

Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Standing of individuals and NGOs

The standing rules are the same as those mentioned in paragraph 1.4. In general, we can say that Belgian law and jurisprudence have evolved in such a way that access to justice in environmental matters is now consistent with the requirements of the Aarhus Convention and related EU law (see paragraph 1.3).

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Administrative appeals and court review

As set out in paragraph 1.3, in administrative appeals all aspects of the administrative decision can be reviewed, while the judicial review by the administrative courts will cover both the procedural and substantive legality. There are no grounds or arguments precluded from the judicial review phase.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Exhaustion of administrative review procedures

When an administrative appeal is provided for in the legislation at stake, that avenue should be exhausted first before recourse is taken to the judicial review procedure (see paragraph 1.3).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Public participation

In order to have standing before the administrative courts, it is not necessary to participate in the public consultation phase of the administrative procedure.

5) Are there some grounds/arguments precluded from the judicial review phase?

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

Fairness

The principle of equality of arms is part of the notion of fair trial. In Belgium, the principle is interpreted in a way

that is consistent with the case law of the ECtHR and the CJEU.

7) How is the notion of “timely” implemented by the national legislation?

Timeliness

The main weakness of the Belgian situation concerning access to justice is that, although we have seen improvement in recent years, the courts still need still too much time to decide cases.

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief

Injunctive relief is available under the conditions set out in point 1.7.2.

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

Cost rules

The rules set out in point 1.7.3 are applicable.

1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC^[1]

Standing of individuals and NGOs

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The standing rules are the same as those mentioned in paragraph 1.4. An important difference with EIA-related permit decisions is that, in general, for SEA-related plans and programmes there is no administrative appeal, only judicial review by the Council of State. The time limit for introducing a case is 60 days after the day of publication of the plan or programme. The main weakness of the Belgian situation concerning access to justice is that, although we have seen improvement in recent years, the Council of State still needs too much time to decide cases (see point 1.8.1).

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Court review

As set out in paragraph 1.3, the judicial review by the Council of State will cover both procedural and substantive legality. Judicial review of SEA is only possible together with the plan or programme concerned, as set out in point 1.8.1. There are no grounds or arguments precluded from judicial review.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Exhaustion of administrative review procedures

Administrative appeal procedures for plans and programmes are, in general, not provided for in the legislation. Thus, the rule to exhaust that avenue first before having recourse to the judicial review procedure is not applicable

(see paragraph 1.3).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Public participation

In order to have standing before the Council of State, it is not necessary to participate in the public consultation phase of the administrative procedure.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief

Injunctive relief is available under the conditions set out in point 1.7.2.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Cost rules

The rules set out in point 1.7.3 are applicable.

1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[2]

Standing of individuals and NGOs

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The standing rules are the same as those mentioned in paragraph 1.4. In general, for plans and programmes there is no administrative appeal provided for, only judicial review by the Council of State. The time limit is 60 days after publication of the plan or programme. In general, we can say that Belgian law and jurisprudence have evolved in such a way that access to justice in environmental matters is now consistent with the requirements of the Aarhus Convention and related EU law (see paragraph 1.1).

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Court review

As set out in paragraph 1.3, the judicial review by the Council of State will cover both procedural and substantive legality. Through the control of general principles of proper administration, the legality control allows to reach out to facts. There are no grounds or arguments precluded from the judicial review phase.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Exhaustion of administrative review procedures

Administrative appeal procedures for plans and programmes are, in general, not provided for in the legislation. Thus, the rule to exhaust that avenue first before having recourse to the judicial review procedure is not applicable (see paragraph 1.3).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Public participation

In order to have standing before the Council of State, it is not necessary to participate in the public consultation phase of the administrative procedure.

Timeliness

The main weakness of the Belgian situation concerning access to justice is that, although we have seen improvement in recent years, the Council of State still needs too much time to decide cases (see point 1.8.1).

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief

Injunctive relief is available under the conditions set out in point 1.7.2.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Cost rules

The rules set out in point 1.7.3 are applicable.

1.4. Decisions, acts or omissions also concerning plans and programmes required to be prepared under EU environmental legislation^[3]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

Standing of individuals and NGOs

The standing rules are the same as those mentioned in paragraph 1.4. There is no variation in respect of the form in which the plan or programme is adopted.

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Court review

As set out in paragraph 1.3, the judicial review by the Council of State will cover both procedural and substantive legality. There are no grounds or arguments precluded from the judicial review phase.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Exhaustion of administrative review procedures

Administrative appeal procedures for plans and programmes are, in general, not provided for in the legislation. Thus, the rule to exhaust that avenue first before having recourse to the judicial review procedure is not applicable (see paragraph 1.3).

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Public participation

In order to have standing before the Council of State, it is not necessary to participate in the public consultation phase of the administrative procedure.

6) Are there some grounds/arguments precluded from the judicial review phase?

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

Fairness

The principle of equality of arms is part of the notion of fair trial. In Belgium, the principle is interpreted in a way that is consistent with the case law of the ECtHR and the CJEU.

8) How is the notion of “timely” implemented by the national legislation?

Timeliness

The main weakness of the Belgian situation concerning access to justice is that, although we have seen improvement in recent years, the Council of State still needs too much time to decide cases (see point 1.8.1).

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief

Injunctive relief is available under the conditions set out in point 1.7.2.

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Cost rules

The rules set out in point 1.7.3 are applicable.

1.5. Executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts^[4]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Standing of individuals and NGOs

Administrative regulations of the federal, regional, community, provincial and local governments can be challenged before the Council of State. The standing rules are the same as those mentioned in paragraph 1.4. There is no administrative appeal provided for, only judicial review by the Council of State. The time limit is 60 days after publication of the regulation in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) or, where provincial

or local regulations are concerned, after their official publication. Furthermore, Art. 159 of the Constitution states that Courts only apply general, provincial or local decisions and regulations where they are in accordance with the law. This “exception of illegality” can be raised in

any court case without a specific time limit.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Court review

As set out in paragraph 1.3, the judicial review by the Council of State will cover both procedural and substantive legality. There are no grounds or arguments precluded from the judicial review phase.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Exhaustion of administrative review procedures

Administrative appeal procedures for regulations are not provided for in the law. Thus, the rule to exhaust that avenue first before having recourse to the judicial review procedure is not applicable (see paragraph 1.3).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Public participation

In general, there is no formal public consultation phase for regulations. Most of the time, however, some specialised advisory bodies composed of stakeholders shall be consulted. In the Flemish Region, the Flemish Government is required to publish draft regulations containing general and sectoral environmental conditions on the website of the Environment Department for a period of 30 days. The draft is available for inspection at the Department of the Environment during the same period. During that period, any person can submit their comments to that Department.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief

Injunctive relief is available under the conditions set out in point 1.7.2.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Cost rules

The rules set out in point 1.7.3 are applicable.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how^[5]?

EU regulatory acts

It is not possible to bring a direct legal challenge before the Council of State concerning any EU regulatory act, because the Council is only competent to annul or suspend administrative acts and regulations issued by a Belgian administrative authority. However, if an administrative act of a Belgian administrative authority is challenged for violation of an EU act and the validity of that EU act is questioned, the Council of State is obliged to refer to the CJEU under Article 267 TFEU (compare with CJEU 19 October 2011, C-281/10, *Vereniging Hoekschewaards Landschap*) before deciding the case.

[1] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.

[2] See findings under [ACCC/C/2010/54](#) for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.

[3] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case law of the Court of Justice of the European Union, such as Case C-237/97, *Janecek*, and cases such as *Boxus* and *Solvay* C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[4] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774.

[5] For an example of such a preliminary reference see Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774.

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