2002 and 18 July 2002 establishing the Natura 2000 list in which a particular site was not included – lack of jurisdiction of the Council of State – the decisions were not challengeable administrative legal acts;
- Council of State, No. 135.409, 24 September 2004, *l'asbl Groupement Cerexhe-Heuseux-Beaufays*: dismissal of the action for annulment for the same reasons.

Considering the major backlog which the Council of State has accumulated in the cases to be heard, it cannot be ruled out that there are more relevant cases pending.

B. The protection status of Natura 2000 sites

[Status of Natura 2000 sites. Do Natura 2000 sites also have the status of nature reserves, national parks or other nature protection areas?]

8. Parts of Natura 2000 sites can also have the status of nature reserves or woodlands (in the context of town and country planning), wildlife sanctuaries, protected landscapes, Flemish Ecological Network sites or protected dunes (in the Flemish Region) or natural parks (in the Walloon Region).

[Protection of Natura 2000 sites. How has Article 6 of the Habitats Directive been transposed into national law in your country? By special national law implementing the Directive, by other national law, etc. How is the protection of Natura 2000 sites ensured? Are there site-specific management plans or other rules of conduct regulating activities within the sites?]

9. In the ***Flemish Region*** the substance of Article 6 of the Habitats Directive is now incorporated, with certain specifications, in Article 36*b* of the Decree of 21 October 1997 on nature conservation and the natural environment. This provision forms part of a special section on special protection areas, which was inserted in the Decree of 21 October 1977 by the Decree of 19 July 2002[15]. Article 36*b* provides that the administrative authority, within its powers, in the special protection areas and irrespective of the (planned) use of the area in question, takes the necessary conservation measures that must always meet the ecological requirements of the types of habitats and the species for which protection is put in place. The Flemish government establishes the detailed rules in connection with the necessary

[15] This late review of Flemish conservation law did nothing to prevent Belgium being censured for the late transposition of the Habitats Directive (ECJ, 27 February 2003, C-415/01, *Commission v Belgium*).

conservation measures and the ecological requirements. The administrative authority must also take all the necessary measures to avoid any deterioration of the environmental quality and the natural environment of the habitats and to avoid any significant disturbance of the species in question in a special protection area. This means, among other things, that for such areas environmental management plans should be drawn up and, where appropriate, environmental development projects elaborated. For wildlife sanctuaries, woodlands, landscapes and land consolidation areas situated within such sites, additional regulations apply with regard to management plans[16].

In the ***Walloon Region***, the substance of Article 6 of the Habitats Directive is incorporated in the Decree of 6 December 2001 and further detailed in the Act of 12 July 1973 on conservation, which now comprises a special section on Natura 2000 sites. For each site, an "active management scheme" must be set up (within 2 years after their designation). Each site falls within the remit of a regional conservation commission. For each site, consultation is organised with the owners and users. Preference is given to the "active management covenant" as an instrument to achieve the objectives of the active management scheme. Such a covenant is entered into for a period of ten years. In addition, there are general prohibitions that apply in the areas concerned. The conclusion and implementation of active management covenants is financially supported by regional subsidies. It is believed that it would no be possible to hammer out agreements with the owners and the tenants (hundreds for some sites) before 2008. For the time being, only very vague provisions are protecting the sites; these provisions do not preclude farmers to modify their agricultural practices. It is reported that already around 2000 hectares of protected sites were lost last year on the account that farmers sewed corn.

[Coverage of implementation. Do national acts, plans and other rules implement the Habitats Directive fully? Are there types of enterprises, impacts on nature or licensing procedures where the requirements of the Directive are not altogether taken into account?]

10. In the ***Flemish Region,*** the correct transposition of Article 6 of the Habitats Directive remains problematic. Whereas Article 6(3) and 6(4) of the Habitats Directive speaks of *"any plan or project"*, Article 36c(3) of the Decree of 21 October 1997 (the so-called "Habitat Test") speaks of *"a licensable activity […] a plan or programme"*. The concept of *"licensable activity"* is defined as *"an activity for which a licence, permit or authorisation is required by law, decree or decision"*. A *"plan or programme"* is *"a document in which policy intentions, policy developments or large-scale public, private or mixed activities are announced and which is drawn up and established, amended or reviewed on the initiative or under the supervision of the Flemish Region, the provinces, the public utilities, the intermunicipal partnerships and/or municipal authorities, and/or of the federal government, or for which co-financing is available from the European Community or the Flemish Region or the Flemish Community in the context of international cooperation, insofar as the intended plan or programme is likely to have a significant environmental or safety impact on the territory of the Flemish Region*". Some authors believe that gaps would arise in the arrangement due to the fact that a plan or programme refers more to large-scale affairs. Furthermore, plans which fall between the two concepts, such as development plans or

[16] E. DE PUE, L. LAVRYSEN, P. STRYCKERS, *Milieuzakboekje 2005*, Wolters Kluwer Belgium, Mechelen, p. 662- 663; G. VAN HOORICK, "De implementatie van 'Natura 2000' in het Vlaamse Gewest" in F.C.M.A. MICHIELS and L. LAVRYSEN (eds.), *Milieurecht in de lage landen*, Boom Juridische Uitgevers, The Hague, 2004, 223-226.

management plans, would not be covered by the arrangement, and wrongly so. In addition, not all interferences in the protected areas are licensable[17]. A similar problem arises in the ***Walloon Region,*** where the law speaks of "any plan or project for which a licence is required" (Art. 29(2) of the Act of 12 July 1973).

[Assessment of impacts. Which authority decides on whether an assessment is to be made or not? If harmful effects on a Natura 2000 site are probable, which party is responsible for assessing the impacts: Applicant, Environmental authority, Licensing authority, etc? How is the appropriateness of the assessment ascertained? If the applicant is required to assess impacts, does he/she have access to the data that prompted the inclusion of the area into a Natura 2000 site? How is assessment of impacts caused by projects or plans in combination with other projects or plans safeguarded?]

11. In the ***Flemish Region*** it is provided (Art. 36c(3) of the Decree of 21 October 1997) that the initiator of the licensable activity or of the plan or programme which, individually or in combination with one or several existing or proposed activities, plans or programmes, is liable to cause a significant deterioration of the natural features of a special protection area, must subject the activity, plan or programme to an appropriate assessment of the significant impacts on the special protection area. The obligation to carry out an appropriate assessment also applies if a new licence has to be requested due to the expiry of the current licence for the licensable activity[18]. The initiator is responsible for formulating an appropriate assessment. If the licensable activity, the plan or the programme is subject to the obligation of a project-related environmental impact assessment or a plan-related environmental impact assessment, the appropriate assessment will be made in the context of environmental impact statement (with respect to which the competent authority may issue individual guidelines). Where licensable activities are concerned, the licensing authority ultimately decides, after having sought the advice of the competent environmental authorities, on the question whether or nor an appropriate assessment should take place and whether it has been conducted properly. The licensing authority in question will differ according to the type of activity and licence. Often it will be the Mayor and Aldermen of the municipality concerned (environmental licences for smaller establishments, planning permission, nature licences). For bigger projects the licensing authority will often be the Provincial Executive of the province concerned (environmental licences for bigger establishments, decisions on administrative appeals against licensing decisions taken by the municipal authority). Sometimes the Flemish Minister for the Environment or the Flemish Minister for Town and Country Planning will decide (administrative appeals against certain decisions of the provincial authority). Sometimes the regional planning officer has to decide (planning permission for public projects). Even if the advice of the conservation authority is not required in the normal licensing procedure, that advice should nevertheless be sought. The assessment of plans and programmes is ultimately the responsibility of the authority approving the plan or programme. That may be the municipal authority, the provincial authority or the Flemish government, depending on the nature or the scale of the plan or programme. In that connection, too, the conservation authority will have to give advice. Judging from the applicable law texts, the Habitats Directive has been correctly transposed on that point – save for what was noted in the answer to Question 10. Whether this will show in everyday practice is a different matter. Our

[17] G. VAN HOORICK, "De implementatie van 'Natura 2000' in het Vlaamse Gewest", *l.c.*, 226-227.
[18] An environmental licence is valid for up to 20 years at the most.

impression is that property developers and the authorities involved are still in a learning process and that the practical implementation of those regulations is not yet up to scratch. The Nature Conservation Agency appears to be very helpful in supplying information to the persons who are responsible for formulating the appropriate assessments.

The situation in the ***Walloon Region*** is similar (Article 29(2) of the Act of 12 July 1973).

C. Case examples

[Examples of licensing decisions regarding projects outside or inside Natura 2000 sites, where

- *Assessment of impacts was not deemed necessary*
- *Impacts were assessed but not deemed adversely affect the integrity of the site concerned*
- *Impacts were assessed and deemed significant]*

12. Within the short time that was given to fill in the questionnaire it was not possible to contact the competent authorities to gain access to licensing decisions in which those issues were raised. Furthermore, no literature is available that offers a systematic analysis of those issues. We will therefore restrict ourselves to the relevant case-law of the Council of State, which naturally only features challenged decisions.

In the discussion of this matter, a distinction should be made according to the time period. First there was the time when the regional legislation was not yet adapted to the requirements of Directive 92/43/EEC, because, as was already mentioned, the implementation of the Birds and Habitats Directives in Belgium was delayed, a situation for which Belgium has actually been censured by the Court of Justice[19]. Secondly, a distinction should be made between the period before and after the entry into force of Commission Decisions 2004/789/EEC and 2004/813/EEC on 28 December 2004, in which the areas of Community importance were provisionally designated.

In the period before the Birds and Habitats Directive was more or less correctly (see above under no. 10) transposed into regional law, the Council of State accepted the direct effect of Article 6 of the Habitats Directive[20]. The Council of State considered that not only a nature reserve (*la grande érablière de Tenneville*) which featured on a provisional list that was drafted by the Walloon government and was communicated to the European Commission should benefit from the protection offered by Articles 6.2 to 6.4, but that the same should also apply to an adjoining area that had not been designated by the Walloon government (*la petite érablière de Tenneville*), which was assumed to meet the criteria of the Directive and in respect of which it could not be ruled out that it would still be included by the European Commission according to the procedure of Article 5 of the Directive. The Council of State considered that the environmental impact statement that was drawn up with a view to obtaining an environmental licence for the operation of a landfill site, and which provided for a buffer zone of 10 metres between the landfill site and the nature reserves, fell short of the requirements of Article 6.3 of the Habitats Directive. In an opinion formulated by the conservation authority, the latter considered that a buffer zone of at least 100 metres was

[19] ECJ, 27 February 2003, C-415/01, *Commission v Belgium*
[20] Council of State, No. 94.527, 4 April 2001, *l'asbl "L'érablière" et la Commune de Nassogne*

needed to "try to protect the nature reserve in question". The Council of State found that, by granting a licence to operate a landfill site under those circumstances, the relevant authority had failed to adequately protect this area from significant deterioration. Furthermore, the smaller nature reserve would disappear completely, which would only be justifiable under the conditions set forth in Article 6.4, conditions which were not fulfilled. The Council of State consequently suspended the execution of the environmental licence that had been issued. By another judgment, planning permission was suspended for the same reason[21]. The action for suspension of the environmental licence for a modified project had initially been dismissed by the Council of State. Meanwhile, the European Commission had expressed the view that, in its opinion, the "*petite érablière*", which the Walloon government had not proposed as a site of Community importance, need not be included in pursuance of Article 5, given its limited size, its questionable state of conservation, and its insufficiently representative character[22]. As far as the "*grande érablière*" is concerned, which had been proposed as a Natura 2000 site, the Council of State came to the conclusion that the environmental impact statement, which found no significant impacts on that site, was sufficiently underpinned and *prima facie* could not be considered unlawful. Nevertheless, the Council of State subsequently did annul this environmental licence on the grounds that the environmental impact statement did not contain a correct appropriate assessment and that it could not be said with certainty that there would be no significant impacts on the "*grande érablière*" site. According to the Council of State, it had in the meantime also emerged that the "*pétite érablière*" would completely disappear as a result of the project and that this could only be justified by reasons connected with human health, public safety or essentially favourable impacts on the environment[23], which was not the case. The Council of State considered that the protection framework put in place by the Habitats Directive had to be applied to this site too, because the Walloon government could not be allowed to derive any benefit from the late transposition of the Birds and Habitats Directives in regional law and this circumstance could not be such as to diminish the effectiveness of the two Directives. Planning permission was annulled for the same reasons[24].

By judgment no. 138.271 of 9 December 2004[25], the Council of State dismissed an action for suspension of planning permission for the construction of a single-family dwelling with indoor swimming pool in a previously approved development, since situated in the immediate vicinity of a Natura 2000 site. The action had been brought by the neighbour. The Council of State found that the licensing authority had adequately assessed the potential impacts on the Natura 2000 site – in the environmental impact statement that was enclosed with the application – and that the conditions that were imposed with respect to wastewater discharge, the layout of the garden with the intervention of the municipal environmental consultant, the use of special building materials and the limitation of outdoor lighting were such as to avoid a significant deterioration of the area in question.

We know of only one court ruling in connection with licensing decisions taken after the implementation of the Birds and Habitats Directives in regional law. By judgment no.

[21] Council of State, No. 96.097, 1 June 2001, *Non-profit association "L'érablière" and Municipality of Nassogne.*

[22] Council of State, No. 134.204, 4 August 2004, *Non-profit association "L'érablière", M. Stassin and C. Nicolas*

[23] Council of State, No. 139.465, 18 January 2005, *Non-profit association "L'érablière" and Municipality of Nassogne*

[24] Council of State, No. 139.466, 18 January 2005, *Non-profit association "L'érablière", Municipality of Nassogne* and *City of Marche-en-Famenne.*

[25] Council of State, No. 138.271, 9 December 2004, *F. Everard de Harzir*

142.418 of 21 March 2005[26], the Council of State suspended a felling licence for a public forest granted to VLM Airlines, which allowed it, as a safety precaution, to prune tall trees in a municipal forest (*domain Fort III*) which extends beyond the runways of Antwerp airport. The forest is part of the special protection area "Historische fortengordels van Antwerpen" (Historic Fortifications of Antwerp) which is protected as a habitat for bats. The Council of State considered that a nature licence and an appropriate assessment was required, which was not the case.

The Council of State has also suspended or annulled a number of planning decisions because they violated the Birds and/or Habitats Directives. For example, the Walloon Government Decision of 11 December 1997 to partially amend the regional zoning plan for Wavre-Jodoigne-Perwez with a view to the construction of a golf course was annulled because it violated Article 4 of the Birds Directive. The planned golf course on the "*Domaine de Mérode*" would occupy about 10% of a special bird protection area (*vallée de la Dyle*) designated by a Walloon Government Decision of 19 September 1989, and this in violation of Article 4.2 of the Birds Directive[27].

The Flemish Government Decision of 26 December 2000 to partially amend the regional zoning plan for Sint-Niklaas-Lokeren with a view to the construction of the so-called "*Deurganck-dok*" (Port of Antwerp) on the Left Bank of the Scheldt was also suspended by the Council of State because it violated Article 6.4 of the Habitats Directive, due to the fact that the planned dockyard would diminish the special protection area "*Schorren en polders van de Beneden-Schelde"* (Salt Marshes and Polders of the Lower Scheldt), which reduction would in turn be compensated by an extension of the special protection area "*Durme en middenloop van de Schelde*" (Durme and Central Course of the Scheldt). Since the latter area had already been notified to the European Commission under the Habitats Directive, there was no question of a full compensation[28]. The planning permission that had been granted for the construction of the dockyard had previously been suspended twice[29], so that the works that had already begun on the *Deurganck-dok* had to be stopped. Thereupon the Flemish Parliament decided to take the matter in hand. A special decree was adopted (the so-called Deurganckdok Decree of 14 December 2001)[30] in which it was set out that the construction of the Deurganckdok was a project of imperative and overriding strategic interest within the meaning of Article 6.4 of the Habitats Directive. The same went to the licences required for the (simultaneous) establishment of the nature compensation sites, which were considerably enlarged in relation to what had originally been provided for in the original regional zoning plan, after the environmental impact statement was revised, including the requisite appropriate assessment. The Flemish government may issue the licences without awaiting the amendment of the regional zoning plan. The licences are then ratified by decree, so that the Council of State no longer has jurisdiction to review the lawfulness thereof, but only the Constitutional Court has jurisdiction to review their constitutionality. Meanwhile, the Constitutional Court has dismissed all actions for suspension and actions for annulment brought against this Decree and against the decrees whereby planning permission has been ratified by the Flemish

[26] Council of State, No. 142.418, 21 March 2005, *Municipality of Borsbeek*
[27] Council of State, No. 96.198, 7 June 2001, *J.-P. Wellens and others*
[28] Council of State, No. 109.563, 30 July 2002, *M. Apers and others*
[29] Council of State, No. 87.739, 31 May 2000; Council of State, No. 93.767, 7 March 2001
[30] See: R. VAN GESTEl, "Incident- of gelegenheidswetgeving: balanceren op het smalle koord van de Trias Politica", *T.P.R.*, 2004, 1683-1697.

Parliament[31]. The Constitutional Court considered that the Flemish Parliament had not been wrong to characterize the construction of the Deurganckdok and the resumption of the construction works as a project of "imperative overriding public and strategic interest". More particularly, the Court ruled:

"B.9.2. The grounds for that course of action followed by the regional legislator were extensively set forth during the parliamentary preparations for the challenged decree (Parl. St., Flemish Parliament, 2001-2002, no. 872/1, pp. 1-16; no. 872/5, pp. 6-7, 9 and 19-27), and can be summarized as follows:

- The Deurganckdok is seen as a strategic project for the Flemish Region, the execution of which had already been decided some time ago and for which the construction works had begun but then discontinued on account of irregularities that were found in the administrative decision-making process;

- The project is of overriding interest from a social, public, economic, ecological and environmental point of view, and should be executed and made operational without delay;

- The social interest relates to the employment effects that are deemed to be connected with the execution of the project and the loss of employment in the event of non-execution; it also relates to the safety aspect involved following the discontinuation of the works;

- The economic interest relates to the economic and budgetary implications of the discontinuation of the works (the direct cost of which is estimated at 9.4 million francs per day and the total cost at least 18.4 million francs per day) as well as to the fact that the port of Antwerp would become less attractive for container transport if the project is not realized;

- The public interest relates to the expected mobility savings;

- The ecological interest relates to the obligation of simultaneous ecological compensation imposed by Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora."

The Constitutional Court also held the view that the considerably extended nature compensations now do meet the requirements of the Birds and Habitats Directives. The Court added: *"It is not for the Court, but for the European Commission, assisted by the Committee referred to in Article 20 of the Habitats Directive, to judge whether the requirement has been satisfied that all compensatory measures necessary to ensure that the overall coherence of the European ecological network "Natura 2000" is protected have been taken, given that the definition of this network has not yet been finalized, in accordance with Article 4(2), last paragraph, of the Habitats Directive, and that in any case there is still time for that until 10 June 2004, in accordance with Article 4(4) of the Habitats Directive. It suffices for the Court to establish that all the nature compensatory measures have been taken that are specified in the aforementioned environmental impact statement. As appears from the documents submitted by the Flemish government, more particularly the Memo to the Flemish government (VR/2002/18.03/DOC.0207) of 18 March 2002, the challenged decree, as was expressly announced in the parliamentary preparations for that decree, had been communicated to the European Commission in accordance with Article 6(4) of the Habitats Directive. Unless the European Commission or the Council decides otherwise, where appropriate under the supervision of the Court of Justice, the Court of Arbitration has no evidence to conclude that the challenged decree violates Article 6 of the Habitats Directive, read in conjunction with Article 10 of the EC Treaty. There is therefore nothing to indicate in what way the rights which the petitioning parties derive from those provisions would be infringed in a discriminatory manner*." Meanwhile, the regional zoning plan has been amended accordingly.

[31] Court of Arbitration, No. 116/2002, 26 June 2002; Court of Arbitration, No. 174/2002, 27 November 2002; Court of Arbitration, No. 94/2003, 2 July 2003; Court of Arbitration, No. 151/2003, 26 November 2003; Court of Arbitration, No. 56/2006, 19 April 2006

The European Commission has discontinued the infringement proceedings it had instituted for lack of compensatory measures, while the Council of State has dismissed the actions for annulment of the planning permission that had been granted.[32]

[Relevance of Community decisions. What kind of influence has the judicature of the ECJ had on national decisions (e.g. the precautionary principle). Relevance of the Commission guidelines on Managing Natura 2000 sites?]

13. Insofar as the competent courts of law are requested to do so by the parties, account is taken of the most recent and relevant case-law of the European Court of Justice. Generally speaking, they will not do so of their own accord if none of the parties asks them to. So far, the "*Commission Guidelines on Managing Natura 2000 sites*" have left no traces yet in the case-law.

[Examples of licensing decisions concerning exemptions from protection (Article 6 para 4)

- *Which authority decides on exemptions and which authority on appeals?*
- *Have exemptions been applied for and have they been granted?*
- *Grounds for refuting and allowing an exemption (alternative solutions, imperative reasons of overriding public interest, opinions of the Commission)*
- *In case an exemption has been granted, how has the incurred loss to protected values of nature been compensated? How has the Commission reacted?]*

14. In the ***Flemish Region*** it is provided that the public authority that has to decide on a licensing application, a plan or a programme can only grant the licence or approve the plan or programme if the plan or programme or the operation of the activity is not liable to cause a significant deterioration of the natural features of the special protection area in question. The relevant authority must ensure that the project or plan cannot give rise to a significant deterioration of the natural features of a special protection area (Art. 36c(4), Decree of 21 October 1997). As an exception to this rule, a licensable activity, plan or programme which, individually or in combination with one or several existing or proposed activities, plans or programmes, is liable to cause a significant deterioration of the natural features of a special protection area, can only be authorised or approved once it has been established that for the natural features of the special protection area *there are no less harmful alternative solutions* and for *imperative reasons of overriding public interest, including those of a social or economic nature.*

Where the special protection area concerned or a part thereof hosts a priority natural habitat type or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest. Furthermore, the derogation can in such case only be

[32] Council of State, No. 154.603, 7 February 2006, *M. Apers and others*

allowed if the following conditions are satisfied: a) the necessary compensatory measures and the necessary active conservation measures have or will be taken to ensure that the overall coherence of the special protection area and areas will be protected; b) the compensatory measures are such that an equivalent habitat or the natural environment thereof, of at least a similar surface area, is in principle actively developed. Every decision in that connection must be well-reasoned. The licensing authority must in its decision on the planned action, and where appropriate also the implementation thereof, take into consideration the approved environmental impact statement, the appropriate assessment or the opinion of the conservation authority. The licensing authority must justify every decision on the planned action with respect to the following points in particular: a) the choice of the planned action, a particular alternative or certain partial alternatives; b) the acceptability of the expected significant deterioration of the natural features of a special protection area; c) the compensatory measures and active conservation measures proposed in the environmental impact statement, the appropriate assessment or the opinion of the conservation authority. If this decision is taken as part of a procedure for granting a licence, permit or authorisation, the licensing authority will communicate its decision to the applicant in the same way as the decision on the application for the licence, permit or authorisation is communicated. It is the Flemish government that rules on the existence of an imperative reason of overriding public interest, including reasons of a social or economic nature (Art. 36c(5)). Since the decision is taken by the Flemish government, no administrative appeal is possible. However, the decision can be challenged before the Council of State.

The situation in the ***Walloon Region*** is similar.

For a case-law example, we can refer to the *Deurganckdok* case discussed under no. 13.