4. Environmental Law in Belgium

A. THE ENVIRONMENTAL LAW SYSTEM

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INTRODUCTION: BELGIUM, THE FLEMISH REGION IN PARTICULAR

In this chapter we will focus on the environmental law system in Belgium. Obviously this cannot provide more than a brief introduction to the main principles. The reader who is interested in further details is therefore advised to consult the literature mentioned in the footnotes. One of the main features of the Belgian constitutional system is that according to article 1 of the Belgian Constitution, Belgium is a federal state, made up of three communities and three regions. The communities are: the Flemish Community; the French Community; and the German-speaking Community. The regions are: the Flemish Region; the Walloon Region; and the Brussels-Capital Region.

As we will stress below, the environmental competences are to a large extent attributed to the regions. Another consequence of this division of powers is of course that in the federal Belgium, five environmental legislations must be taken into account: the Flemish; Walloon; Brussels; federal; and European environmental legislation. Considering (i) the fact that the differences between the three regional environmental legislations are or can be great (as regards organisation as well as contents); (ii) the fact that the Flemish environmental legislation has been reviewed during the past seven years in a very thorough way; and (iii) the fact that there are redactional limits to the size of this chapter, this chapter will only deal with the Flemish environmental legislation and the federal environmental legislation which is applicable in the Flemish Region.

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1 This chapter largely builds on earlier work of the authors, more particularly Deketelaere, 'Public environmental law in Belgium in general and in the Flemish Region in particular', in Seiden and Heldeweg (eds), Comparative environmental law in Europe, (Antwerp: Makin, 1997), pp. 33-71. Legislation, case law and doctrine in this contribution have been followed until 1 August 1997.

1. Structure of the Public Bodies and Their Competences

1.1 Brief Overview of Public Bodies with Legislative Competence

First we will broadly sketch the division of powers and more specifically address the question what kind of legal acts can emanate from the various public bodies. Then we will address the question which public bodies have specific competence as far as environmental policy is concerned. In addition we should mention that there are a number of specific administrative authorities which all have competence in a variety of areas. The most important of these relate to either the licensing procedure or monitoring and enforcement. Some of these various authorities within the Flemish Region as well as their powers shall be discussed below (see section 4.3).

As far as the basic constitutional division of powers is concerned, the following applies:

(1) At the federal level, the legislative power is vested in the House of Representatives, the Senate and the King, the executive power in the King and the judicial power in the Courts (Courts of First Instance, Courts of Appeal, Court of Cassation, Council of State, Court of Arbitration).

(2) At the level of the regions and the communities (to which legislative and executive powers were devolved by the different constitutional reforms of 1970, 1980, 1988 and 1993) the legislative power is vested in the different parliaments or councils and the executive power in the different governments. In Flanders, the organs of the Flemish Community also exercise the jurisdiction of the Flemish Region, so that the powers are vested in one single Flemish Parliament and Flemish Government. The same does not apply for the French-speaking part of the country, which has both a ‘Council of the French Community’ and a ‘Walloon Regional Council’. The regions and the communities do not have their own court systems.

(3) At the level of the provinces, the legislative power is vested in the different provincial councils and the executive power in the different permanent deputations.

(4) Finally, at the level of the communes, the legislative power is vested in the different communal councils and the executive power in the different colleges of mayor and aldermen.

It is important to stress that all of these public bodies have some kind of legislative competence. The federal legislator, who issues statutes, is only competent for those matters which explicitly have been indicated by the Constitution as federal competence. However, these exclusive areas of federal competence are not laid down yet in the Constitution. As long as this is the case, the areas of residual competence also remain with the federal government. Decrees and ordinances issued by community and regional councils and parliaments, in matters for which they are declared competent, also have force of law.

The communes and the provinces have a general authority to issue rules and regulations for matters of exclusive communal, respective, provincial interest. However, the communes and the provinces can only exercise these competences for matters which are not falling within the jurisdiction of higher authorities.
1.2 Competences for Environmental Policy

A lot of attention is paid in the literature to the division of competences between the federal level and the decentralised level as far as environmental policy is concerned. The federal government is according to article 6(1) of the Special Institutional Reform Law of 8 August 1980, only competent for: (1) the setting up of product norms; (2) the protection against ionising radiation; and (3) the transit of waste. Beside these explicit environmental competences, the federal government is also competent for: (1) the introduction of product taxes; (2) the award of eco-labels; (3) the protection of the North sea; (4) labour security and hygiene; (5) civil protection; (6) the coordination at national and regional level of the preparation and succession of the European environmental policy; and (7) the execution of a substitution right in case of failure of the regions on the European and international level.

The same article 6(1) of the Special Institutional Reform Law attributes most of the environmental competences to the regions. In broad lines, these competences are: (1) the different aspects of zoning and planning; (2) the different aspects of the environment (soil, waste, noise, air, classified installations, etc.) and the water policy; (3) the different aspects of land organisation and nature protection. Beside these explicit environmental competences, the regional governments also have competences in the field of environmental criminal law, environmental tax law, European environmental law and international environmental law.

The environmental competences of the provinces and communes are limited: most of their powers are administrative and supervisory powers in environmental matters, often delegated to them by the regional governments. The legislative powers of the provinces and communes are limited to interests which are exclusively provincial or communal. In practice they mostly concern the protection of public health.

2. Main Features of the Litigation System

There are basically three types of courts that play a role in environmental litigation.

2.1 Court of Arbitration

First of all we should mention that the complex division of competences as far as environmental law-making is concerned, led to the creation of the so-called court of arbitration, which has to settle conflicts of competence and abuses of power. Since the entering into force of the Special Law of 6 January 1989 on the Court of Arbitration, every natural or legal person who shows an interest, can ask the Court of Arbitration for the suspension or the annulment of an (environmental) law, (environmental) decree or (environmental) ordinance. The interest which one has to prove may not coincide with the general interest. One has to be directly touched by the relevant disposition. An appeal to the Court of Arbitration is only possible when the relevant legal dispositions are either (1) violating the established rules concerning the division of powers between the state, regions and communities; or (2) violating one of the following articles of the Constitution: the equality principle (article 10); the non-discrimination principle (article 11); the freedom of education (article 24).
2.2 Administrative Procedures and the Council of State

Secondly, we should point to the existence of a variety of administrative procedures. In this respect we can, for instance, point to the procedure for the delivery of an environmental permit.\(^2\) The delivery of environmental permits in the Flemish Region is regulated by the decree of the Flemish Parliament of 28 June 1985 concerning the environmental permits and two decisions of the Flemish Government, executing this decree. It concerns more particularly the decision of the Flemish Parliament of 6 February 1991, containing the Flemish Regulation concerning the environmental permit (also referred to as Vlarem I) and the decision of the Flemish Government of 1 June 1995 containing general and sectoral regulations concerning environmental hygiene (also referred to as Vlarem II). The decree concerning the environmental permit and Vlarem I stipulate the procedure for the delivery of environmental permits.\(^3\) These regulatory texts themselves provide for an appeal procedure with a higher administrative body. A similar procedure also exists, for example, for the delivery of a building permit.

When it has become impossible to introduce an appeal by the administrative route with a higher authority, there is still the possibility of asking the Department Administration of the Council of State to annul the disputed act. This Department decides on the appeals of annulment against acts, regulations and deeds of the different administrative authorities: in principle, what ever administrative decision can be disputed before the Council of State. Awaiting a final decision, the Council of State can, as the only institution, suspend the disputed act or impose certain provisional measures. The Council of State is a court which has the task, when all receptivity conditions are fulfilled, of judging the legality of administrative acts in general, and decisions about permit demands or appeals in particular.

Every natural and legal person who is legally able to act, according to the Civil Code, and who has an interest, can introduce an appeal with the Council of State. The interest in such a case must be a personal, direct, positive and lawful interest, which must remain during the whole procedure.

Not all acts of the administrative authorities can be annulled by the Council of State. The acts of which the annulment is asked, must meet the following conditions: (1) it must be an act of a Belgian administrative authority; (2) it must be a definitive act of law, which is bringing, or avoiding, a change in an existing legal situation; (3) it must be an act taken in final course, in the sense that other legally established appeal possibilities are no longer possible. It speaks for itself that final administrative decisions about building permits, groundwater extraction permits and environmental permits are decisions of which one can ask the annulment before the Council of State.

The Council of State can only annul an act of an administrative authority when it contains a violation of legality. An administrative act is illegal because of: (1) incompetence (\textit{ratio loci}, \textit{ratio personae}, \textit{ratio temporis}); (2) non-fulfilment of substantial (or on penalty of nullity) prescribed conditions; (3) non-application of the law; (4) diversion of power, in this sense that another goal is pursued by the act than the one on the basis of which the decision was taken.

\(^2\) We can discuss this briefly here, since this will be addressed in further detail below in 8.1–8.10.

\(^3\) For further details see Deketelaere, n.1 above, pp 58–63.
The appeal for annulment must be introduced within 60 days after the decision was announced or was officially communicated to the petitioner. If it concerns a decision which must not be announced or communicated, the period of 60 days only starts the day knowledge of it is obtained. If the appeal is introduced after this period, than the non-receptivity will be officially invoked by the Council of State.

An administrative act which was annulled by the Council of State is deemed never to have existed. The decision not only applies against the administration whose decision was annulled but also against third parties: it applies *erga omnes*.

The Council of State is also competent to suspend the implementation of a decision of an administrative authority, on the basis of ‘serious arguments’. This means that as soon as an appeal for annulment is introduced, an appeal for suspension can also be introduced. The suspension is only possible when the following conditions are met: (1) the concerned act, permit or administrative regulations must be capable of annulment; (2) it seems that the immediate implementation of the act or regulation may cause a serious disadvantage which will be difficult to repair (serious arguments must be formulated for this line of appeal). The appeal for suspension must be introduced by a separate petition, which may not form part of the appeal for annulment, but must be introduced before or at the latest together with the appeal for annulment. The petition must contain an explanation of the means and the facts which, according to the petitioner, justify the suspension. The Council of State decides within 45 days about this petition. This period of 45 days can, in case of utmost urgent necessity, be reduced to a few days or a few hours. If the disputed decision is suspended, the Council of State takes a decision about the appeal for annulment within a period of six months after the decision about the appeal for suspension.

### 2.3 Judiciary

A third category of courts is important for environmental litigation are the common courts belonging to the judiciary power. The organisation of the ordinary (i.e. not administrative) judiciary power is structured as follows:

#### Table 4.1: Organisation of the criminal and civil judiciary structure

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<thead>
<tr>
<th>Labour Court</th>
<th>Tribunal of Commerce</th>
<th>Tribunal of first instance</th>
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<td></td>
<td>Civil Tribunal</td>
<td>Correctional Tribunal</td>
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<td>Juvenile Tribunal</td>
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<td>Justice of the peace</td>
<td>Police Tribunal</td>
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4 Ibid., p. 35.
The courts belonging to the judiciary power are important for both civil and criminal enforcement. Civil cases are tried either before the civil tribunal or, when the amount at stake is very low, before a justice of the peace. An appeal is possible to the civil tribunal at first instance (against decisions of the justice of the peace) or to the Court of Appeal (against decisions of the civil tribunal). Finally, under restricted conditions, parties can appeal to the Court of Cassation.

Criminal offences are prosecuted either before the police tribunal (for very minor offences) or, which occurs more frequently, before the correctional tribunal. Appeal is possible to the correctional tribunal (against decisions of the police tribunal) or to the court of appeal (against decisions of the correctional tribunal). If specific conditions are met, a revision can be asked for by the court of cassation.

3. MAIN FEATURES OF ENVIRONMENTAL POLICY

As far as the Flemish Region is concerned, there are two documents which should be mentioned, since they enumerate the leading principles of environmental policy. The first is the decree of the Flemish Parliament of 5 April 1995 concerning general regulations in the matter of environmental policy which states the goals and the principles of the Flemish environmental policy.

According to article 1.2.1(1) of the decree of 5 April 1995, the goals of the Flemish environmental policy (on behalf of the present and future generations) are: (1) the protection of the environment through a sustainable use of resources and nature; (2) the protection, against pollution and the taking away, of man and environment, and in particular of the ecosystems which are of interest for the working of the biosphere and concern the food-supply, health and other aspects of the human life; (3) the nature conservation and the promotion of the biological and landscape diversity, notably through the maintenance, restoration and development of the natural habitats, ecosystems and landscapes with ecological value and the preservation of the wild species, in particular of those that are threatened, vulnerable, rare or endemic.

In article 1.2.1(2), the principles of the Flemish environmental policy are laid down as follows: (1) the principle that environmental policy should aim at a high level of protection; (2) the principle of precaution; (3) the principle of preventive action; (4) the principle of pollution-at-source; (5) the 'polluter pays' principle. A final principle is mentioned in Article 1.2.1(3), namely the integration principle, or the integration of the above-mentioned goals and principles in other policies of the Flemish Region. The same paragraph also indicates what should be taken into account in the implementation of the Flemish environmental policy: socio-economic aspects, the international dimension and the available scientific and technical data.

A second source of general principles of environmental policy comprises the already-mentioned decree of the Flemish Parliament of 28 June 1985 concerning the environmental permit. According to article 22 of the decree of the Flemish Parliament of 28 June 1985, the exploiter of a classified installation must, regardless of the granted permit, always take the necessary measures in order to avoid damage, nuisance and heavy accidents and, in case of an accident, to limit the consequences of it as much as possible for man and environment. This general
'duty to care' is also laid down in article 43(2) of Vlarem I. Next to this duty to care, another important principle of the Flemish environmental policy is laid down in the Vlarem I, namely the BAT-principle: the exploiter of a classified installation must use the 'best available techniques'. BAT is defined in article 1, 29E of Vlarem I as 'the most advanced development phase of activities, process and working methods applied in that process, by which namely the practical utility is proven of certain techniques as foundation for emission limit values which emissions in the environment as a whole have to prevent or, when that is not achievable, reduce to a minimum, without anticipating on the choice of specific technologies or techniques'.

Techniques resulting in excessively high costs are not considered to be BAT. This means costs which (1) are unreasonable in relation to their level of protection of the environment, or, (2) are excessive, from an economic point of view, for a well managed company of a branch of industry. Reference to the use of BAT is made in Article 4.1.2.1 of the decision of the Flemish Government of 1 June 1995 containing general and sectoral regulations concerning environmental hygiene, being the second decision executing the decree of the Flemish Parliament of 28 June 1985 (Vlarem II). According to the first paragraph of article 4.1.2.1, the exploiter must always, as a normal careful person, apply the best available techniques in order to protect man and environment, and this applies as much to the choice of treatment methods at the level of the emissions, as to the choice of source-limiting measures (adapted production techniques and methods, resource management). This obligation also applies modifications to classified installations as well as to activities which are as such not subjected to a permit or a notification. The second paragraph of article 4.1.2.1 stipulates, fortunately, that the fulfilment of the general and sectoral regulations of Vlarem II and/or the environmental permit is considered to correspond with the obligation of the first paragraph of that article.

4. ENVIRONMENTAL LAW LEGISLATION (GENERAL)

4.1 The Constitution

In Belgium the right to a clean environment is in some form recognised in the Constitution. Indeed, one of the economic, social and cultural rights of every Belgian, as laid down in article 23 of the Constitution, is 'the right to the protection of a healthy environment'. The reverse of this right of every citizen, is the obligation for the government to protect the environment: because of the constitutional recognition of this right since 1994, the government is irrevocably obligated to devote itself to the promotion of the rights inserted by the Constitution and to the concrete realisation of the Constitution-honoured principles, relating to these rights.

However, as is the case with many of the so-called social rights, it is generally not held that article 23 of the constitution would have direct effect. It is therefore more to be seen as a guideline for government action than as a source of rights in individual cases.
In addition to the Constitution we should once more refer to the special institutional reform law of 8 August 1980 already mentioned above at section 1.2. This law is of crucial importance since it provides for the division of environmental competences between the federal government and the regions. The division of competences is laid down in article 6(1) of the law of 8 August 1980. Although this article gives the impression that the division of environmental competences is clear and undisputed, this is not the case in reality. For example, in its decision of February 1995, the Court of Arbitration stated that the federal government can adopt environmental measures in general and measures concerning waste in particular on condition that the measures concerned are of a fiscal nature and do not violate the proportionality principle. This federal (fiscal) environmental competence is in practice difficult to reconcile with the division of powers laid down in article 6(1)

4.2 Other Statutes

The environmental legislation in Belgium traditionally had a very strong administrative nature. There was, and still is, no general environmental protection act. The first important instrument of environmental control was an old regulation of 1888/1946 on nuisance, installing a licence system for every installation that was presumed to cause hindrance. The permit system based on these regulations was for a long time the most important instrument of environmental policy in Belgium. A second phase of legislation took place in the 1960s-1970s, when sectoral legislative came into being, regulating specific aspects of environmental harm, in specific statutes. These laws all came into being prior to the federalisation of Belgium discussed above. Hence, these were federal environmental laws. In this respect we can mention, for example, the federal service Water Protection Act of 26 March 1971 and an act on air pollution of 28 December 1964.

After the first federalisation of environmental law in 1980, the Flemish and Walloon Regions immediately started to use their newly granted powers. In the Flemish Region, for instance, a decree concerning the prevention and management of waste was adopted on 2 July 1981 (see section 5.1.1 below) and on 28 June 1984 a decree concerning the environmental permit (aiming at an integration of licensing system) was adopted. In the Walloon region on 5 July 1985, a was decree was promulgated and on 7 October 1985 a decree concerning the protection of surface waters against pollution. The region of Brussels-capital only became active as far as environmental policy is concerned in the 1990s with, for example, an ordinance concerning the prevention and management of waste of 7 March 1992 and an ordinance concerning the environmental permit of 3 July 1992. Many these decrees and ordinances have since been replaced, which shows the rapid evolution in (regional) environmental law in Belgium.

Indeed, since these first new environmental decrees and ordinances the region made extensive use of their legislative powers. The result of this evolution is rather complex set of laws at the federal, and decrees at the regional level, whi

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6 A selected overview of federal, Flemish, Brussels and Walloon environmental legislation is provided by Dekeyser, n.1 above, pp. 38-40.
obviously render it difficult to get a clear impression of the approach in Flemish environmental law, and was a reason for the then Flemish Minister of the Environment to institute the 'interuniversity commission for the reform of the environmental legislation in the Flemish Region'. The task of that Commission, founded by the present Flemish Minister for the Environment, was the following: rationalisation and simplification of environmental legislation; increase in efficiency of the penal, civil and administrative means for enforcement of the environmental legislation; integration of environmental considerations in other policy fields; and economically, legally and ecologically motivated choices of environmental policy instruments.

Five years after its foundation, the Commission proposed a 'draft of framework decree environmental policy'. On the basis of this draft of framework decree, five new environmental decrees were adopted by the Flemish Parliament between 1994 and 1995: the decree of 15 June 1994 concerning the environmental policy agreements; the decree of 20 April 1994 modifying the decree of 2 July 1981 concerning the management of waste; the decree of 22 February 1995 concerning soil sanitation; the decree of 5 April 1995 concerning general regulations in the matter of environmental policy; and the decree of 19 April 1995 complementing the decree of 5 April 1995 with a title I concerning environmental care at plant level. In the future, more new decrees will be adopted and more existing environmental legislation will be modified on the basis of this draft of framework decree environmental policy.

When discussing the main features of environmental policy, we have already indicated the decree of the Flemish Parliament of 28 June 1985 concerning the environmental permit and the decree of the Flemish Parliament of 5 April 1995 concerning general regulations in the matter of environmental policy. These, together with executive regulations, can certainly be considered the most important legal documents that serve as a legal basis for the classic so-called command and control approach. The main instrument is still the environmental permit. According to article 4(1) of the decree of the Flemish Parliament of 28 June 1985 concerning the environmental permit, nobody can exploit or change a class 1 or 2 classified installation without a prior written environmental permit. This environmental permit (which is valid for a maximum of 20 years) incorporates the earlier (pre-1 September 1991) individual exploitation permit, waste water, discharge permit, waste permit, groundwater permit and noise permit.

In addition, the Flemish and Federal environmental legislation contains an enormous amount of prohibitions and restrictions. Most of them can be found in parts 4, 5 and 6 of Vlaemin II: the general and sectoral regulations (covering the different parts of the environment: air, noise, water, waste, etc.) contain many restrictions and prohibitions for classified installations.

However, it is quite obvious that, next to those general and sectoral environmental conditions for (non-) classified installations, prohibitions and restrictions can also be found in the remaining applicable sectoral environmental laws and decrees and their executing decisions: the decree of the Flemish Parliament of 2 July 1981 concerning the prevention and management of waste; the decree of the

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Flemish Parliament of 22 February 1995 concerning soil sanitation; the law of 26 March 1971 concerning the protection of surface waters against pollution; the decree of the Flemish Parliament of 24 January 1984 containing measures relating to groundwater management; the law of 28 December 1964 concerning the fight against air pollution; the law of 18 July 1973 concerning noise; the decree of the Flemish Parliament of 23 January 1991 concerning the protection of the environment against pollution as a consequence of the production and use of manure; the law of 21 January 1987 concerning the risks of heavy accidents from certain industrial activities; the law of 15 April 1994 concerning the protection of the population and the environment against dangers arising from ionising radiation and concerning the Federal Agency for Nuclear Control; the law of 29 March 1962 concerning organisation of town and country planning; the law of 12 July 1973 concerning the protection of nature; the Forest decree of the Flemish Parliament of 13 June 1990; the decree of the Flemish Parliament of 14 July 1993 concerning the protection of coastal dunes; and the law of 14 August 1986 concerning the welfare of animals.

4.3 Main Powers of the Various Authorities

The structure of the public bodies and particular authorities has already been set out above in section 1.1. In explaining the administrative procedures, we have already pointed out the importance of administrative authorities in the licensing system. Administrative authorities also play a major role in enforcement.

In the procedure for the granting of an environmental permit, it is basically political institutions that play a major role. The competent authority for granting a class I installation is the permanent deputation of the province; for a so-called class II installation it is the College of Mayor and Aldermen. The regional minister for the environment is competent for the granting of permits for mobile installations. The administrative authorities play a crucial role in this procedure, since for every environmental permit application (and appeal) which is made to the permanent deputation, advice must be given by the following authorities: (1) Department of Environmental Permits; (2) Department of Zoning and Planning; (3) Department of Preventive and Ambulant Healthcare; (4) Department of Natural Resources and Energy; (5) Flemish Public Waste Company; (6) Flemish Environmental Company; and (7) Flemish Land Company. The first two of these departments must always give advice; the other departments and institutions only when this is explicitly indicated in the list of classified installations. The departments and institutions give their advice to the environmental permit commissions within 60 days in the case of an application for a permit, and within 30 days in case of a permit appeal. It is not possible within the scope of this chapter to discuss in further detail the many public authorities that play a role in environmental policy.

For an application for an environmental permit made to the College of Mayor and Aldermen, advice must be given by the environmental service of the municipality and one or more of the above-mentioned departments and institutions when this is explicitly indicated in the list of classified installations. The advice must be given within 30 days. However, one of the above-mentioned authorities should certainly be mentioned again here, namely the Flemish public waste company (OVAM). Article 38 of the Flemish waste decree of 2 July 1981 instituted this Flemish waste company. This company is, among other things, competent to
give advice not only on a variety of matters related to waste, but also on soil cleanup operations, which will be discussed below in section 5.

Administrative authorities not only play a role in the licensing procedure, but also in the enforcement of the various environmental regulations. The central administrative enforcement body in the Flemish Region is the 'Environmental Inspection' division of the Flemish Environmental Administration (AMINAL). Its primary task is to control classified installations and see if they respect the environmental permits that were granted to them. Beside the inspectors of this division, the Mayor of the communes and the Governors of the provinces can order, and/or execute administrative measures in some cases (waste, zoning and planning, classified installations, etc.).

For the imposition of the different administrative measures, specific administrative procedures were developed, which differ from one sectoral law to another.

From an enforcement policy point of view, it must be said that (i) administrative sanctions are not used very often (because of the risk of liability of the inspector, Mayor or Governor) and (ii) after a few years of difficult cooperation with the classic enforcement institutions, the cooperation between the administrative and judicial enforcement services is now going quite well.

4.4 Main Instruments of Environmental Law Legislation

We have already indicated in section 3 above some of the main principles of environmental legislation in the Flemish Region. We shall now provide a brief overview of the variety of environmental policy instruments which are used there today. Obviously this overview cannot be exhaustive. We have already indicated the importance of the permit system as well as prohibitions and restrictions which underlie almost all traditional command and control systems of environmental regulation. We would now like to point out a few other policy instruments used in environmental law, which are different from the traditional instruments of direct regulation discussed above (see 4.2 above). In the 1990s the choice of environmental policy instruments in Belgium and more particularly in the Flemish Region has changed dramatically. A lot more attention is now paid to the use of instruments of social regulation, planning and market regulation. The following examples can illustrate this evolution.

4.4.1 Instruments of social regulation

Environmental impact reports

The duty to draft environmental impact reports is laid down in six decisions of the Flemish Government of 23 March 1989, executing Directive 85/337/EEC of the Council of the European Communities of 27 June 1985 concerning the assessment of the effects of certain public and private projects on the environment. The most

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8 For a more detailed overview see Deketelaere, n.1 above, pp. 43–58.
9 We shall follow the division made by Deketelaere, n.1 above, pp. 43–58.
10 OJ 1985, L/175.
important is the decision of the Flemish Government of 23 March 1989 concerning the environmental impact assessment of certain categories of classified installations. According to articles 2 and 3 of this decision, an environmental impact report must be added to the demand for an environmental permit in case it concerns an indicated classified installation.

**Environmental labels**

In execution of Regulation No. 880 of 92 of the Council of the European Communities of 23 March 1992 concerning a community system for the award of environmental labels, a committee for the award of the European environmental label was set up by the law of 14 July 1994 at the federal level. The Committee is the ‘competent body’ as intended in article 9 of the Regulation. The Committee is in charge of the award of the environmental label.

**Covenants**

Increasing attention has also been paid to the possibility of the industry negotiating agreements with the government in order to avoid regulation 'from above'. The basic conditions for the use of the so-called covenants in environmental cases have been laid down in a decree of the Flemish Parliament of 15 June 1994 concerning the environmental policy agreements. According to article 2 of the decree, an environmental policy agreement is every agreement between the Flemish Region, represented by the Flemish Government on the one hand and one or more representative umbrella organisations of companies on the other, with the goal of (i) preventing environmental pollution, (ii) limiting or taking away the consequences of it, or (iii) promoting a more effective environmental management. An environmental policy agreement cannot replace, or be less stringent than, the prevailing legislation or regulations. During the validity period of the environmental policy agreement, the Flemish Region cannot issue regulations, by means of executive decisions, which either relate to the topics dealt with by the environmental policy agreement or are more stringent than it. However, the Flemish Region remains competent to issue regulations, either in case of urgent necessity, or in order to fulfil compelling obligations of an international or European legal nature. An environmental policy agreement is closed for a certain period, which can in no case be longer than five years.

**Environmental management systems**

On 19 April 1995, the Flemish Parliament adopted a decree completing the decree of the Flemish Parliament of 5 April 1995 holding general regulations concerning environmental policy, with a title III on environmental care at plant level. This decree of 19 April 1995 contains the use of different instruments of social regulation, namely: the appointment of an environmental coordinator; the draft of an environmental audit; the measurement and registration of emissions and immissions; the drafting

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12 See Deketelaere, n.1 above, pp. 45–47.
of an annual environmental report; the elaboration of a company policy in order to avoid heavy accidents and to reduce the consequences of it for man and environment; and the obligation to notify and to warn in case of accidental emissions and disturbances.12

4.4.2 Financial instruments

Instruments of financial aid

There is a variety of instruments aimed at providing tax advantages for environment-friendly investments. Such advantages include an increased investment deduction for environment-friendly investments, made possible through the federal code of income taxes, and the so-called environmental subsidies: an increased expansion aid for environment-friendly investments on the basis of an 'ecology criterion'. The latter has been made possible through a decree of the Flemish Parliament of 15 December 1993.

Self-financing environmental levies

There are many so-called self-financing environmental levies. These are levies aimed at the financing of the environmental policy of the government and are rather frequently used in Belgium and in the Flemish Region in particular. Many examples of such self-financing environmental levies can be found both at the federal level as well as at the level of the Flemish Region.

Regulating environmental levies

The so-called regulating environmental levies are levies aimed at the deterrence of environment-unfriendly products and services. A regulating environmental levy on products damaging the environment was introduced in Belgium in 1993: in the framework of the reform of the state in 1993, a levy on products damaging the environment was introduced by the Special and Ordinary law of 16 July 1993 concerning the completion of the federal state structure. The levy concerns the following products: beverage packaging; disposable cameras and razors; batteries; packaging for certain industrial products; insecticides; and paper. In most cases, the levy can be avoided (by attaining recycling percentages or by establishing deposit-refund or other collection systems), or reductions and exemptions can be obtained. In the Special and Ordinary law of 16 July 1993, the levy is defined as a levy which is equated to excise duties and levied on a product, brought into consumption, because of the damage which it is deemed to cause to the environment.

4.4.3 Planning

Planning is becoming an increasingly important instrument of environmental policy. The instrument of planning was obviously already known within the area of town and country planning, which installed a system of zoning.

Within the scope of this chapter, it is important to be aware of the decree of the Flemish Parliament of 5 April 1995, covering general regulations concerning environmental policy, mentioned at 4.4.1 above. This decree established a new system of environmental planning in the Flemish Region. According to article 2.1.1
of the decree, environmental planning is the whole of activities aimed at bringing coherence to the preparation, fixing and execution of the decisions concerning the environment. Article 2.1.2 provides for environmental planning at three levels: the regional level; the provincial level; and the communal level. Environmental planning at regional level covers: (1) an environmental report, to be drawn up every two years; (2) an environmental policy plan, to be drawn up every five years; (3) an environmental year programme, to be drawn up every year. At province and municipality level, environmental policy plans and environmental year programmes can also be drawn up.13

5. LEGISLATION WITH RESPECT TO SOIL POLLUTION AND WASTE

5.1 Liability for Soil Clean-up in Flanders

5.1.1 Waste Decree of 2 July 1981

As far as the particular topic of liability for soil clean-up in the Flemish Region is concerned, we should first consider the Flemish Waste Decree of 2 July 1981. This Decree instituted an administrative agency, OVAM,14 and gave it – inter alia – the task of organising the clean-up of polluted soils. Originally, the Waste Decree only provided that OVAM could remediate polluted soils ex officio, but omitted to provide for a specific regulation concerning recovery of costs. That has been provided for in a Decree of 12 December 1990, which stipulated that OVAM could remediate the polluted soils at the expense of the party who had received an order to clean-up and had omitted to react. This provision15 gave far reaching competences to OVAM, which could clean up at the expense of almost anyone (innocent or not) and in all circumstances (irrespective of whether the provisions of the Waste Decree had been violated or not). This provision, which amounted to a strict liability, was heavily criticised in publications. Since the provision was too broad and unspecified, a new regulatory framework was necessary to provide for the possibility of recovering clean-up costs.

5.1.2 Soil Clean-up Decree of 22 February 1995

This regulatory framework was provided through the working of the inter-university commission for the reform of environmental law in the Flemish Region. We already mentioned that in 1989 a commission of academics under the presidency of Hubert Bocken was installed with the task of drafting a comprehensive code on environmental law and policy. A first report was presented in December 1991 and a final draft was presented in February 1995.16 Part 11 of the Draft Decree on

13 For further details concerning these environmental policy plans and their contents, see Deketelaere, n.1 above, especially at pp. 48–50.
14 Openbare Vlaamse Alvalstoffenmaatschappij.
15 Art. 21(2).
16 Bocken and Ryckboe, n.7 above pp. 2–158. For an outline see Bocken, Lambrechts, Boes, De Nauw, Faure and Lavrysen ‘The Flemish Draft Decree on Environmental Policy: An Outline’, in Bocken and
Environmental Policy contains a Title on protection of the soil and soil clean-up.\textsuperscript{17} Even before the interuniversity commission presented its final draft, the Flemish legislator had already implemented the proposals of the commission in a Soil Clean-Up Decree of 22 February 1995. This new Decree contains detailed provisions concerning both the duty to clean-up and liability.

**Liability for new soil pollution**

As far as liability is concerned, a distinction is made between 'old' and 'new' pollution.\textsuperscript{18} The liability for new soil pollution is laid down in articles 25-29. The principle laid down in article 25(1) is that anyone who has caused soil contamination as a result of an emission, shall be liable for all expenses which have been incurred arising from the soil clean-up as well as for the further damage caused by the latter. This is a new rule of no fault liability in respect of the costs of soil clean-up.\textsuperscript{19} However, where the emission which caused the soil contamination emanated from a classified installation or was the result of a classified activity, article 25(2) provides that it will be the operator who will be liable, i.e. the licensee of the classified installation. This is a called channelling of liability to the licensee.

It should also be noted that specific rules are laid down in the Decree which favour the position of the 'innocent possessor' who did not cause the contamination, but, without being aware of it, acquired a contaminated land area and who is actually the victim of contamination caused by others.\textsuperscript{20} In fact the Decree stipulates that the innocent possessor is not bound to carry out the clean-up or to finance this himself. This in turn excludes the liability of the innocent possessor. Liability of the innocent possessor is excluded if the person: 1) did not cause the contamination; and 2) was unaware of the contamination and was not deemed to be aware of it at the time when he became the operator.\textsuperscript{21}

**Liability for historic pollution**

Liability for historic pollution is regulated in a totally different way. Article 32(1) of the Soil Clean-Up Decree provides that the new strict liability laid down in the Decree does not apply retrospectively.\textsuperscript{22} Liability for the cost of soil clean-up as well as further damage shall be determined in accordance with the rules of tort which applied before the Decree came into effect and which are discussed above. Note that although the new Soil Clean-Up Decree does not apply to historic


\textsuperscript{18} The explanatory memorandum concerning soil clean-up was drafted by Bocken, Ryckbost, and Deloddere 'Soil Clean-Up', in Bocken and Ryckbost, n. 7 above, pp. 232-241.

\textsuperscript{19} See Bocken, Ryckbost and Deloddere, n. 7 above, p. 237.

\textsuperscript{20} Ibid., pp. 238-240.

\textsuperscript{21} In the case of historical pollution the Decree has a broader field of application of exemption in case of innocent possession. It would go too far to discuss this in detail within the scope of this chapter.

\textsuperscript{22} Bocken, H., Ryckbost, D. and Deloddere, S., n.7 above, in *Draft Decree on Environmental Policy*, p. 238.
pollution, innocent possessors of historically polluted land areas can enjoy the exemption of liability if they meet the criteria set out above. But this limitation only applies to the costs of soil clean-up. Liability based on fault continues to apply in full, even in relation to the innocent possessor.23

5.2 Public Law Liability

5.2.1 New pollution

We have already indicated that according to the Flemish Waste Decree, OVAM had a (disputed) right to order the remediation of polluted soils.24 The conditions under which someone can be held to remediate are now also laid down in the new Soil Clean-Up Decree of 22 February 1995. Once more a distinction is made between new and historic pollution. The clean-up of new pollution is, according to article 7(2), required whenever the soil clean-up standards have been violated.25 These standards have been set by the Flemish Government in a recent executive order and determine the level of soil contamination at which unacceptable effects on humans and the environment are deemed to arise. Where the soil clean-up standards have been exceeded, the clean-up must be carried out.

The duty to clean-up rests, according to article 10(1), on the following persons:26

1. the operator, where the land area on which the contamination occurred accommodates an installation or an activity for which a licence is required;
2. in all other cases on the owner of the land area on which the contamination occurred, where he fails to prove that a different person, acting for his own account, had de facto control over the land area. Where the owner succeeds in proving this, the obligation will be imposed on that other person.

The obligation to carry out the clean-up is clearly, as far as new contamination is concerned, a separate and independent obligation. This means that the clean-up must be carried out as soon as the criteria for the contamination have been met and without requiring a notification to that effect from OVAM.27

The person who is bound to carry out the clean-up operations will do so at his own expense. This rule serves to solve the problems of initial financing which will arise where the rule is that the public authorities shall carry out the decontamination work on their own initiative.28 However, the person who finances the decontamination operation may, according to article 11 of the Soil Clean-Up Decree, recover these costs from the person who caused the contamination to take place and is therefore liable according to article 25. This clearly shows the relationship between the duty to clean-up and the liability issue.

23 See Boeken, Ryckbost and Deloddere, n.7 above, p. 240.
24 This was disputed because it was held that the Flemish region had no right – in 1990 – to introduce a liability regime departing from the classic principles of tort law laid down in the civil code.
25 See Boeken, Ryckbost and Deloddere, n.7 above, p. 234.
26 Ibid. p. 236.
27 Ibid.
5.2.2 Historic pollution

As far as historic contamination is concerned, article 30 of the Decree provides that soil clean-up will be required if the soil contamination in question represents a serious risk. When assessing the degree of seriousness of the risk represented by the soil contamination, account will in practice need to be taken of the following: the nature and degree of concentration of the substances or micro-organisms; the possibility that they might become disseminated; the purpose of the soil; and the risk of exposure of humans, plants or animals as well as water collection processes. Article 30(2) further provides that the Flemish government shall determine the land areas where soil clean-up will have to take place. This regulation has meanwhile also been published in the Belgian State Gazette. This corresponds with the idea that resources necessary to carry out soil clean-up everywhere in the Flemish Region will not be available in the short term.

The persons obliged to carry out the clean-up in the case of historic pollution are the same as the persons to which the duty to clean up in case of new pollution is addressed. However, since in the case of historic contamination the land areas to be contaminated are being identified by the Flemish government, the obligation to carry out the contamination in that case only arises once the operator or owner involved has been given notification by OVAM that he must proceed to carry out the clean-up. Contrary to the situation in case of new pollution, there is no independent obligation to clean up in case of historic pollution, in the absence of a notification by OVAM.

One should further note that also in case of historic pollution the duty to clean up does not apply to the innocent possessor who meets certain criteria. In addition the exemption for historic pollution has been extended somewhat in the case of private persons. Article 31(3) provides that anyone who bought land before 1 January 1993, even though he knew or should have known that it was contaminated, will nevertheless not be obliged to carry out the clean-up where, as from the time at which he acquired the land, he used it throughout for reasons other than professional or commercial reasons. The provision aims to avoid the situation whereby private persons who bought a house in an area which was, for example, contaminated by cadmium, could be obliged to decontaminate their land themselves, at their own expense.

5.2.3 Decontamination ex officio and criminal sanctions

Finally, it should be mentioned that if the person who is bound to decontaminate does not fulfil his obligations, OVAM may, after having served a default notice, proceed to carry out the clean-up at its own initiative. In that case OVAM is entitled to recover the costs from the person who is liable according to the provisions discussed above. This explicitly provides for a right of recourse of

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29 See Soil Clean-Up Decree, art. 2(3) and see Bocken, Ryckbost and Deloddere, n.7 above, p. 234.
31 See Soil Clean-Up Decree, art. 31(2).
32 See Bocken, Ryckbost and Deloddere, n.7 above, p. 239.
33 See Soil Clean-Up Decree, art. 45 as well as Bocken, Ryckbost and Deloddere, n.7 above, p. 237.
34 This is explicitly stated in art. 46(3).
OVAM and eliminates any doubt one could have concerning the chain of causation, discussed above.

The Soil Clean-Up Decree provides for severe criminal sanctions. The criminal sanction applies to anyone who violates the provisions of the Decree. This therefore also applies to the person who would have a duty to decontaminate in the case of no pollution because the soil clean-up standards have been exceeded and who omits to do so. These severe criminal sanctions have been criticised.

6. THE EFFECT OF EC ENVIRONMENTAL LAW ON LEGISLATION AND ADJUDICATION

6.1 Effect of EC Environmental Law on Legislation

With respect to the duty of Member States to implement European environmental law, Belgium is obviously not to any large extent different from other Member States. The Belgian Federal State does have a duty under European law, for example, to implement European environmental directives. The only particular aspect that should be mentioned in this respect as far as the implementation procedure is concerned, is that as a result of the federalisation of Belgium a lot of the competences with respect to environmental law no longer rest with the federal state, but have been attributed to the regions (see 1.2 above). The fact that the regions now have these important competences for environmental policy obviously also has important implications for the implementation of European environmental law.

One consequence is that a structure had to be established to involve the regions at an early stage in the negotiations concerning matters that belonged to their exclusive competences. Indeed, the Belgian Federal State is the formal member and previously the Constitution provided that only the King was competent to conclude treaties. This, however, has been changed as a result of the federalisation. Article 167(1) of the newly coordinated Belgian constitution now provides that the King still ‘manages’ the international affairs, without harm to the competences of the regions and communities to regulate the international cooperation concerning the matters belonging to their competences. Article 167(3) of the Constitution now explicitly grants power to the regional governments to conclude treaties as well.

Specific rules have also been laid down concerning the participation of the regional governments in the negotiations and decisions at European level. The latter was indeed necessary since in the early stage of federalisation a lot of uncertainties still existed as to the precise boundaries of the competences of the regions. This led to considerable delays in the implementation of European directives in one or more of the regions. As a consequence of this, the Belgian Federal State could often be found as a defendant at the European Court of Justice for non fulfilment of duties under European law. The constitutional amendments which

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35 Soil Clean-Up Decree, art. 50 allows for imprisonment of up to 5 years and a fine of up to 20 billion Belgian francs.
now gave an independent right to the regions to negotiate international treaties and which guarantees them an involvement at the European Community level should guarantee that these problems now belong to the past. The involvement of the regions, who now possess the most important competences for environmental policy, at an early stage of development of European directives should guarantee a smooth implementation of these directives afterwards.

It should be mentioned that the draftmen of the new Belgian federal system wanted to avoid the promulgation of conflicting or different regulations in the three regions, especially as far as transboundary matters are concerned. Therefore article 92bis of the special institutional reform law of 8 August 1980 provides for the possibility of cooperation between the Federal State, the Communities and the regions. This article provides for the possibility to have cooperation agreements between these institutions. With respect to European environmental policy such a cooperation agreement has meanwhile been drafted.

Moreover, an article 92quater of the special Institutional Reform Law, introduced by law of 5 May 1993, now provides that proposals of European regulations or directives concerning matters which belong to the competences of the regions, have to be sent to the council or parliament of the regions. This new law now also provides for a ‘substitution power’ for the Federal State. Article 16(3) of the special institutional Reform Law now stipulates that when the Belgian State has been charged with a violation of duties under international law concerning matters which in fact belong to the competences of the regions, the state receives, under very strict conditions, the right to regulate instead of the negligent region.

6.2 Effect of EC Environmental Law on Adjudication

As far as the enforcement of European environmental law is concerned, it should be mentioned that Belgian citizens have all the rights granted to them through the case law of the European Court of Justice. In 1963 the ECJ decided in the well known Van Gend & Loos case, 36 that the European Community constitutes a new legal order which gives rights, not only to the Member States, but also to their citizens. After that, the principle of direct effect has obviously been refined in the many well known cases of the ECJ. Many examples could be given of environmental cases where the principle of direct effect is invoked by citizens against the state. 37 European environmental law not only plays an important role in civil disputes, but also before the criminal courts. The well known Mellery case could serve as an example. In that case the Court of Appeal of Antwerp ruled in a judgment of 23 June 1995 that executive orders of the Walloon government of 17 May 1983 and 19 March 1987, which put a ban on dumping of non-Walloon waste, were contrary to European law. The consequence was, that the offences which had been criminalised for a long period of time were consequently not liable for punishment. 38

7. **Civil Liability**

7.1 **General System**

7.1.1 **Key elements of tort law**

The basic rule of tort law in Belgium was and is still article 1382 of the Civil Code 1804, which provides for a duty to compensate for the tortfeasor who negligently caused damage to another: a classic negligence rule. The victim had two ways of proving negligence: he could either prove that the party causing the injury violated the general duty of care or he could prove that a statutory duty was breached. Bocken has shown in his dissertation that article 1382 of the Belgian Civil Code (CC) can play a considerable role in remedying environmental damage. Since it is generally held that every violation of a statutory norm constitutes a fault, article 1382 CC still plays an important role in soil pollution cases. As we discussed above, the Soil Clean-up Decree provides in detail who has a duty to clean-up polluted soils under what circumstances. A violation to fulfill this duty then automatically constitutes a fault.

In addition, Belgian tort law contains a wide variety of strict liability rules, some of which are also of importance for environmental liability. In this respect we should specifically consider article 1384, al 1 CC, which provides that the guardian of a defective property is liable for the damage caused by the particular defect of that property. Article 1384, al 1 CC has been widely interpreted by case law. There is supposed to be a defect as soon as there is an abnormal feature that is deemed to cause damage. Legal doctrine therefore holds that this broad interpretation in case law in fact amounts to a strict liability rule. The strict liability of article 1384, al 1 CC has also been applied to cases of soil pollution. As early as 1958 the commercial court of St. Niklaas decided that real property of which the soil has been polluted with oil, should be considered a defective property. Since the liability of article 1384, al CC rests in principle on the guardian of the defective property, it has been held that this provision provides for a legal basis to hold the owner or lessee of polluted soil liable for the costs for the remediation of that particular land. It is clear that this strict liability under article 1384 al 1 CC potentially leads to a broad liability, including for the innocent owner or lessee of a polluted soil.

In addition to the fact that this may lead to unreasonable consequences, there was another reason why regulatory action was nevertheless needed to make the recovery of soil clean-up costs possible. This has to do with a decision of 28 April 1978 of the Belgian Cour de Cassation. The court held that the fact that the government fulfills a statutory duty breaks the chain of causation between the fault of a third party and the fact that the government incurred costs when it fulfilled its statutory duty. The consequence of this point of view of the Cour de Cassation is

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41 The so-called Walter Kay decision.
that the government who fulfils a statutory duty to clean-up a polluted soil cannot recover these costs from the liable polluter, neither on the basis of the negligence role, nor on the basis of strict liability, because the chain of causation has been broken by the fact that the costs were incurred as a consequence of the fulfilment of a statutory duty. Although later decisions of the Cour de Cassation provide for a more balanced answer there still are doubts with respect to the question whether the public authorities can use classic tort law to recover soil clean-up costs. This is one of the reasons why legislative action was necessary to prescribe a specific right of the competent public authorities to claim back costs made for soil clean-up from the liable polluter. The recent regulations that we have discussed above in 5.1.2 therefore now explicitly provide that the competent authority can claim these costs. The claim will then always be based on the specific regulatory provision and not on the strict liability of article 1384, al. 1 CC in order to avoid the mentioned causation problems.

7.1.2 Claim-for-suspension procedure

On the basis of the law of 12 January 1993 (claim-for-suspension procedure), the president of the court of first instance can ascertain the existence of acts which form a recognisable infraction or a serious threat for an infraction of one or more dispositions of laws, decrees, ordinances or decisions concerning the protection of the environment. A claim can only be introduced on the basis of this law on the demand of the attorney of the King, an administrative authority and an association without a lucrative goal, which has been a legal entity for at least three years and is able to prove that there is a real activity which is in accordance with its statutory goal and which concerns the collective environmental interest that it aims to protect. The claim for suspension is introduced and dealt with as the short-cause-procedure. Not only are the procedural aspects of the short-cause-procedure and the claim-for-suspension-procedure the same, but the results of the procedures are also similar: in the short-cause-procedure, the president of the court of first instance can order all measures which are, in his opinion, necessary for the provisional solution of a threat or urgent case and he can also order the provisional stop of works, the prohibition of activities, etc.; in the claim-for-suspension-procedure, the president of the court of first instance can order the stop of activities implementation of which has already started and can impose measures preventing the implementation of those activities or preventing damage to the environment.

7.2 Special Environmental Law Liabilities

The rules set out above concerning the general system of tort law still constitute the most important means to recover damage caused by environmental pollution. However, the legislator has instituted specific strict liability regimes for a few specific cases of environmental harm. Some of these are the consequence of international conventions and therefore not typically Belgian. In this respect we can mention a statute introducing strict liability for nuclear accidents, introduced to implement the international conventions on nuclear accidents. The Belgian legislator equally introduced a strict liability regime for oil pollution to fulfil its obligations under international law to implement the international convention on
oil pollution damage. Typically 'Belgian' is article 7 of the act of 22 July 1974 concerning toxic waste, which provides for a strict liability for the producer of toxic waste for all damage caused by that waste. An example can also be found in the Flemish Decree of 24 January 1984 concerning ground waste management. Article 14–19 of this decree provide for a strict liability.

In addition we should refer once more to the strict liability regime that was instituted as a result of the soil clean-up decree of 22 February 1995, discussed above at 5.1.

We have already mentioned several times that Flemish environmental law is subject to important reforms as a consequence of the work of the interuniversity commission for the reform of environmental law in the Flemish Region. The draft decree on environmental policy also contains specific provisions in part 9 on compensation of damage caused by pollution. The general idea is to establish strict non retroactive liability for environmental damage.

7.3 Liability in a Company Law Context

There are not that many particular aspects as far as environmental liability is concerned when this liability suddenly arises in a company law context. A few topics that might play a role in that respect are discussed below.

7.3.1 Piercing the corporate veil

According to Belgian law, companies that are lawfully incorporated according to the conditions of corporate law, enjoy in principle legal personality with the consequence that the liability is limited to the assets of the corporation. This means that obviously also in environmental liability the legal personality is in principle respected, meaning that creditors can only claim on the assets of the company which is liable for the environmental pollution. However, there may be circumstances under which the corporate veil can be pierced if the legal personality has been abused. If that is the case, under particular circumstances the debts of the company can be attributed to another corporation or to a natural person. The case where natural persons are held liable for debts of a corporation are those where, for example, the directors more or less used the corporation instead of managing it. The piercing of the corporate veil is sometimes accepted in cases where the only director of a corporation is at the same time the shareholder. This fact as such is not sufficient to pierce the corporate veil, but it might be the case when the natural person involved is actually abusing the corporation.

In some cases another company can also be held liable for the debts of a corporation that has gone bankrupt. The criterion is again whether the privilege of limited liability has been abused. This will for instance be the case when a new company has been incorporated to take over the activities of an old company without taking over the debts. Finally it should be mentioned that in some cases: has even been held that allied companies (belonging to the same group) were held liable to fulfill the contractual obligations of each other.
7.3.2 Liability of directors

Within the company law context the question obviously arises whether directors can be held liable for the consequences of environmental pollution. It is important to stress that within Belgian criminal law there is no criminal liability of the corporation. Hence, Belgian case law holds that the judge in the criminal court will have to examine which natural persons can in fact be held liable for an (environmental) crime committed by a corporation. In many cases this leads to the personal liability under criminal law of directors as well as of other managers within the corporation. The criterion is whether the person concerned has any guilt relating to the environmental crime. To examine this, the question must be put whether he or she could have had any influence on the environmental crime committed by the corporation.

The situation is in principle different as far as civil liability in the company law context is concerned. In principle it will be the corporation itself that will be held civilly liable against third parties who are victims of environmental pollution. The question, however, arises whether the director can be held liable in civil law according to directors’ liability. There are basically three possible instances of directors’ liability which may play a role in environmental cases:

1. Liability of the director according to article 62(1) of the corporation law. According to this provision directors may be held liable against the corporation for shortcomings in their management. This is only a liability against the corporation, not against third parties. The specific contents of the duties of care under this rule depend upon the specific function of the director involved. This rule may play a role, for example, if a director charged with the environmental policy within the company did not inform the board of directors or shareholders that investments were necessary to comply with environmental legislation. It can particularly play a role if the corporation itself has been sued by a third party victim.

2. Liability for a breach of the articles of incorporation or the corporation law. According to article 62(2) of the corporation law, directors are jointly and severally liable against the corporation as well as against third parties for all damage which results from a violation of the corporation law or the articles of incorporation. Again, it depends on the articles of incorporation whether this can play a role in environmental cases. One of the duties often laid down in articles of incorporation is a duty of information to the shareholders. If a director whose special function it is to take care of environmental policy, fails to inform the shareholders of certain environmental risks, this may be considered a breach of the articles of incorporation and hence lead to liability under article 62(2). This provision can, as mentioned above, also be used by third party victims.

3. The traditional tort liability against third parties. If a third party victim can therefore prove not only that environmental harm was the result of the company’s behaviour, but also that the conditions for individual tort liability

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42 For the general conditions of tort liability see section 7.1.1 above.
of the director were met, the director shall be liable in tort. One important exception to this rule, however, can be found in article 18 of the labour contract law. This law of 2 July 1978 provides that an employee is only liable for damage which he causes during the performance of his labour contract *viz-a-viz* his employer or third parties in case of intent, gross negligence, or a fault which occurs on a more regular than accidental basis. This provision therefore, substantially limits the liability of directors if they are considered to be employees. This is frequently the case in smaller companies where directors also have a position as an employee within the company.

In some cases important duties will rest upon the environmental manager/ coordinator who has special tasks concerning environmental management within the company. If responsibilities have been adequately delegated to this "eco-manager", the board of directors might escape personal liability and the eco-manager be held personally liable, under both civil and under criminal law. However, if he has properly warned and informed the directors, liability may be shifted back to them.

7.4 Which Damage Qualifies for Compensation?

If the conditions for liability in tort are met, the victim should in principle be fully compensated. This means that, in principle, the victim has to be returned in the *status quo ante*. All the damage that has been caused by the tort should be compensated. This concerns both the direct loss as well as the lost profit. Indirect losses also have to be compensated.

In principle, the preferred way of compensating the victim is *restitutio in integrum*. This means that, in principle, ways should be found to restore environmental harm as far as possible; compensation is only the second option.

Obviously many specific problems arise when compensation has to be awarded regarding the question how ecological damage can be estimated. We cannot discuss these problems in further detail within the scope of this chapter.
B. PRACTICAL QUESTIONS OF ENVIRONMENTAL LAW

Vera van Houtte

8. STARTING A NEW COMPANY

Since Belgium’s division into three regions, the old national legislation on operation permits has gradually been replaced, at least in two of the three regions so far, by regional instruments of legislation which in their main principles have much in common, but which differ in their details. These regional rules have territorial application and the place of the plant or establishment determines which of the three sets of rules is applicable.

The main features of the Flemish and Brussels rules are discussed summarily below. The Walloon rules are not described, however, because Wallony is about to change its rules (which at present are basically still the same as the old national rules) in the near future. In all likelihood, the Walloon rules will be rather similar, in their principles, to the Flemish and Brussels rules. Their details (terminology, time limits and periods, competent authorities etc.) are likely, however, to differ substantially.

8.1 When is an Environmental Licence Required?

An environmental licence is in principle required prior to starting operations or opening an establishment and prior to implementing a change in a licensed operation or establishment. However, in practice, the licence is required prior to the beginning of the construction works. Indeed, the rules provide for a reciprocal link between the building permit and the environmental permit:

- the building permit for the construction or change of an establishment which cannot be operated without environmental licence, is suspended (i.e. construction works are prohibited) as long as the environmental licence is not delivered or the prior environmental notification is not filed. If the environmental licence is refused, the building permit becomes invalid;
- similarly, the effect of the environmental licence is suspended until a building permit is delivered and refusal of the building permit implies the lapse of the environmental licence.

All three legislative regions have listed different types of establishments and activities requiring either an environmental permit or a prior environmental notification. These lists, although drafted on the basis of the same principle – i.e. in function of the degree of potential danger to man and environment which the establishments or activities represent – differ in their detail from one region to another.

8.1.1 Flanders

The Flemish decree of 28 June 1985 on environmental licences has classified potentially dangerous establishments and activities in three main categories.\textsuperscript{43} A
environmental licence is needed for the more or less dangerous establishments belonging to the first or second category. The third category which contains merely inconvenient establishments does not require a licence, but a mere prior notification to the competent authorities.\textsuperscript{44}

The environmental licence incorporates the licence for the discharge of wastewater and the storage and/or elimination of waste materials. The prior licence or prior notification is required not only for operating any of the listed establishment but also for changing them. The Flemish legislator also uses this classification to specify which establishments require an environmental coordinator (of either leve and/or an environmental audit and/or AMINAL report and/or a periodic so investigation. This classification thus plays a major role in Flemish environment legislation.

8.1.2 Brussels

The Brussels Region’s Ordinance of 5 June 1997 is the second version of the regional environmental licence legislation for Brussels, which stems from 1992, an has attempted to simplify the former procedural rules. It distinguishes between four categories of establishment:

- the lists of class IB, II and III establishments are determined by an implementing decree of the Brussels government and the list of class IA establishments determined in the Ordinance itself;
- class IA, IB and II establishments require an environmental licence whereas class III establishments are subject only to prior notification.

As in Flanders, the Brussels environmental licence is global in the sense that covers all environmental aspects of the operations, including waste water discharge and direct or indirect discharge of waste materials. Moreover, the Brussels environmental licence procedure incorporates the environmental impact assessment (EIA) procedure provided in the Ordinance of 5 June 1997 (see section 12.1.2 below).

The licence or notification is required not only prior to operation\textsuperscript{45} of the establishment, but also prior to its relocation, to restarting operations following a

\textsuperscript{43} See Annex 1 to the implementing decree of the Flemish government of 6 February 1991 on environmental permits (Vlarem I) which contains an alphabetical list of dangerous establishments with classification in one of the three categories on the basis of the nature and the degree of environmental impact of the materials which are handled and the operations taking place, of the determined by the technical capacity of the installation (e.g. production and treatment of organ and inorganic chemicals: if yearly capacity is less than 1,000 tons - third category; between 1,0 and 10,000 tons - second category; if more than 10,000 tons - first category). The same principle applies to establishments treating oil products, storing or treating of waste, using paints, etc.

\textsuperscript{44} Flemish Decree of June 28, 1985 on environmental permits, art. 4.

\textsuperscript{45} ‘Operation’ is defined as installing, beginning of use, maintaining in use, the use or maintenance of an establishment (i.e. equipment or an installation), as well as any discharge of substances coming from an establishment.
interruption of operations of at least two successive years, to the continuation of
the operation of an establishment of which the licence is about to expire, to the
beginning of operation of an establishment of which the licence has not been used
during a period of maximum two years\textsuperscript{46} and to the continuation of the operation
of an establishment which was not previously subject to licence but which now
falls into one of the classes covered by the rules. A licence or notification may also
be required when the change or extension of a licensed or notified establishment
causes it to fall into another class of the list or is likely to cause an increase of the
danger, nuisance or inconvenience of the establishment.

The Brussels ordinance also provides the possibility to obtain an environmental
certificate for class IA and IB establishments. Delivery of an environmental
certificate for such establishment is without prejudice to the obligation to obtain an
environmental licence but gives an indication to the applicant of whether and
under which conditions an environmental licence is likely to be delivered if an
application for a licence were introduced and handled. The theoretical possibility
of the delivery of a licence and its conditions as laid down in the environmental
certificate are in principle valid for two years.

\subsection*{8.1.3 Walloon}

Under the old federal statute on ‘operation’ permits which still applies in this
region, only two classes of ‘dangerous’ and ‘inconvenient’ (meaning causing
hindrance without being dangerous) establishments exist. This statute only takes
into account the potential danger or nuisance for human beings, with the exclusion
of the environment. The classification in either of the two classes specifies the
danger or nuisance which the activity presumably creates.

\subsection*{8.2 Main Features of the Licensing Procedure}

The procedures organised (with detailed differences) in each of the three regions
for the application and delivery of the licence differ for each category or class of
establishment. In all three regions, the rules require the deposit of a documented
application. The application is subject to a public inquiry and to advice from
various public services and official bodies before the licence can be granted.

In Flanders the procedure covers five phases:

- verification of the admissibility and completeness of the application;
- public inquiry;
- advice;
- decision;
- publicity.

\textsuperscript{46} This period may be shorter as the competent authority lays down in the permit the actual period
within which the environmental licence has to be used.
For certain establishments the application must be accompanied by a scientific report on the potential effects on the environment and/or on safety issues, prepared by the applicant and/or external independent registered experts. Similarly, each region has detailed rules to be respected concerning the notification of an inconvenient establishment.

8.3 Competent Authorities

8.3.1 Flanders

The application for a licence concerning a first category establishment must be filed with the Provincial authorities (bestendige deputatie). The licences for a second category establishment are granted by the municipal authorities (college van burgemeester en schepenen). The latter are also competent to receive notification of a third category establishment. When an establishment falls (on the basis of various pieces of equipment installed or various substances handled) in more than one category, the procedure applicable to the highest category applies to the establishment as a whole. When an establishment is situated in the territory of more than one province or municipality, the authorities of each province or municipality have jurisdiction, which has to be exercised in concert with each other.

8.3.2 Brussels

The Brussels Institute for Environmental Management (IBGE) issues the environmental licences for class IA and IB establishments. Class II licences are issued by the municipal authorities of the municipality in which the plant is located. Although two different authorities are competent for the issue of the licences, only the municipal authorities are competent to receive the applications for both (the principle of the so-called single 'window').

Issue of the licence requires prior consultation of various authorities such as the fire brigade, zoning authorities and, above all, for class IA and IB establishments, of the Concert Committee, composed of representatives from all concerned authorities, which renders its advice following a public inquiry and hearing of interested parties. The advice of the Concert Committee, although not binding on the IBGE or the municipal authorities, in practice often determines the final decision.

8.4 Participation by the Applicant and Others in Decision-making

8.4.1 Participation by applicant

Flanders

Following the filing of the application for a licence, the applicant can participate in the information meeting, which may be organised as part of the public inquiry.

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47 See section 12 below.
48 For Flanders, Vlaem i lays down the procedure for the application and delivery of the permit, as well as for notification.
49 See the layout of procedure for installations of classes IA, IB and II in Exhibit I.
procedure. At least one such information meeting must be organised for first category establishments which require an EIA report or a safety report (see 12.1 below). At the initiative of the municipal authorities such information meeting may be organised for all other first and second category establishments. The applicant is invited in writing to attend this meeting and can give additional information about his application during the meeting.

The applicant has to be heard, at his request, by the provincial or regional (as the case may be) Environmental Licence Commission. This Commission is composed of representatives of the province and of the various consultative bodies. The request to be heard has to be filed in writing within a specific period following the filing of his application for the licence.

Brussels

In cases where an EIA is required, the applicant may decide, if the assessment is negative, to withdraw his request or to amend it in order to make the project compatible with the conclusions of the EIA.

8.4.2 Participation by others

The application for an environmental licence for first or second category establishments in Flanders and of classes IA and IB in Brussels is the subject of a public inquiry. This inquiry implies that, on the one hand, third parties can consult the application and its annexes during a specific period of time and, on the other hand, that a notice needs to be affixed at the place of the operations, in order to give third parties the chance to formulate their remarks. Moreover, as regards first category establishments in Flanders, the public inquiry is published in at least one regional and one other newspaper; furthermore, the owners situated within a circle of 100 metres of the place of operation, are personally informed about the application for a licence. In Brussels such personal information is not provided.

In Brussels, the procedure provides a double public inquiry for licences of class IA establishments: a first public inquiry (lasting 15 days) takes place following the filing of the request and relates to the terms and conditions of the environmental impact study. Upon completion of this study, a second public inquiry follows, lasting 30 days. For class IB and II establishments there is a single public inquiry during 15 days.

In Flanders, the public inquiry takes 30 days, no matter to which category the establishment belongs.

8.5 Duration

Each regional legislation mentions terms, per class or category of installation, within which the environmental licence has to be delivered. Yet several of these terms are not binding on the authority, which may exceed the term fixed.

56 Vlarem I, art. 17(3).
8.5.1 Flanders

Licences for the first category are delivered (by the province) within four months and the second category licences (by the municipality) within three months. These terms run from the date of the notice of the authorities confirming that a complete and admissible application has been received. They can be prolonged by a motivated decision of the province, for a maximum of two months, or by the municipal authorities for a maximum of one-and-a-half months. If no decision is taken on the application within four or three months respectively or at the expiration of the prolonged term, the licence is considered to be refused.

The above time limits do not include the period required for the preparation of the environmental impact study because this study, if required, has to be achieved prior to the filing of the application for the environmental licence. The same applies to the safety report. Indeed, the environmental impact report and the safety report, if required, have to be filed together with the application for the licence. Without these reports, the application file is not complete and the above periods for delivery of the environmental licence will not even start running.

8.5.2 Brussels

The duration of the procedure for a class II establishment is approximately 70 days. For a class IB establishment it is more or less six months, incidents excepted. It is impossible to determine exactly the duration of the procedure for delivery of a class I A licence, as there is no maximum period for the performance of the impact study which, in Brussels, is part of the application procedure. On the average, the duration for this procedure is about one year.

8.6 Costs of the Licensing Procedure

8.6.1 Flanders

In Flanders, the costs of an application for a first category establishment requiring an environmental impact or safety report, amount to BEF 10,000, and to BEF 5,000 when no such report is required. The cost is BEF 2,500 for a second category establishment. These ‘taxes’ have to be paid by the applicant at the time of filing of this application (which is inadmissible as long as payment is not made) and are intended for the Flemish Fund for Environmental and Natural Prevention and Remediation.

8.6.2 Brussels

The Ordinance provides that the income from licence applications is to be paid to the Brussels Fund for Environmental Protection and that the following taxes are due:

- BEF 25,000 for a class IA environmental certificate;
- BEF 100,000 for a class IA licence without prior application for an environmental certificate;
- BEF 50,000 for a class IA licence with prior application for an environmental certificate;
• BEF 10,000 for a class IB environmental certificate or licence;
• BEF 5,000 for a class II environmental licence.

8.7 Chances of Obtaining the Licence

The objective of the legislation is to safeguard the environment, as well as the health and security of the population (including all those present within the establishment who are not protected as employees) against the dangers and inconveniences of the establishment or the activity. In most cases the licence is delivered with conditions, however, aimed at reducing the inconveniences and nuisances, which are inherent to the establishment.

Special conditions may be imposed relating to, for example: subscription to insurance for civil liability of the operator; control of the installation and its environment; measures to be taken in case of an accident, roads to be used by vehicles driving to or from the installation; operating hours of the installations; and investments in environmental protection devices.

However, if the nuisance, which follows from the establishment, is such that the operating conditions do not allow to reduce it to acceptable proportions, the licence may be refused. This is a matter of delicate evaluation of the interests of the operator and the neighbours (from which employment considerations cannot always be entirely excluded).

A special procedure applies when the licence does not provide or impose appropriate conditions required to avoid, reduce or remedy danger, nuisance or inconvenience for the environment and health (or when the conditions imposed are no longer adequate).

8.8 Assessment Criteria by Competent Authorities

The competent authorities take into account:

• the interaction between the dangers, nuisances and inconveniences of the envisaged establishment and those of already existing establishments;
• the applicable mandatory rules, including the pollution reduction programmes;
• the best available techniques for avoiding, reducing or remedying dangers, nuisances and inconveniences of the establishment and their actual use possibilities;
• the advice given by the consulted persons and bodies.

Finally, the destination of the area in which the site is located, according to general and particular zoning plans constitutes an important criterion.

8.9 Regulations to be Expected

The Flemish and Brussels regulations have been amended repeatedly and recently. The Walloon regulation is still the old federal statute of 1946/1947 and is expected to be replaced by modern regulations in the course of 1998.
8.10 Term of the Licence

8.10.1 Flanders

The licence is granted for a specific period, fixed in the licence, which may not exceed 20 years; however, it is possible to obtain a temporary licence the term of which does not exceed one year or three months. A temporary licence may be renewed once for a maximum period equal to the initial period.

8.10.2 Brussels

The licence is valid for a maximum of 15 years following the start of operations.

9. LEGAL PROTECTION WITH REGARD TO ENVIRONMENTAL LICENCES

9.1 Who can Appeal?

9.1.1 Flanders

The applicant or the operator has recourse against a tacit refusal of his licence (see 8.5.1 above) or a negative decision on the application. Recourse is also open for:

- the provincial Governor;
- the advising authorities;
- the municipal authorities against a decision of the provincial authorities;
- legal entities whose statutory purpose is the protection of the environment which may be influenced by hindrance from the establishment authorities;
- third parties who have an interest to appeal.

9.1.2 Brussels

Any person establishing an interest may appeal against the delivery of an environmental licence.

9.2 To which Authorities?

9.2.1 Flanders

An appeal against a decision of the municipal authorities is lodged by registered letter before the provincial authorities. An appeal against a decision of the provincial authorities is handled by the Flemish Government.

51 Possible trial period, which cannot exceed two years, included (Flemish Decree of 28 June 1985, on environmental permits, art. 18).
52 If the establishment is related to a building site (Vlaam, I, art. 39(3)).
53 In other cases (Vlaam, I, art. 39(3)).
54 Flemish Decree of 28 June 1985, art. 23.
9.2.2 Brussels

An appeal against a decision of the IBGE or of the municipal authorities is to be brought before the Environmental College, which is composed of six experts. When deciding on an appeal, this Environmental College can reopen the entire case. In its decisions it also takes into account the desirability. The decisions of the Environmental College are themselves open to appeal to the Brussels Government.

9.3 Time Limits

9.3.1 Flanders

All appeals have to be introduced within 30 days after the notification of the decision or the expiration of the term within which a decision should have been taken (in the case of tacit refusal).

The provincial authority deciding on appeal has to take a decision within four months after the receipt of the appeal. The Flemish Government has to take its decision in appeal within a period of five months. If no decision is taken within this period, the licence is presumed to be granted tacitly for a period of 20 years.

9.3.2 Brussels

An appeal with the Environmental College has to be lodged within 30 days following receipt of the notification of the decision when the appeal is filed by the applicant. For the appeal by other parties, the period of 30 days runs from the publication of the decision.

The decision of the Environmental College is notified within 60 days following the date of mailing of the registered appeal. When it decides to hear the parties, this period is prolonged by 15 days.

The time limits and procedure for the second appeal, before the Brussels Government, are very similar to those for the appeal before the Environmental College. However, if the Brussels Government fails to notify its decision on appeal within 60 (or 75 days) following the date of posting of the registered appeal, the appellant may send a reminder to the Government. If no decision is then notified within another 30 days following the date of posting of the registered reminder, the decision which has been appealed – even if it was itself a tacit decision – is presumed to be confirmed on appeal.

9.4 Main Features of the Appeal Procedure

9.4.1 Flanders

The appeal does not suspend the decision, unless it is filed by the Provincial Governor, the local board, or the advising authorities. First, the Provincial Board

55 Ibid, art. 23(1).
56 Ibid, art. 23(5).
57 Vlaem I, art. 50(5); Council of State, N.V. Maes, nr. 43.177, 3 June 1993, TMK, 1993/4, 237.
58 Flemish Decree of 28 June 1985, art. 24(3).
or the Minister examines the admissibility of the appeal and its annexes. Notice of the examination is sent to the applicant within 14 days. If the appeal was not introduced by the applicant, he is informed of the appeal.

As in the procedure at first instance, the appeal is subject to advice from different official bodies, as well as from the Provincial Commission for environmental licences. The applicant also has the right to request to be heard by the authorities.

9.4.2 Brussels

The appeal does not suspend the decision, unless it is sufficiently motivated by reasons of serious danger or irreparable damage and is filed by the local board concerning class IA or IB installations or by the Institute for class II and temporary installations. The suspension is ordered within five days after the filing of the appeal by the president of the Environmental College after having heard the parties.

9.5 What are the Powers of the Appellate Body?

The powers of the appellate bodies are similar to the powers of the decision-taking authorities in first instance. The licence can be refused or granted or granted under certain specific conditions.

10. CHANGE OF COMPANY ACTIVITIES

10.1 When is a Licence Necessary?

Once operations have started, three hypothetical situations can be distinguished in which a company will be subject to certain obligations in relation to its environmental licence:

- where there is a change in the applicable rules, implying an addition to or change in the classification lists;
- where there is a change in the licensed activities or installations of the establishment;
- where there is a change of the operator.

10.2 What are the Differences Compared to Starting a New Company?

10.2.1 Change in the classification lists

Flanders

When a change or addition to the classification lists causes a licensed establishment to fall into another class, the existing licence remains valid for the remainder of its validity term.

59 Vlaeml, art. 50(2)(c).
60 Brussels Ordinance of 5 June 1997, art. 84(1-2).
61 Ibid., art. 84(3).
62 Vlaeml, art. 38(5)
When a change or addition to the classification causes an establishment which did not previously need a licence to become subject to a licence obligation, an application needs to be filed with the authority which is competent for the newly classified activity, within six months following the entry into force of the amended classification. A public inquiry is not required in this procedure – operations can be legally continued until the final decision on the application has been made.\textsuperscript{63}

**Brussels**

When an unlicensed establishment becomes subject to a licence obligation for Class IA, IB or II as a result of a change of classification, a licence must be applied for within six months following the entry into force of the classification of the establishment. The operations can be pursued during that period and until the notification of the decision on the application.\textsuperscript{64}

**10.2.2 Change in the licensed activities and installations**

**Flanders**

The Flemish Decree distinguishes between three types of change, defined as follows:

- amendment: i.e. moving equipment within the licensed establishment or adoption of another production method;
- expansion: i.e. increasing the capacity, power or surface in the area which is covered by the licence;
- extension: i.e. increase in storage capacity, power or surface in an area not covered by the existing licence.

A new licence is required for any change, which causes the establishment to fall in a higher category than before, and for an extension. This licence is delivered by the authority which delivered the initial licence.\textsuperscript{65}

In other cases the change must merely be notified (on a specific form, without tax being due) to the authority which delivered the present licence. Within 60 days following receipt of the notification, the authority acknowledges receipt or adopts a motivated decision that the change does cause an additional risk for humans or the environment or increases the hindrance. In the latter case, a licence is required\textsuperscript{66} and must be applied for according to the ordinary procedure.

**Brussels**

When the change or extension of a licensed establishment causes it to fall into another class or increases the danger, nuisance or inconvenience linked to the licensed establishment, a new licence may be required. Therefore, prior to the change or extension, the operator has to notify the authority of the envisaged

\textsuperscript{63} Flemish Decree of 28 June 1985, art. 16.

\textsuperscript{64} Brussels Ordinance, art. 7(6).

\textsuperscript{65} Flemish Decree of 28 June 1985, art. 27(1).

\textsuperscript{66} Ibid., art. 27(2).
modification by registered post. This authority then decides, within one month whether a licence application has to be filed. 67

10.2.3 New operator

The licence is linked to the establishment and is not personal to the operator. S

of the establishment to another operator has no impact on the licence, which remains valid. Notification of the transfer of the establishment is, however, required.

Flanders

The transfer of an establishment must be notified, at least 10 calendar days prior
the date of the envisaged take-over, to the authority which granted the licence.
Although the notification is required on sanction of expiry of the licence, 68
Council of State considers this sanction illegal. 69

Brussels

There is no sanction on the obligation to notify a transfer of an establishment within 15 days following the transfer, to the licensing authority.

11. Legal protection in the event of change of company activities

As far as the legal protection is concerned, the same rules are applicable in the event of change of company activities as when a licence is granted for a new company.

12. Environmental impact assessment

12.1 When is an Environmental Impact Assessment Required?

The categories of establishments for which an EIA is required largely correspond to those enumerated in Annexes I and II of Directive 85/337/EEC of 27 June 1985, on the effects of certain public and private projects on the environment (OJ 15 L/175, p. 40).

12.1.1 Flanders

The Decree of the Flemish Government of 23 March 1989 70 concerning the environmental impact assessment of certain categories of inconvenient establishments

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67 Brussels Ordinance, art. 7(2)(1).
68 Viarem, art. 42(2).
69 Council of State, Verhove, nr. 60,156, 13 June 1996.
70 Amended by Decree of 10 March 1998, which considerably extended the list of projects subject to EIA.
requires a prior environmental impact assessment for the licensing of establishments listed in its article 3, for example:

- refinery of crude oil;
- thermic plants with a power of at least 300MW;
- plants for asbestos production or treatment;
- integrated chemical plants;
- dangerous waste disposal installations;
- stables for certain quantities of certain animals;
- petrochemical installations;
- pesticide production plants with a minimum capacity of 30,000 tons per year.

A second decree of the same date furthermore requires an EIA for certain categories of construction permits prior to the filing of the application for the construction permit, for example:

- highways;
- railroads;
- airports;
- harbours;
- industrial areas of at least 100 ha;
- urban projects of at least 2,000 residences or of a surface of 10 ha or of at least 100,000m² office space;
- yachting harbours of at least 500 moorings;
- certain pipelines;
- recreational facilities of at least 20 ha.

The interpretation of these categories often creates problems and it is in practice not always easy to determine whether or not a specific project requires an EIA or not.

12.1.2 Brussels

According to the Ordinance of 5 June 1997, an EIA study is required for the licensing of a class IA establishment, whereas a class IB establishment requires such study only exceptionally but in principle an EIA report is required.

Thus, an EIA study is required, for example, for:

- highways, roads with four lanes or more, long distance railroads and airports with runways for at least 2,100m;
- office buildings, with a total above ground surface of more than 20,000 m²;
- parking lots in the open air or covered garages for more than 200 cars.

The following require only an environmental impact report, for example, for:

- all transport infrastructure works causing a substantial change of the surrounding transport networks, to the extent not covered by the above obligation to make an environmental impact study;
- hotels of more than 100 rooms,
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- office buildings with a total above ground surface of between 5,000 and 20,000m²;
- A class II establishment can be licensed without an environmental impact assessment being made.

12.2 Main Features of the Procedure

12.2.1 Flanders

The EIA contains all information relevant to determine the environmental effects of the operation of the envisaged establishment, such as the description of the project, the production processes, the materials used, its effects on nature and environment (air, water, soil) etc. The report is drawn up at the initiative and expense of the permit applicant by one or more experts, designated by the applicant and some of which must be recognised by the Flemish Minister of the Environment.

The board of experts has to be composed by experts of all relevant disciplines and its specific composition must be approved for each project separately by the administration for the environment, on sanction of invalidity of the report produced by the board. The same administration reviews the report upon its finalisation for its conformity with the rules of the decree. If the report does not conform, it has to be corrected and resubmitted for certification. Only a report which is certified to conform can be used thereafter as an annex to the environmental licence application.

Although the licensing authority is not bound by the findings of the environmental impact assessment report, it has to take them into account when delivering its reasoned decision on the application.

12.2.2 Brussels

The legal requirements for the establishment of an EIA report are less strict than those applying to the preparation of an EIA study. Both the study and the report are prepared at the initiative and at the cost of the licence applicant. An administrative authority (comité d’accompagnement) supervises their preparation. A public inquiry is organised in the framework of the licensing procedure for establishments requiring an EIA (see also Table 4.2).

12.2.3 The federal level

Since the federal state retained its regulatory power in the field of nuclear power control, it remained, with exclusion of the regions, competent to enact EIA regulations. Accordingly, the General Regulation for that Protection against Ionising Radiation of 28 February 1963 provides that the operation of a nuclear installation must be preceded by an EIA.

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21 BOI 16 May 1963.
Table 4.2: Layout of standard procedures for the Brussels Region

<table>
<thead>
<tr>
<th>Class IA Application for permit (w.o. certificate)</th>
<th>Class IA Application for certificate or permit</th>
<th>Class IB Application for certificate</th>
<th>Class IB Application for permit (w.o. certificate)</th>
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</table>

Class II Application for permit

Temporary establishment Application for permit

Complete file

Complete file

Determination of terms of authorisation

Delivery of permit by IBGE

Delivery of permit by municipal authorities

Determination of terms of authorisation

Delivery of permit
12.3 Duration of the Procedure

12.3.1 Flanders

The procedure contains mainly three phases:

Prior concertation

The initiator of the project, notifies to the competent authority AMINAL its intention to realise a project subject to an EIA, including:

- a summary description of the project and its location;
- a copy of its agreement with the recognised experts;
- a list of names of all the experts who will constitute the board of experts;
- the pre-study, if any;
- the designation of the expert-coordinator.

AMINAL thereupon approves the composition of the board (at the latest within 10 days following the notification), discusses the preliminary report and gives directives on the content of the report.

The preliminary report must contain, inter alia:

- justification of the project (economic, social);
- description of possible alternatives;
- identification of environmental problems;
- coverage of the EIA (disciplines);
- methodology of the effect-prediction and assessment;
- determination of the reference situation.

Realisation

The EIA is realised in accordance with the directives contained in the preliminary report and covers, inter alia:

- the collection of basic information;
- the characteristics of the effects;
- description of the effects;
- proposals for alleviating measures;
- consideration of post-evaluation;
- drafting of the EIA report.

The report is then filed with AMINAL.

Evaluation

This phase covers the evaluation of the report and the grant of the conformity certificate.

The certificate of conformity is delivered (in principle within 30 days) without taking into account the desirability of the project, but exclusively on the basis of the quality, content and objectivity of the report. The duration of the procedure can be
considerably influenced by the type of environmental impacts to be evaluated. Thus, some reports may require a study lasting a full year (because the impact in all four seasons has to be reviewed).

12.3.2 Brussels
The EIA procedure is part of the procedure for obtaining environmental certificates and licences.

The Brussels Ordinance, as amended by the Ordinance of 5 June 1997 provides a number of time limits to be respected by the administration in the different phases of an EIA. As mentioned above, the EIA is subject to a public inquiry.

13. Enforcement

13.1 Possibilities of Enforcement

13.1.1 Criminal liability
Most of the statutes relating to environmental issues provide for fines and imprisonment (although see 13.2, below). Maximum criminal penalties generally are considered too low, however, to be a true deterrent from committing environmental infringements.

13.1.2 Administrative sanctions
The mayor and some public servants can order the closure of an establishment, the interruption of its activities, or the putting of seals on an establishment, which operates without licence or which infringes the operating conditions. Moreover, certain decrees provide that the competent administration can impose administrative fines (as distinguished from criminal fines).

13.1.3 Civil law liability
In cases where conditions for civil liability are fulfilled (negligence, damages, causal link between negligence and damages), the judge can order restoration of the original situation or payment of an indemnity.

13.1.4 So-called objective liability
In the cases for which the legislator has foreseen an objective liability, it is sufficient to show that damage has been caused.\footnote{\textit{e.g.}, producers of poisonous waste (Act of 22 April 1974, BOJ, 1 March 1979); manager of an establishment for soil pollution in Flanders (Decree of 22 February 1995, BOJ, 29 April 1995).}
13.1.5 Citizen suits (the federal statute of 13 January 1993, granting legal access to environmental protection groups)

Recognised environmental protection groups have been granted standing under the federal statute of 12 January 1993, granting legal access to such groups,\(^73\) though under certain conditions. According to some case law, the statute also grants (indirectly) standing to individual citizens.

The federal statute of 12 January 1993 allows recognised environmental groups to obtain an injunction against third parties ordering them to cease environmental infringements; according to the case law of the Belgian Supreme Court, such an injunction may also consist of a restoration order.

13.2 Risks for Companies and Directors

According to Belgian law, legal entities are not criminally liable. For this reason, the facts are attributed to a natural person who can be held criminally liable, on the basis that he committed a negligence or that he had or was presumed to have the necessary authority and control.

Nevertheless, it is worth mentioning that a draft statute providing for criminal liability of legal entities is being prepared. Until the statute on criminal liability of legal entities shall be amended, the members of the board of directors shall be criminally liable for environmental infringements of the company, unless they can show that they delegated authority and responsibility to one or more managers or employees of the company, in which case the latter may be found personally liable.

The Brussels Ordinance provides in this respect specifically that 'the employer of the author of an infringement is also subject to criminal sanctions when he has not given to his employee the necessary instructions or means required for the respect of the applicable rules, taking into account the responsibility delegated to this employee'.

13.3 Enforcement in Practice

There exist a clear tendency towards stricter enforcement of environmental rules. Public prosecutors, environmental groups and the public at large (for example neighbours) are becoming more tenacious when confronted with environmental infringements.

14. Soil Pollution

Substantive attention is paid hereafter to the Flemish legislation on soil pollution as it is the only regional legislation so far on this issue. It is expected that the two other regions will model their legislation on the Flemish experience.

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\(^73\) BOJ, 9 February 1993.
14.1 Flanders

The Flemish Soil Remediation Decree (SRD) of 22 February 1995\textsuperscript{74} regulates the consequences of soil pollution, both historical (defined as pollution which came into existence prior to 29 October 1995) and new (which came into existence after that date), in the Flemish Region. The SRD grants extensive powers for investigation and remediation of soil pollution to OVAM, a public body, which:

- is to keep a register of polluted soils;
- can at all times perform or require to perform preliminary soil investigations, or descriptive investigations, as the case may be;
- can require financial security from persons with a remediation obligation (to cover their liability for the remediation costs);
- can, at its own initiative and at the cost of the person obliged to remedy, remedy itself the polluted soil when the person obliged to remedy fails to do so after having been properly summoned.

The SRD imposes a remediation obligation on any person who has actual control over the polluted soil, i.e.:

- the operator, if, on the soil on which the pollution came into existence, an establishment is being operated or an activity is taking place which is subject to an environmental licence or prior notification in accordance with the Flemish Environmental Licences Decree of 28 June 1995;
- in all other cases, the owner of the land on which the pollution came into existence, unless he is able to show that another person has the actual control over this land in which case the latter comes under the remediation obligation.

The so-called 'innocent occupant' is not obliged to proceed to soil remediation (and hence to bear the risk not to have any recourse for the remediation costs against the polluter). The conditions under which one may qualify as an 'innocent occupant' are more stringent in case of newly polluted soil than in case of historically polluted soil. In both cases, the occupant of a polluted soil, if he is to qualify as an 'innocent' holder, must demonstrate that at least the following conditions are satisfied:

- he did not cause the pollution;
- at the moment he became the operator, the owner or, possibly the person having actual control over the land, was not and did not have to be aware of the pollution.

In the case of newly polluted soil, the occupant must in addition demonstrate that no so-called 'risk establishment' has been established or 'risk activity' has taken place on the land (the 'risk land') since 1 January 1993. The notion of 'risk

establishment’ or ‘risk activity’ refers to certain polluting establishments and activities the list of which has been established by the Flemish Government by implementing decree of 5 March 1996 (BOJ, 27 April 1996). According to this decree, a rather large number of industrial establishments are concerned. The Decree of 26 May 1998 requires the municipal authorities to establish, not later than 25 July 2000, an inventory of all the ‘risk land’ on their territory.

A distinction must be made between new and historical soil pollution as to when soil remediation becomes mandatory. In the case of new soil pollution, the obligation to remedy exists as soon as the remediation standards laid down by the implementing decree of 5 March 1996 (so-called Vlarebo), are exceeded and without having to wait for the summons from OVAM. Accordingly, the remediation obligation is automatic (self-executive). In the case of historical soil pollution, the Flemish Government must first, following the proposal of OVAM, determine the historically contaminated soils, where soil remediation shall have to be undertaken.25 Remediation of historically polluted land is thereupon mandatory only after OVAM has officially summoned the concerned operator/owner, or the actual controller of the land. OVAM shall give these summons when it is found that the soil pollution is a ‘serious threat’ for man or the environment (including drinking water capture).

The SRD does not provide for an implementing decree to define uniformly the notion of ‘serious threat’. In practice, the OVAM has adopted some guidelines for the ‘serious threat’ assessment. It appears that OVAM is interpreting the notion of ‘serious threat’ very broadly.

The moment at which remediation becomes mandatory is different for new and historical pollution. Once remediation becomes mandatory, however, the same soil quality standards must in principle be achieved. It is possible, although not certain, that in practice the remediation requirements will be implemented less severely in case of historical pollution than in case of new soil pollution.

The person obliged to remediate is held to pre-finance the remediation works, even if it appears that he may have recourse against potentially liable (third) persons, according to the applicable rules on liability. If the person having the actual control over the polluted land qualifies as an ‘innocent occupant’ and is therefore not obliged to remedy, then OVAM pre-finances itself the remediation (and may subsequently have recourse).

As to the liability for remediation costs and damages, the SRD provides for different rules for historical and for new soil pollution. The SRD introduces a new strict liability regime for the costs of soil remediation as a result of new pollution. The polluter of the soil is strictly liable for:

- the costs of a preliminary soil investigation, a descriptive soil investigation and soil remediation;
- the damage, which is suffered as a result of the aforementioned activities or other measures, as well as of use restrictions or precautionary measures, imposed by virtue of the SRD.

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25 The list of historically polluted soils which need remediation has been determined by decisions of the Flemish Government of 4 March and 21 May 1997 (BOJ, 4 and 9 September 1997), and of 20 January 1998 (BOJ, 6 March 1998).
This strict liability is not retroactive and is of public policy.

Since the new liability rules are not retroactive, the liability for historical pollution thus continues to be governed by the general liability rules, which were applicable prior to the date on which the SRD took effect (29 October 1995):

- liability for negligence;
- strict liability for the producer of toxic waste;
- liability of the ‘holder’ of defective (polluted) soil which causes damages to third persons;
- liability of the owner of polluted soil which obliged the public authorities to take protective measures for neighbours and environment;
- possibly, contractual liability.

The SRD provides for special rules in case of transfer of land. These rules prescribe mandatory information to be provided to the buyer of land and determine the moment at which remediation has to be performed. The SRD defines ‘transfer of land’ as follows:

- transfer of ownership of the land (other than after death of the owner);
- the granting or termination of the right of usufruct, a right to use or inhabit, or a right to build on land or a long-term lease;
- the conclusion or termination of civil, agricultural or commercial rental agreements, or concessions for a cumulative duration of more than nine years;
- the conclusion or termination of these rental agreements or concession for a cumulative duration of more than one year on land on which a so-called risk establishment was situated or risk activities took place;
- the conclusion of real property financial leasing agreement for a building with land or its termination, with or without exercise of the purchase option;
- the transfer, among living persons, of a right mentioned above;
- the merger of companies of which one is owner of (polluted) land or the cessation of a company, which is owner of (polluted) land;
- the contribution of a going concern or an industrial branch, provided it includes land;
- the adoption of a charter for co-property.

The take-over of a company through the acquisition of its shares is not, however, considered as a transfer within the meaning of the SRD. In the case of transfer of land, as defined above, preliminary conditions have to be fulfilled prior to the transfer. The conditions precedent are stricter for the transfer of so-called ‘risk land’ (determined in the Viarego implementing decree of 5 March 1996). The decree of 26 May 1998 moreover requires these conditions to be fulfilled before the conclusion of certain preparatory agreements preceding the transfer.

Prior to the conclusion of the agreement concerning the transfer of any land, the transferor must request a soil certificate from OVAM and inform the transferee of its content. OVAM must, in principle, deliver such certificate within one month. The soil certificate shall contain any information known to OVAM concerning the state of pollution of the soil. If no information exists concerning the state of the soil, the soil certificate shall say so.
The private and authentic transfer deeds must contain certain information. A private contract of sale will have to contain the content of the soil certificate; the notary public must mention in the authentic transfer deed that the transferor has informed the transferee of the soil certificate's content, prior to the conclusion of the agreement.

Failure to respect the above obligations is sanctioned by nullity of the transfer agreement, which may be invoked by the transferee or OVAM, unless the transferee, having received the soil certificate, has renounced explicitly in the notarial deed to the nullity sanction. The above obligations and formalities took effect from 1 October 1996.

The SRD provides for additional special obligations in case of transfer of so-called 'risk land'. These special obligations aim at subjecting risk land to investigation prior to the transfer (in order to protect the transferee and the pub community) and, if the land appears to be polluted in excess of what is allow by virtue of the SRD, to impose/organise the mandatory remediation at that time. The transferor must proceed with a preliminary soil investigation prior to the transfer, to be made under supervision of an authorised soil remediation expert. The transferor must notify his intention to sell to OVAM prior to the transfer. The results of the preliminary soil investigation must be attached to the notification.

From there on, OVAM steer the procedure, which will slightly differ, once more, depending on whether new or historical pollution has been revealed by the preliminary soil investigation.

(1) *Descriptive soil investigation*. If OVAM finds, on the basis of the preliminary investigation or the register of polluted soils, that 'serious indications' exist that the concerned risk land is polluted to such extent that the soil remediation standards are exceeded or risk to be exceeded, (if the pollution is new) or if 'serious indications' exist that the pollution causes a serious threat for man and the environment (if it is historic), it will summon the transferor to conduct a descriptive soil investigation. OVAM must notify its finding to the transferee within a period of 60 days following the notification of the intention to transfer, in the absence of which the transfer may be realised (which, however, does not seem to prevent OVAM to intervene *ex officio*, on other grounds).

(2) *Soil remediation project and related obligations*. If it appears from the descriptive soil investigation or from the register of polluted soils that the soil remediation standards are exceeded (in case of new pollution) or that the historic pollution causes a serious threat, the transfer may not take place, except if the transfer:
- has prepared a soil remediation project;
- has undertaken towards OVAM to proceed with the soil remediation work;
- has given financial securities guaranteeing this undertaking.

The remediation itself must, however, not be performed prior to the transfer.

The transferor can disregard the summons to conduct a descriptive soil investigation and is exempted from the obligation to proceed with a

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26 Since the transfer of contaminated land to insolvent companies would result in the burdening of public community (OVAM) with the costs of remediation.
remediation if he qualifies as an 'innocent occupant'. The transferor must then communicate his opinion (for example that he qualifies as an 'innocent occupant') to OVAM within 30 days following the summons to proceed with a descriptive soil investigation. If OVAM disagrees with him (and provided it informs the transferor thereof within 60 days), the transfer may not take place. If OVAM does not answer within said period of 60 days following the communication by the transferor of his opinion, the transfer may take place.

The notary public must mention in the authentic deed relating to the transfer of risk land, whether the obligations relating to the transfer of risk land have been fulfilled. Non-compliance with the obligations relating to the transfer of risk land (preliminary soil investigation, notification, descriptive soil investigation, soil remediation and related obligations) is sanctioned by the nullity of the agreement concerning the transfer. This nullity may be invoked by the transferee of the land or OVAM.

The obligations of the transferor, which are a condition precedent to the valid transfer of risk land (mainly soil remediation), can be assigned by the transferor to the transferee. OVAM has to be notified, however, of such assignment and must be given a copy of the agreement thereon between transferor and transferee.

The special obligations applicable in the case of transfer of risk land, also apply, by analogy, to the closing of a risk establishment or the termination of risk activities.

The Vlarebo implementing decree also obliges operators of risk establishments or activities to conduct, at their cost, periodical preliminary soil investigations. The following periodicity is provided according to the risk presented by the establishment/activity concerned:

- Category A: every 20 years, and for the first time prior to 31 December 2003;
- Category B: every 10 years, and for the first time prior to 31 December 2001;
- Category C: every 5 years, and for the first time prior to 31 December 1996.

The soil remediation procedure, whether triggered by a mandatory periodic preliminary soil investigation, or by a pending transfer of land, closing of plant or even a voluntary decision to remedy, consists of four phases:

1. Descriptive soil investigation: aims at determining the degree and seriousness of the soil pollution.

   A proposal for the descriptive soil investigation must be prepared under the direction of a recognised soil expert and notified to OVAM which, within 30 days following receipt, is to declare that the proposal conforms or to impose changes or additions to it. If OVAM does not react within 30 days, the proposal is assumed to conform.

   The conforming proposal is thereafter performed, again under the direction of the soil expert. Intermediate reports on the findings are sent to OVAM which may request changes or additions in the work within 14 days.

   The final report on the investigation is to be approved by OVAM which can also request additional investigations within 60 days failing which it is assumed approved.
(2) **Soil remediation project**: intended to determine the remediation process. It is prepared and put in an application under the direction of a soil expert. It is transmitted to OVAM which informs the owners and users of the soil to be remedied or on which works necessary for the remediation will be performed. They have 20 days to comment. If the remediation works require an environmental licence or construction permit, other authorities and interested parties are informed of the project and can object.

Upon receipt of all comments and objects, OVAM has 90 days to decide on the conformity of the project with the SRD. The above authorities and interested parties can file an appeal against the conformity declaration with the Flemish government, which has to decide within 60 days. Failing a decision or notification within 10 days to the parties involved, OVAM’s declaration of conformity is presumed to be confirmed.

(3) **Remediation works**: the declaration of conformity of the project counts for environmental and construction permits if they are required for the project. The works have to be done under the direction of a soil expert, and must respect the conditions and measures imposed by OVAM in the declaration of conformity.

(4) **Control**: OVAM inspectors control the works while they are in progress. After the termination of the works, a recognised soil expert makes a final evaluation report about the results of the remediation works. On the basis of this report, OVAM delivers to the owner and user of the soil or to the persons who took the initiatives for the remediation, a declaration confirming the results of the remediation.

In practice, the new legislation and its gradual entry into force have, understandably, raised numerous practical problems which have led to litigation (often still pending) and to amendments of the legal texts. During the first four years, much attention went into the preliminary soil investigations intended to prove the historical character of the pollution, the constitution of the register of polluted soil and of the list of historically polluted land for which remediation is required, and the recognition of the soil experts.

The first actual soil remediation projects and works are now being performed and will add to the experience being gathered with this relatively recent set of legislation.

### 14.2 Brussels

There is no specific soil remediation legislation in the Brussels Region. However, a draft proposal for an Ordinance on Soil Remediation which is inspired by the Flemish Soil Remediation Decree is reportedly in the process of being prepared.

### 14.3 Wallony

As is the case in the Brussels Region, there is no specific soil remediation legislation in the Walloon Region. However, the Walloon Government is reportedly intending to enact specific legislation on the remediation of petrol service stations.
15. MERGER AND TAKE-OVER

15.1 Environmental Issues in the Event of a Take-over

The following items have to be checked:

- environmental licence;
- waste disposal arrangements (incl. toxic);
- waste water licences;
- ground water capture;
- soil pollution
  - of land presently owned or controlled,
  - of land previously owned or controlled;
- contaminated buildings (asbestos, PCBs, etc.);
- compliance with rules on
  - environmental coordination,
  - environmental reporting;
- compliance, prosecution, claims for damages.

15.2 Solutions in Practice

A thorough due diligence exercise on environmental issues is to be performed. Inquiries with local plant operators appear often to be more useful than a full review of the data room. Attention should be given to the fact that many companies in Belgium may be infringing either the applicable statutes or the conditions of their operating/environmental licences. As enforcement is getting stricter, this may be a dangerous situation in case of take over. Even more so because the take over or merger may give the authorities the opportunity to change their so far often lenient attitude.

15.3 Sale/Purchase of Polluted Real Property

See section 14 above.

The Flemish rules of the SRD on transfer of land are not applicable in the case of sale of shares. It is advisable, however, to follow the same procedure voluntarily, i.e.:

- require the seller to obtain a soil certificate for the land owned, controlled or previously owned or controlled in Flanders by the company whose shares are being purchased;
- if risk activities took place on this land, request the seller of the shares to present a preliminary soil investigation;
- if the preliminary soil investigation indicates that there may be pollution exceeding the intervention threshold, request a descriptive soil investigation and inform OVAM;
- make careful contractual arrangements in function of the eventually required soil remediation.
REFERENCES


