EUFJE Annual conference 24-25 October 2022 - Climate law and litigation

Belgian Report

1. How has judicial decision-making on climate change issues evolved in your country over the last decade?

In our report for the 2017 EUFJE Oxford Conference on Climate Change and Adjudication[1] we have given an overview of the pertinent Belgian jurisprudence till mid 2017. Climate change issues were at that time to a limited extend present in the caselaw of the Constitutional Court and the Supreme Administrative Court.[2]

Since mid 2017 the strategic case mentioned in that report, the so-called *Klimaatzaak* [3], has finally be decided in first instance on 17th June 2021 by the Court of First instance in Brussels[4]. The case has been appealed meanwhile and is pending now before the Court of Appeal of Brussels.[5] After a written conclusion round that will take sixteen months, the *Climate Case* will be heard on appeal from 14 September to 6 October 2023.

Another strategic case is *ClientEarth v. Belgian National Bank* that challenges the European Central Bank's Corporate Sector Purchase Program (CSPP), in which six national central banks purchase bonds from eligible companies to improve financing conditions by lowering debt costs, and that is believed to support greenhouse-gas intensive sectors and therefore exacerbates the climate crisis. In December 2021, the Brussels Court of First Instance rejected ClientEarth's application on procedural grounds.[6] ClientEarth announced early 2022 that it appealed the judgment. The case is now also pending before the Brussels Court of Appeal.

Furthermore one can see that arguments related to climate change are more frequent present in the case law of the Constitutional Court, mainly to justify the proportionality of measures taken in the framework of climate or environmental policy that restrict some freedoms or that constitute a burden for some industries[7], as one of the arguments justifying the annulment of a discriminatory measure[8] or as a justification to uphold temporally a regulation concerning the operation of windmills that has

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[1] https://www.eufje.org/images/docConf/ox2017/belgium.pdf
[2] pp. 4-6.
[3] http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/
[4] http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf
[5] http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211117_2660_appeal.pdf
[6] https://www.clientearth.org/latest/latest-updates/news/why-clientearth-is-suing-the-central-bank-of-belgium-for-climate-failings/; Why we're going back to Court against the Belgian National Bank | ClientEarth;
[7] E.g. judgments n° 30/2017 (on charges for the use of highways by lorries), n° 37/2019 (on the Brussels low emission zone), n° 70/2020 (on public interest obligations related to electricity distribution), n° 43/2021 (the Walloon low emission zone).
[8] E.g. judgment n° 11/2020 (on the mobility compensation).

found to be unlawful because not subjected to SEA[9], awaiting new regulations that shall be adopted after a full SEA in conformity with EU Law.[10] Recently, climate change policy arguments have also been accepted in a case concerning permitting of a relative small project. The Council of Permit Disputes, an administrative Court in the Flemish Region that is specialised in environmental and land use issues, held that an integrated environmental permit for a petrol station was illegal and should be annulled, because the provincial government has not checked whether the project was in conformity with the climate objectives as laid down in a policy document, the "Mayors Covenant for Climate and Energy".[11]

2. Before which type of courts is this type of litigation brought and by which type of plaintiffs?

The *Klimaatzaak* is brought by a small ENGO that has been established in view of that case – inspired by the Dutch Urgenda case - by some well known media figures. It is supported now by more than 67.000 individuals[12]. The case of ClientEarth against the *National Bank of Belgium* has been brought by an ENGO specialised in environmental litigation. Both strategic cases are pending before civil courts.

The cases decided by the Constitutional Court have been brought by industry, governments, renewable energy professional organisations, industrial federations, the fossil oil industry, individuals, trade unions and environmental organisations. The petrol station case of the Council for Permit Disputes has been brought by individuals.

3. What are the opportunities to this type of litigation in your country?

As strategic cases questioning the policy ambitions are concerned, the final result of both the *Klimaatzaak* and the *National Bank of Belgium Case* will be of great importance for the further development of such type of litigation, we believe.

It might be expected that more climate litigation will be developed relating plans and projects with a climate impact. The question will be if SEA and EIA have sufficient studied climate impacts and alternatives and approvals and permits are sufficient reasoned in the light of climate change policies and objectives. In a case against a permit for a new waste incineration plant, the Council of Permit Disputes decided to annul the permit because of an irregular alternative research in the EIA. The alternatives research must take into account, among other things, the 'decided policy', including the Flemish Energy and Climate Plan[13]. The introduction of more and more adaptation measures, including investments in infrastructure to tackle droughts and floodings, will give rise to new instances of litigation, as well as civil and criminal liability cases relating to government emergency responses in climate change induced disasters and insurance issues concerning the coverage of climate change related damages.

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[9] CJEU, Grand Chamber, 25 June 2020, Case C-24/19, A and Others (Wind turbines at Aalter and Nevele).

[10] Judgments n° 30/2021 and n° 142/2021.

[11] Case of R. Lauwrys e.a. v. Province of Antwerp; Raad voor Vergunningsbetwistingen 22 April 2021, RvVb-S-2021-0923, *TMR* 2021, pp. 380-382, 9 December 2021, RvVb-A-2122-0276, https://www.dbrc.be/sites/default/files/2022-01/RVVB.A.2122.0276_0.pdf; H. SCHOUKENS, "Het tankstation-arrest van de Raad voor Vergunningsbetwistingen als opstap richting een klimaattoets bij plannen en projecten: juridische analyse van een nakende paradigmashift", *TMR* 2021, pp. 342-365.

[12] Climate Case, the lawsuit in which everyone wins | Climate Case (klimaatzaak.eu)

[13] Raad voor Vergunningsbetwistingen 21 april 2022, RvVb-A-2122-0671 (Case of Bond Beter Leefmilieu Vlaanderen and Natuurpunt Beheer v. Flemish Region).

4. What are the challenges to this type of litigation in your country?

Funding of litigation might be a problem, although litigation costs in Belgium are comparable moderate, as well of the length of proceedings and the complex nature of climate governance in Belgium due to the repartition of competences between the federal government and the communities and regions. It took the *Klimaatzaak* 6 years to have a first judgment on the merits, because 4 governments are concerned, with different official languages and the case went up to the Supreme Court for a final decision if the whole case could be heard in French.[14]

5. What is the average length of proceedings (including on appeal and cassation)?

As indicated, it took 6 years to have a first judgment on the merits in the *Klimaatzaak*. It will most probably take 2 years for an appeal decision and maybe another year for a Supreme Court decision if a cassation appeal would follow.

The non-admissibility decision in the case of the *National Bank of Belgium* followed within 11 months. It has to be seen when the case will be heard and decided by the Court of Appeal.

As the Constitutional Court is concerned, the Court takes on average 12 months to decide a case. The cases mentioned are all demands for annulment, so that the whole case is as a rule finalised within that time frame. In a few cases the Court referred however the case to the CJEU for a preliminary ruling[15]. In such cases the average time for delivering a final judgment is more than 4 years, taking into account the time needed to refer the case, the time needed by the CJEU to answer and the time needed to finalise the case after the ruling given by the CJEU. The Constitutional Court takes on average also 12 months to deliver a preliminary ruling when the cases is referred to the Constitutional Court by other Belgian judges, but that time will than come on top of the time taken in the cases before the referring judges.

The petrol station case took the Council for Permit Disputes less than 5 months to decide on the request for suspension.

6. Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

In the *Klimaatzaak* the Court of First Instance of Brussels held that by pursuing a deficient climate policy, the four governments were infringing the right to life, and to respect for private and family life and the home enshrined in Articles 2 and 8 ECHR. Due to the combination of poor results in reducing GHG emissions, chaotic climate governance and repeated warnings from the European Commission, the Belgian authorities have in so doing not acted with the prudence and diligence expected of a *bonus pater familias* in the sense of Article 1382 of Code Civil. The applicants asked the Court for an injunction against the public authorities to take the necessary measures to reduce GHG emissions. In particular, they asked for a judicial follow-up, sanctioned by a penalty payment. However, their request was not granted on the grounds that it would infringe the principle of the separation of powers. The Court

[14] Climate Case, the lawsuit in which everyone wins | Climate Case (klimaatzaak.eu)

[15] CJEU, 31 January 2013, Case C-26/11*, Belgische Petroleum Unie and Others*; CJEU 26 September 2013, Case C-195/12, *IBV & Cie*.

considered that it should not deprive the public authorities of their discretion in determining the measures to be taken. Its review is limited to establishing "fault" within the meaning of Article 1382. The Court emphasised that the Paris Agreement does not require the Belgian authorities to respect a trajectory and that EU secondary law only requires a 35% reduction in emissions of GHG compared to 2005 by 2030.[16]

As the Constitutional Court cases are concerned, most of them were cases in which measures to protect the climate were challenged and the Court has rejected the demands for annulment, judging that constitutional, international and European provisions were not violated. There have been 2 exceptions. In one case (ETS on aviation) the annulled regional laws regulation the matter. The Court found that the Federal Government should be involved, because the system at stake has to do also with the regulation of civil aviation and navigation above territorial sea, matters of federal competence. A Co-operation Agreement was necessary to regulate the matter properly. The Court upheld the effects of the annulled regional acts to allow for negotiation and conclusion of such an Agreement, which was done on time. The other case concern the annulment of the mobility compensation that was believed to be discriminatory and not contributing to a sustainable climate policy.[17]

In the petrol station case the Council of Permit Disputes suspended the permit by way of interim relief, awaiting the final decision of annulment.

7. Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard

Depending on the Court at issue the situation is different. The Constitutional Court and the administrative courts (Council of State, Council for Permit Disputes) can annul and suspend a challenged act of parliament (Constitutional Court), an administrative regulation or an individual administrative acts (permit decisions only in case of the Council for Permit Disputes) respectively. Those decisions are so to speak "self enforcing". The Council of State can also provide for compensation for damages. In case the judgment implies that a new regulation or individual administrative act should be taken, an penalty payment can be imposed per day of delay in taking such a decision. Similar powers have been given tot the Council of Permit Disputes.

Civil courts can give an order and enforce that by imposing a penalty payment per day of delay in executing such an order and provide for compensation or reparation in natura.

[16] N de Sadeleer, Belgian tort law. Tortious omissions to pursue a climate change policy consistently with international law, paper for the Avosetta Meeting 2022, Uppsala. Meanwhile, under the Fit for 55 Legislative Package, that reduction objective would be increased to a reduction of 47 % for the non-ETS sectors.

[17] 2020-011f (const-court.be)

8. What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses

In de *Klimaatzaak* it are the articles 2 and 8 of the ECtHR and article 1382 of the Civil Code (liability for fault) interpreted in the light of the international and European Climate obligations and commitments of Belgium.

In the cases of the Belgian Constitutional Court it are the Articles 7b (sustainable development), 10 and 11 (equality and non-discrimination) and 23 (right to the protection of a healthy environment) of the Constitution, read in conjunction with international (UNFCC, Kyoto Protocol, Paris Agreement….) and EU (Decision 94/69/EC, Decision 2002/358/EC, Directive 2003/87/EC, Directive 2009/30/EC, Regulation 2018/1999/EU…) Climate Law, as well as intra-Belgian co-operation agreements in the field of climate change.

The Council of Permit Disputes applies the general objectives in article 1.1.4 VCRO (Flemish Codex Spatial Planning). It is a useful general norm for permits (and plans) and states that spatial planning is aimed at 'sustainable spatial development' in which space is managed for the benefit of the current generation, without compromising the needs of future generations, and that future consequences for the environment must be taken into account.

II. Case identification and data collection

The following cases are worth mentioning:

I.

R. Lauwrys e.a. v. Province of Antwerp

Case number: RvVb-S-2021-0923 and RvVb-A-2122-0276

Names of the plaintiffs and defendants, including the type (governments, corporations and/or individuals); 1. René LAUWRYS, 2. Irmgard HOUSCHKA, 3. Patrick HUYBRECHTS, 4. Theodorus VAN DEN BRANDE, 5. Patricia COENEN (individuals) v. Provincie ANTWERPEN (provincial government) - Intervening parties; 1. College van burgemeester en schepenen van de gemeente BOECHOUT 2. Gemeente BOECHOUT (local government), 3. GABRIËLS & CO nv (permit holder – petrol station operator)

Filing Date: 7 December 2020

Status: Challenged permit suspended on 22 April 2021 – Annulled on 9 December 2021

Jurisdiction: Raad voor Vergunningsbetwistingen (Council for Permit Disputes – Flemish Region of Belgium)

Principal Laws: Flemish Land Use Codex (art. 1.1.4 – art. 4.3.4) – Covenant of Mayors

Summary[18]: This is a noteworthy case regarding a planning and environmental permit for a petrol station in the municipality of Boechout. Initially, the permit application was declined by the local municipality, which relied, amongst others to its climate pledge. To be more precise, the municipality of Boechout had signed the Covenant of Mayors and argued that authorising a petrol station, without any additional renewable energy facilities, would run counter to its climate pledges. This decision was overturned on appeal, by the Provincial authority of Antwerp, who held that climate-related considerations had no role to play in assessing the compatibility of a permit application with the applicable environmental and spatial planning rules.

In a first decision of 21 April 2021, the Council suspended the permit with reference to Article 4.3.4 of the Flemish Spatial Planning Code. This provision allows permit issuing authorities to decline permit applications which clash with the sectoral objectives and due diligence obligations that are applicable in other environmental policies. International and EU obligations which, although they lack direct effect, force competent authorities to implement certain environmental objectives fall within the scope of the said provision. The municipality of Boechout had put forward that this provisions provides a legal ground to take into account the climate pledges that were included in the Covenant of Mayors. The Council agreed, stating that 'care for climate' can be brought with the material scope of Article 4.3.4 of the Flemish Spatial Planning Code. Whereas the Council acknowledged the fact the binding force of the climate targets imbedded in the Paris Agreement remained rather ambivalent, the signing of the Covenant of Mayor reasserted the duty to care for climate incumbent on the local authority.

In its subsequent decision of 9 December 2021, in which the Council annulled the permit, the Council reaffirmed its position. In doing so, it added two additional lines of argumentation. First, it recalled Article 1.1.4 of the Flemish Spatial Planning Code, which stipulated that the rights of future generations are to be taken into account when executing the Flemish spatial planning policy. This provision indeed puts forward the principle of sustainable spatial planning, which ought to be at the heart of the Flemish spatial planning policy and, according to the Court, can be used as lever to integrate climate considerations in permitting procedures. Second, the Court also underlined that the climate pledges of the municipality are not merely voluntary. It is not precluded, the Council held, that citizens will in due course hold also local municipalities accountable for not meeting their climate targets. In doing so, the Council indirectly linked the principle of climate responsibility of governments and public authorities to the permitting policies. It is the first time that climate liability was also invoked in the context of local authorities. Third, the Council also indicated that achieving the climate pledges does not only require additional commitments on the part of the municipality, but also on the part of the inhabitants and companies present on the territory of the municipality.

II.

Bond Beter Leefmilieu en Natuurpunt Beheer v. Flemish Government

Case number: RvVb-A-2122-0671

Names of the plaintiffs and defendants, including the type (governments, corporations and/or individuals); 1. BOND BETER LEEFMILIEU VLAANDEREN vzw 2. NATUURPUNT BEHEER, VERENIGING VOOR NATUURBEHEER EN LANDSCHAPSZORG IN VLAANDEREN vzw (environmental NGO's) v. Flemish Government - Intervening parties; 1. ISVAG (permit holder) 2. College van burgemeester en schepenen

[18] Based on summary made by Hendrik Schoukens for the Avosetta 2022 meeting.

van de gemeente Aartselaar (local government) 3. OPENBARE VLAAMSE AFVALSTOFFENMAATSCHAPPIJ (OVAM) (public waste administration)

Filing Date: 23 September 2020

Status: Annulled on 21 April 2022

Jurisdiction: Raad voor Vergunningsbetwistingen (Council for Permit Disputes – Flemish Region of Belgium)

Principal Laws: decree of 5 April 1995 on general provisions on environmental policy – EIA legislation

Summary: Two environmental NGO's brought an action before the Council of Permit Disputes against a permit for a new waste incineration plant. According to the requesting parties, the EIA was not in line with the reduction in waste incineration capacity proposed in the Flemish Energy and Climate Plan (9 December 2019) and the policy ambitions in the field of climate neutrality (criticism is, among other things, that the location alternatives have not been sufficiently investigated in the EIA with regard to valorisation of energy in the environment and related energy efficiency and climate impact). The action was also based on the energy efficiency of the planned project and the possible alternatives (cost-benefit analysis).

The Council for Permit Disputes decided to annul the permit. The 'zero alternative' has not been correctly investigated in the EIA. The EIA is based on the assumption that the current incineration activity can be continued at this location. The alternatives research must take into account, among other things, the 'decided policy', including the Flemish Energy and Climate Plan. The EIA does not conclusively show that the heat demand from the environment played a role in the location alternatives study. Furthermore, article 14.7 of the Energy Efficiency Directive does indeed require that the CBA has effect as an instrument in the permit process and, if necessary, leads to a refusal.

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Some of the older cases of the Constitutional Court have been summarised as follows in the 2017 Report. Maybe they are of less interest for the databases.

Judgment n° 92/2006, 7 June 2006 – Walloon Regional Act – Transposition Directive 2003/87/EC – *sa Cockerill Sambre & sa Arcelor*

The Court found no discrimination of steel companies compared with the non-ferrous and the chemical industries. The Court ruled that in the first commitment period it was justified to start applying the ETS to the largest emitters first.[12] Climate change policies justify limitations on freedom of enterprise and property rights. There has not been a violation of the freedom of establishment.

[12] Compare: ECJ, Case C-127/07, 16 December 2008, *Société Arcelor Atlantique and Others.*

Judgment n° 33/2011, 2 March 2011 – Walloon and Flemish Acts Transposing ETS Amendment- Civil Aviation – *Government of Brussels Capital Region*[13]

The Court found that Federal Government should be involved, because the system at stake has to do also with the regulation of civil aviation and navigation above territorial sea, matters of federal competence. The Regional Acts therefore are not respecting the territorial limitations of the regions. A Co-operation Agreement is necessary to regulate the matter properly. The Court reconfirmed its position in 2 subsequent judgments[14]. The Court upholds the effects of the annulled acts to allow for negotiation and conclusion of such an Agreement. Meanwhile such an agreement has been concluded.

Judgment n° 193/2006, 5 December 2006 – Federal Act – Support for offshore windfarms – *vzw Edora*

The Court held that the development of off shore wind energy justifies higher support than land based because of the extra costs for this type of production.

Judgment n° 8/2014, 23 January 2014 – Flemish Act – Reduction of State Aid for Renewable Energy – *nv Aspiravi and vzw Federatie Belgische Biogasinstallaties*

The Court recognized that there is a need to reduce greenhouse gas emissions. Support for the development of renewable energy fits in that purpose. There is a width margin of appreciation of the legislator and techniques and the related economics are rapidly changing. There is also some room for trial-and-error, but the principle of legal certainty should be respected as regards investment decisions taken under previous schemes. Fixed administrative fines per missing green certificate are not unconstitutional. They are not only a sanction, but also an economic incentive and this has an impact on the proportionality test.[15]

Judgments n° 149/2010, 22 December 2010 and n° 94/2013, 9 July 2014 – Federal Act - Obligation to blend fossil fuels with a growing percentage of biofuels - *Belgische Petroleum Unie VZW and Others*

After the Court had referred the case for a preliminary ruling to the ECJ[16] is held that the obligation to blend a growing percentage of biofuels into fuels for cars entailed no violation of the Freedom of Religion, various EU directives, the Freedom of Enterprise, nor of the Free Movement of Goods.[17]

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[13] See also Constitutional Court, n° 76/2012, 14 June 2012, *Council of Ministers*; Constitutional Court, n° 67/2014, 24 April 2014, *Belgian State v. Flemish Region.*

[14] Judgment n° 76/2012, 14 June 2012; Judgment n° 67/2014, 24 April 2014.

[15] The Court held also in its judgment n° 27/2014 of 13 February 2014, after having consulted the ECJ (Case C-195/12, 26 September 2013, *Industrie du bois de Vielsalm & Cie (IBV) SA v. Région wallonne*), that the exclusion of the sawing mill industry from the most favourable support mechanism for renewable energy production, was justified.

[16] ECJ, Case C-26/11, *Belgische Petroleum Unie VZW and Others*, 31 January 2013.

[17] With its judgment n° 52/2015, 7 May 2015, *Neste Oil Oyj* the Constitutional Court annulled, on demand of a Finnish State Owned Company, the exclusion of one particular type of biofuels (HVO) from a support scheme stimulating the use of sustainable biodiesel, because of a violation of the principle of non-discrimination, in combination with some EU law provisions.

Judgment n° 170/2014, 27 November 2014 – Brussels Code on Air, Climate and Energy – Reduction of car parking places – *vzw Federatie van Belgische Parkings*

The Court held that the reduction or limitation of car parking places in the Brussels Capital Region in the framework of environmental permits is justified in the context of its climate change policies.

The Constitutional Court considers Climate Change Policy as an overriding public interest, that justifies restrictions of various rights and liberties. Differences in treatment can relatively easy be justified especially in the earlier stages of policy development. Emerging climate change law can thus be construed in a manner that is compatible with fundamental principles of the rule of law.[18]

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It has to be evaluated if the more recent cases of the Constitutional are sufficient interesting to include in the databases. Here are the links to the French version of those judgments:

https://www.const-court.be/public/f/2017/2017-030f.pdf

https://www.const-court.be/public/f/2019/2019-037f.pdf

https://www.const-court.be/public/f/2020/2020-011f.pdf

https://www.const-court.be/public/f/2020/2020-070f.pdf

https://www.const-court.be/public/f/2021/2021-030f.pdf

https://www.const-court.be/public/f/2021/2021-043f.pdf

https://www.const-court.be/public/f/2021/2021-142f.pdf