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A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

For the moment Environmental or Procedural Laws have not been amended under the influence of the case law of the CJEU, although different proposals to amend Procedural Law (both for the ordinary Judiciary and for the Council of State) have been introduced in the past by some members of the parliament in view of insuring better implementation of the Aarhus Convention[1] (see: Aarhus Compliance Committee, Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in the case of access to justice for Environmental organizations to challenge decisions in court (Communication ACCC/C/2005/11 by *Bond Beter Leefmilieu Vlaanderen VZW* (Belgium))[2]. These proposals are still pending in Parliament. Another proposal to amend the Act of 12 January 1993 to strengthen the existing action for injunctive relief in environmental matters and facilitate access to it for NGOs was introduced in the Senate on 1 April 2007[3]. It was re-introduced after the 2007 general elections[4], but not discussed and not reintroduced in the current legislature.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law

[1] Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerkens et consorts, 19 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1693/001 ; a similar proposal has been introduced in the Senate : Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mmes Z. Khattabi and Freya Piryns, 16 November 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1330/1; Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerkens et consorts, 14 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1680/001 ; the private bill has also been introduced to the Senate : Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Z. Khattabi, 3 Novembre 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1293/1.

[2] http://www.unece.org/env/pp/compliance/Compliancecommittee/11TableBelgium.html

[3] Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, *Sénat de Belgique* (2006-2007), DOC 3-2442/1

[4] Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, déposé par B. Martens, 6 December 2007, *Sénat de Belgique*, (2007-2008), DOC 4-470/1

in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

2.1. Although Belgian jurisprudence is quite often referring to the Aarhus Convention (e.g. the Constitutional Court in 22 judgements, the Council of State in 123 judgements) there is far less reference to the Aarhus related case law of the CJEU.

CONSTITUTIONAL COURT

2.2. The *Constitutional Court* referred to different judgments of the CJEU, including C-263/08 *Djurgarden* and C-427/08, *Irish Costs,* in the judgement by which it referred a series of questions for a preliminary ruling to the CJEU[5]. This case is about the Decree of the Walloon Parliament of 17 July 2008 on certain permits for which there are overriding reasons in the public interest (*Décret du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général).* Articles 1 to 4 of that Decree (Legislative Act of the Walloon Parliament) provided that overriding reasons in the public interest have been established for the grant of town-planning permits, environmental permits and combined permits relating to acts and works for the improvement of the infrastructure and public buildings of the regional airports of Liège-Bierset and Brussels South Charleroi, the RER rail network, the structural modes of public transport for Charleroi, Liège, Namur and Mons and the missing road and waterway links of the trans-European transport network in the Walloon Region. These permits could be granted by the Walloon Government. Within 45 days of their being granted the Government had to submit these permits to the Walloon Parliament. The Walloon Parliament had to ratify the permits submitted to it within 60 days. Furthermore the articles 5 to 9 of the Decree provided that a series of permits, for which overriding reasons in the public interest have been established, were ratified. These permits are relative to some works and activities concerning Liège-Bierset Airport, Charleroi-Brussels South Airport, the RER network and the associated structures, a wastewater treatment plan and a management and training centre.

The *Conseil d'État* (Council of State or Supreme Administrative Court) essentially has jurisdiction to rule on actions for annulment brought against administrative acts such as environmental and building permits. It does however not have jurisdiction to hear actions brought against acts of a legislative character. The ratification by decree of the Walloon Parliament of those permits gave those acts legislative status. The *Conseil d'État* consequently ceased to have jurisdiction to hear actions for annulment brought against the acts thus ratified, which could now be challenged only before the Constitutional Court, before which, however, only certain grounds may be pleaded, namely violation of the Constitution, in conjunction with provisions of international and European law. The Constitutional Court is in principle not competent to verify the procedural legality (including observance of EIA legislation, public participation…) of the permits that have been ratified by the Parliament. Thus the judicial review of those permits is much more restricted than normal administrative permits.

[5] Constitutional Court, n° 30/2010, 30 March 2010, *M.-N. Solvay and Others*. This is CJEU Case C-182/10, *Solvay and Others* that is very similar to CJEU, Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and Others* and Joined Cases C-177/09 to C-179/09, *Le Poumon vert de la Hulpe and Others*.

The Constitutional Court had before it a number of actions seeking annulment of the decree of the Walloon Parliament of 17 July 2008 which 'ratified' the building permits for various works that is to say, authorized them in view of 'overriding reasons in the public interest'. The Court further had before it questions referred by the *Conseil d'État* for a ruling on the lawfulness of that decree. The *Conseil d'État* had previously already itself raised the question of the compatibility of the decree with European Union law and the Aarhus Convention and referred questions on that point to the CJEU for a preliminary ruling. The Constitutional Court on is turn referred different questions for a preliminary ruling to the CJEU. The essential question was if the Aarhus Convention and the implementing EU directives were applicable to such a decree or not, and if so, if the constitutional review of the Constitutional Court satisfied the requirements of art. 9 (3) and (4) of the Aarhus Convention.

The CJEU held in this respect[6],: *"2. Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended*."

Based on the answer of the CJEU in particular the paragraphs 30 to 48 of the judgment in *Solvay and Others* case, the Constitutional Court[7] has meanwhile come to the conclusion, looking also to the parliamentary discussions, that the Decree does not satisfy the conditions set out by the CJEU to be considered as a "specific legislative act" that can be exempted from full judicial review. The Court annuls therefore the articles 1 to 6 and 15 to 17 of the Decree for violation of the articles 10, 11 and 23 of the Constitution, in combination with the aforementioned provisions of the Aarhus Convention and Directive 85/337/EEC. It declares that the other articles (that were not challenged by a demand for annulment) are violating the same provisions, so that they must be set aside by the courts[8]. The result of the case is that all of the permits concerned can now be subject of full judicial review by the Council of State and that the Council can judge the pending cases.

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[6] CJEU, C-182/10 , *Solvay and Others*, 16 February 2012

[7] Constitutional Court, n° 144/2012, 22 November 2012, *M.-N. Solvay c.s. v. Walloon Region*

[8] See also: Constitutional Court, n° 11/2013, 21 February 2013, *Ville de Charleroi v. Walloon Region*

2.3. The Constitutional Court annulled the reduction, in the Flemish Region, of the time limit to lodge a judicial appeal with the (new) Council of Permit Contestations to 30 days from the day after the contested decision is made public (instead of 60 days to lodge an appeal with the Council of State from the day one becomes aware of the decision) accepting an argument based on the violation of art. 10, 11 and 23 of the Constitution, combined with art. 6 ECHR and art 9 of the Aarhus Convention[9]. This time limit has meanwhile be prolonged to 45 days.

2.4. The Constitutional Court, that has itself a broad view on standing of NGO's[10] and private persons, invited the Council of State, with references to the case ECtHR, 24 February 2009*, L'Erablière ASBL v. Belgium* and other ECtHR cases, not to apply to restrictive or formalistic requirements when assessing the interest requirement[11]. In a recent judgment the Constitutional Court invited the Council of State again to restrain from a to formalistic application of rules regarding admissibility[12].

SUPREME COURT

2.5. The *Supreme Court* (Court of Cassation) has for the moment not referred to any of the Aarhus cases of the CJEU. Nevertheless the Aarhus Convention has influenced recently the case law of the Supreme Court in a dramatic way.

In the 1970s, a trend could be discerned in Belgium whereby the civil courts and the criminal courts (as far as actions for damages are concerned) increasingly acknowledged that environmental groups could rely on a collective interest to have standing. This trend was stemmed by the Supreme Court in the so-called *Eikendael* judgment of 19 November 1982 (Hof van Cassatie, *Nv S. v. Vzw Werkgroep voor Milieubeheer Brasschaat*, 19 November 1982). In this judgment the Supreme Court considered that, in accordance with Article 17 of the Judicial Code, no legal action is admissible if the plaintiff has no interest in bringing such an action. According to the Court, unless the law provides otherwise, legal proceedings instituted by a natural or legal person were not admissible if the plaintiff had no personal and direct interest, in other words, no interest of its own. The court left no doubt that public interest does not amount to 'own interest'. The own interest of a legal person is only that which affects its existence or its tangible and intangible assets, its property, honour and reputation. A corporate purpose, even if this be the protection of the environment, was in the Court's view not an own interest.

The Supreme Court had till recently not the opportunity to reconsider this case law in the light of the Aarhus Convention. The first occasion to do so, a Judgment of 11 June 2013[13], brought a radical change in the Court's approach towards standing of environmental NGO's. The Court held that Art. 3 (4) of the Aarhus Convention stipulates that Each Party "shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation". Art. 9 (3) of the Convention stipulate that: "In addition

[9] Constitutional Court, n° 8/2011, 27 January 2011, *A. De Bats and Others v. Flemish Government.*
[10] See e.g. Constitutional Court, n° 114/2009, 9 July 2009, *L'Erablière asbl*
[11] Constitutional Court, n° 109/2010, 30 September 2010, *C. Demerlier*
[12] Constitutional Court, n°44/2013, 28 March 2013, *cvba Association Intercommunale pour la Protection et la Valorisation de l'Environnement pour la province de Luxembourg*
[13] Hof van Cassatie, 11 juni 2013, *P.P. en P.S.L.V. t. GSI en vzw M Nr.* (P.12.1389.N)

and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." Art. 2(4) define "the public" as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups". Therefore, says the Court, it follows from these provisions that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention. According Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belong to the victims. They shall demonstrate a direct and personal interest. When such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so. The Supreme Court approves the challenged judgment of the Court of Appeal of Brussels that accepted the action in reparation of an environmental NGO in a criminal case dealing with violations of the Flemish Code on Town and Country Planning (illegal construction of horse stables and an outdoor arena).

SUPREME ADMINISTRATIVE COURT

Explicit references to CJEU case law

2.6. With reference to case C-240/09 *Slovak Brown Bear* the Council of State came to the conclusion that Art. 8 of the Aarhus Convention has no direct effect[14].

2.7. With reference to the same case, especially paragraphs 47 en 48 ("it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case" and "it is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)"), the Council of State held that Art. 9 (3) of the Aarhus Convention is not establishing an unconditional right to an effective appeal that would preclude any condition of admissibility. The Council is of the opinion that the necessity to demonstrate a lawful personal interest is not violating the Convention. Even if such a condition must be interpreted broadly for environmental NGO's, there is still a need to demonstrate a

[14] Conseil d'Etat, n° 220.463, 14 Augustus 2012, *asbl Ligue Royale belge pour la protection des oiseaux*

sufficient direct link between the challenged act and the objective of the association that would be prejudiced, otherwise one would be confronted with an *actio popularis*[15].

2.8. With reference to the Opinion of Advocate general Sharpston in case C-263/08 *Djurgarden* the Council of State was of the Opinion that the necessity to give large access to justice to environmental NGO's does not mean that such an NGO, to be admissible, must not respect the prescriptions of national law governing the management of non-profit organisations (in this case the obligation to publish modifications in the composition of the board in the official journal)[16]. Later on the Council of State referred in that case a question for a preliminary ruling to the Constitutional Court[17] and the Constitutional Court found the interpretation of the Council of State of the relevant provision of the Act governing non-profit organisations (that the action is automatically inadmissible if the changes in the composition of the board were not published) violates the Constitution, while another interpretation (that the organisation has still the possibility to proof that the change in the composition has been taken effectively place and the defending party is aware of it) would not violate the Constitution[18].

2.9. The Council of State has suspended a building permit of a railroad project that is located on the territory of two regions (with different legal regimes) considered to be illegal because of violation of the legislation on the use of languages. The applicant referred to case C-416/10 *Krizan* while asking for interim relief. The Council of State is of the opinion that the applicant will undergo a difficult to rectify prejudice and suspend the building permit, rejecting a request of the defending railway company to reject this demand on the basis of a balance of conflicting interests[19].

Case law of the ECtHR

2.10. In the case of *L'Erablière ASBL*[20] a local environmental NGO demanded the annulment of a decision granting planning permission for a waste treatment plant in a nature protection area. In a decision of 26 April 2007 the Council of State declared the applicant association's application for judicial review inadmissible because the statement of facts did not satisfy the official requirements and did not provide the Council of State and the judge examining the case with sufficient information. Relying on Article 6 (1) ECHR (right to a fair hearing), the applicant association complained that the inadmissibility decision regarding its application for judicial review of planning permission amounted to a violation of its right of access to a court. The ECtHR considered that increasing the capacity of a waste collection site could directly affect the private life of the members of *L'Erablière,* and stressed that the aim of the association was limited to the protection of the local environment. Consequently, it found that its action could not be regarded as an *actio popularis* and held that Article 6 was therefore applicable. The ECtHR noted that the submission of a statement of the facts was one of the formal requirements under domestic law for lodging an application for judicial review before the Council of State. It observed, however, that the Council of State and the opposing party could have acquainted

[15] Conseil d'Etat, n° 223.882, 13 June 2013, *asbl Terre Wallonne*
[16] Conseil d'Etat, n° 205.742, 24 June 2010, *asbl L'Erablière;* n° 207.160, 31 August 2010, *asbl L'Erablière*
[17] Conseil d'Etat, n° 218.297, 1 March 2012, *asbl L'Erablière*
[18] Constitutional Court, n° 44/2013, 28 March 2013, *asbl L'Erablière*
[19] Raad van State, n° 224.226, 2 July 2013, *A. Oude Hendrikman*
[20] ECtHR, 24 February 2009, *L'Erablière ASBL v. Belgium*

themselves with the facts even without this statement. The Court concluded that the limitation on the right of access to a court imposed on the applicant association was disproportionate to the requirements of legal certainty and the proper administration of justice, contrary to Article 6 (1) ECHR.

Environmental NGOs

2.11. As the case law of the Council of State[21] is concerned, we can repeat what has been written in the *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium* (2012) commissioned by the European Commission. For the moment it seems that the jurisprudence of the Council of State is subject to evolution. In a recent judgment of the general assembly of the Council of State[22], the Council used the usual formula of the Constitutional Court concerning standing requirements for NGO's, in stating that a non-profit organization that has legal personality (*association sans but lucrative*) has standing if its statutory objective is of a particular nature, and thus different from that of general interest, that she is defending a collective interest, that de statutory aim can be affected by the challenged act and that it is obvious that she is pursuing her statutory objective in an active way (para 28.2.3.2). A similar formula was used in later judgments[23]. Since the creation of particular administrative courts dealing with immigration law (on the federal level) and building permits and alike in the Flemish region, the caseload is indeed becoming more manageable and the backlog is gradually disappearing. Together with pressures from the ECtHR[24], the Constitutional Court[25] and the Aarhus Compliance Committee[26], it can be expected that the Council will become more lenient again. For the moment there is however no clear picture. Triggered by the Aarhus Convention, some judgments can be welcomed[27], while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention[28]. In the latter case law the Council of State is of the opinion that although environmental NGO's are presumed to have an interest by virtue of Art. 9 (2) of the Aarhus Convention, they must also show "capacity" or "quality" ("*hoedanigheid*" "*capacité*"), a somewhat unclear concept in this context that is interpreted in that sense that there should be a clear match

[21] See for a complete overview of the case-law since the creation of the Council of State in 1948 till mid 2010, discussing around 900 judgments relating to more than 600 cases: P. Lefranc, Over de ontvangst van milieuverenigingen in de Raad van State (overzicht van rechtspraak 1948-2010), *Tijdschrift voor Milieurecht,* 2010, 426-467. 426-467. See also: P. Lefranc, De toegang tot de afdeling bestuursrechtspraak van de Raad van State in het licht van het Verdrag van Aarhus, *Tijdschrift voor Milieurecht*, 2012, 634-645.

[22] Raad van State, n° 187.998, 17 November 2008*, Coomans et. al., Tijdschrift voor Milieurecht,* 2009, 64-94.

[23] Raad van State, n° 192.085, 31 March 2009, *vzw Natuurpunt e.a;* Raad van State n° 211.533, 24 February 2011, *vzw Milieufront Omer Wattez.*

[24] ECtHR, 24 February 2009, *L'Erablière ASBL* v. Belgium.

[25] Constitutional Court, n° 109/210, 30 September 2010, *Christel Demerlier*; Constitutional Court, n°44/2013, 28 March 2013, *cvba Association Intercommunale pour la Protection et la Valorisation de l'Environnement pour la province de Luxembourg*

[26] Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW.*

[27] E.g. Raad van State, n°. 166.889, 15 February 2007, *VZW Milieufront mer Wattez*. See in the same sense: Raad van State, n° 193.593, 28 May 2009*, vzw Milieufront Omer Wattez*; Raad van State, n° 197.598, 3 November 2009, *vzw Stichting Omer Wattez*; Raad van State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*.

[28] E.g. Raad State, n° 197.509, 3 November 2009, *vzw Milieufront Omer Wattez* and more than 20 other judgments in the same sense; P. Lefranc (2010), 446

(proportionality) between the statutory objective of the NGO and the contested project[29]. A regional organisation can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, or bigger projects that are of *supra* regional interest. Sometimes also "representativity" ("*representativité*" "*representativiteit*") is requested, meaning that the association should have sufficient support of the people living in the area that is affected by the contested decision.[30]

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

3.1. We can repeat on this point also what has been written in the *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium* (2012): delay in adjudication and applying effective remedies seems to be the main challenges.

3.2. According to the Organic Act on the Council of State (Art 17 (4)) the president or acting president of the competent Chamber of the Council of State should decide on the demand for suspension within a period of 45 days. If an administrative decision or regulation is suspended, a final decision on the demand for annulment should be delivered within the following six months. There is however no sanction for transgressing this time limits. In practice, these time limits were seldom observed in the past. It seems that decisions on demands of suspension are delivered in practice 4 to 9 months after the introduction of the case. When the act or regulation is not suspended, deciding on the merits of the cases can take a long time, till recently delays of five to ten years were not exceptional. Some of the cases were found at the end to have no subject anymore, because e.g. the period of validity of a challenged permit had expired meanwhile[31]. Because the backlog of the Council of State is gradually disappearing in recent times, nowadays decisions on demands for suspension seems to be taken within a period of 5 months on average and on demands for annulment within a period of 2 to 2,5 years. This should be in the near future 12 to 18 months. There are no clear figures on the performance of the Flemish Council for Permit Disputes[32]. It is however clear that this Council has already build up a serious backlog, so that the Council is not meeting the requirement of timely judgments for the moment[33]. The *Judicial Code* provides in its Articles 1035 to 1041 a fast track procedure ("summary proceedings") for dealing with requests for *interim relief*. The cases can be handled on very short notice. That same procedure – but leading to a judgment on the merits of the case -

[29] P. Lefranc (2010) 447-453; P. Lefranc (2012), 642-644; the Council is sometimes of the opinion that there is a sufficient proportional relationship between the material and territorial sphere of action of a (sub-)regional environmental NGO and a contested decision (e.g.: Raad van State, n° 208.918, 10 November 2010, *vzw Natuur en Landschap Meetjesland* concerning a specific land use plan for an industrial facility), while on other occasions it believes that this is not the case (e.g. Raad van State, n° 208.116, 13 October 2010, *vzw Milieufront Omer Wattez* (building permit for an individual house); Raad van State, n° 208.473, 27 October 2010, *vzw Milieufront Omer Wattez* (building permit for an individual house)).

[30] P. Lefranc (2010) 453-454.

[31] P. Lefranc, De vereiste van het actueel belang. En de redelijke termijn ?, *Tijdschrift voor Milieurecht,* 2005, 667-671.

[32] See for a random sampling of processing times: Raad voor Vergunningsbetwistingen, *Jaarverslag 2010-2011, Brussels,* 55-59.

[33] Raad voor Vergunningsbetwistingen, *Jaarverslag 2010-2011,* 59-65.

is applicable in the framework of the Act of 12 January 1993 on a Right of Action for the Protection of the Environment (Art. 3(1)). We can quote an example of a case introduced on June 7th 2004, with a decision in first instance on June 24th 2004 and a decision on appeal on July 2th 2004.[34] However, such a diligent handling of cases seems to be exceptional. Especially when there is appeal it can happen that the case takes different years to be settled[35].

3.3. In general one can say that the different courts dispose of sufficient remedies to provide for adequate and effective relief. However, in practice, there are a lot of cases that deliver unsatisfactory results, mainly because of the delays in handling the cases due to the historical backlog with the Council of State (and the newly build up backlog with the Flemish Council for Permit Disputes) and on the level of the Courts of Appeal, as civil (and penal) cases are concerned. When a plan or permit is challenged before the Council of State or the Flemish Council for Permit Disputes and one does not obtain the suspension of the challenged act within a short period, the risk is real that the developments or projects have been completely or largely realised[36] on the ground the day the act is annulled some years later. It can also happen that a project has to be stopped in the course of its realisation if it takes too much time to obtain a suspension of the permit. That is frustrating, not only for the third parties, but also for the developers and the authorities. That is especially so if the Council decides e.g. to annul with very much delay on (very) formal grounds, without going into the substantive issues. It can lead to delays in development, extra costs, repeated attempts to regularize the situation, followed by renewed disputes and judgments, claims for damages and, finally, loss of respect for and credibility of the court system. This situation partially explains also why regional authorities have tried to circumvent judicial review by the Council of State in providing ratification of some permits for larger projects by the regional parliament, which has as a result that those acts could only be challenged before the Constitutional Court, with a less extended review as a consequence. Such an approach is only under strict conditions compatible with EU law (see para 2.2).

[34] P. Lefranc, De milieustakingswet: overzicht van rechtspraak (1993-2008), *Tijdschrift voor Milieurecht* 2009, 25.

[35] Lefranc (2009), 25. Very exceptional is however a decision on the admissibility of a case only, that was taken more than 4 years after the introduction of it (and that has been appealed before a judgment on the merits was passed): President of the Court of First Instance, Ghent 26 September 2011, *Tijdschrift voor Milieurecht* 2011, 711-718.

[36] E.g. Council of State, n° 212.825, 28 April 2011, *Lauwers*. The Council of State annuls a building permit – delivered on 29 March 2007 - for the construction of a tramway *Deurne-Wijnegem*, together with the decision to release the operator from the obligation to prepare an EIA, because that second decision was found to be unlawful (the decision that there were no significant impacts to be expected was found inconsistent with the elements of a mobility study on cut-through traffic). In that respect the case-law of the Council of State seems in line with the case law of the ECJ (Case C-75/08 *Mellor* [2009] ECR-I-3799, paras 57-59). The demand for suspension had been rejected in 2008 (Council of State, n° 183.799, 4 June 2008). The construction was nearly completed the day the judgment on the merits was passed. The construction works have been delayed. Meanwhile the permit has been issued again with relative minor changes, but that seems to satisfy the requester and the tramway became operational in April 2012.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

We can repeat on this point also what has been written in the *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium*" (2012) and in the *Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union* (2012): although fees and costs are not a real obstacle, they have a chilling effect.

Civil cases

In civil matters the principle is that the losing party has to pay the costs, except when there is an agreement in another sense between the parties that is ratified by the Court (art. 1017 Judicial Code). Are considered as costs (art. 1018):

- **court fees;**
- **costs of judicial acts;**
- **costs for expedition of judgements;**
- **costs of experts and witnesses;**
- **travel expenses of the judges, the registrar and the parties made for the particular case, when the travel is ordered by the court;**
- **the judicial allowance;**
- **the honorarium and costs of the mediator appointed by the court.**

The judgement will fix these costs, after the parties have had the opportunity to declare and prove them (art. 1021). Some of the costs are fixed by law or executive order.

The court fees vary according to the instance. The fee is 82 EUR before a court of first instance, 186 EUR before a court of appeal and 325 EUR before the Supreme Court. There are fixed tariffs for issuing a summons by a bailiff to introduce a new case (around 50 EUR) and for witnesses (5 EUR per appearance in court). Court fees as such do no vary according to "the value of the case".

The basic, minimum, and maximum amounts of the procedural allowance (contribution to the honorarium and costs of the lawyer of the winning party) are determined by the Royal Decree of 26 October 2007 (*Moniteur belge*, 9 November 2007). These allowances apply per instance (first instance, appeal, cassation…). When the claim is or can be expressed in money the allowance will vary according the value of the claim. E.g. for a claim of less than 250 EUR, the basic allowance is 150 EUR, with a minimum of 75 EUR and a maximum of 300 EUR. For a claim between 10.000 and 20.000 EUR, the basic allowance will be of 1.100 EUR, with a minimum of 625 EUR and a maximum of 2.500 EUR. For a claim of more than 1.000.000 EUR the basic allowance is 15.000 EUR, with a minimum of 1.000 EUR and a maximum of 30.000 EUR. For claims that cannot be expressed in money the basic amount is 1.200 EUR, with a minimum of 75 EUR and a maximum of 10.000 EUR. There is also a fee on delivering an expedition or a copy of a judgement (between 0, 50 and 5 EUR per page, according to the instance).

Criminal cases

As indicated above, an intervention in the honorarium and costs of the losing party is only possible in case of an acquittal, when the civil party has exercised the prosecution itself by direct summons before the criminal court (art. 162*bis* Criminal Procedure Code). In the vast majority of the cases the civil party will only intervene in a prosecution launched by the public prosecutor, so that the award of a "procedural allowance" will be very exceptional. The person who is convicted will be condemned to the costs of the procedure (art. 162 Criminal Procedure Code). The costs are regulated by the Royal Decree of 27 April 2007. There are fixed tariffs for experts, translators and interpreters, bailiffs, witnesses, member of the jury and different technical interventions.

Administrative cases

As indicated earlier, the system of "judicial allowances" does not apply in the procedure before administrative tribunals or the Supreme Administrative Court, so the winning party must bear the costs and honorarium of its own lawyer. Before the Council of State a court fee has to be paid. The fee amounts to 175 EUR per requester. The same sum has to be paid separately if on demands also the suspension of the challenged act. If e.g. 10 persons are introducing together a request for suspension or for annulment the fee will be each time 175 EUR. At the end of the procedure this court fee has to be paid by the losing party. The same principles apply before the Flemish Council for Permit Disputes (being that the court fee is 175 EUR for a demand for annulment and 100 EUR for a demand for suspension).

Constitutional Court

There is neither a court fee nor a system of "judicial allowances" before the Constitutional Court.

Bonds

The appellant in an environmental case has not to pay a bond in order to obtain an injunction of the appealed decision. However when an individual citizen or group of citizens act in the place of the defaulting municipality on the basis of Art. 271 Municipal Act (and its regional counterparts) there is an obligation to "offer" security that one should pay the costs of the proceedings and the condemnations if one loses. In general, a declaration that one shall bear the costs and that one has paid the initial court fee, is accepted as being sufficient in that regard.

Evaluation

The preparation of a case and the elaboration of the further pieces in the procedure and the pleadings are time consuming. With an hourly rate ranging from € 100 to € 300 (without material costs) the barristers cost of a case will easily reach € 3000 to € 9000. Environmental NGOs mention an average cost of € 5000 for a Council of State case, and € 2000 for a case before the ordinary courts. They try often to do themselves a maximum of preparatory work so that they can limit barrister's costs. In some instances, barristers agree with a preferential tariff for an NGO (e.g. hourly tariff of € 75). A case for less than € 2000 seems however impossible. In complex cases, and in cases where there is a need to appeal, the cost can be much higher. Together with the court fees, which as such are not

so high, and the risk to have to pay in civil cases a "judicial allowance" as intervention in the lawyer's fees and cost of the winning party, if one loses the case, this can be an obstacle for access to justice by ordinary people and ngo's. If these costs are not covered by an insurance (that can be often the case when a private party is suffering damages that can be considered as environmental) one shall think often twice or more before launching procedures. If it is not a clear cut case, one shall often abandon the idea to go to court. Although one cannot speak of "prohibitively expensive" procedures in Belgium, lawyer's fees and the new system of "judicial allowances" have clearly a dissuasive effect.

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

The obligation to adopt an action plan on air quality when limit or target values are exceeded has been transposed in domestic law[37]. The only available avenue to bring such a case to court seems to be to start an ordinary procedure before a civil court (in urgent cases summary proceedings before the president of the court of first instance) asking for an injunction , coupled with a penalty payment. If that failure could be considered as an "obvious violation" or "a serious threat for a violation" of environmental law in the sense of Art. 2 of the Act of 12 January 1993, that procedure would be available too. For NGO's there is seems to be in the light of the recent case law of the Supreme Court no standing problem in the ordinary procedure anymore. There seems to be room for adjudication in conformity with Arts. 9 (3) and 9 (4) of the Aarhus Convention.
Such a case was brought in the past by two individuals of a busy street against the city of Leuven and the Flemish Region, to oblige the city and the region to do PM measurements, to draw up an action plan to improve the air quality (within a period of 6 months) and to take the necessary measures to implement such a plan in the following 6 months and to condemn them to penalty payments of € 1000 per day of delay. The First judge (Justice of the Peace) declared himself without jurisdiction, being of the opinion that such an order, would violate the separation of powers because not respecting the discretionary powers of the administrative authorities. On appeal, the Court of First Instance of Leuven rejected

[37] E.g. Flemish Region: Art. 2.5.2.4.1 VLAREM II.

this view an found the action admissible and within the courts' jurisdiction. The Court however found that according to domestic law, monitoring was a duty of the Flemish Environment Agency, that the Flemish Government had already approved a reduction plan for the non-attainment areas, that this plan has offered to local authorities "a calculation of air pollution from road traffic-model" (CAR Model), that, although there might be on the basis of that model question of exceeding limit values in the street concerned, the model is only a simulation with some approximation. In the courts view it was not proven that the air quality limits were exceeded in reality, taking also into consideration that the CAR model was showing a gradual improvement of the situation under the influence of the regional plan, so that it was not proven that the authority was not complying with its obligations as set out in the *Janecek* case[38]. The claims were thus dismissed.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

In the first place, land use planning should make it possible to realise such a project. If the existing land use plans do prevent such a project, they should first be modified or a specific plan should be adopted. If the plan or the amendment of an existing plan likely to have significant environmental effects, a SEA should be drafted. One's the plan is adopted by the competent authority on the local or regional level, it can be challenged with the Council of State. The project itself will require a building permit (only in exceptional cases also an environmental permit is necessary for an "infrastructural construction project"), may be subject to EIA and need an appropriate assessment according (the regional legislation transposing) Art. 6 (4) of the Habitats Directive. The permit, once delivered in first instance, can be appealed with the higher administrative authority. A final decision on appeal, can be challenged before the Council of State and, as the Flemish region is concerned, the Flemish Council for Permit Disputes.
The main elements of the decision-making procedure - that is varying between the 3 regions - and how the decision can be appealed within the administration have been outlined in the *Study on factual aspects of access to justice in relation to EU Environmental law. Belgium* (2012) (pp. 5-6). When a final decision by the authorities on administrative appeal has been taken, it can be challenged, within a period of 60 days before the Council of State, and, as the Flemish region is concerned, but only in relation to the building permit (the environmental permit has to be challenged with the Council of State) within a period of 45 days before the Flemish Council for Permit Disputes. According Art. 19 of the Organic Act on the Council of State, an action for annulment of an administrative act can be brought by any party (any natural or legal person) which has been "harmed" or has an

[38] Civil Court, Leuven, 10 March 2010, *Van Eygen and Viane*, (summary in *Tijdschrift voor Omgevingsrecht en Omgevingsbeleid*, 2012/1, 50-52).

"interest" at stake. Meeting this requirement does not pose particular problems for individual claimants. Proof of actual harm is not required; a legitimate interest in the contested act is sufficient. This interest need not necessarily be based on a legally recognised subjective right. Whether a natural person has the interest required to seek judicial review of an administrative decision affecting his or her environment is essentially a factual matter, which will be judged by the Council of State based on the specific circumstances of the case[39]. Although the notion "public concerned" within the meaning of the Aarhus Convention is not actually used, the case law on the criteria for standing for individual members of the public in substance comes very close to the definition of this notion in the Convention. The Council will examine whether the claimant will or may be affected by the environmental effects of the implementation of the decision. The nature and range of those effects will be taken into account. In the event of uncertainties, the decision on standing tends to be in favour of the claimant. The distance between the claimant's home and the activity that is the subject of the contested decision is an important consideration, but it is not necessarily decisive. In planning cases, e.g., the settled case-law is that any "inhabitant of the neighbourhood" has a legitimate interest to seek review of planning decisions affecting its aspect and development. There is also case-law in which the Council held that a person using a forest area for recreational purposes (e.g. walking) can challenge the legality of an administrative act which will result in the deterioration of that area. It is for the moment unclear under which conditions an environmental NGO will have standing[40]. The solution can be different according to the Chamber (2 French and 2 Dutch speaking Chambers are involved) that has to deal with the case (see para 2.11). There is however no doubt that a nature conservation NGO having property in the area or being in charge of the management a nature conservation area that could be affected, will have standing. There is no variation in standing rules if the project is subject to EIA or not.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

In the *administrative appeal procedures* for e.g. environmental or building permits, in general only appeals lodged by authorities have suspensory effect, not appeals lodged by the applicant or third parties[41].

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

[39] Similar provisions apply to the Flemish Council for Permit Disputes. A permit decision can be challenged by "any natural or legal person who directly or indirectly suffers from disadvantages or nuisances from the authorization, validation or registration" (Art. 4.8.11.3° VCRO).

[40] As the Flemish Council for Permit Disputes is concerned, there is a specific provision defining which type of NGO's have standing: "'*process competent*' (*procesbekwame)* associations acting on behalf of a group whose collective interests are threatened by the authorization, validation or registration decision or damaged, if they have a sustainable and effective activity in accordance with the Articles of Association" (Art. 4.8.11,4° VCRO)

[41] However in the Flemish region, bulding permits appealed by third parties will be suspended (Art. 4.7.21 VCRO)

By an Act of 1989 the Council of State was empowered to *suspend* the implementation of a challenged administrative decision or regulation (the Flemish Council for Permit Disputes has similar powers). An action for cessation ("*vordering tot schorsing*" "*demande de suspension*") may be brought along with the action for annulment. The Council of State *may* suspend the challenged decision if the grounds for annulment are found to be valid on first sight (a serious plea is invoked "*moyen serieux*" "*ernstige middelen*"), if there is an urgent necessity and if the immediate implementation of the challenged act or regulation may cause detriment that is difficult to remedy. Even when the conditions for suspension are present, the Council is not obliged to suspend, taking into account the different interests at stake.

According Article 584 of the Judicial Code, the President of the Court of First Instance is competent to give a provisional solution (*interim relief*) to any case in summary proceedings ("*kort geding*" "*procedure en référé*"). So the president can in urgent cases, after summary proceedings, order temporary measures with a view to avoid serious detriment[42].

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

Yes, if they have standing (see above).

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

There is no obligation to participate in the decision-making process before the administrative decision has been taken. However, when there is and administrative appeal with a higher administrative authority available (that is the case with environmental and building permits) one should exhaust first that possibility. Only administrative decisions taken in last administrative instance can be challenged before the administrative courts.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

[42] See for applications of this procedure in environmental matters: E. De Pue, L. Lavrysen & P. Stryckers, *Milieuzakboekje 2013,* Kluwer, Mechelen, 1245-1250

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

Different avenues are available. In cases of potential environmental damages a request for action can be brought, and administratively appealed if one considers that the decision is not acceptable. In the Flemish region a similar request can be formulated to obtain administrative measures (including injunctions of all kind, Art. 16.4.7 Decree of 5 April 1995). In all regions the Environmental Inspectorate can be informed and invited to take action. In the 3 regions the breach will probably be considered as an environmental crime. In that case one can fill in a complaint with the Public Prosecutor (and in case one suffers damages, with the Investigating Judge). That can lead to criminal prosecution (or an alternative administrative punishment if the public prosecutor decides not to prosecute before the criminal court). If one suffers damages, one can claim compensation in the criminal case. Finally one can introduce an environmental action before the President of the Court of First Instance on the basis of the Act of 12 January 1993. Citizens, after having invited the municipality to act, can also bring such an action on behalf of the defaulting municipality.