

**GHENT UNIVERSITY**

**ENVIRONMENTAL LAW SYLLABUS**  
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**PART I****SOURCES OF ENVIRONMENTAL LAW - DIVISION OF COMPETENCE  
RELATING TO ENVIRONMENTAL POLICY**

## **I. INTRODUCTION**

The first part of the course deals with on the one hand sources of environmental law, and on the other hand the division of competence relating to environmental policy.

Sources of law are understood as the different ways in which laws originate. A rule of law must be formulated by a body authorised to do so. It then becomes a rule of conduct to be enforced and upheld by or by virtue of societal authority.

The sources of law aspect is accordingly very closely related to the division of competence.

Before discussing the subject, one further element requires clarification: what do we understand as environmental law?

Environmental law does not occur in the traditional classification of branches of law. The reason is obvious: environmental law cannot be classified in just one existing legal field. It involves a cross-section of traditional legal areas and applies as public law<sup>1</sup> and private law<sup>2</sup>, of both national, regional and international law. Characteristic of environmental law is on the one hand its object, and on the other hand its particular instruments and concepts.

Environmental law is usually described as the part of the law that concerns the protection of the physical environment. This protection can be to different degrees, ranging from the specific and exclusive protection of the physical environment, to indirect protection, to environmental protection as an incidental or not incidental adaptation of regulations which have a different objective.

Falling under environmental law in its broad sense are:

- town and country planning and urban development (the management of the available demarcated area);
- environmental protection (the prevention and combating of environmental pollution);
- monuments and the protection of landscapes;
- nature conservation and protection;
- the management of natural resources.

The course is mainly oriented towards environmental protection, environmental protection law and the branches of law on which environmental protection law is based.

## **II. SOURCES OF (ENVIRONMENTAL PROTECTION) LAW**

### **1.1. Summary**

Reference is traditionally made to four sources of such law:

- a) Legislation;
- b) General principles of law;

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<sup>1</sup> Public law is usually understood as constitutional law (fundamental regulations concerning the organisation and the operation of the State and the rights and freedoms of its people), administrative law (conditions regulating the administrative activity of bodies not comprising legislative bodies or the judiciary), budgetary and fiscal law, criminal law and international and supranational law.

<sup>2</sup> Private law regulates private affairs; being those not related to the exercising of the authority of the State. This includes civil law, commercial law and international private law.

- c) Customary practice;
- d) Legal judgements.

Each of these categories can be subdivided.

#### **a) Legislation**

The law in the substantive sense of the word is understood as standards with a general and permanent scope in written form formulated by a public authority authorised to this end.

Different international, national, regional and local authorities are authorised for the imposition of such standards. Laws are given different names depending on the body that imposes the standard.

At international and supranational level there are treaties, regulations, directives, decisions, etc.

At federal level there is the Constitution, special law, the law, the Royal Decree and the ministerial order.

At regional level there are the decrees of the [Flemish](#) and the [Walloon Region](#), the orders of the [Flemish Government](#) and the [Walloon Region government](#) and ministerial orders.

In the [Brussels Capital Region](#) in this respect there are orders and decisions of the [Brussels Capital Government](#) and ministerial orders.

At intermediary level there are the regulations of the Provincial Council and the bylaws of the Governor. At local level there are municipal bylaws.

A clear hierarchy exists for the different forms of laws.

#### **b) General principles of law.**

General principles of law are fundamental rules which are valid even if they are not explicitly stipulated in a text of law. This concerns basic principles which comprise the foundations of our legal system. The recognition of general principles of law allows the filling of gaps in legislation, while giving uniformity and coherence to our system of standards. General principles of law are usually made explicit by legal judgements. The court finds the general principles of law in existing positive law. It will usually derive the existence of a general principle of law from legal provisions in which it is expressed. One then assumes that this legal provision is a (special) application of a more general (not written) principle of law.

General principles of law are purely supplementary, besides and subordinate to legislation. Written law prevails in the event of a conflict with a general principle of law, and not vice versa.

Known general principles of law are, for example, the principles of proper administration. These are principles to be given regard by the government each time it acts. Examples include: the duty of justification (each law must be accompanied by justification of the law)<sup>3</sup>, the requirement of due care (the government must act in such a way with regard to those whose interests may be involved that the latter's interests are not unnecessarily affected), the principle of reasonableness or principle of proportionality (the government measure must be proportionate to the intended result) and the principle of legal certainty.

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<sup>3</sup> The obligation of explicit justification of administrative acts has in the meantime become a legal obligation in Belgium (Law 29 July 1991, *O.J.* 12 September 1991).

Others principles of law often used are: the law of defence and/or the right to hear and be heard (in disciplinary proceedings, measures seriously affecting a person's interests, e.g. with the withdrawal of a licence), the principle of impartiality (no one may be a judge and party in a case at the same time), the principle that everyone is considered to know the law (one cannot evade the application of a rule of law by claiming ignorance of it), the principle of non-retroactivity (in principle a rule of law does not apply to the past) and the principle of the immediate application of the new law.

### **c) Customary practice**

Customary practice is a generally prevailing practice according to which everyone acts in the same way with the conviction of complying with a legal obligation. Customary practice nowadays has very little application. Its meaning in environmental law is negligible.

### **d) Legal judgements**

Legal judgements are understood as the application of legal standards to actual individual cases by the courts of justice.

From a technical perspective, legal judgements cannot be considered as a source of law because legal judgements, theoretically at least, do not comprise a generally compulsory rule. In principle a judgement or ruling - there are exceptions including certain rulings of the [Council of State](#) and the Court of Arbitration - does concern an immediately compulsory regulation for the parties involved, but it is not binding for people in general as regards other similar cases.

Although legal judgements are therefore not normally binding for whoever was not party to the procedure, they are nevertheless very important for knowledge and composition of the law, and this in two perspectives.

Firstly, established legal judgements are in fact generally valid, particularly when such judgements were made by the highest courts of justice (Supreme Court, [Council of State](#), Court of Arbitration). In the future courts will also follow such rules established by legal judgements. Although officially not compulsory, these legal judgements will nevertheless administer the legal status of parties besides those involved in the case in which the rule was established.

Legal judgements are also a source of new laws. A court is often faced with situations where legislature has no ready specific solution. However, the court must make a judgement. If necessary it must fill the gaps in law on the basis of an analogical interpretation. With the interpreting of an unclear written law, the court also makes an active contribution to the furtherance of the law. By interpreting rather than amending, the text of a large part of the Civil Code is largely adapted to current social needs. A good example of this is article 544, that has provided the basis for the theory of "neighbour nuisance", a development that could not have been foreseen by the legislator at the time. At present significant developments are taking place with regard to article 714 concerning common property.

### **e) ... and legal doctrine?**

Legal doctrine is the whole of scientific observations of legal scholars in law. Legal doctrine serves a number of purposes, be this to a varying extent. Sometimes the statement aims at describing prevailing law. Sometimes the emphasis is placed on the systematisation of regulations embodied in legislation and case law. Legal scholar authors also criticise existing law and make suggestions for improvement.

Legal doctrine is certainly not an official source of law: what legal scholars write has no binding effect in itself. Legal doctrine is mainly important as a source of knowledge concerning prevailing law. A

number of authoritative authors have also had an important influence on legal judgements and, to a less extent, on legislation.

## **1.2. Sources of knowledge**

### **a) Legislation**

Legislation is published in official publications:

- European legislation: [Official Journal of the European Communities](#) - (*Pb.*)
- National and regional legislation: [Belgian Official Journal](#) - (*O.J.*)

In general it is more convenient to consult certain unofficial texts (collections), unless one is in search of very recent legislation. The most common environmental codes are:

- [Juridisch Milieucompendium](#), Stichting Leefmilieu, Antwerpen, in cooperation with Kluwer Editoria (composition E. DE PUE). This loose-leaf publication now fills twenty bindings and comprises environmental protection law, town and country planning and nature conservation. The following are covered:

- federal legislation
- Flemish legislation
- European legislation

- [Milieubescherming](#), Kluwer Editorial, Diegem (composition H. BOCKEN and L. LAVRYSEN). This loose-leaf edition now fills six bindings and is limited to environmental protection law. The following are covered:

- federal legislation
- Flemish legislation
- Brussels legislation

A French-language edition also exists covering Walloon legislation instead of Flemish law.

- [Wetboek Afval & Water, Wetboek VLAREM I, Wetboek VLAREM II](#), Kluwer Rechtswetenschappen België, Antwerpen (composition J. HEYMAN and L. SMOUT). This bound publication consists of three volumes and is limited to waste, water, ecotaxes, the environmental licence, VLAREM I and VLAREM II. The following are covered:

- federal legislation
- Flemish legislation

There are also newsletters which more or less systematically inform on recent developments:

- [Nieuwsbrief Milieu & Bedrijf](#) (fortnightly), Kluwer Editorial, Diegem
- [Milieu- en energierecht Info](#) (monthly), Die Keure, Brugge
- [Actuele Voorinformatie](#) (with Milieugids, Juridisch Milieucompendium, ...), three-weekly Kluwer Editorial, Diegem

### **b) Legal doctrine**

There are two publications in Belgium specifically concentrating on environmental law:

- [Tijdschrift voor Milieurecht \(T.M.R.\)](#) - 6 times a year, [Uitgeverij Mys & Breesch](#), Ghent

- Aménagement, Environnement, Urbanisme et Droit Foncier (Amén.) - 4 times a year, Uitgeverij [Kluwer](#) Rechtswetenschappen, Antwerp

The more general legal publications and environment journals also sometimes include articles on environmental law.

Very many books on environmental law are also published. General works include:

- K. DEKETELAERE (ed.), *Handboek Milieurecht*, [die Keure](#), Brugge, 2001, 1579 p.

- E. DE PUE, L. LAVRYSEN and P. STRYCKERS, *Milieuzakboekje*, [Kluwer rechtswetenschappen](#), Antwerp - Edition updated annually

- W. LAMBRECHTS, *Overzicht van het Belgisch Milieurecht*, [Kluwer Rechtswetenschappen](#), Antwerpen, 1999, 465 p.

The Belgian Association for Environmental Law (Belgische Vereniging voor Milieurecht) publishes a series with monographs and collections on various subjects (Uitgeverij E. [Story-Scientia/ Kluwer rechtswetenschappen](#)).

The Leuvense Vereniging voor Milieujuristen publishes a series of reports under the name "Leuvense Milieurechtstandpunten" (Uitgeverij [die Keure](#))

### c) Legal judgements

Legal judgements appear in the official publications of the relevant bodies ([Court of Justice](#), [Court of Arbitration](#), [Supreme Court](#), [Council of State](#)) and in legal publications.

Environmental legal judgements are also recorded in the *Tijdschrift voor Milieurecht* and in *Aménagement, Environnement, Urbanisme en Droit Foncier*.

A lot of information on environmental law can also be found on the Internet. The point of reference is the Energy and Environment Information System for the Flemish Region or EMIS, where each day environment and/or energy-related legislation is extracted from the Belgian Official Journal and the European Official Journal. In addition, under the authority of the Flemish government EMIS runs the Navigator Milieuwetgeving (<http://www2.vito.be/navigator/default.asp>) which includes the coordinated versions of Flemish environmental legislation along with a full search facility.

## III. DIVISION OF COMPETENCE AND ENVIRONMENTAL POLICY

### **A. INTERNATIONAL AND SUPRANATIONAL LEVEL**

#### **§ 1. International level**

A not insignificant part of environmental legislation originates in an international context. Environmental issues have an international and sometimes worldwide dimension: here we can mention the hole in the ozone layer, the greenhouse effect, the movement of air pollution over long distances, the problem of the pollution of the sea and cross-border rivers, the international trade in waste, etc.

These problems must accordingly be tackled within the framework of international public law, also sometimes called international law.

International law or international public law regulates relations between states, between states and international organisations, and the working of international organisations. Besides international customary law it is mainly treaty law that is of importance.

Treaties are written agreements governed by international law and domestically by public law. They are concluded between international legal persons with treaty competence who aim to create rights and obligations or establish international organisations.

Treaties can only be concluded by international legal persons with treaty competence: this mainly concerns States and certain international organisation (e.g. [European Atomic Energy Community](#), [OECD](#), [IMO](#), [ICAO](#), [WHO](#)) or supranational organisations (e.g. [the European Union](#)).

In the case of federal and quasi-federal states the question arises as to who is competent to conclude treaties: the federal state or the constituent states. As far as international law is concerned, this is a matter that must be resolved by the legislation of the federal state involved (the so-called "renvooi" principle). Treaty law can also become a competence of constituent states besides the federation, or a specific mutual division of competence can be introduced. One requirement is that the treaty competence is actually assumed, and that the partners recognise this competence. In practice in just about all federal states treaty competence is granted to the federal government, and the constituent states, if they do have treaty competence, only have partial competence and this is exercised under federal supervision.

Treaties can be bilateral, i.e. concluded between two states, or multilateral, between a number of parties.

#### **a) The rules of competence in Belgium relating to treaty law**

Since 18 May 1993 - the date of the coming into force of the special law of 5 May 1993 concerning international relations of the Communities and the Regions in pursuance of [article 167](#) of the Constitution - a distinction must be made between three kinds of Treaties: a) Treaties concerning regional issues; b) Treaties concerning federal issues; c) mixed Treaties. One must therefore first determine the content of the Treaty. If the content solely concerns affairs falling under the competence of the Region, hypothesis a) is applicable. If the content solely concerns affairs falling under the competence of the federal government, hypothesis b) is applicable. If the content concerns both, hypothesis c) is applicable.

a) The conclusion of treaties concerning regional issues is a competence of the relative Regional government (for the [Flemish Region](#) <http://belgium.fgov.be/abtb/nederlands/0003/0305041.htm> this is the [Flemish Government](#)). The relative regional government must inform the King beforehand both of the intention of starting negotiations for the concluding of a treaty and of each following legal act it wishes to conduct with the purpose of concluding the treaty. The Council of Ministers can register an objection within 30 days. As a result of this the procedure is suspended. Within the following thirty days the Interministerial Conference on Foreign Policy must take a decision according to the consensus procedure. If no consensus is reached, the Council of Ministers can confirm the suspension by means of a reasoned Royal Decree for one of following reasons: a) a party to the treaty not recognised by Belgium; b) a party to the treaty with which Belgium has no diplomatic relations; c) a party to the treaty with which relations have been cut, suspended or are being severely threatened; d) the proposed treaty is in violation of Belgium's international or supranational obligations. According to the same procedure the King can suspend a concluded treaty for the reasons mentioned in c) and d).

Treaties must be approved by the competent Council. In Flanders this is [the Flemish Parliament](#) (previously the Flemish Council).

b) Treaties concerning federal affairs are concluded by the King. They initially come into force after

they have been given the approval of the [Senate](#) and the [Chamber](#). This approval is given in the form of a sanctioning act.

c) Treaties concerning mixed affairs are concluded according to a procedure determined in an agreement of cooperation between the federal government, the Regions and the Communities. The Regional governments must be involved in the negotiations concerning these treaties (so-called. 'Mixed Treaties').

Most treaties not only require signing and approval by the body competent to this end, they must also be ratified. Ratification is the stage at which the State informs the parties to the treaty that the treaty has been accepted. In Belgium this is a written document signed by the King and also signed by the Minister for Foreign Affairs, in which he declares that he is cognizant of the treaty, and that he approves, accepts and confirms it. Ratification can only take place after the legislator involved has approved the treaty. In the treaty itself it is determined where the ratification document must be deposited. This is usually the ministry of foreign affairs of the country where the treaty was concluded - sometimes it is the secretariat of an international organisation.

The treaty becomes definitively concluded with its ratification. Multilateral treaties usually only become applicable at international level after a minimum number of partners determined in the treaty have ratified the treaty.

examples:

[The Vienna Convention for the Protection of the Ozone Layer of 22 March 1985](#). Article 17.1. of this treaty determines: "This Convention shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession."

[The Montreal Protocol of 16 September 1987 on substances that deplete the ozone layer](#). Article 16.1 of this treaty determines: "This Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by that date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled."

## **b) International organisations active in the field of the environment**

### *UNEP*

A first organisation that must be mentioned is [UNEP](#) (United Nations Environment Programme). This is a specialised United Nations world organisation ([UNO](#)) set up in 1972. [UNEP](#) consists of a Governing Council, an Executive Director and a secretariat in Nairobi. [UNEP](#) is active in the fields of research, monitoring and projects (mainly for the Third World) and acts as a consultancy forum.

A number of important treaties have originated within the framework of [UNEP](#):

- [The Convention for the Protection of the Ozone Layer](#), Vienna, 1985.
- [The Protocol on Substances that Deplete the Ozone Layer](#), Montreal, 1987.
- [The Convention on international trade in endangered species of wild fauna and flora](#), Washington, 1973.
- [Convention on the control of transboundary movements of hazardous wastes and their disposal](#)

, Basel, 1989.

Some years ago attention was particularly devoted to the [UNCED](#) (Conference on Environment and Development, Rio, June 1992) which, after four follow-up conferences of the Brundtland report ("Our Common Future", Report of the World Commission for Environment and Development), was held on the twentieth anniversary of the Stockholm conference. There environment protection was considered in the wider context of development problems, such as debt and north/south trade. This resulted in two new treaties:

- [The Biodiversity Treaty](#)
- [The Climate Change Treaty](#)

A number of important political statements were also made, and an action programme (Agenda 21) was approved. Work is currently taking place on its implementation.

#### *Others UN organisations*

Within the framework of the [UNO](#) the following organisations must also be mentioned: [IMO](#) (International Maritime Organisation), [ICAO](#) (International Civil Aviation Organisation) and [IAEA](#) (International Atomic Energy Agency). Important treaties originating within these different organisations are:

- [IMO](#):
  - [The Treaty of London \(Mexico, Moscow, Washington\) on the prevention of the pollution of seas as a result of the dumping \(and incineration\) of waste, 1972,1978,1980.](#)
  - [International Convention for the Prevention of Pollution by Ships \(MARPOL\), London, 1973.](#)
- [ICAO](#):
  - [The Chicago International Civil Aviation Treaty, 1944, 1961, 1971 \(appendices on noise pollution, air pollution, the transportation of dangerous substances, etc.\).](#)
- [IAEA](#):
  - [Treaty on Early Notification of a Nuclear Accident, Vienna, 1986.](#)
  - [Convention on Assistance in the Case of a Nuclear Accident, Vienna, 1986.](#)

The [ECE](#) (Economic Commission for Europe, Geneva) was set up in 1947 as the first of five regional commissions of the United Nations, and groups just about all West and East European countries, the USA and Canada. Since 1956 the [ECE](#) has been conducting work in the field of environmental issues. In 1971 within the [ECE](#) 'The Senior Advisers to the [ECE](#) Governments on Environmental Problems' was set up. Their work consists of exchanging information about research, monitoring and environmental standards between East and West Europe. The following treaties accordingly originated:

- [Convention on long-range transboundary air pollution, Geneva, 1979.](#)
- [Protocol additional to the Geneva Convention on Long-Term Financing of Co-Operative Programme for Monitoring and Evaluation of the Long-Term Transmission of Air Pollutants in Europe, Geneva, 1984.](#)

- [Protocol on SO<sub>2</sub> emissions](#), Helsinki, 1985.
- [Protocol on NO<sub>x</sub> emissions](#), Sofia, 1988.
- [Protocol on VOC emissions](#), Geneva, 1991.
- [Treaty on EIA's in a cross-border context](#), Espoo, 1992.
- [Treaty on the cross-border effects of industrial accidents](#), Helsinki, 1992.
- [Convention on the Protection and Use of Transboundary Watercourses and International Lakes](#), Helsinki, 1992.

Non-compulsory recommendations were additionally provided ("soft law").

### *OECD*

The [OECD](#) (Organisation for Economic Co-operation and Development, Paris) groups most East and Central European countries, in addition to the USA, Canada, Japan, Australia and New Zealand (29 Member States). The principal body is the Council, made up of delegations from all Member States. There is also an Executive Committee and a Secretariat besides various working parties (including the Environmental Committee). In the field of the environment attention is concentrated on legal, economic and scientific research.

The [OECD](#) has developed various very important recommendations, including "the polluter pays principle" (1972), and recommendations on EIA's. (drawing up of environmental impact assessments), waste materials, air pollution, noise pollution, cross-border environmental pollution.

Recommendations approved unanimously by the Council of Ministers are only compulsory if they are converted into internal legal standards in conformity with the constitutional regulations particular to each Member State.

The [OECD](#) provides significant momentum for aspects such as EU environmental policy. An important activity is the periodic screening of the environmental policy of the Member States.

### *Council of Europe*

The [Council of Europe](#) (Strasbourg) was set up in 1949 and unites just about the whole of West and Central Europe and Turkey. The Council is responsible for the promotion of European unity, the strengthening of democracy and human rights and the improvement of living conditions. It comprises a committee of ministers and an advisory Parliamentary meeting as well as a Court of Human Rights. The Secretariat comprises a Directorate for environmental care and preservation services for historical sites and buildings. Attention is mainly focused on town and country planning and nature and landscape protection. The following treaties originated within the framework of the Council:

- [Convention on the Conservation of Wildlife and Natural Habitats in Europe](#), Bern, 1979.
- European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (incl. environmental issues) Madrid, 1980.
- [Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment](#) (still not in force)

### *The BENELUX*

In the field of environmental policy the BENELUX also strives for co-ordination and integration. In the BENELUX there is a Special Commission for Town and Country Planning and a Special Environment Commission. They report to the Benelux Committee of Environment Ministers. The Benelux Treaty allows the committee of ministers to enforce decisions of a compulsory nature. Decisions relating to hunting, the protection of birds, town and country planning and groundwater abstraction have been introduced.

Non-compulsory recommendations are additionally provided.

A number of treaties have also originated from the Benelux:

- [Benelux agreement on hunting and the protection of birds, Brussels, 1970, Luxembourg 1977.](#)
- [Benelux agreement on nature conservation and landscape protection Brussels, 1982,.](#)

### **c) Treaties and the hierarchy of the standards**

If an inconsistency originates between an international standard compulsory for Belgium and an internal legal standard, the international standard prevails over the internal legal standard if this international standard is of immediate effect (i.e. if it is sufficiently clear, unconditional and specific to be able to be applied without specific implementing provisions of an internal nature).

## **§ 2. Supranational level: the European Union**

The law of the [European Union](#) distinguishes itself from traditional international law in a number of ways. This is why it is usually called supranational law instead of international law. Officially, European law falls under international law; it is indeed partly contained in and partly based on treaties concluded between sovereign states. As regards content however, there are some prominent differences with traditional international law: it is more a communal national law inside the Member States than a law between the Member States. It also regulates the mutual rights and obligations between the Union and its subjects to a much greater extent than traditional international law, being the Member States and their nationals and between the peoples themselves. Derived European law also originates in a very different way to traditional international law: instead of involving a traditional intergovernmental organisation, this concerns Europe's own community bodies which have been given real competence originating from a restriction of competence or a transfer of specific competence from the Member States to the Union. Besides a [Council of Ministers](#) there is an independent [Commission](#), a [Parliament](#) and a [Court of Justice](#). In traditional international law treaty law is mainly of importance, in European law much attention is devoted to the rulings of the bodies of the E.U. which are Europe's own source of law. European Treaties have caused the origination of a new rule of law that is constantly gaining importance, also as far as environmental policy is concerned.

For more than twenty-five years European environmental law has been a guide for the development of environmental law in our country.

### **a) Introduction**

Up until 1 July 1987, the date of the coming into force of the ["Single European Act"](#), the word "environment" did not occur once in the [Treaty Establishing the European Economic Community](#) (Rome, 1957). In the fifties the environment was still not really a subject of significance - it was only at the start of the seventies that the need for a European environmental policy was identified. A breakthrough arrived at the European Summit in Paris (October 1972). The European [Commission](#)

was then given responsibility for the development of a European Action Programme on the Environment.

The First Action Programme on the Environment (1973-1977) established the objectives and principles of the environmental policy of the E.E.C. and already contained a summary of concrete action to be taken. The programme was updated by the Second Action Programme on the Environment (1977-1981). From the Third Programme (1982-1986) the emphasis was strongly placed on preventive action. The Fourth Programme (1987-1992) was in the form of a fully-fledged annual environmental programme with thoroughly developed policy proposals in various areas of environmental policy. The [Fifth Environmental Action Programme](#) concentrated on the long-term ("Towards Sustainability"). It was updated in 1998.<sup>4</sup> The Sixth Programme is currently being prepared.

With the absence of explicit provisions in the [Treaty of Rome](#) relating to environmental policy, this policy was based on an "environmentally friendly" interpretation of the former article 2 and articles 100 (now art. 94 EC) and 235 (now art. 308 EC) of the E.E.C Treaty.

According to the former article 2 of the E.E.C Treaty it was the task of the Community: "*....to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth, greater stability, the raising of the standard of living and the promotion of closer relations between Member States*".

Article 100 EEC (now [art. 94 EC](#)) gives the [Council](#) competence to adopt directives with the objective of the harmonisation of legislation of the Member States which has direct repercussions on the organisation and operation of the common market.

Article 235 EEC (now [art. 308 EC](#)) gives the [Council](#) the competence to take appropriate measures which seem necessary, within the context of the common market, to achieve an objective of the Community when the Treaty does not provide for the competence required to this end.

The view that the provisions referred to offered a sufficient legal basis for a community environmental policy was endorsed by [the Court of Justice](#)<sup>5</sup>, that in 1985 came to the conclusion that the protection of the environment is one of the essential objectives of the Community.<sup>6</sup>

From 1 July 1987, the date of the coming into force of the "[Single European Act](#)", the environmental competence of the E.C. was explicitly acknowledged in the E.E.C Treaty, and in two different places: on the one hand there was article 100 A EEC (now [art. 95 EC](#)) on the internal market, and on the other hand Title VII with [articles 130 R to T EEC](#) (now [art. 174-176 EC](#)) which fully relate to environmental policy.<sup>7</sup>

## **b) Foundations and general framework of European environmental policy.**

### **I. Environmental policy and the common/internal market.**

#### *- Introduction*

According to the old article 2 of the E.E.C. Treaty, the Community had the task of organising a common market and converging the economic policy of the Member States in order to, as already mentioned, stimulate the harmonious development of economic activities throughout the Community,

<sup>4</sup> Decision no. 2179/98/EC of the European Parliament, the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability" *Pb.L.* 1998, no. 275.

<sup>5</sup> C.O.A. cases 91/79, *Jur.* 1980, 1099; C.O.J. case 92/79, *Jur.* 1980, 1115; C.O.J. case 68/81, *Jur.* 1982, 153; C.O.J. case 69/81, *Jur.* 1982, 163; C.O.J. case 70/81, *Jur.* 1982, 169; C.O.J. case 71/81, *Jur.* 1982, 175; C.O.J. case 73/81, *Jur.* 1982, 189.

<sup>6</sup> C.O.J. case 240/83, *Procureur de la République c. Association de défense des brûleurs d'huiles usagées*, *Jur.* 1985, 549.

<sup>7</sup> With the Treaty of Amsterdam, signed on 2 October 1997 and entering into force on 1 May 1999, the Treaty on the European Union and the Treaty establishing the European Community were consolidated. The numbering of the articles was then changed. Below, where necessary we will refer to the new numbering with the old numbering.

as well as steady and balanced expansion, greater stability, the raising of the standard of living, and closer relations between the States in the Community.

In pursuance of the former article 8 of the Treaty, this common market would have to be in place no later than 31 December 1969. The Treaty itself offered no specific description of what must be understood as this "common market". The term was defined by the [Court of Justice](#): "*a common market is a market where each market participant from a relative community must be free to invest, to produce, to work, to buy, to sell or provide services or reside where economic conditions are the most favourable, without unfair or artificial conditions of competition.*".

The common market is based on "four freedoms": the free traffic of goods, persons, services and capital. It is particularly the free traffic of goods that is of importance to environmental policy. This involves various limitations for the environmental policy of the Member States.

Free traffic of goods accordingly means that a customs union is set up between the Member States. On the one hand, import and export duties and all taxes of equal effect between the Member States are removed, and on the other hand a communal customs rate applies with respect to third States. Taxes of equal effect such as import and export duties mean each financial charge which, without being a customs duty in the actual sense, is imposed on goods crossing borders within the Community, to the extent they are not permitted by specific treaty provisions. Problematic in this respect was article 22 of the Walloon Waste Decree of 5 July 1984, that subjected the disposal of waste originating from other countries and Regions by landfill to a charge of 100 BEF per tonne, while their own waste materials were not subjected to such a charge.

Quantitative import and export restrictions (e.g. contingents) and measures of equal effect are in principle prohibited. Measures of equal effect such as quantitative import and export restrictions can according to the [Court of Justice](#) be widely interpreted. "Any trade regulation of a Member State which can directly or indirectly actually or potentially hinder this intra-Community trading is to be considered as a measure of equal effect as a quantitative limitation."<sup>8</sup> Environmental standards for certain products can also be prohibited according to this principle. There are however two types of exceptions to this prohibition principle. According to the former [article 36](#) (now [art. 30](#)) of the E.C Treaty the prohibition principle pertaining to quantitative import and export restrictions and measures of equal effect comprise no impediment to the prohibition or limitation of imports, exports or transit which are justified by the protection of public decency, public order, the health and the life of persons, animals or plants, the national artistic and archaeological patrimony or the protection of industrial and commercial property. These prohibitions or limitations may, however, not comprise a means of random discrimination, nor a disguised restriction of trade between the Member States. Besides the strictly to be interpreted exceptions of the former [article 36](#) (now [art. 30](#)) - for which no appeal can be made after harmonisation - trade restricting-measures can also be permitted because of other (non-economic) "compelling requirements", including compelling requirements of environmental policy. A condition here however is that these restrictions must be equally applicable to national and imported products, that they are of a reasonable nature and are 'proportional' to the intended objective. They are only justified provided that they cannot be replaced by measures with a less trade-restricting effect<sup>9</sup>. This possibility of derogation also only applies during a period in which a Community regulation is lacking.

It is on the basis of the principle prohibition of measures of equal effect as quantitative limitations that the [Commission](#) launched infringement proceedings against Belgium following the Decision of the Walloon Region Executive of 19 March 1987 that in principle (barring variations by the Executive) prohibited the dumping of foreign waste in the [Walloon Region](#). The [Court of Justice](#) did not agree with the [Commission](#) in its reasoning. Although the B.W.Ex. of 19 March 1987, as regards toxic and dangerous waste, was found conflicting with Rl. 84/631/EEC concerning the cross-border traffic of

<sup>8</sup> C.O.J. case 8/74, Public Prosecutor t. Dassonville, *Jur.* 1974, 837.

<sup>9</sup> C.O.A. 20 February 1979, Cassis de Dijon, *Jur.* 1979, 649.

toxic and hazardous waste, the decree is not discriminatory as regards the non-toxic or hazardous waste. Although waste materials must be regarded as products of which traffic may in principle not be hindered, they are materials of a special nature. Taking account of the limited capacity of each region or area, their accumulation represents a danger to the environment. In this case the [Walloon Region](#) was confronted with a massive flow of waste materials originating from other regions which comprised a real danger to the environment. The principle of counteracting environmental pollution at the source means that each region or local government must take appropriate measures to ensure the receipt, the handling and the disposal of its own waste materials; they must be disposed of as near as possible to the place of their origination to limit their transportation to the extent possible <http://www.eel.nl/index3.htm>.<sup>10</sup>

*- On the way to an internal market*

Despite the principles included in the [Treaty of Rome](#) concerning the free traffic of goods, persons, services and - to a less extent - capital and the removal of the most significant obstacles to the achievement of this, in practice many material, technical and fiscal hindrances remain and one can hardly consider it a true common market comparable with a market within one Member State. Material obstacles include the physical control of goods and persons at the borders (border formalities, sanitary controls, etc.). Technical barriers result from all possible differences in regulations of the economic systems between the Member States which can unfavourably affect intracommunity trade. Fiscal barriers particularly concern the differences relating to VAT and indirect taxes. At the start of the eighties the conviction grew that this situation was significantly contributing to the relative decline of the European economy compared to Japan, the US and the newly industrialised countries.

In 1985 the [Commission](#) of the EC produced a "White paper"<sup>11</sup> in which a list of some 300 measures was described which were to be implemented to create a true common market by the end of 1992. It was soon apparent that with the existing decision-making procedure (normally unanimity within the [Council](#)) it would be impossible to introduce all these measures within the proposed period. The "[Single European Act](#)"<sup>12</sup>, an amendment and addition to the E.E.C Treaty, principally had the purpose of accelerating the decision-making procedure with the intention of achieving the "internal market", giving [the European Parliament](#) more influence, and explicitly including a number of policy areas (including the environment) in which the E.C. was already active in the Treaty.

*- The period from 1 July 1987 to 30 April 1999*

To be able to achieve the "Europe 1992" programme described by the [Commission](#) in the "White paper" a number of amendments were made to the E.E.C. Treaty. The most important new articles were articles [8 A](#), [B](#) and [C](#) (the subsequent art. 7A, 7B and 7C, are the current [art. 14](#) and [15](#)) and [100 A](#) and [B](#) (now [art. 95](#)). The old article 8 A (now [art. 14](#)) determines that the Community must establish the measures intended to gradually create the "internal market", being an "area without internal borders in which the free traffic of goods, persons, services and capital is guaranteed", in the course of a period that would in principle end on 31 December 1992.

[Article 100 A](#) (now [art. 95](#)) determines that - as distinct from the normal decision-making procedure requiring a unanimous vote in the [Council](#) (the former [art. 100](#), now [art. 94](#)) - the harmonisation of legislation needed for the achieving of this "internal market" takes place by qualified majority voting in the [Council](#), in cooperation with the [European Parliament](#) (in the period from 1 July 1987 to 31 October 1993) (Single European Act) or as a co-decision of the [European Parliament](#) (in the period from 1 November 1993 to 30 April 1999) ([Maastricht Treaty](#)).

<sup>10</sup> C.O A. 9 July 1992, Commission t. Kingdom of Belgium, *Jur.* 1992, 4431.

<sup>11</sup> Doc. COM(85)310 def. of 14 June 1985.

<sup>12</sup> Luxembourg-The Hague, 17-28 February 1986, approved by the law of 7 August 1986, *O.J.* 28 January 1987, entered into force on 1 July 1987.

This more flexible decision-making procedure did not however apply for one of the three fundamentals of the internal market: the harmonisation of indirect taxes, for which unanimity was required and still is (art. 99, now art. 93) and neither for the free traffic of persons and the rights and interests of employees.

Important for environmental policy was [article 100 A, paragraph 3](#) which determined that: "The [Commission](#) will with its (...) proposals in the field of public health, safety, environment protection and consumer protection depart from a high level of protection". This provision was included because certain countries (including Denmark and Germany) feared that harmonisation would lead to politics of the "lowest common denominator" and that they would therefore be compelled to lower their environmental standards. The wording is however quite flexible. The [Commission](#) was not compelled to form a proposal at the level of the Member State with the most stringent requirements and the [Council](#), which ultimately takes the decision, was not bound by the requirement of the "high levels of protection" and could still mitigate the proposal of the [Commission](#).

One very controversial article was [article 100 A, paragraph 4](#) which determined that: "When a Member State, after the [Council](#) has implemented a harmonisation measure by a qualified majority, considers it necessary to apply national provisions justified by serious requirements within the meaning of [article 36](#) or which relate to the **protection of the working environment or the environment**, this Member State will duly inform the [Commission](#)."

The [Commission](#) confirms the provisions concerned after it has established that they do not comprise a means of random discrimination nor a disguised restriction of trade between the Member States.

As a departure from the procedure of articles 169 and 170 the [Commission](#) or a Member State can directly approach the [Court of Justice](#) if it believes that another Member State is misusing the competence referred to in this article."

This provision represented a break from the situation as it had been up to that time. As already mentioned, according to the [Court of Justice](#) Member States can no longer call upon [article 36](#) (now art. 30) or other compelling requirements to take import or export restricting measures if the legislation with respect to a certain good has been harmonised at European level. [Article 100 A, paragraph 4](#) stipulated that this was possible in certain cases, including when the European standard was established by majority decision on the basis of [article 100 A](#) and a Member State believed it represented a step backwards in comparison with its own legislation. When [article 100 A, paragraph 4](#) was applied, this meant that despite a European harmonised standard certain Member States still had the possibility of closing their market to goods which met this standard. However, there was lack of clarity about the precise applicability of [article 100 A, paragraph 4](#): could only outvoted Member States apply the article or also others? Could only existing more stringent standards be used, or could new more stringent national standards also be introduced? Could Member States considering the European standard too high use a less stringent standard? What was the scope of control competence of the [Commission](#)?

The Court has only once had the opportunity to judge the scope of [article 100 A, paragraph 4 EC](#), this being on the occasion of a German regulation relating to restricting the use of PCP (pentachlorophenol)<sup>13</sup>. With this ruling two of the legal questions mentioned above were answered. After the coming into force of a harmonisation measure, the application of the derogating measures was only possible after the Commission had confirmed the measure and the Commission had conducted a thorough investigation into the measure. The Court did not respond explicitly to the other legal questions. From the questions that were judged and from the definition of the Court of the wider context of the dispute it did appear that the Court considered [art. 100 A, paragraph 4 EC](#) as a derogation from the rule. As far as the not judged aspects were concerned, a restrictive interpretation was also in the line of expectation.

<sup>13</sup> C.O J. 17 May 1994, case C-41/93, French Republic t. Commission, *T.M.R.* 1994, 395-398.

From the old article 8 A (the former [article 7 A](#), now [art. 14](#)) it followed that the Community was charged with the taking of the necessary measures to gradually achieve an "internal market", and by no later than 31 December 1992. A statement was added to the Act stipulating that no automatic legal consequences were attached to the date of 31 December 1992. Reference must however be made here to the content of the now revoked [article 100 B](#).

It determined that:

" 1. During 1992, the [Commission](#) shall, together with each Member State, draw up an inventory of national laws, regulations and administrative provisions which fall under [Article 100a](#) and which have not been harmonised pursuant to that Article.

The [Council](#), acting in accordance with the provisions of [Article 100a](#), may decide that the provisions in force in a Member State must be recognised as being equivalent to those applied by another Member State

2. The provisions of [Article 100a](#), paragraph 4 shall apply by analogy

3. The [Commission](#) shall draw up the inventory referred to in the first subparagraph of paragraph 1 and shall submit appropriate proposals in good time to allow the [Council](#) to act before the end of 1992".

In 1992 it therefore had to be established which obstacles of a legal nature remained to the "internal market" which had not yet been removed by harmonisation. There were then two options: either on the basis of [article 100 A EC](#) (now [art. 95 EC](#)) one could proceed with the development of a harmonised European standard, or one could judge that the different national standards were in fact equivalent and could be declared so. That had the consequence that a product that satisfied the legislation of the Member State of origin must be allowed in all other Member States, even if the requirements made by the legislation there were different.

- Period from 1 May 1999

Since the coming into force of the [Treaty of Amsterdam](#) on 1 May 1999<sup>14</sup> the room for manoeuvre of the Member States has been increased (see [art. 95 EC](#)). They are explicitly given the possibility of taking new, more far-reaching environmental measures, but only if these are based on new scientific evidence with respect to environmental protection for reasons specific to the relevant Member States occurring after the adoption of a harmonisation measure. The [Commission](#) only confirms the national measures if there is no case of impedance of the working of the internal market. The period for assessment amounts to 6 months; it can be extended to 12 months. The [Commission](#) must also examine whether the European regulation must be adapted.

## **II. Environmental policy as a fully-fledged European policy area.**

### **A. The period from 1 July 1987 to 30 April 1999**

#### *a) Single European Act*

Since the coming into force of the Single European Act environmental policy has been designated by a new title in the [Treaty of Rome](#) as an area of full European competence, besides the traditional

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<sup>14</sup> Law of 10 August 1998 concerning approval of the Treaty of Amsterdam on the amendment of the Treaty on the European Union, the Treaties for the establishment of the European Communities and some associated acts, Appendix, Protocols A, B, C and D, and final act, executed in Amsterdam on 2 October 1997, *O.J.* 30 April 1999.

areas such as agriculture, transportation, economics, social policy and other 'new policy areas' such as regional policy, research and technological development.

In the period of the Single European Act (1 July 1987 to 30 October 1993) the regulation was the following:

The former article 130 R, paragraph 1 determined that the acting of the Community in the field of the environmental had the following purpose:

- to preserve, protect and improve the quality of the environment;
- to contribute to the protection of the health of people;
- to ensure the prudent and rational use of natural resources.

To achieve these objectives, in the former article 130 R, paragraph 2 the following was determined:

*"The acting of the Community is based on the principles of preventive action, counteracting of environmental pollution by priority at the source, and the polluter pays principle. Environment protection requirements form a part of the other branches of Community policy."*

The former article 130 R, paragraph 3 gave four criteria to be met for the acting of the Community in the area of the environment:

*"When planning action in the area of the environment the Community will take account of:*

- the available scientific and technical information;
- the environmental circumstances in the different regions;
- the advantages and disadvantages that can result from acting, and not acting respectively;
- the economic and social development of the Community as whole and the balanced development of its regions."

Article 130 R, paragraph 4 added:

*"In the area of the environment the Community will act when the objectives specified in paragraph 1 can be achieved better at Community level than at the level of individual Member States. Without prejudice to certain measures of a community nature, Member States will ensure the financing and the execution of the other measures."*

As distinct from environmental measures that could be taken within the framework of the "internal market" policy, the rule of unanimity applied for "ordinary" environmental policy. The Council did however dispose of (although never used) the possibility of deciding by unanimous vote to take certain decisions by qualified majority voting (ex .130 S).

Also of importance was *ex article 130 T* that determined that *"Protective measures established at community level by virtue of article 130 S do not prevent a Member State taking and implementing measures for more far-reaching protection which are compatible with this Treaty."*

When we compare article 100 A with the former articles 130 R-S-T (version Single European Act) there are some conspicuous differences:

- as regards decision-making: qualified majority as distinct from unanimity (although there was the possibility of switching to qualified majority voting for certain decisions);

- as regards the subject: restricted to the "internal market", as distinct from a practically unlimited field of action;
- as regards the level of the standards: based on a high level of protection as opposed to the weighing of advantages of acting or not acting and taking account of regional differences;
- as regards the freedom of the Member States: very limited possibility to be more stringent as opposed to practically unlimited possibilities of acting more stringently.

Because of these differences, each time the [Commission](#) wished to make a proposal for a European measure in the field of the environment a debate ensued on the question of which treaty basis must apply, and consequently which decision-making procedure had to be followed. For a number of measures there could be little doubt: product standards must undoubtedly be based on [article 100 A](#) in view of their direct repercussions on the free traffic of goods and therefore on the internal market, while measures concerning nature conservation had to be based on [article 130 R-S-T](#) because they realistically had barely an influence on the internal market. For many measures the choice was not so obvious. As an example let us take the example of [emission standards](#) for industrial installations. Industrial installations are not covered by the free traffic of goods, as distinct from the products made there. But emission-reducing measures for industrial installations do have an effect on the operating costs and competitive position and can, when they diversify greatly, affect competition. We are then indeed involved with the internal market. A regulation on the basis of [article 130 S](#) had the consequence that Member States which did not want to too greatly burden their own industry did not implement more stringent standards in comparison with the European standard. When one simultaneously wanted to maintain high levels of protection and prevent affecting competition [article 100 A](#) was an appropriate basis. The higher the standards, the more appropriate it was to use [article 100 A](#) as the basis.

In practice this grey area caused yet more considerations with the choice of legal foundation. The [Commission](#) was inclined to choose [article 100 A](#) because of the more flexible procedure. The same applied for the [European Parliament](#), because it had greater authority under [article 100 A](#). In the [Council](#) opposite trends were apparent depending on whether the Member State was for or against the measure proposed by the [Commission](#) and depending on whether their intended result was best served by the one or other way.

From practice it appeared that product standards were based on [article 100 A](#) (e.g. directives on motor vehicle exhaust gases; classification, the packaging and labelling of dangerous preparations). The [Commission](#) also based its amendment proposals for the various waste material directives on [Article 100 A](#) (now [art. 95](#)). The [Council](#) did not follow the example of the [Commission](#), but was ruled against by the [Court of Justice](#) regarding the TiO<sub>2</sub> directive<sup>15</sup>. The Court, on the other hand, was of the opinion that the framework Directive 91/156/EEC was correctly based on [article 130 S](#) (now [art 175](#))<sup>16</sup>. Directives concerning [emission standards](#) for fixed installations (e.g. directive on emissions from incinerators for municipal waste), as well as the amendment of the Seveso Directive were based on [article 130 S](#) (now [art. 175](#)).

#### *b) The Maastricht Treaty*

The [Maastricht Treaty](#) (1 November 1993-30 April 1999) imposed a number of changes. The objectives of the Community, as described by the EC Treaty, explicitly included environment protection.

<sup>15</sup> C.O J. 11 June 1991, Commission t. Council, case C 300/89 (Amendment titanium dioxide industry directive), *Jur.* 1991, 2967.

<sup>16</sup> C.O J. 17 March 1993, Commission t. Council, *T.M.R.* 1993/4, 223.

According to [article 2 EC](#) among the Community's tasks was the stimulation of "sustainable and non-inflationary growth with respect for the environment". One of the resources to achieve this objective was mentioned in [article 3, k\), EC](#), being: "a policy in the field of the environment", with which environmental policy definitively acquires a place alongside other more traditional fields of community policy.

The subsidiarity principle had already been introduced for the environment by the Single European Act in former article 130 R, paragraph 4, EEC. The Union treaty placed this principle at the front of the Treaty ([art. 3 B EC](#)) and converted it to a central principle applying for both for non-Community fundamentals ([art. B, last paragraph UV](#)) and for the Community fundamentals of the Union treaty.

In general it can be accepted that the subsidiarity principle does not necessarily have to impede the further development of European environmental policy. Environment protection is a perfect example of an area in which European and international action is needed to make progress.

The three benchmarks proposed by the European [Council](#) of Edinburgh in this field give few difficulties as far as environmental affairs are concerned. Indeed, many environmental challenges are related to transnational problems. This is not only the case for global environmental challenges such as the deterioration of the ozone layer, the greenhouse effect or climate change, it also applies for continental problems (air pollution over long distances) and many regional problems (pollution of cross-border watercourses and aquifers, sea water pollution, the protection of migrating fauna by species and habitat protection, dangers associated with genetically modified organisms).

Very many other environmental measures - including those which initially appear to concern local environmental challenges - can be justified by protecting against unfair competition, avoiding disguised trade barriers or strengthening economic and social coherence.

Member States acting individually in the field of product policy will soon raise the objection that, as a result, free traffic of goods comes under threat or the interests of other Member States are affected. Greatly varying emission standards or environmental quality standards can lead to unfair competition.

Scale advantages are also often associated with communal action in the area of the environment. A sufficient level of environmental protection throughout the whole Community benefits the environment more than very stringent action by one or some (small) Member States, associated with lax action by the majority of Member States. The guideline that community action would provide "better" results than individual action by the Member States must, from an environmental perspective, be understood as "better" for the environment of the Community as whole or "better" for the environment as such (also outside the Community). It does not mean that the environment in each Member State would be made better by it.

Although from a legal perspective the impact of the subsidiarity principle on environmental policy can be considered negligible, it may be feared that the principle could give ammunition to those who for political reasons would like to renationalise environmental policy.

The [Maastricht Treaty](#) also completely rewrote the Environment chapter. The following differences with the situation in the previous period can be mentioned. First of all the objectives of the community environmental policy were widened ([art. 130 R, paragraph 1, EC](#)). The Community then had the explicit objective of stimulating measures at international level to rise to the challenge of regional or worldwide environmental challenges. "Regional environmental challenges" here refer to international environmental challenges which occur on a smaller scale than world level, for example in a continent or a part thereof. With this addition an end was made to the discussion about the possible territorial limitation of the environmental policy of the Community. The Community was then indisputably competent to take measures to tackle global environmental challenges, such as measures for the protection of the ozone layer or to combat climate change or desertification, and also for

environmental protection in third countries, such as measures (e.g. import bans) to protect the fauna or flora in Africa or in Asia. In the past there were voices maintaining that the competence of the Community was restricted to the protection of our "own environment" and that it did not extend to cover the environment further afield. This provision also established a practice where the Community was becoming increasingly active in international environmental policy. A powerful stimulant to continue the policy implemented came from the European Council, in meeting in Dublin in June 1990<sup>17</sup>. In the closing statement of this Council meeting the heads of state and government leaders accepted their special responsibility for the environment with respect to their own nationals and the whole world. They were of the opinion that the Community must play a leading role in international environmental policy, more specifically in areas such as the protection of the ozone layer, the counteracting of the greenhouse effect, the preservation of tropical rainforests, the counteracting of desertification and the improvement of environmental conditions in Central and East Europe.

The principles of environmental policy were also widened and made more distinct. The four principles already mentioned in ex article 130 R, paragraph 2, EEC - being the principle of pollution prevention, the principle of the preference for source-oriented measures, the principle of the polluter pays and the integration principle - were supplemented by two new principles: the principle of the high level of protection and the precautionary principle. The integration principle was also made more distinct. It was explicitly mentioned that European environmental policy as such aimed at a high level of protection that took account of regional differences. The principle of striving for a high level of protection was qualified in 130 R, paragraph 2, EC by the addition that account must be taken of regional differences, which was not the case in article 100 A, paragraph 3, EC. The addition of the precautionary principle was important. The principle was to give further perspective to the criterion specified in article 130 R, paragraph 3, EC of the "taking account of available scientific and technical data". It could certainly no longer be interpreted as one having to wait before acting until research had indisputably determined that there was indeed a problem. Finally, the integration principle was made more distinct. Where it was determined in article 130 R, paragraph 2, EEC, that the requirements in this area of environment protection comprised a constituent of the other branches of Community policy, article 130 R, paragraph 2, EC determined that the requirements in this area of environment protection must be integrated with the establishment and the implementation of Community policy in other fields. It entailed the obligation to consider all relevant environmental aspects with the establishment and implementation of other policies. This was confirmed in a Statement with the Final Act which mentioned: "The Conference notes the obligation of the Commission and of the Member States to take full account of the environmental effects and the principle of sustainable growth with its proposals and with their implementation". The making more distinct of the integration principle did not, however, result in environmental interests gaining priority over other interests.

Also notable was that a second paragraph was added in the former article 130 S, paragraph 2, EC which allowed the inclusion of clauses in European environmental measures which enabled provisional exemption measures to be taken by the Member States. The subsidiarity principle included in the former article 130 S, paragraph 4, EEC, disappeared from the Environment chapter and was replaced by the general subsidiarity principle of article 3 B EC. The four criteria to be met by community environmental policy were, on the other hand, retained.

The decision-making procedure of the Environment chapter was fundamentally changed. Where according to the old article 130 S EEC the rule of the consultation of the E.P. and the E.S.C. together with unanimity in the Council was specified, no less than four decision-making procedures were specified in the change imposed by the Maastricht Treaty in article 130 S EC.

The basic decision-making procedure according to the Environment chapter was the procedure of article 189 B and after consultation of the Economic and Social Committee the establishment of general programmes of action in which the priority objectives are set down. It was also made clear that

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<sup>17</sup> EUROPEAN COUNCIL, Declaration on the Environment "The environmental Imperative", Dublin, 25-26 June 1990.

these programmes of action, as was always the case in the past, were purely as an indication. The second paragraph of the [former article 130 S, paragraph 3, EC](#) also meant that measures compulsory for Member States or for people included for implementation in the programme could only be established, depending on the case, according to the basic procedure of [article 130 S, paragraph 1, EC](#) or according to one of the exception procedures of [article 130 S, paragraph 2, EC](#).

On the basis of [article 130 S, paragraph 5, EC](#) the Council could, when an environmental measure entailed disproportionately heavy costs for the government of a Member State, include in the "without prejudice to the polluter pays principle" measure appropriate provisions in the form of exemptions of a temporary nature and/or financial support from the Cohesion Fund. This provision resulted from requests from the less rich countries, principally Spain, who judged that when environment protection was regarded as a case of community importance, the Community should also contribute to the costs associated with the measures. Three conditions must be met for the application of this clause: a) it must concern a measure taken on the basis of [article 130 S, paragraph 1, EC](#) b) there must be a request from a Member State for the application of this clause and c) the measure must entail disproportionate costs for the authorities of this Member State or Member States.

The Cohesion Fund, together with other Structural Funds ([European Agricultural Guidance and Guarantee Fund, guarantee department - European Social Fund - European Fund for regional development](#)) aims to make a contribution to the strengthening of economic and social coherence with the purpose of eliminating the differences between the levels of development of the different regions and reducing the arrears of the least favoured regions ([art. 130 A, EC](#)). The Cohesion Fund, that as distinct from the other Structural Funds is only intended for the four weakest Member States (Spain, Portugal, Greece and Ireland) finances projects in the field of the environment and transeuropean transport networks ([art. 130 D, EC](#)). From the wording used it appears that the Cohesion Fund cannot be used to finance other transeuropean networks such as those concerning telecommunications or power supplies, nor projects not relating to environment protection.

The old article 130 T EEC was slightly changed. It was supplemented by a provision according to which the Commission must be informed of more far-reaching measures used or taken by Member States. No period was determined within which this must happen, and the obligation did not apply for draft measures, only for actual ones.

## **B. Period from 1 May 1999**

### *Integration of environment protection and sustainable development in the general aims of the EC*

The [Treaty of Amsterdam](#) introduced more specific amendments to both the First Part of the Treaty and the Environment chapter.

First of all, in [article 2 EC](#) explicit reference was made to the concept of sustainable development and to a high environmental protection level. According to [article 2 EG](#) the Community has the following task "*by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities within the whole Community, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity between Member States.*" Although the wording of [article 2](#) was clearly improved with respect to the wording of the Maastricht Treaty because explicit reference was now made to sustainable development and the need for a high level of quality of the environment, and not merely "durable and non-inflationary growth while observing the environment", the provision still remained ambiguous because there was no mention of sustainable and non-inflationary growth. It must indeed be mentioned that a variant of the concept appeared in [article B](#) of the Treaty concerning European Union (UV). This mentions

"balanced and sustainable economic and social progress". The concept of "sustainable development" is also used in [article 6 of the EC Treaty](#).

[Article 3 EC](#) determines that to achieve the objectives mentioned in [article 2 EC](#) the acting of the Community under the conditions and according to the timescale provided by the Treaty includes: "*a policy in the field of the environment*" ([art. 3, 1](#)). The *subsidiarity principle* is left unchanged in [article 5 EC](#) and in [art. B , last paragraph, UV](#). It was however supplemented by the Protocol on its application that established the criteria developed by the European Council of Edinburgh.

The *integration principle* was given a more prominent place in the Treaty. The new [article 6 of the EC Treaty](#) determines: "*The requirements relating to environment protection must be integrated in the description and execution of the policy and actions of the Community, within the meaning of article 3, in particular in view of the stimulation of sustainable development*". The fact that environmental considerations had to be integrated in other policy areas was further emphasised by a Protocol<sup>18</sup> and a Statement<sup>19</sup> in the Final act of the Treaty.

### *Objectives, principles and criteria of the community environmental policy*

As far as the Environment chapter is concerned there is first of all the renumbering of both the Title (Title XIX) and the articles ([art. 174 to 176](#)).

The content of the objectives and principles of the community environmental policy as contained in the Treaty since the Maastricht Treaty was not changed.

[Article 174, paragraph 1](#), determines: "*The policy of the Community regarding the environment contributes to the pursuit of the following objectives:*

- *conservation, protection and improvement of the quality of the environment;*
- *protection of the health of people;*
- *prudent and rational use of natural resources;*
- *promotion at international level of measures to meet the challenge of regional or global environmental challenges."*

[Article 174, paragraph 2](#), determines: "*With its environmental policy the Community strives for a high level of protection, taking into account the various situations in the different regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*

*In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure."* Here there was only one change with respect to the previous situation. With the inclusion of the integration principle at the start of the Treaty it is no longer mentioned in the Environment chapter.

Neither were any changes made to the criteria to be met by the community policy. [Article 174, paragraph 4](#), determines: "*With the determining of its policy for the environment the Community will take account of:*

- *the available scientific and technical information;*
- *the environmental circumstances in the different regions of the Community;*
- *the advantages and disadvantages than can result from acting, and not acting respectively;*

<sup>18</sup> See protocol no. 11 concerning the protection and welfare of animals.

<sup>19</sup> See statement no. 12 concerning the assessment of the environmental effects: "*The Conference notes that the Commission binds itself to draw up an assessment of the environmental effects for proposals which can have considerable consequences for the environment*".

*- the economic and social development of the Community as a whole and the balanced development of its regions."*

From the wording used it appears that these "touchstones", "criteria" or "prior conditions" apply as a guiding principle for community bodies with the preparation of environmental measures, and that they do not comprise derogations from the principles mentioned in paragraph 2. This provision also entails the obligation to check if these criteria are met with the preparation of measures. Should it appear in a certain case that one or more of these criteria are not met, this does not however mean that the measure cannot be taken. No legal penalties are associated with non-compliance in this respect, at least according to the majority perspective in legal doctrine. Some, however, do not rule out an appeal when checking against these criteria not would have taken place, although this is ruled out by checking by the Court of the way in which account was taken of these criteria.

The first two criteria were introduced after pressure from United Kingdom, the fourth after pressure from Greece and Ireland. According to the first criterion, the Community must take account of *available* scientific and technical data. It in no way compels the Community to conduct its own scientific or technological research before taking a certain measure or taking measures for which scientific or technical data are available. Neither does the criterion mean that the Community may not act before there is unanimity in scientific circles with regard to a specific problem. The second criterion refers to certain areas in the Community having a "natural" advantage (island situation, favourable atmospheric conditions) so that less extensive environmental requirements need to be made than in other areas to maintain the same quality level. The differentiation in the regulations allowed on the basis of this criterion must be based on objective criteria, such as geography and climatic conditions. Not all national particularities come into consideration here. The third criterion entails the Community having to assess the advantages and disadvantages of European regulations. This assessment must also include economic considerations, but not exclusively. This may also concern the question of which resources are best used. Although a pure financial cost/benefit analysis is not required - a draft version of this provision does require this - it is clear that the costs of the measures to be taken will play a major part in decision-making concerning the level of protection to be pursued. The fourth criterion expresses the concern of the less developed Member States that environmental measures could be taken at the expense of their social and economic development. This provision not only offers a legal foundation for a regionally differentiated environmental policy, this addition also results in the possibility of the acting of the Community with regard to the environment being made subordinate to economic growth and employment.

Neither were any changes made to the paragraph concerning co-operation between Member States and the Community within international organisations. [Article 174, paragraph 4](#), determines: *"Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300. The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."*

*Decision-making*

*procedure*

Amendments were made regarding the decision-making procedure, these now being contained in [article 175](#). This provision reads:

*" 1. The [Council](#), acting in accordance with the procedure referred to in [Article 251](#) and after consulting the [Economic and Social Committee](#) and the [Committee of the Regions](#), shall decide what action is to be taken by the Community in order to achieve the objectives referred to in [Article 174](#).*

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to [Article 95](#), the [Council](#), acting unanimously on a proposal from the Commission and after consulting the [European Parliament](#), the [Economic and Social Committee](#) and the [Committee of the Regions](#), shall adopt:

- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources;
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The [Council](#) may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

3. In other areas, general action programmes setting out priority objectives to be attained shall be adopted by the [Council](#), acting in accordance with the procedure referred to in [Article 251](#) and after consulting the [Economic and Social Committee](#) and the [Committee of the Regions](#).

The [Council](#) acting under the terms of paragraph 1 or paragraph 2 according to the case, shall adopt the measures necessary for the implementation of these programmes."

In comparison with the situation under the [Maastricht Treaty](#) there were two changes concerning decision-making.

In the first place, from then on the advice of the [Committee of the Regions](#) is also requested, both within the framework of the ordinary procedure (paragraph 1), for measures to be agreed by unanimity (paragraph 2) and for the establishing of action programmes (paragraph 3). The [Committee of the Regions](#) is not counted among the actual institutions of the Community, which are listed in [article 7, paragraph 1](#). This is an auxiliary body of the [Council](#) and the [Commission](#) with a similar statute as the [Economic and Social Committee](#) ([art. 7](#)) and with purely advisory competence<sup>20</sup>. This [Committee](#), as distinct from the [E.S.C.](#), does not have to be consulted for directives for the harmonisation of legislation of influence on the organisation and the operation of the common market ([art. 94 EC](#)), nor for measures concerning the organisation and operation of the internal market ([art. 95 EC](#)) nor concerning the harmonisation of indirect taxation ([art. 93 EC](#)).

The second, more important, change concerns the decision-making procedure to be applied in the [Council](#), the [European Parliament](#) and the [Commission](#). The distinction between measures taken in cooperation with the [European Parliament](#) and measures taken as a co-decision with the [European Parliament](#) is removed. In both cases, from now on the procedure of [article 251 EC](#) is applicable, being the co-decision procedure. This procedure was also simplified as mentioned earlier. Because the co-decision procedure also applies for measures taken within the framework of the organisation and operation of the internal market, for the majority of the environmental measures from then on an identical procedure applies.

An exception is still made for the cases mentioned in [article 175, paragraph 2, EC](#). The same ambiguousness as at the time of the [Maastricht Treaty](#) continues to exist as regards the exact description of cases in which a unanimity of votes in the [Council](#) and pure consultation of the [European Parliament](#) is required, so this requires closer examination.

A first question is knowing what is to be understood as "*provisions of a principally fiscal nature*". This perhaps refers only to taxation measures and not financial resources in general. The mentioning of such measures in [article 175, paragraph 2, EC](#) raises the question about the relationship between this

<sup>20</sup> The Committee of the Regions has advisory competence and consists of representatives of the regional and local bodies. Belgium is represented by 12 members ([art. 263-265 EC](#)).

provision and [article 93 EC](#) that relates to the harmonisation of sales tax, excise duties and other indirect taxes within the context of the internal market. As distinct from [article 95 EC](#), in [article 175, paragraph 2, EC](#) it is not determined that it is applicable "without prejudice to" [article 93 EC](#). Does [article 93 EC](#) apply as a special provision in relation to [article 175, paragraph 2, EC](#)? Or is exactly the reverse the case? Because the decision-making procedure relating to fiscal measures is equivalent under both provisions, there is in principle no objection to simultaneously basing a fiscal environmental measure on both provisions, if it were not the case that the consequences for the scope of national policy are different depending on which article serves as the legal basis, and that the underlying objective is also different. [Article 93 EC](#) is intended for harmonisation in achieving the internal market, when [article 175, paragraph 2, EC](#) concentrates on the environmental objective. [Article 175 EC](#) according to [article 176 EC](#) only aims for minimum harmonisation, while [article 93 EC](#) is more intended for total harmonisation. Note that the unanimity rule only applies for environmental measures which are "*principally*" of a fiscal nature (e.g. the proposed CO<sub>2</sub>/energy tax), and not for environmental measures to which an additional fiscal aspect is related. When in the context of an environmental measure a provision of a fiscal nature is included, this would not result in it no longer being able to be accepted according to the basic procedure of [article 175, paragraph 1, EC](#).

The exceptions mentioned after the second dash - "*measures concerning town and country planning, land use (...) and quantitative water management*" - also cause interpretation difficulties. What is meant in this context by measures concerning town and country planning? Does this only concern measures relating to town and country planning, or does it also refer to measures which have repercussions on town and country planning or which in a certain respect are comparable to measures concerning town and country planning such as measures of area-specific environmental policy (zoning, habitat protection)? Also the land use exception causes similar difficulties. Because this concerns exceptions to the rule strict interpretation seems appropriate, so only actual measures relating to town and country planning and land use apply under the exception and not measures concerning area-specific environmental policy. This restrictive interpretation appears to be supported by the exception to the exception. In the provision discussed, an exception is made from the unanimity rule with "waste material management and measures of a general nature". This sort of measure therefore does come under the main rule of [article 175, paragraph 1, EC](#). From this one could conclude that measures - such as area-specific environmental measures - which do have repercussions on town and country planning or land use (as is also the case with many measures relating to waste material management), but that cannot be regarded as actual measures of town and country planning or land use, can be taken according to the procedure of qualified majority and co-decision.

The last exception with respect to quantitative water management also causes difficulties. On the basis of the Dutch language version one would be able to conclude that measures concerning the control of the water quantities are referred to here. This conclusion is however not clear in the other language versions, where such a qualification appears nowhere. In English there is mention of the "management of water resources", in French "*la gestion des ressources hydrauliques*" and in German "*der Bewirtschaftung der Wasserressourcen*". Although this terminology does point in the direction of quantitative management, a wider interpretation, so that water quality policy would be counted as an exception, is not fully ruled out. Here also, the rule that exceptions must be strictly interpreted can allow water quality policy to fall under the general rule, while historical interpretation points in the same direction: the text originated from the Dutch Presidency, and in the Netherlands as in the Dutch text version a clear distinction is made between water quality management and water quantity management.

The exception after the third dash - *measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply* - possibly causes even greater difficulties of interpretation than the exceptions discussed above. It is indeed not always clear beforehand which environmental measures have a considerable influence on the energy choices of a Member State or on the structure of the energy supply of a Member State. A certain measure can for the majority of the Member States have a neutral or only modest impact, while there may be major consequences for one or several Member States. Accordingly, the Directive relating to large heating

installations can lead to the reorientation of energy policy in certain Member States (switching from brown coal to coal or from coal to gas or nuclear energy), but in other Member States there may be no impact at all on the choice of energy provider (but an impact on the choice of technology). Such matters can also evolve over time, depending on the prices of the energy providers and the supply possibilities. It can therefore be expected that major differences of opinion will originate between the Member States in this respect.

In principle, for the exceptions mentioned, as previously the unanimity rule applies (and the consultation of the E.P., the E.S.C. and now also the [Committee of the Regions](#)). Nevertheless, the second paragraph of [article 175, paragraph 2, EC](#) - as the former article 130 S EEC - determines that the [Council](#) "under the conditions referred to in the first paragraph" (i.e. with unanimity and after consultation of the E.P., the E.S.C. and the [Committee of the Regions](#)) can determine that in this area a decision can be made by a qualified majority. After a such unanimous decision within the [Council](#) it can then be decided by a qualified majority, either for the taking of a (new) measure concerning one of these exceptions, or for the taking of implementing measures for a measure taken earlier by unanimity on this area. This however does not correspond to the main rule of [article 175, paragraph 1, EC](#). The [Council](#) does then indeed decide by a qualified majority of votes, but the cooperation procedure with the E.P. does not appear applicable with the absence of an explicit provision in this sentence. We therefore arrive at the third procedure for the taking of environmental measures in pursuance of the Environment chapter.

According to [article 175, paragraph 3, EC](#), the [Council](#) establishes general action programmes "in other areas", according to the procedure of [article 251](#) and after consultation of the [Economic and Social Committee](#) and the [Committee of the Regions](#), in which priority objectives to be achieved are set down. One aspect of this provision is clear, namely the decision procedure to be followed: the [Council](#) decides by a qualified majority of votes according to the co-decision procedure with the [European Parliament](#) and after the E.S.C. and the [Committee of the Regions](#) have been consulted. The question is: for which kinds of decisions does this apply? The first words of the introductory sentence "in other areas" causes difficulties. Which other areas are referred to? Does it concern subjects that have not yet arisen in [article 175, paragraph 1 and paragraph 2](#)? This does not seem very probable, now these paragraphs are exhaustive and all environmental matters coming into consideration for Community regulation are already mentioned therein. This is indeed confirmed in the second paragraph of [article 175, paragraph 3, EC](#). Maybe this concerns a writing error and the words "in other areas" must be ignored, otherwise this procedure would only apply for environmental measures which are not environmental measures, something that could not have been the intention of the writers of the Treaty. The actual subject is then made clear in the second part of the first paragraph. This concerns the determining of "general action programmes in which the priority objectives to be achieved are established". In other words, the Environment action programmes are established according to the co-decision procedure and by qualified majority. The provision does not, however, rule out environmental action programmes restricted to a certain part of environmental policy being established on the basis of this provision. Examples are the action programmes established in the past relating to pollution by cadmium or the action programme for the limiting of the pollution of the sea by oil. It is also made clear that these programmes of action, as was always the case in the past, are purely as an indication. The second paragraph of [article 175, paragraph 3, EC](#) meant that measures binding for the Member States or for the people taken for implementation in the programme, could only be established according to the basic procedure of [article 175, paragraph 1, EC](#), or according to one of the exception procedures of [article 175, paragraph 2, EC](#).

*National implementation, support from the Cohesion Fund, nature of the measures, notification of more far-reaching measures*

The principle that financing and implementation is a matter for the Member States remained unchanged. [Article 175, paragraph 4](#), determines "without prejudice to certain measures of a Community nature, the Member States are responsible for financing and implementing environment

*policy.*" Neither did anything change regarding the earlier mentioned granting of exemptions of a temporary nature and/or support from the [Cohesion Fund](#).

[Article 175, paragraph 5](#), determines: "*Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:*

- temporary derogations, and/or
- financial support from the Cohesion Fund set up pursuant to [Article 161](#).

Neither was anything changed regarding the nature of the measures taken in pursuance of the Environment chapter or the obligation to report more far-reaching national protection measures *a posteriori*. [Article 176 EC](#) determines: "*The protective measures adopted pursuant to [Article 175](#) shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission "*

### **III. Protection against ionising radiation**

The subject of nuclear energy is a responsibility of the European Atomic Energy Community (EAEC or [EURATOM](#)), one of the three European Communities (EC) which since the "Merger Treaty" (1965) must be regarded as one whole, and since the [Maastricht Treaty](#) comprises the first pillar of the "European Union" (E.U.).

The central aspect of the task of [EURATOM](#) is the development of research and the dissipation of technical knowledge. Others important tasks are:

- the establishing of uniform safety standards;
- the facilitation of investment;
- ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;
- make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;
- exercise the right of ownership conferred upon it with respect to special fissile materials ( [art. 2 EURATOM-Treaty](#)).

According to CHAPTER II of the Treaty [EURATOM](#) has the task of establishing basic standards within the Community for the protection of the health of workers and the general public against the dangers arising from ionising radiation<sup>21</sup>. The Member States must implement appropriate laws, regulations and administrative provisions to ensure compliance with the established basic standards ([art. 33](#)). The Member States must dispose of the necessary control installations to permanently exercise control of the radioactivity of air, water and soil and ensure compliance with the basic standards ([art. 35](#)). Any plan for discharging radioactive substances must be presented beforehand to the [Commission](#) of the E.C for advice ([art. 37](#) ). [EURATOM](#) also carries out certain safety and control activities.

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<sup>21</sup> See: Directive laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation, *O.J.L.* 1959, no. 11.

#### IV. The EEA Treaty

In Porto on 2 May 1992 - after original objections by the [Court of Justice](#) against the originally intended EEA Court of Justice - agreement was reached on an association agreement between the EC and the [European Free Trade Association](#) (EFTA)<sup>22</sup> to form a joint *European Economic Area* (EEA) as of 1 January 1993. This concerns a bulky and complex document consisting of the actual Agreement on the European Economic Area with an additional 49 protocols and 22 appendices and a Final act with 30 common statements and 39 other statements. As with the [Maastricht Treaty](#), however, problems occurred with the ratification of this Agreement. A referendum in Switzerland (2 December 1992) gave a no vote, so Switzerland as yet could not ratify the Agreement. Ultimately the EEA could be launched on 1 January 1994, with five of the seven EFTA Member States<sup>23</sup>, after the EEA Agreement was amended by a Protocol<sup>24</sup>. In view of the Swiss decision to not take part, because of its close ties with Switzerland Liechtenstein was given more time to join (among other aspects the customs convention between Liechtenstein and Switzerland had to be revised) without the possibility being excluded of Switzerland joining later. This EEA comprised (at that time) twelve Member States of the E.C. and the EFTA Member States of the time (Austria, Sweden, Finland, Norway, Iceland), but without Switzerland. Liechtenstein only joined on 1 May 1995<sup>25</sup>. In the meantime Austria, Sweden and Finland became full members of the EC on 1 January 1995<sup>26</sup>. The EEA therefore now consisted of 18 members, of which 15 were EC Member States and 3 EFTA Member States

The purpose of the association agreement is to promote the continued and balanced strengthening of trade and economic relations between the parties to the agreement under equal conditions of competition, while observing the same conditions with the intention of the establishment of a homogenous European Economic Area. (art.1, paragraph 1, EEA). The association is based on a number of basic principles: i) *free traffic of goods within the EEA* with the prohibition of customs duties, import and export restrictions, and derogations thereof, which run parallel to those in the [EC Treaty](#); ii) *free traffic of persons, capital and services* including the free traffic of employees, the freedom of establishment, the freedom to provide services, etc.; iii) *common rules* relating to *competition, the forming of monopolies and state aid*; iv) *co-operation in certain specific fields* such as social policy and *environmental policy*. The EEA disposes of a number of institutions, being the EEA Council<sup>27</sup>, a Joint Committee, a Joint Parliamentary Committee<sup>28</sup> and a Consultative Committee of the EEA<sup>29</sup>.

According to the Preamble the parties to the agreement are determined "to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken" as well as being determined "to take, in the further development of rules, a high level of protection concerning health, safety and the environment as a basis". This resulted in a separate part (part 3) on the environment in Part V that relates to the "horizontal provisions relevant to the four freedoms". In this part the basic principles relating to co-operation in environmental affairs are established. The provisions are very similar to the provisions of the Environment chapter of the [EEC Treaty](#) as added by the [Single European Act](#), therefore without the amendments made to it by the [Maastricht Treaty](#) and the [Treaty of Amsterdam](#). According to article 73, paragraph 1, EEA the acting of the parties to the agreement as regards the

<sup>22</sup> The E.F.T.A. consisted at that time of the following countries: Austria, Sweden, Finland, Norway, Iceland, Liechtenstein and Switzerland.

<sup>23</sup> Law of 18 March 1993 on the approval of the Agreement on the European Economic Area, of the protocols, of the final act and of the appendices, signed in Porto on 2 May 1992, *O.J.* 7 February 1994 and *O.J.* 21 March 1994. Also see: *Pb.L.* 1994, no. 1.

<sup>24</sup> Law of 22 July 1993 on the approval of the Protocol, signed in Brussels on 17 March 1993 for the amendment of the Agreement on the European Economic Area, *O.J.* 21 March 1994. Also see: *Pb.L.* 1994, no.1.

<sup>25</sup> Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, *Pb.L.* 1995, no. 86.

<sup>26</sup> The Norwegians rejected entry by referendum.

<sup>27</sup> Consisting of members of the Council of the E.C., of the Commission of the E.C. and one government member from each EFTA Member State.

<sup>28</sup> Consisting of representatives of the European Parliament and the national parliaments of the EFTA Member States.

<sup>29</sup> Consisting of representatives of the Economic and Social Committee and the Consultative Committee of the EFTA.

environment has the following purpose: "a) to preserve, protect and improve the quality of the environment; b) to contribute to the protection of the health of people; c) to ensure a prudent and rational utilization of natural resources." According to article 73, paragraph 2, EEA this is based on "the principles of preventive action, counteracting of environmental pollution by priority at the source, and the polluter pays principle. Environmental protection requirements shall be a component of the Contracting Parties' other policies." Measures concerning the environment applicable within the EEA are summarised in Appendix XX (art. 74 EEA). According to article 75 EEA: "The protective measures referred to in Article 74 shall not prevent any contracting party from maintaining or introducing more stringent protective measures compatible with this Agreement."

In Protocol 31 concerning co-operation on specific areas outside the four freedoms there is also a provision on the environment. (art.3). This determines that "within the framework of the activities of the Community" co-operation in environmental affairs will be strengthened in the area of environmental policy and environment action programmes, with the integration of environmental protection requirements in other policies, economic and fiscal resources, environmental questions with cross-border consequences, and important questions of regional and world importance discussed by international organisations. It is also mentioned that this co-operation includes regular assemblies. It is also determined that as soon as practicable after the coming into force of the EEA Agreement, the required decisions will be taken to encourage the participation of EFTA Member States in the [European Environment Agency](#) "as soon as the location of this Agency is established by the Community, to the extent this has not yet been regulated" (art 3, paragraph 2).

In this Protocol it is also determined that in cases in which the Joint Committee of the EEA has decided that co-operation is given the form of parallel legislation with an identical or similar content, the procedures referred to in article 79, paragraph 3, EEA - with which reference is made to the decision-making procedures of Part VII EEA - are applicable to the preparation of such legislation in the area in question. 3, paragraph 3).

As far as environmental policy is concerned, the EEA agreement *grosso modo* entails the EFTA Member States binding themselves to adopt the majority of the existing European requirements as of 31 December 1991 regarding environmental protection and to integrate them in their internal rule of law. Appendix XX summarises the relative European environmental directives. This concerns 32 texts, ranging from the directives relating to the assessment of environmental effects and free access to environment information, to ten directives relating to water, eight directives relating to air, four directives relating to hazardous materials, and seven directives relating to waste materials. For certain directives, one or a number of EFTA Member States may be granted a longer period to comply (1 January 1995 instead of 1 January 1994). Furthermore, the EFTA Member States take note of six recommendations. Texts relative to the environment also occur in other appendices, including in appendix II on technical standards and regulations, in which, among others, the directives with respect to standards for the restriction of noise pollution and air pollution by vehicles are mentioned, and those concerning the noise level of material.

As far as the new (i.e. from 1 January 1992) environmental measures to be taken by the Community are concerned, the general procedure for integration of community law in the EFTA Member States applies. In principle, EFTA Member States must be informed on a preventive basis of all proposals for regulations, and preparatory consultation must place among officials, and if requested, at political level. Once the measure has been adopted by the Community the Joint Committee must, in principle, proceed as quickly as possible with the supplementing of the appendix to the Agreement to include these new measures. If no agreement is reached, the Joint Committee disposes in principle of a period of six months to take another decision of such a nature to ensure the good operation of the Agreement, where aspects for consideration include the declaration of equivalence of legislation. If no decision is made in time, this results in the provisional suspension of the relative part of the appendix concerned.

In the meantime a multiple of decisions were made by the Joint Committee to supplement appendix XX.

#### **d) The instruments of European environmental policy.**

European environmental policy is given form by means of regulations, directives, decisions and recommendations.

A regulation ([art. 249, 2° paragraph EC](#)) is immediately and directly applicable and does not have to be converted into national law to directly give rights to or impose obligations on the people of the Member States. In the field of environmental policy only a limited number of regulations have originated (including relating to the protection of the woodlands against air pollution, eco-labels, eco-audits, the import, export and transit of waste materials, the exporting of hazardous materials and CFCs).

As distinct from a regulation, a directive ([art. 249, 3° paragraph EC](#)) is not immediately and directly applicable. A directive is binding for Member States as regards the result, but Member States are free to choose the resources to achieve this result. Within the period determined in the directive, Member States must bring their legislation and administrative practice in line with the directive. They must therefore either adopt new legislation, or amend or withdraw existing legal or administrative conditions. When the period for the conversion of a directive into national law has passed, private persons can in certain cases call upon the directive against the government even if national law conflicts with it. This is the case for the provisions of a directive which are called 'directly applicable'. The major part of European environmental law consists of directives (see the subsidiarity principle). This will probably also remain the case in the future, although the instrument of regulations is becoming somewhat more important.

Decisions ([art. 249, 4° paragraph EC](#)) are binding for those at who they are explicitly aimed.

Recommendations ([art. 249, 5° paragraph EC](#)) are non-compulsory standpoints of the [Council](#) or the [Commission](#) of the E.U. A number of recommendations relating to the environment have originated.

Member States are bound within the period indicated in the directive (usually 1 to 2 years) to take the necessary legal, regulatory and administrative measures to ensure the complete and correct conversion of a directive.

The [Commission](#) of the E.U. supervises compliance with this obligation ([art. 211 EC](#)). When the [Commission](#) establishes that a Member State has not complied with its obligations it provides a reasoned opinion after the Member State has had the opportunity to make its defence. If the State concerned does not act upon this advice from the [Commission](#) in the period established, the [Commission](#) can bring the case before the [Court of Justice](#) ([art. 226 EC](#)).

If the [Court](#) does indeed establish that a Member State has not complied with its obligations, the State is sentenced and is obliged to take the measures needed for the implementation of the ruling ([art. 228 EC](#)). The [Court](#), up until the [Maastricht Treaty](#), could not however impose injunctions. If after the first or second sentencing the Member State still did not comply with its obligations, a third sentence followed. Accordingly, Belgium was sentenced on 13 June 1990 for a third time because of the infringement of the waste material directives, this time because the [Brussels Capital Region](#) had not forwarded the specified reports on the application of these directives to the [Commission](#) on time. Since the coming into force of the [Maastricht Treaty](#) the [Court](#) has been able to impose an administrative penalty or a penalty payment with the second time of sentencing.

#### **e) Institutions involved with European (environment) policy**

The most important institutions of the E.U. are: the [Commission](#), the [Council](#), the [European Parliament](#), the [Economic and Social Committee](#) and the [Committee of the Regions](#).

The [Commission](#) consists of twenty members these "who shall be chosen on the grounds of their general competence and whose independence is beyond doubt". In practice this means that the five large Member States appoint two members and the small Member States one member. A commissioner is appointed as competent for environmental issues. Administrative support is provided by the Directorate-General for the Environment. The competence of the [Commission](#) consists mainly of an initiative monopoly. All decisions of the E.U. must originate from a proposal of the [Commission](#). In a limited number of areas the [Commission](#) also disposes of independent or delegated autonomy of decision and power of implementation. The [Commission](#) supervises compliance with treaty obligations by the Member States and maintains international relations.

With the preparation of Commission proposals independent experts, advisory committees, management committees and committees on rules consisting of national officials are often consulted.

A commission proposal (for a directive, regulation, recommendation) is published in the [Official Journal of the European Communities](#), series C, 'Preparatory acts' ([Pb.C](#)) and submitted for advice to the [Economic and Social Committee](#) ([E.S.C.](#)- consisting of representatives of all sectors of economic and social life, being: producers, farmers, transporters, employees, traders and skilled craftsmen, the free professions and others of general importance) and to the [European Parliament](#). The [E.P.](#) has no legislative power. In a number of cases it provides advice concerning proposals of the [Commission](#). With the [Single European Act](#) the influence of the [E.P.](#) was somewhat increased by the so-called "Cooperation procedure"; since the coming into force of the [Maastricht Treaty](#) there has been the "co-decision procedure" that was simplified by the Treaty of Amsterdam.

Autonomy of decision is largely granted to the [Council](#). The [Council](#) of Ministers consists of fifteen members; each national government appoints one representative member. The General Affairs Council groups the Ministers of Foreign Affairs. For us it is mainly the Environment Council that is of importance, where Belgium is currently represented by the Federal Minister or State Secretary of Public Health and the Environment, assisted by a regional environment minister. The [Council](#) is assisted by an administration and by the [Committee of Permanent Representatives \(COREPER\)](#). The [COREPER](#) has the task of preparing the activities of the [Council](#). COREPER I consists of the acting permanent representatives of the Member States at the E.U. COREPER II consists of the permanent representatives (ambassadors) of the Member States at the [E.U.](#) These bodies also have sub-working parties (e.g. environment working party) comprising permanent representative members.

The decisions in the [Council](#) are, depending on the case, taken by unanimity (e.g. decisions on the basis of [art. 94](#) and [art. 308 EC](#)), by absolute majority (if no other voting procedure is specified in the treaties) or by qualified majority<sup>30</sup> (e.g. [art. 95 EC](#), basic procedure [art. 175 EC](#)). The decisions are published in the [Official Journal of the European Communities](#), series L 'Legislation' ([Pb.L](#)).

Finally, of great importance is the [Court of Justice](#) E.G. (Luxembourg). The [Court of Justice](#) has the task of ensuring compliance with law by the interpretation and the application of the treaties and their implementing rules. It is not practical here to examine all the competence of the [Court](#). But for environmental law there are two such competences of great importance:

(1) the [Court](#) passes judgement in disputes between the [Commission](#) and the Member States, or between different Member States about non-compliance by a Member State with its European obligations ([art. 226-227 EC](#), [141-142 EURATOM](#)). This is also the case with a breach of directly applicable provisions of treaties (e.g. relating to the free traffic of goods, relating to the advisory obligation for radioactive discharges) or with the infringement of directives or the failure to implement

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<sup>30</sup> In this case the votes are weighed: Belgium, Greece, the Netherlands, Portugal: each 5 votes; Germany, France, Italy, U.K.: each 10 votes; Spain: 8 votes; Austria and Sweden: each 4 votes; Denmark, Finland and Ireland: each 3 votes; Luxembourg: 2 votes.

them. When the **Court** establishes that a Member State has not complied with its obligations, the relative Member State is sentenced.

(2) the **Court** is competent to, by way of prejudicial decision, judge on questions brought by national courts about the interpreting of the treaties and derived European law. In the highest instance the national courts are in certain cases obliged to bring such question if these arise in a pending case.

Without any doubt it can be stated that the **Court** has played and still plays a very important part in the European integration process. A significant amount of cases dealt with in recent years relate to environmental law.

## B. FEDERAL AND REGIONAL LEVEL

### § 1. The Constitution

The **Constitution** is the basic legal system of Belgium. The Constitution governs:

- 1) the territory of Belgium and its parts: Communities, Regions, language areas, Provinces, agglomerations, municipalities;
- 2) the fundamental rights of Belgians (including the entitlement to the protection of a healthy environment);
- 3) the sharing of competence between the various public bodies;
- 4) the fundamental rules concerning taxation and public finances;
- 5) the fundamental rules concerning the armed forces and the gendarmerie.

The **Constitution** is much more difficult to change than an ordinary law:

- 1) an amendment declaration approved by **Chamber**, **Senate** and the King is required;
- 2) an election is then organised;
- 3) the articles for amendment can be changed by the new **Parliament** and the King: a 2/3 majority in the **Chamber** and **Senate** is required. A fundamental change to the constitution was completed on 5 May 1993 <sup>(31)</sup> and a fully rearranged text was announced on 17 February 1994 <sup>(32)</sup>.

### § 2. Special laws

Since the start of the seventies the **Constitution** has contained increasing numbers of articles which allow the legislator to regulate certain matters by means of a "special majority law". This means a majority within each language group of the **Chamber** and **Senate** with a 2/3 majority in the **Chamber** and **Senate** being required to be able to regulate.

Such special laws are required for matters including:

- rearrangement of the competence of the **French Community** between the **Walloon** and the **Brussels Capital Region** (art. 163);

<sup>31</sup> *O.J.* 8 May 1993.

<sup>32</sup> *O.J.* 17 February 1994.

- establishment of the language border (art. 4);
- allocation of residual competence to the Regions or Communities (art. 35);
- the competence, organisation and operation of the Communities (art. 115 and 127);
- liability under criminal law of ministers (art. 125);
- treaty law of the Communities and Regions (art. 167);
- the competence, organisation and operation of the Regions (art. 39);
- the competence, composition and operation of the Court of Arbitration (art. 141);
- the development of the procedure for conflicts of interest (art. 143);
- the system of financing for the Regions and the Communities (art. 175 and 177).

These constitutional provisions were implemented by the following special laws:

- special law of 8 August 1980 for the reform of institutions, amended by the special laws of 8 August 1988, 12 January 1989, 16 January 1989, 5 May 1993, 16 July 1993 and 13 July 2001;
- special law of 16 January 1989 on the financing of the Communities and the Regions, amended by the special laws of 16 July 1993 and 13 July 2001;
- special law of 6 January 1989 on the Court of Arbitration;
- special law of 12 January 1989 with respect to the Brussels institutions, amended by the special laws of 16 July 1993 and 13 July 2001.

These special laws form part of constitutional law in the wide sense. They are very important because they establish the division of competence between the Federal Government, the Communities and the Regions.

Besides the federal (previously national) State there are three Communities in Belgium (the [Flemish](#), the [French](#) and the [German-speaking communities](#)) and three Regions (the [Flemish](#), the [Walloon](#) and the [Brussels Capital Region](#)). As far as environmental policy is concerned it is mainly the Regions that are of importance. The [Flemish Region](#) comprises the four Flemish provinces and Flemish Brabant (that became a separate province on 1 January 1995). The [Walloon Region](#) comprises the four Walloon Provinces (incl. the East-Cantons) and Walloon Brabant (that also became a separate province on 1 January 1995). The [Brussels Capital Region](#) comprises the 19 bilingual municipalities of the Brussels agglomeration.

Also of importance here is that the [Flemish Region](#) was actually "merged" with the [Flemish Community](#), while this was not the case for the [Walloon Region](#) and the [French Community](#) (which do retain the possibility of merging in mutual agreement as well as the possibility of transferring the competence of the Community to the [Walloon](#) and [Brussels Capital Region](#)).

### **§ 3. Laws, decrees and orders**

#### **a) Laws**

A law is a result of joint action by the three branches of federal legislative power: [Chamber](#), [Senate](#) and King (together with the Government).

A law can originate in two ways:

a) A government initiative: the King has the entitlement to present bills for approval to the [Parliament](#). A bill will already have undergone a long process before it is presented to one of either Chambers. A draft bill is usually drawn up by the office of the competent Minister(s), either with or without the cooperation of the administration, and following the advice of relative bodies which have to be consulted (e.g. Finance Inspectorate). It is then discussed by the Council of Ministers and the advice of the legislation department of the [Council of State](#) is requested. After the [Council of State](#) has issued its advice and the necessary changes have been made, the draft bill can be approved by the Council of Ministers and presented to the King for signing. The bill can then be presented to either of the legislative Chambers. The bill is accompanied by an explanatory memorandum and the advice of the [Council of State](#), and appears in the form of a parliamentary document.

b) A parliamentary initiative: a legislative initiative can also come from one or more members of the [Chamber](#) or the [Senate](#) in the form of a legislative proposal. If a legislative proposal is accepted by one of either Chambers it also becomes a bill.

Government initiatives are obviously much more likely to become law than legislative proposals. One can indeed assume that a bill largely represents the view of a parliamentary majority.

Bills and legislative proposals are first considered by the competent commission of the Chamber concerned. The Commission reflects the political balance of power of the Chamber concerned. For environmental policy, in [the Chamber](#) it is mainly the Committee on Public Health, the Family and the Environment that is of importance. In the [Senate](#) this is the Committee on Public Health and the Environment. The discussions proceed in the presence of the competent Minister (in this case the Minister of Consumer Affairs, Public Health and the Environment) and his staff. Amendments can be accepted and the proposal or draft can be accepted by an ordinary majority, amended or not. The considerations are embodied in the Report of the Committee, that is drawn up by one or two persons and accepted by the Committee. The reports are published as parliamentary documents. Then follows consideration at a plenary meeting or by central committee, which concludes with voting (on the amendments, articles and the proposal as a whole). An ordinary majority is also sufficient here.

Until a few years ago, after this procedure had been completed in one Chamber it had to be repeated in its entirety in the other Chamber. If amendments were made by other Chamber, the whole procedure had to be repeated again in the other Chamber ('navette' or 'integral bicameralism'). An end was brought to integral bicameralism on 21 May 1995. An allocation of responsibilities between the [Chamber](#) and [Senate](#) was introduced. This entailed a distinction being made between three kinds of laws: a) those only having to pass through the [Chamber](#), b) those passing through the [Chamber](#), but which at the request of the [Senate](#) can also pass through the [Senate](#) ("evocation"), c) those which must pass through [Chamber](#) and [Senate](#). In the second case the [Senate](#) can propose amendments, but the final decision lies with the [Chamber](#).

The first category (only the [Chamber](#)) includes the granting of naturalisation, the budget and accounts and the determining of armed forces contingents.

The second category (the [Senate](#) can require consideration) includes laws not falling under the first or third categories.

The third category ([Chamber](#) and [Senate](#) must consider together) includes: review of the [Constitution](#), special majority laws, the approval of treaties, substitution laws, laws concerning the [Council of State](#), the lawcourts and concerning agreements of cooperation.

When a bill has been approved by both Chambers or the competent Chamber, it must receive royal assent from the King and he promulgates the law. The date of the law is the date of being given royal assent and promulgation by the King. The King always acts here under the responsibility of one or more Ministers. The law is then promulgated in the [Belgian Official Journal](#). The law comes into force on the tenth day after publication, unless a different date is mentioned in the law itself.

## b) Decrees

The [Flemish](#) and the [Walloon Region](#)<sup>33</sup> can enforce decrees relating to the affairs for which they are competent. Former national laws can be amended or replaced by decrees relating to the affairs which were regionalised in 1980, 1988/1989 or in 1993. Decrees are equivalent to laws. The origination procedure runs parallel with that for federal laws.

Powers of decree are jointly exercised by the Council and the Regional Government. In the [Flemish Region](#) this concerns the [Flemish Council \(the Flemish Parliament\)](#) and the [Flemish Government](#). The Flemish Council, competent for regional affairs, has consisted since 21 May 1995 of directly elected members. The regional government is elected from the Council. Elections are held every five years together with European elections.

The initiative for a decree can be taken by the Regional Government or by a member of the Council. A draft decree (initiative of the Regional government) originates in way similar to a federal bill: draft bill from the competent Ministers, prescribed advice (e.g. [SERV](#), [MINA Council](#)), principle agreement of the regional government, advice of [Council of State](#), compiling of the text of the draft by the Regional Government, presentation to the Council.

Council members may also take initiatives: they can submit proposals for decrees.

In the Councils there are also specialised committees. In the [Flemish Parliament](#) there is a [Commission for the environment](#), which deliberates in the presence of the [Flemish Minister of the Environment and Agriculture](#) and his staff. Here there is only a single-chamber system as distinct from at federal level. When a draft or proposal has been accepted by the Council it is confirmed and promulgated by the Regional Government and the decree is promulgated in the [Belgian Official Journal](#). It comes into force on the tenth day after publication, unless the decree itself specifies a different date.

## c) Orders

Orders are a phenomenon specific to Brussels. Since 12 July 1989 the [Brussels Capital Region](#) has disposed of its own legislative and executive bodies: the [Brussels Capital Council](#) (directly elected since the last European elections but one) and the [Brussels Capital Government](#) (appointed by the [Brussels Capital Council](#)) with its own administration.

A Brussels order is generally similar to the [Flemish](#) and the [Walloon decree](#). An order can abolish, supplement, amend or replace prevailing national statutory provisions in matters entrusted to the [Brussels Capital Region](#) (these are the same areas in which the [Flemish](#) and the [Walloon Region](#) are competent, *infra*). There is a however small difference with the decrees mentioned earlier: orders can be examined by ordinary lawcourts and the [Council of State](#) for their conformity with many articles from the [Constitution](#) and special laws, while this is not the case for decrees.

For areas including town and country planning, the federal government can suspend and nullify orders should they jeopardise the federal or international function of Brussels. Neither is this possible for decrees.

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<sup>33</sup> The same applies to the [Flemish](#)-, [French](#)- and [German-speaking Community](#).

The procedure for the origination of orders is the same as for decrees. Initiative comes from the [Brussels Capital Government](#) (draft orders) and members of the [Capital Council](#) (proposals for orders).

#### **d) More specific distinction**

The laws, decrees and orders can be subdivided into certain categories:

- an interpretative law/*decree/order* interprets a different statutory provision; a statutory provision interpreted in this way is considered to have always had this meaning;
- a coordination law/*decree/order* combines different already existing statutory provisions on a specific subject to form a new better-organised and accessible text;
- a programme law/*decree/order* regulates the most diverse of subjects which the Federal or Regional Government regards necessary for actually achieving the objectives set in the budget;

example: the programme decree of the [Flemish Region](#) (environmental levies in the waste water sector, solid waste and fertilisers)

- a framework law/*decree/order* in general terms regulates a certain area and is limited to authorising the King/Regional government to take the measures necessary to achieve these general objectives; the statutory provisions only gain content as the implementing provisions are established.

example: - the law of 28 December 1964 on the counteracting of air pollution;  
 - the law of 18 July 1973 on the counteracting of noise pollution.

### **§ 4. Royal decrees, decisions of the Regional Government, ministerial orders**

In this paragraph we discuss legal standards originating from the executive power.

#### **a) Royal decrees**

Federal executive power lies with the King ([article 29](#) of the Constitution). Because he is immune and has no responsibility, after a parliamentary majority has been reached he appoints a government consisting of Ministers (who together form the Council of Ministers) and state secretaries (who together with the Ministers form the Government Council). The constitutional/legal concept of the King usually covers both the person of the King and those of Minister(s) or State Secretary(ies) in charge. A Royal Decree (R.D.) is therefore always also signed by one or more Ministers or State Secretaries. For environmental policy it is mainly the [Minister of Consumer Affairs, Public Health and the Environment](#) who is of importance, but many other departments are also involved to a greater or lesser extent (e.g. [Foreign Affairs](#), [Transport](#), [Economic Affairs](#), [Science Policy](#), [Agriculture](#), ...).

The federal executive power only disposes of assigned competence. This competence is assigned either by the [Constitution](#) itself or by the law. The executive power can only act if such action is based on authorisation by the [Constitution](#) itself or the legislator.

The [Constitution](#) makes the King responsible for matters including:

- the implementation of laws;
- defence and responsibility for foreign relations;
- the appointment of officials, judges, etc.

By virtue of [article 67 of the Constitution](#) the King is competent to make regulations and take decisions required for the implementation of the laws and, without prior authorisation by law, he can make regulations and take decisions relating to the establishment and the organisation of general administration and the maintaining of internal order and security.

With the implementation of laws the King must respect the law and higher legal standards (international treaties and the [Constitution](#)). In this respect the King and all other administrative authorities are under the authority of the judiciary. [Article 159 of the Constitution](#) determines that the courts only apply orders and regulations to the extent they correspond with the law. The administration department of the [Council of State](#) can nullify unlawful orders and regulations. They are therefore hierarchically subordinate to international treaties, the [Constitution](#) and the law.

The King exercises his competence by means of Royal Decrees (R.D.). Drafts of "regulatory orders" (regulations) must, except in the event of reasoned great urgency ("In view of great urgency"), be submitted for advice to the legislation department of the [Council of State](#).

When they are "in the interest of the majority of the people" they are promulgated in the [Belgian Official Journal](#). In other cases they may be promulgated by extract. They come into force on the tenth day after their promulgation, unless a different period is mentioned in the decision itself.

#### **b) Orders of the Regional Governments**

The regional equivalent of a Royal Decree is the Order of the Regional Government. For the [Flemish Region](#) this concerns Orders of the [Flemish Government](#) (O.Fl.G. - previously Order of the Flemish Executive or O.Fl.Ex.). Here also, with the exception of cases of reasoned great urgency, regulatory orders are subject to the advice of the legislation department of the [Council of State](#). In principle each decision is taken by the full Government by consensus. The Government can, however, delegate one of its members the responsibility of taking certain decisions within bounds established beforehand. In the Flemish Government V. DUA is currently the Flemish Minister for the Environment and Agriculture.

#### **c) Ministerial Decisions**

The King or the Regional Government can appoint individual Ministers to exercise additional and supplementary regulatory competence. This takes place in the form of Ministerial Orders, which are obviously subordinate to royal decrees or orders of the regional government and higher legal standards.

### **§ 5. Division of competence between the federal government and the Regions for the environment**

The state reforms resulted in important competence in environmental affairs being assigned to the Regions; the federal government does however still retain certain competence. Before taking a closer look at this division of competence it is necessary to briefly remind ourselves of the basic characteristics of the new structure of the state:

- the Regions dispose of assigned competence; the federal government disposes of reserved (i.e. assigned by the Constitution to the legislator) and residual competence (i.e. everything not entrusted to the Regions or the Communities remains under federal competence, even if there is no explicit text stating this)<sup>34</sup>.

<sup>34</sup> The new article 35 of the Constitution provides for this system being reversed (assigned competence for the federal government, residual competence for Region or Community). The new system will, however, only come into force after the competence of the federal government has been established by special law. This has not yet happened.

- in principle the Regions dispose of exclusive competence, this meaning that the federal government can no longer involve itself with affairs that have been entrusted to the Regions and Communities. Variations from this general principle are possible for many points. Besides exclusive competence there is also parallel competence (e.g. federal and regional participation in the same business) and competitive competence (e.g. relating to scientific research, taxation).

## a) The competence of the Regions

### I. Town and country planning

The Regions are initially competent for town and country planning and, since 1 January 1989, for the protection of monuments and landscapes (art. 6, § 1, I, of the special law of 8 August 1980, amended by the special law of 8 August 1988).

### II. Protection of the environment

The Regions are also competent for the protection of the environment (art. 6, § 1, II, of the special law of 8 August 1980, as amended by the special law of 8 August 1988 and 16 July 1993). There are, however, certain exceptions to this competence where the federal government retains competence. A specific analysis of the division of competence is therefore required.

#### 1) Protection of the environment in the narrow sense

According to article 6, § 1, II, first paragraph, 1, of the special law of 30 July 1993 the Regions are competent for: "*The protection of the environment, including soil, subsoil, water and air against pollution and deterioration, as well as the combating of noise pollution*". The most important difference with the former regulation concerns the fact that the federal government loses its competence to establish sectoral standards with the absence of European standards<sup>35</sup>. *Exceptions* were however made for the establishment of *product standards* (art. 6, § 1, II, second paragraph, 1). Previously, there was the question of who was competent in this area. Now it is explicitly determined that the federal government is competent, although the Regional Governments must be involved with the drawing up of these standards. 6, § 4, 1). A product standard is a standard providing conditions which must be met by a product to be able to be brought on the market. This not only concerns technical requirements which determine what level of pollution or nuisance may not be exceeded as regards the composition or the properties of a product (e.g. lead level of petrol, biodegradability of a detergent, standards relating to the noise level or exhaust gases of vehicles, etc.), but also ecolabels. On the other hand there are rules concerning the use of products under regional competence (e.g. fertiliser standards imposing limitations on the use of fertilisers).

Protection against ionising radiation remains a federal competence. 6, § 1, II, second paragraph, 2).

As mentioned, article 6, § 4, 1, of the special law determines that the Regional Governments must be involved with the drawing up of federal regulations relating to product standards. The [Council of State](#) has decided that "being involved" requires a more intensive form of consultation than the mere requesting of advice<sup>36</sup>.

<sup>35</sup> Up until this date the Regions were competent for: "*The protection of the environment, including general and sectoral standards, with observance of the general and sectoral standards established by the national government when no European standards exist*". This meant that the Regions were in principle competent for acting against air, water and soil contamination and noise pollution. The national government did however retain limited competence in this respect: it could still establish general and sectoral standards (emission standards, immission standards, draft and construction standards, operating standards, in short technical environmental standards with overall scope or specific to a business sector), to the extent and for as long as no such European standards existed. If a European technical environmental standard came into force the national government lost its competence. At that time it was the Regions who were exclusively competent for implementing and applying the European standard.

<sup>36</sup> C.o.St. no. 32.760, 16 June 1989, Région wallone.

## 2) Waste policy

According to article 6, § 1, II, first paragraph, 2, the Regions are competent for "*waste policy*". Up to 7 May 1994 (art. 128) - the date of the coming into force of the EEC Regulation concerning the import, export and transit of waste materials - the federal government remained competent for the import, export and transit of waste materials, and from that date for the *transit of waste materials*. The federal government also remained competent with regard to *radioactive waste*.

The Regions are competent for all waste materials, so also for toxic waste, waste materials of vegetable or animal origin (e.g. offal, animal carcasses), but not for radioactive waste.

The Regional Governments must be involved with the drawing up of federal regulations relating to the transit of waste materials (art. 6, § 4, 1, special law) and the federal government and Regional Governments involved will consult together in determining how policy relating to the import, export, and transit of waste materials can be coordinated. 6, § 5, special law).

## 3) Environmental supervision of companies and other nuisance-producing establishments

The Regions are competent for: "*The policing of dangerous, unhealthy and nuisance-causing companies, with the reservation of measures of internal policing concerning employment protection*" (article 6, §1, II, 3, of the special law of 8 August 1980, as amended by the special law of 8 August 1988 and art. 6, § 1, II, first paragraph, 3, of the special law of 8 August 1980, as amended by the special law of 16 July 1993). No changes were made to this competence In 1993.

The Regions are therefore competent for the environmental supervision of companies and other nuisance-producing establishments, for example by means of a system of operating or environmental licences and more modern policy instruments such as environment impact reporting and safety reports. The competence comprises both preventive supervision (licences, standards) and curative supervision (e.g. safety measures). The federal government does however remain competent for work safety and hygiene. In practice this caused problems including with the application of title I of the ARAB (general Belgian regulations for work safety) (operating permit). The [Council of State](#) and the Court of Arbitration decided that title I of the ARAB aimed at both precluding environmental nuisance and ensuring work safety and hygiene. That meant that since the state reforms of 1980 one would in principle have had to have a double permit: an environmental operating permit (under regional supervision) and a work protection operating permit (under national supervision)<sup>37</sup>. This situation mainly caused problems with appeals (should one appeal against the decision of the provincial executive to both the regional Minister for the Environment and to the [national Minister of Employment](#)?). Administrative practice of the provinces was unclear (whether or not to request advice from [Technical Employment Inspectorate](#)). Legislation therefore required clarification, and this was provided with the removal of the references to employment protection in title I ARAB<sup>38</sup>. As a result, the involvement of the federal government with its application disappeared.

The Regions are, however, not competent for the "external policing" of classified establishments covered by the Royal Decree of 28 February 1963 on general regulations for the protection of the population and employees against the danger of ionising radiation, which does not prevent the federal government from being able to involve the Regions with the licensing procedure (represented on Special Commission).

On the basis of article 6, § 1, II, 3, of the special law the Regions are also competent for the partial implementation of the [SEVESO directive](#)<sup>39</sup>, while other aspects fall under the competence of the

<sup>37</sup> C.o.St. no. 24.848, 22 November 1984, NV SECA, *R.W.* 1985-1986, 1425-1428.

<sup>38</sup> R.D. of 19 February 1991, *O.J.* 13 April 1991.

<sup>39</sup> Directive 96/82/EC of the Council of 9 December 1996 on the controlling of the dangers of serious accidents involving dangerous substances, *Pb.L.*, 1997, no. 10.

federal government (employment protection, civil protection (disaster plans, co-ordination of aid) and co-ordination in a European context). Intense mutual co-operation is a requirement in this regard.

Since 30 July 1993 the following has applied: "*The federal government and the Regions conclude in any event an agreement of cooperation (...) for the application at federal and regional level of the regulations of the European Community concerning the risks of serious accident hazards with certain industrial activities.*" (art. 92bis, § 3, special law). Such an agreement of cooperation was concluded in June 1999.<sup>40</sup>

### III. Water policy

Since 30 July 1993 the Regions have not only been competent regarding the protection of water against pollution and deterioration (art. 6, § 1, II, first paragraph, 1) (see I), they are also competent for: "*Water production and water provision, including technical regulations relating to the quality of the drinking water, the purification of waste water and sewers.*"<sup>41</sup>. The federal government is therefore no longer competent to "with the absence of European standards" establish technical regulations relating to drinking water or to establish "general and sectoral discharge conditions". There was no point in the first exception mentioned because European standards had already long existed in this field. The standards to be met by drinking water are included in [EEC directive 80/778/EEC](#)<sup>42</sup>.

On the basis of this provision the regions are competent for regulations concerning groundwater use<sup>43</sup>. They are also competent for so-called "major hydraulic engineering works", which until 1 January 1989 were under national competence. Also under the competence of the Regions are: the water purification infrastructure, permits for discharges, water quality planning, etc. and sewers.

### IV. Land use and nature conservation

On the basis of article 6, § 1, III, of the special law of 8 August 1980, as amended by the special law of 8 August, the Regions are competent for:

a) land consolidation and land use, b) nature protection and nature conservation (with the exception of the import, export and transit of exotic species of plants, animals and their carcasses), c) green areas, parkland and green spaces, d) woodlands, e) hunting (with the exception of the manufacture, possession and trade in hunting weapons) and bird catching, f) the catching and cultivation of fish, g) agricultural hydraulics and non-navigable streams (including their banks), h) dewatering, polders and watercourses.

### V. Agriculture and the environment

Since 30 July 1993 the Regions have been competent for: "*The application of European measures in the context of the common agricultural policy concerning the environment and land use, forestry and nature conservation.*" (art. 6, § 1, V, 5). Also determined: "*The federal government shall consult the Regional Governments involved for the preparation of the negotiations and decisions, as well as for the follow-up of the activities of the European institutions concerning agriculture policy. At European level the representatives of the Regions sit alongside the federal representatives on the technical committees.*"(art. 6, § 2bis.) It is also determined that consultation shall take place between the

<sup>40</sup> Agreement of cooperation of 21 June 1999 concerning the control of the dangers of serious accident involving dangerous substances.

<sup>41</sup> The Regions were previously competent regarding: "*Water production and water provision including technical regulations relating to drinking water, with the observance of the minimum standards established by the national government where no European standards exist.*" (article 6, §1, V, 1°, of the special law of 8 August 1980, amended by the special law of 8 August 1988). They were also competent for: "*The purification of waste water. This competence included the determining of general and sectoral discharge conditions while respecting the general and sectoral discharge conditions established by the national government where no European standards exist.*"

<sup>42</sup> Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, *Pb.L.*1980, no. 229, amended by Directive 81/858/EEC, *Pb.L.*1981, no. 319 and Directive 91/692/EEC, *Pb.L.*1991, no. 377.

<sup>43</sup> Court of Arbitration no. 27, 22 October 1986, *O.J.* 13 November 1986.

Regional Governments involved and the Federal Government about: "*measures with repercussions on agriculture policy.*" (art. 6, § 3*bis*, 5).

As of 1 January 2002 the competence of the regions in the field of agriculture policy was further enlarged. From that date they have been the competent authority for agriculture policy and offshore fishing (amended art. 6, § 1, V, BWHI). The federal government only reserves a small number of named competences, including standardisation and its supervision relating to the quality of raw materials and vegetable products to ensure the safety of the food chain (art. 6, § 1, V, 1°, BWHI) and standardisation and its supervision relating to animal health, animal welfare and the quality of animal products to ensure of the safety of the food chain (art. 6, § 1, V, 2°, BWHI). The agreement of the Regional Governments involved is required for measures of the federal government relating to animal welfare which have an effect on agriculture policy (art. 6, § 1, V, last paragraph, BWHI). The Regional Governments involved and the federal government consult each other for the preparation of the negotiations and decisions, as well as for the follow-up of activities concerning agriculture policy. 6, § 2*bis*, BWHI)

## VI. Scientific research

In accordance with article 6*bis* of the special law of 8 August 1980, inserted by the special law of 8 August and amended by the special law of 16 July 1993, the Regions are competent for "*scientific research in the context of their (...) competence, including research for the implementation of international or supranational agreements or acts.*" . The federal government for its part is competent for scientific research that is needed for the exercising of its own competence, the provision and organisation of networks for exchanging information, space research, federal scientific and cultural institutions, programmes and action which require homogenous execution at federal or international level (to be determined by agreement of cooperation)<sup>44</sup>, the keeping of a permanent inventory of the scientific research, and cooperation on activities with international research bodies according to specific rules to be determined by agreements of cooperation. Federal initiatives can however (in areas under the competence of the Regions or Communities) be taken on the advice of the Federal Council for Scientific Policy for matters forming the subject of international or supranational agreements, or which concern action or programmes exceeding the interests of a Community or a Region.

## VII. European and international environmental policy

As already mentioned above, since 18 May 1993 the Regions have been competent for the concluding of *treaties* in regional affairs, while the federal government remains competent for treaties relating to federal competence. For mixed treaties which simultaneously concern regional and federal competence, an agreement of cooperation determines the procedure to be applied.

Proposals for regulations, directives and decisions of the [Commission](#) relating to regional competence must be sent to the regional councils (art. 92*quater* special law, inserted by the special law of 5 May 1993). The Regional Governments are as a result of the special law of 5 May 1993 authorised to bind the State in the [Council of the E.C.](#) where one of their members represents Belgium in accordance with an agreement of cooperation (art. 81, § 6, spec. law). According to article 92*bis* of the special law the federal government, the Communities and the Regions shall in any event conclude one or more agreements of cooperation concerning the representing of Belgium at international and supranational institutions, concerning the procedure relating to the determining of standpoints, and the position to be taken with a lack of consensus within these organisations. In other words, an agreement of cooperation

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<sup>44</sup> See e.g. The Agreement of Cooperation dd. 24 October 1997 concerning the plan for scientific regulations for a policy aimed at sustainable development, *O.J.* 4 February 1998.

can enable regional ministers to represent Belgium in the (Environment) Council of the E.C., something that has indeed happened in the meantime.

By virtue of the special law of 5 May 1993 a right of substitution was also introduced. Article 16, § 3, of the special law determines: "*When the State is sentenced by an international or supranational court of justice as a result of non-compliance with an international or supranational obligation by a Community or a Region, the State can act in the place of the Community involved or the Region involved for the execution of the ruling part of the decision (...)*". The implementation of this right of substitution is subject to three strict conditions (art. 16, § 3, first paragraph, 1° to 3°). The substitution measures cease to be applicable from the time that the involved Community or Region complies with the ruling part of the decision. The State can recover the costs of non-compliance with an international or supranational obligation by a Community or a Region from the relative Community or Region.

### **VIII. Additional competence**

A number of what are called "additional competences" are at the disposal of the Regions. These are indispensable to obtaining a good environmental policy. We will limit ourselves here to mentioning the most important:

- the general and special financing of subordinate administrations (art. 6, §1, VIII, 2° and 3° of the special law of 8 August 1980, inserted by special law of 8 August, amended by spec. law 16 July 1993): this allows the Regions to stimulate environmental investments by subordinate administrations by wholly or partly subsidising them;
- general and specific supervision of subordinate administrations (art. 7 of the special law of 8 August 1980, amended by special law of 8 August 1988);
- the establishment of infrastructures, institutions and enterprises (art. 8 and 9 of the special law): on the basis of these provisions the Regions were able to establish organisations such as the [OVAM](#), the [VMM](#), the [VLM](#), the [BIM](#), etc.;
- implicit competence (art. 10 of the special law of 8 August 1980, amended by special law of 8 August 1988 and by special law 16 July 1993): decrees can contain provisions for matters for which the Regions are not competent if this is required for the exercising of regional competence;
- competence for criminal law (art. 11 of the special law of 8 August 1980, amended by special law of 16 July 1993)<sup>45</sup>: the decrees can make non-compliance with their provisions punishable, and determine the penalties due to non-compliance. The provisions of Book I of the Penal Code are applicable here, subject to the exceptions which - on the unanimous advice of the Council of Ministers - can be determined for special infringements by a decree. The decrees can also grant the capacity of agent or officer of criminal police, regulate the evidential value of official reports, and determine the cases in which a search warrant can be issued;
- make compulsory purchases (art. 79 of the special law of 8 August 1980).

### **IX. Fiscal competence**

Also of importance to environmental policy is the fiscal competence of the Regions. Without going into detail, the basic principles can be described as follows:

The Regions are competent to impose and collect *charges*. This means they can require payment for services provided by them. An example of this was the contribution companies had to pay (up until the

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<sup>45</sup> The Regions previously already had limited competence with regard to criminal law; they could make non-compliance with the provisions of their decrees punishable, and determine non-criminal penalties in accordance with the provisions of book I of the Penal Code; as regards prosecution they had no competence and were fully dependent on national legislation.

end of 1989) to the purification costs of the water purification company when they had their waste water treated by the company. The principle of levying a charge must be included in a decree or order (or former national law).

Within certain limits the Regions are also competent to impose *taxes*. A tax is a charge without immediate and proportionate return of service from a government. A distinction must be made between internal or autonomous taxation and additional and limited taxation.

*Internal or autonomous taxation* refers to new taxes charged by the Regions

*example*: environmental levies on solid waste materials, water pollution, manure surpluses, the consumption of water, etc. in the [Flemish Region](#).

Here the "*non bis in idem*" rule applies. The Regions may not introduce taxes identical to already existing national taxes. The federal government can under certain circumstances abolish such taxes. The law of 16 July (art. 356) however determines that the State and the Communities are not authorised to impose taxes on the items water and waste (reserved for the Regions). The Regions may not derogate from the basic rules of *Economic and Monetary Union* (e.g. they may create no disguised internal customs duties - see the Walloon water tax nullified by the Court of Arbitration)<sup>46</sup>.

*Additional and limited taxation* is understood as the fiscal freedom assigned to the Regions by the special law of 16 January 1989 on the financing of the Regions and the Communities. On the basis of this special law the Regions can, for example, under certain conditions impose an additional levy on personal income tax. As a result of the special law of 16 July 1993, the regions also receive the net proceeds of environmental taxes - with the exception however of any environment tax on non-renewable energy which can only be partly allocated to the regions - which are imposed at federal level as "regional taxes", i.e. changes to taxes can only be introduced with the agreement of the Regional Governments. As of 1 January 2002 environment taxes were again brought fully under federal competence.

Certain (constitutional) rules which must be observed apply for both kinds of taxes:

- the essence of the taxes must be regulated by decree or order;
- they must be renewed annually by decree or order (the so-called. finance decree);
- the principle of equality must be observed<sup>47</sup>;
- the executive power may not allow any exemptions or reductions.

## **b) The competence of the federal government**

We have already mentioned that the federal government as yet (in anticipation of the implementation of [art. 35 of the Constitution](#)) exercises all competence which is not assigned to the Regions or the Communities. It is therefore not possible to provide an exhaustive description of the federal competence in the area of the environment. We will limit ourselves here to the most important points.

- protection against ionising radiation, the issue of radioactive waste;
- the transit of waste (until 7 May 1994 also its import and export);

<sup>46</sup> Court of Arbitration no. 32/91 of 14 November 1991, *O.J.* 28 November 1991, *T.M.R.* 1992, 28; Court of Arbitration no. 33/91, 14 November 1991, *O.J.* 4 December 1991, *T.M.R.* 1992, 32.

<sup>47</sup> For cases of applicability: Court of Arbitration, no. 32/91, 14 November 1991, *T.M.R.* 1992/1, 28; Court of Arbitration no. 16/92, 12 March 1992, *T.M.R.* 1992/1, 32; Court of Arbitration no. 59/92, 8 October 1992, *T.M.R.* 1993/1, 31.

- the determining of product standards (including the [ecolabel](#)); the Governments of the Regions must also be involved with the drafting of these standards;
- the establishing of environmental taxes on products consumed due to damage considered to be caused to the environment; amendments are subject to the agreement of the Regional Governments (up to 31 December 2001);
- the protection of the North Sea: the competence of the [Flemish Region](#) ends at the coastline (low water mark), the federal government remains competent for the protection of the North Sea environment (e.g. dumping and incineration of waste at sea); because the major part of sea pollution originates from land (rivers, air, direct discharges) it is clear that the federal government can do little here without closely involving the Regions;
- work safety and hygiene;
- civil protection (disaster planning and the coordinated action of aid and emergency service in the case of environmental disasters);
- scientific research within the framework of international programmes or that exceeds the interests of the Regions, on the advice of the Federal Council for Scientific Policy;
- the concluding of mixed and federal treaties: an agreement of cooperation specifies the procedure for mixed treaties;
- European environmental policy: the federal government must consult the Governments of the Regions about the preparation and the follow-up of European decision-making. By means of an agreement of cooperation, they can be given the competence to represent Belgium in the Council of Ministers (it is now determined that a regional environment minister assists the federal minister); the federal government has substitution competence in certain cases.

## **c) Co-operation and conflict management**

### **I. Agreements of cooperation**

In certain cases a coordinated policy presupposes the joint action of the Regions and the State. Up until 1988 there were no explicit legal possibilities available to this end. In practice so-called "protocols" or "protocol agreements" were concluded between national and regional authorities in which certain arrangements were made:

Example:

- protocol agreement on the Seveso law;
- protocol agreement on the R.D. of 2 June 1987 relating to the import, export and transit of waste.

The legal status of these agreements was however particularly ambiguous. There were no possibilities of imposing penalties if the agreements were not complied with, and in practice this often caused difficulties.

The special law of 8 August 1988 gave this form of co-operation a firm legal basis in article 92*bis* concerning "agreements of cooperation".

The co-operation intended by article 92*bis* can take on different forms, and relate to aspects including:

- a) the joint establishment and joint management of communal services and institutions;

- b) the joint exercising of competence;
- c) the communal development of initiatives.

Negotiations on agreements of cooperation take place by the competent ministers of the federal and regional governments.

If the subject of an agreement of cooperation is of an administrative or regulatory nature and no expenses are involved, it does not have to be approved by law, decree or order. If however, an agreement of cooperation requires the changing of laws, decrees or orders, if expenses are involved, or if Belgians could be personally bound, it must be approved by the relative legislative meetings. On approval the necessary changes can then be immediately implemented in the respective standards. It is this binding effect that distinguishes agreements of cooperation from the 'protocols' or 'protocol agreements'.

Disputes concerning the interpretation or the application of an agreement of cooperation can, if provided for by the agreement, be settled by a so-called cooperation board. Each party appoints one of the members of the board. The chairman is co-opted by the members, or if no agreement is reached, by the chairman of the Court of Arbitration. No appeal can be made against the decision made as a majority against a minority, and it can form the subject of compulsory enforcement. The hearing of the cooperation board is public, and the decision is published in the [Belgian Official Journal](#) unless other arrangements are provided for in the agreement of cooperation.

example: The agreement of cooperation of 30 May 1996 concerning the prevention and management of packaging waste.

As mentioned, the federal government and the regions are as a result of the special law of 16 July 1993 obliged to conclude an agreement of cooperation on the application of the [Seveso Directive](#).

## **II. The Consultation Committee of the Federal Government and the Community and Regional Governments and the Interministerial Conference on the Environment**

Mutual co-ordination of policy and conflict management can also take place within the framework of the Consultation Committee of the Federal Government and the Community and Regional Governments. Since the law of 16 July 1989 this Committee has also been able to organise specialised 'interministerial conferences'. This resulted in an 'Interministerial Conference on the Environment', which included the federal and regional ministers competent for the environment.

## **III. Avoiding and settling conflicts of competence**

A lack of clarity can exist about the exact bounds of competence of the State, the Communities and the Regions, and the exceeding of competence can also occur.

The prevention of conflicts of competence is one of the tasks of the legislation department of the [Council of State](#). In advice issued with regard to the drafting and proposal of standardisation, particular attention is devoted to the issue of competence. In certain cases the Consultation Committee can also become involved.

The settling of conflicts of competence is, at legislative level (laws, decrees and orders), a task of the Court of Arbitration. The [Council of State](#) (nullification competence) and the ordinary courts of justice (left out of consideration) are competent for the settling of conflicts of competence at executory level (royal decrees, orders of the Regional Governments, ministerial orders, individual administrative actions).

The Court of Arbitration and the [Council of State](#) are, at legislative and executory levels respectively, competent to impose penalties after the infringement of [articles 10](#) (principle of equality), [11](#) (ban on discrimination) and [24](#) (freedom and equality in education) of the Constitution.

## C. INTERMEDIARY AND LOCAL LEVEL

### § 1. The provinces

Articles [31](#) and [108 of the Constitution](#) give provincial authorities the responsibility of the management of everything of provincial importance. The [Constitution](#) does not, however, provide a description of provincial importance. Traditionally this is described as all matters taken from the responsibility of the provinces by higher legal standards and designated as national, regional, community or local importance.

The Provincial Council does, within the context of provincial importance, dispose of regulatory policing competence. The regulations may not however relate to subjects already regulated by laws, decrees, orders or regulations of general administration (R.D.'s, orders of the region and community governments). They are legally and automatically rescinded if the same subject is regulated by a higher legal standard. They are also subject to administrative supervision ("guardianship") that is exercised by the Regional Government. The Regional Government can nullify provincial regulations when they violate the law or the general interest. Penalties can be imposed of at most eight days prison sentence and a maximum fine of 200 (X 200) BEF. The regulations are published in the Provincial Journal and come into force eight days later, unless a different date is included in the regulation itself (art. 85 Provinces Act).

The Governor of the province (the representative of the State, the Region and the Community in the province) can introduce bylaws to maintain peace and order in the province and for the safety of persons and goods. These are made known by posting a notice. Infringements are punishable with a prison sentence of 8 to 14 days and a fine of 26 (X 200) to 200 (X 200) BEF.

In practice the competence exercised by provincial bodies within the framework of so-called "co-government" is of greater importance to environmental policy. Laws, decrees, orders, royal decrees and decisions of Regional Governments entail quite a number of responsibilities with respect to the application of environmental legislation being allocated to provincial bodies. They are therefore to a large extent also implementing and advisory bodies of the higher federal and regional authorities.

Accordingly, the Provincial Executive is the licensing authority within the context of numerous environmental laws and decrees.

example: - [Decree on the environmental licence](#): licences for first category establishments;

In other cases the Provincial Executive acts as appeal body.

example:

- [Decree on the environmental licence](#): appeals against decisions of the Mayor and Aldermen relating to nuisance-producing establishments of the second category;
- Town and Country Planning decree: appeals against decisions of the Mayor and Aldermen.

The Governor is also allocated certain tasks within the context of environmental legislation:

example:

- [Waste Decree](#): acting relating to dumped waste;

-Civil protection: co-ordination for disaster planning.

## **§ 2. The Brussels agglomeration**

The only existing agglomeration is the Brussels agglomeration. The agglomeration is situated at supra-municipal level. The bodies of the Brussels agglomeration have since 12 July 1989 been converged with those of the [Brussels Capital Region](#): the agglomeration council converges with the [Brussels Capital Council](#) and the bench of aldermen converges with the [Brussels Capital Council](#). From a legal perspective these are, however, two distinct public bodies. As far as environmental policy is concerned the Brussels agglomeration is competent for the "collection and processing of waste", and this under the control of the [Brussels Capital Region](#), that is also competent for waste policy. The "collection and processing of waste" agglomeration competence is however implemented by means of regulations (Net Brussels), while regional competence is implemented by orders. In the hierarchy of standards the agglomeration regulations are positioned between provincial regulations and municipal regulations.

## **§ 3. The Municipalities**

The municipalities manage all that of municipal importance ([art. 31 and 108 of the Constitution](#)) and they have the task of providing inhabitants with good policing, particularly regarding cleanliness, health, safety and quiet on public roads and places and in public buildings ([art. 135 New Municipalities Act](#)). Neither is municipal interest a clearly described concept here. It involves everything that is not taken from municipal autonomy by higher legal standards. When a higher legal standard exhaustively regulates a certain matter in detail, this means municipal autonomy is lost.

It is the municipal council who establishes municipal bylaws. They may not be contrary to the laws, decrees, orders and regulations and decisions of the State, the Regions, the Communities, the Community Commissions (Brussels), the Provincial Council or the Provincial Executive. Infringements are punishable by police sentences ([art. 119 New Municipalities Act](#)). The higher government (Provincial or Regional government) can suspend and nullify such regulations if they are contrary to the law or the general interest (administrative supervision).

The Mayor can issue bylaws in the event of riot, unlawful assembly, serious disturbance of public order or other unforeseen incidents when the slightest delay could cause danger or damage for the inhabitants. He must immediately notify the municipal council of such measures, which must be confirmed by the municipal council at the next meeting or they are cancelled ([art. 134 New Municipalities Act](#)). They can be suspended by the Regional Executive or by the Provincial Governor.

As far as municipalities are concerned, in practice co-government is also of greater importance to environmental policy. Very many environmental laws and decrees allocate certain implementing responsibilities to municipal bodies.

In many cases the Mayor and Aldermen act as licensing authority.

example: - [Decree on the environmental licence](#): licences for second category installations, third category registration.

- Town and Country Planning decree: town and country planning licences.

In other cases they act as an advisory body or as organiser of public enquiries.

A responsibility can sometimes also be allocated to the municipal council.

example: - municipal land use plans, waste materials plan

The Mayor also has many responsibilities. Most environmental laws and decrees determine that he must establish whether the installations in his municipality dispose of a licence. He must usually act in the event of a threatening danger and in disaster situations.