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Case Summary posted by the Task Force on Access to Justice

BELGIUM: Court of First Instance Brussels, 10 October 2018, Greenpeace v. Flemish Region

<i>1. Key issue</i>	The right of environmental NGOs to ask a Court order to communicate air quality data to the European Commission and to draft a comprehensive air quality plan
<i>2. Country/Region</i>	Belgium
<i>3. Court/body</i>	President Dutch-speaking Court of First Instance of Brussels
<i>4. Date of judgment /decision</i>	2018-10-10
<i>5. Internal reference</i>	Voorzitter Nederlandstalige Rechtbank van eerste aanleg Brussel 10 oktober 2018, vzw <i>Greenpeace t. Vlaamse Gewest</i>
<i>6. Articles of the Aarhus Convention</i>	Art. 9, paras. 3 and 4
<i>7. Key words</i>	Civil Proceedings – Environmental NGO – Standing – Right to claim court orders – Air Quality – Law relating to the environment – Violation of environmental standard

8. Case summary

Greenpeace took the Flemish Region of Belgium to court for violation of NO₂ Air Quality Standards. Although the data collected during 2017 by the automatic monitoring stations only showed a few exceedances of the annual mean NO₂ concentrations (see: <http://www.ircel.be/en/air-quality/measurements/nitrogen-dioxide/exceedances>) in the Flanders Region, more detailed studies and modelling showed a lot of exceedances, particularly in so called “street canyons” all over Flanders. Greenpeace asked the President of the Court of First Instance of Brussels to order the Region to communicate those data to the European Commission, to draw up a comprehensive and integrated Air Quality Plan for the whole Region, to take measures to avoid exceedances expected to last beyond 2030, to implement the Air Quality Plan through different concrete measures (kilometre charge, ultra-low emission zones, improvement of public transport, reviewed smog alarm system) and to prohibit any other measure that could cause exceedances.

The Court partially accepted the demand, holding:

(1) The Act of 12 January 1993 on a right of action for the protection of the environment concerns infringements of one or more provisions of laws, decrees, ordinances, regulations or decisions for the protection of the environment. European directives are also envisaged because they are binding for the Belgian authorities as soon as they have been enacted and have entered into force, even if they have been transposed into internal legislation. The question whether a directive has direct effect or not is not relevant in that respect. The Air Quality Directive unquestionably concerns the protection of the environment.

(2) The Act of 12 January 1993 requires a *manifest* infringement or a serious threat of such an infringement. The judge must thus establish that there is an infringement of an environmental rule that is clearly identifiable and accountable and that the consequences of that infringement would cause damage to the environment with a degree of seriousness that can justify a judicial intervention. The “manifest”

threshold of the requirement may however not be overstated in view of article 9, para. 3, of the Aarhus Convention.

(3) The judge cannot take over policymaking of the legislative and executive powers and must exercise restraint when imposing policy measures on the government. The regulatory freedom of the authorities must be respected, which means that the judge cannot oblige the government not to take this or that particular measure if it turns out that this measure is not the only way in which the government can bring back legality.

(4) A claim for a court order to prohibit the defendant from taking any measure of which it is statistically expected that it would lead to the exceedance of limit values is too imprecise to be granted. Moreover, it is not made plausible that the Flemish Region intends to take measures that are likely to lead to the exceeding of limit values.

(5) The annual limit value for NO₂ of Directive 2008/50/EC on ambient air quality and cleaner air for Europe is an environmental standard that is part of the Belgian legal order. The violation can be established by the judge and on that basis measures may be imposed on the Belgian authorities, in particular the duty of Article 23 of the Air Quality Directive to draw up an air quality plan.

(6) With regard to the concrete implementation of air quality plans and the measures to be adopted, Member States have a margin of discretion. The Air Quality Directive does require that when developing air quality plans, a weighing of interests is made between, on the one hand, the objective of reducing the risk of pollution and, on the other hand, other public and private interests, in which technical difficulties, socio-economic and budgetary constraints can play a role.

(7) When, in the context of an air quality assessment according to the method laid down in the Air Quality Directive, additional information is obtained through indicative measurements and / or modelling techniques that meet the standard and criteria of the Air Quality Directive, this information must be included in the assessment, including the question whether the limit values are respected. That information must be communicated to the European Commission. A violation of the Air Quality Directive can therefore be established if it appears that a Member State has applied indicative measurements and modelling techniques but has not passed this information on to the European Commission. A violation can also be established when it appears that the data obtained through these additional techniques show that limit values were not respected.

(8) The violation of the failure to communicate to the European Commission the information obtained by modelling techniques that comply with the Air Quality Directive requires that an order is given to the Flemish Region, namely an order that such data and communicated in accordance with Article 27 of the Air Quality Directive and its Implementation Decision to the European Commission within a period of 3 months.

(9) From the information obtained by the air quality modelling techniques it has been found that there are frequent and permanent annual limit value exceedances for NO₂, spread over various locations in all six zones and agglomerations in which the Flemish Region is divided. It is certain that the obligation imposed by the Air Quality Directive to respect the annual limit value for NO₂ was violated in all zones and agglomerations in which the Flemish Region was divided for the measurement of the NO₂ values. The documents submitted show that the measures taken by the Flemish Region and the policy pursued are not sufficient to avoid these exceedances, nor that they are of a nature to reduce air pollution below the annual limit value within the shortest possible period. An order must be given to draw up an air quality plan, in accordance with the requirements of art. 23 of the Air Quality Directive, in particular the duty to keep the period of exceedances as short as possible. That plan must apply to the entire territory of the Flemish Region. The air quality plan 2017, which is limited to the Antwerp agglomeration, is not sufficient and must be reassessed and adjusted in the light of the data obtained through modelling. A period of one year to do this is appropriate. This obligation must be coupled with a penalty payment per day of delay.

(10) The claim with regard to the content of the desired air quality plan is manifestly unfounded. This also applies to the claim for taking such measures, regardless of any air quality plan.

9. <i>Link address</i>	https://www.rechtbanken-tribunaux.be/sites/default/files/public/content/download/files/greenpeace_vlaamsgewest_101018.pdf http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/Belgium_2018_Greenpeace_AirQuality_Judgment.pdf
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