

SPECIES PROTECTION

Belgian Report

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I. General background

Nature conservation, including species protection, is in Belgium mainly a regional competence, with differences in legislation between the Flemish, Walloon and Brussels Capital Region as a result. An exception must be made as the protection of species in the Belgian part of the North Sea is concerned (which is a federal competence) as well as for the import, export and transit of exotic flora, fauna and their carcasses (that is also a federal competence).¹ We will focus in this report on Flemish regional law.

Species protection is based on a mixture of nature conservation law and hunting and fishing regulations both on the federal level (marine environment) and on the regional level.²

II. Introductory questions

The *EU Environmental Implementation Review Country Report for Belgium*³ stresses that land conversion (to urban, industrial, agricultural, transport or tourism purposes) and intensification of agriculture are causes of biodiversity loss, followed by ecological fragmentation and pollution as well as related eutrophication, acidification, soil degradation and noise perturbation.⁴ Further threats include the direct and indirect overexploitation of natural resources including fish stocks, groundwater extraction and the drying up of wetlands. Disruption caused by invasive alien species increase the effect of the above drivers. Marine species and sea bottom habitats are under heavy pressure from fishing bycatches and in particular from beam trawling, the most common fishing practice in Belgian marine waters. Overall fishing activities have resulted in a sharp decline in long living and slowly reproducing species such as sharks and many habitat structuring species. In the Belgian coastal waters, invasive alien species also constitute a predominant proportion of the marine fauna.

The Conservation Status of Habitats and Species was qualified as follows in that report⁵:

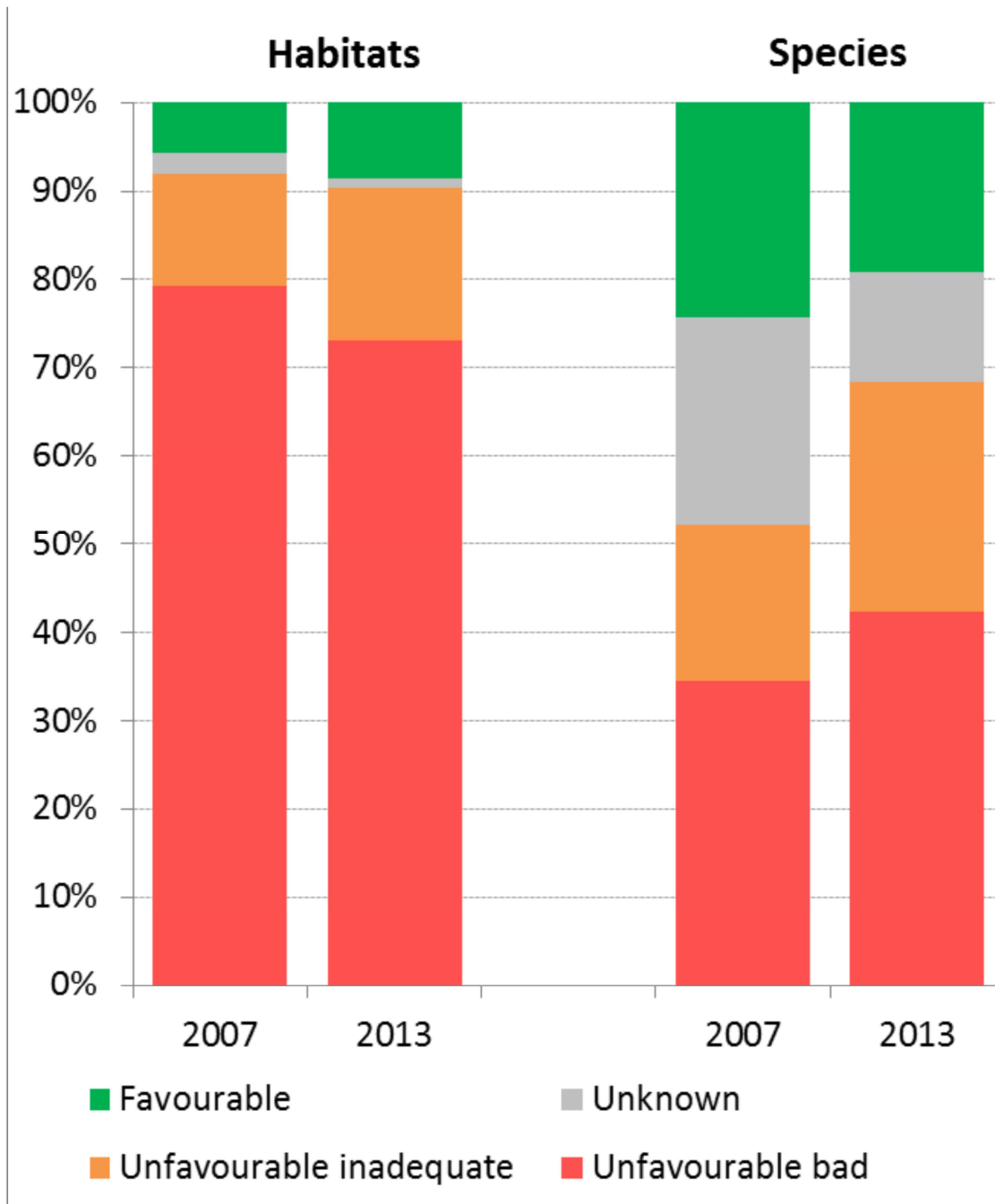
¹ Art. 6, § 1, III, 2°; Special Act of 8 August 1980 on State Reform; L. Lavrysen & B. Seutin, "De landinrichting en het natuurbehoud" in B. Seutin & G. van Haegedoren, *De bevoegdheden van de gewesten*, Bruges, die Keure, 2016, 68-73, 80-81, 82-83.

² H. Schoukens, K. De Roo & P. De Smedt, *Handboek natuurbehoudsrecht*, Mechelen, Wolters Kluwer Belgium, 2011, 364-441, 491-537; E. De Pue, L. Lavrysen & P. Stryckers, *Milieuzakboekje 2016*, Mechelen, Wolters Kluwer Belgium, 1017-1039, 1141-1184.

³ http://ec.europa.eu/environment/eir/pdf/report_be_en.pdf

⁴ Belgian National Focal Point to the Convention on Biological Diversity, 2013. Biodiversity 2020 – Update of Belgium's National Biodiversity Strategy. Royal Belgian Institute of Natural Sciences, Brussels - <https://www.cbd.int/doc/world/be/be-nbsap-v2-en.pdf>

⁵ See also: https://circabc.europa.eu/sd/a/eaef99b0-0845-4d76-acd5-ab5287f84ba7/BE_20140528.pdf



Flanders is a densely populated, dynamic region with a highly fragmented landscape. As a result, the state of nature is strongly under pressure. About half of the wild plants and animals are on the "Red List"⁶ Approximately 30% of the species is highly vulnerable, or threatened with extinction. About 7% are already extinct, i.e., not seen since 1980. The main causes of these negative trends are the loss of suitable habitats and reduced environmental quality.

Nature protection is part of environmental law and thus the Decree of 5 April 1995 containing general provisions relating to environmental policy is applicable⁷. That Decree contains the basic principles of environmental policy in the Flemish region of Belgium that have been

⁶ <https://www.inbo.be/nl/rode-lijsten-vlaanderen>

⁷ Art. 6 Decree of 21 October 1997 concerning nature protection and the natural environment (further referred to as 'the Nature Protection Decree').

taken from the EC Treaty: prevention, precaution, integration, combating environmental pollution at source, polluter pays. To those principles the standstill principle has been added⁸. Additionally in the Nature Protection Decree one can find the principle of ecological compensation⁹.

III. Directive 92/43/EC

1. Surveillance of conservation status (art. 11 and 14 HD)

The monitoring provisions of the Habitats Directive have been transposed in Artt. 5- 7 of the Flemish Species Protection Order of 1 September 2009¹⁰. This task has been assigned to the *Institute for Nature and Forest (INBO)*.¹¹ Supervision and enforcement, including taking remedial action, is a task of the *Agency for Nature and Forest (ANB)*¹². Information about practice can be found on their respective websites.¹³

2. Conservation of species (art. 12-16 HD)

2.1. System of strict protection for animal and plant species(Artt. 12-13 HD)

Before the entry into force of the Flemish Species Protection Order of 1 September 2009 the species protection was subject to different executive orders, based on different Acts (Nature Protection Act, Hunting Act, River Fishing Act, ...) , that contained some lacuna's so that the relevant provisions of the Birds- and Habitats Directive were not fully implemented¹⁴. The Flemish Species Protection Order of 1 September 2009 is based on the Nature Protection Decree. The relevant provisions of the Birds¹⁵- and Habitats¹⁶ Directive haven been transposed in a clear and precise way in the Artt. 10-18 as the species protected by those Directives are concerned.¹⁷

Various species protection programs have been developed in consultation with the stakeholders and enacted by the Minister in view of bringing the species concerned in a favorable state of conservation within a period of 5 years.¹⁸

As "deliberate" is concerned it means that the act has been committed knowingly and willingly. It's the "*dolus generalis*" concept of Belgian penal law.¹⁹ As "disturbance" is concerned, according to the Explanatory Report of the Flemish Species Protection Order, it

⁸ Art. 1.2.1, § 2, Decree of 5 April 1995 containing general provisions relating to environmental policy.

⁹ H. Schoukens, K. De Roo & P. De Smedt (2011), 49-51.

¹⁰ Besluit van de Vlaamse Regering van 1 september 2009 met betrekking tot soortenbescherming en soortenbeheer ("het Soortenbesluit").

¹¹ H. Schoukens, K. De Roo & P. De Smedt (2011), 375-377; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1040-1041.

¹² <https://www.natuurenbos.be/>

¹³ <https://www.inbo.be/nl/thema>

<https://www.natuurenbos.be/beleid-wetgeving/natuurinspectie/takenpakket>

¹⁴ H. Schoukens, K. De Roo & P. De Smedt (2011), 364-366.

¹⁵ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

¹⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended).

¹⁷ H. Schoukens, K. De Roo & P. De Smedt (2011), 378-389; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1020- 1028.

¹⁸ Port of Antwerp, Beaver, Smooth snake, Montagu's harrier, Hamster, Grayling, Spadefoot, Corncrake, Bittern; see: <https://www.natuurenbos.be/SBP>; H. Schoukens, K. De Roo & P. De Smedt (2011), 407-413.

¹⁹ H. Schoukens, K. De Roo & P. De Smedt (2011), 379; Court of Appeal, Antwerp, 18 Februari 2010, TMR 2011, 706-709

should be interpreted as a disturbance with a measurable and demonstrable impact on the conservation status of a species.²⁰

2.2. *Measures to control taking of and the exploitation of certain animal species of Community interest*

The Flemish Hunting Decree of 24 July 1991 is based on the wise use principle and aims a “sustainable wildlife management”: species and their habitats may not be threatened in their survival, the game should also be available for future generations, hunting may not disturb biodiversity and ecosystems and the interests of other users of open space must be respected. Hunting rights are part of property rights and one may not hunt on properties of someone else without his permission. Everyone who like to use hunting rights must introduce every year a plan indicating the concerned hunting grounds (at least 40 ha closely-knit) with the District Commissioner.²¹ Individual hunters may associate themselves in wildlife management units. Hunting is subject to passing a hunting exam and obtaining a hunting permit. Hunting is only allowed of those species (39) mentioned in the Hunting Decree and indicated in more detail by Flemish government (actually 14 species) in certain periods and area’s and using the prescribed hunting methods.²²

Wolf, disappeared for a long time in Flanders²³ and may not be hunted for the moment, if he would appear in the Flemish region.

Also river fishing is regulated. Fishermen (and woman) need a permit and only those species indicated by Flemish government may be fished during the specified periods. Furthermore there are other measures to restrict fishing and only the fishing tackle allowed by the Government may be used.²⁴ Trapping of birds is since 2003 completely forbidden.²⁵

2.3. *The prohibition to use of indiscriminate means*

This interdiction has been transposed in Art. 16 of the Flemish Species Protection Order.²⁶

2.4. *Derogations*

Article 16 of the Habitats Directive has been transposed correctly and nearly literally in the Artt. 19-23 of the Flemish Species Protection Order, taking the case law of the ECJ into account.²⁷ Literature follows the interpretations given by the ECJ and the guidance given by the European Commission on all of the relevant aspects.

²⁰ H. Schoukens, K. De Roo & P. De Smedt (2011), 381.

²¹ Because last year those plans have been made public in a digital way (<https://www.natuurenbos.be/beleid-wetgeving/natuurgebruik/jacht/waar/jachtplan>) one has discovered that those plans often include properties of which the owner has not given its approval to hunt on it. *Vogelbescherming Vlaanderen* is campaigning against this situation: <http://www.schietinactie.be/#9/50.9965/4.4096>

²² H. Schoukens, K. De Roo & P. De Smedt (2011), 501-512; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1141-1158. In the past the decisions to open hunting of certain species were taken on a periodical basis and those regulations have often been challenged with the Council of State and from time to time partially annulled.

²³ Recently a wolf was spotted twice in the Walloon Ardennes.

²⁴ H. Schoukens, K. De Roo & P. De Smedt (2011), 530-536; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1169-1173

²⁵ E. De Pue, L. Lavrysen & P. Stryckers (2016), 1030.

²⁶ H. Schoukens, K. De Roo & P. De Smedt (2011), 387-388; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1025-1026.

²⁷ H. Schoukens, K. De Roo & P. De Smedt (2011), 389-407; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1026-1028.

2.5. *Re-introducing species/non-native species* (Art. 22 HD)

A derogation of the conservation measures can also be given in view of re-introduction of species, in the framework of a species protection program or by way of a specific derogation in case of translocation.²⁸ Beavers have been reintroduced in the Walloon Ardennes and they have meanwhile also colonized some areas in Flanders.²⁹ Re-introduction is a contested approach in circles of ecologists.³⁰ The *Institute for Nature and Forest (INBO)* is doing some research for some species of flora and fauna (Orchids, Burbot, Weatherfish) and some local re-introductions have been positively (Natterjack Toad, Common Spadefoot) or negatively (Badger) advised.³¹

As non-native species are concerned, there is a specific provision in Art. 21, § 2, transposing art. 22 (b) of the Habitats Directive.³²

2.6. *Overlapping between Annexes*

There is no relevant practice, nor particular legal requirements on the simultaneous application of derogations under Articles 6 (4) and 16 of the Habitats Directive.

IV. **Birds Directive**

Artt. 5 to 9 of the Birds Directive have been transposed by the provisions of the Flemish Species Protection Order, discussed above.³³

V. **Enforcement**

a. *Responsible bodies*

In the Flemish Region the main enforcement body is the Agency for Nature and Forest (ANB)³⁴. Its nature inspectors and some other staff are competent to supervise regional nature conservation law. As CITES is concerned supervision of import, export and transit of protected species is mainly entrusted to the federal Cites Administration and to Customs.³⁵ In case of infringements in violation of penal law (that is the bulk of the legislation) also the local and federal police are competent.

b. *Sanctions*

In the Flemish Region the Decree of 5 April 1995 containing general provisions relating to environmental policy ("DABM") provides both for criminal and administrative sanctions. Most of the violations of nature conservation law are considered as crime that can be sanctioned with criminal or alternative administrative sanctions, only some minor violations have been

²⁸ Art. 20, § 1, 6°, and 21 Flemish Species Protection Order.

²⁹ <https://waarnemingen.be/soort/maps/375>

³⁰ O. Dochy, D. Bauwens, T. Adriaens, S. Vrielynck, D. Maes & K. Decler, *Prioritaire en symboolsoorten voor soortbescherming in West-Vlaanderen*, INBO, Brussels, 2007, 121-124.

³¹ <https://www.inbo.be/nl/thema/beleid/soortenbeleid/herintroducties>

³² H. Schoukens, K. De Roo & P. De Smedt (2011), 400; E. De Pue, L. Lavrysen & P. Stryckers (2016), 1026-1028.

³³ H. Schoukens, K. De Roo & P. De Smedt (2011), 369-407.

³⁴ <https://www.natuurenbos.be/natuurinspectie>

³⁵ <http://www.health.belgium.be/nl/dieren-en-planten/dieren/bedreigde-dieren/cites/hoe-werkt-cites-belgie>

defined as administrative environmental offenses³⁶ that can only be sanctioned with administrative fines. In cases of crimes it is up to the public prosecutor to decide which sanctioning track is followed. In case of criminal prosecution before the criminal court the sanctions that can be imposed goes from 1 month to 2 years of imprisonment and/or fines from € 700 to € 1.750.000. Some serious breaches of nature protection law can however be punished with up to 5 years of imprisonment and fines up to € 3.500.000.³⁷ In case the public prosecutor decides not to prosecute an alternative administrative fine can be imposed of maximum € 1.750.000.³⁸ For the minor administrative infringements the maximum administrative fine is € 350.000. These sanctions can be combined with the forfeiture of illegal benefits, the seizure of the equipment used for the crime and restoration measures. Effectiveness depends on the type of infringement, the perpetrator, his track record, the prospects of his reintegration, the costs for the authority and the time and expenses needed to complete a case successfully.³⁹

c. *Monitoring incidental capture and killing*

According Art. 12 (4) of the Habitats Directive Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned. This provision has been transposed through Art. 6 of the Flemish Species Protection Order. The task has been assigned to the *Agency for Nature and Forest (ANB)*.⁴⁰ It seems that incidental capture and killing in the Flemish region occurs very seldom and concern exclusively sea mammals.⁴¹

d. *Cases*

In the appendices two important cases are summarized. The first one is from the Court of Appeal of Ghent and is about illegal trade in protected and endangered birds that has been considered as a form of organized crime with serious sanctions as a consequence.

The second one is from the Constitutional Court and is about the right of ENGO's to claim damages in criminal cases in the environmental field. This case law has been followed since by criminal judges, particular in the field of species protection.⁴²

e. *ELD Directive*

The Environmental Liability Directive has been transposed in the Flemish Region through Title XV of the Decree of 5 April 1995 containing general provisions relating to environmental policy is applicable (as amended by the Decree of 21 December 2007).⁴³ To our knowledge that Title, that is following very closely the wording of the Directive itself, has not played an important role in species protection.

³⁶ They are listed in Annexes XXVII, XXVIII, XXXIX, XXX and XXXI of the Executive Order of the Flemish Government of 12 December 2008 (as amended).

³⁷ E. De Pue, L. Lavrysen & P. Stryckers (2016), 167, 169-171.

³⁸ E. De Pue, L. Lavrysen & P. Stryckers (2016), 167, 160-165

³⁹ C.M. Billiet, "Lappendekens in de rechtshandhaving. Naar een publiekrechtelijke sanctionering in het omgevingsrecht", in C.M. Billiet & L. Lavrysen (eds.), *In de roos. Doeltreffende sanctionering van omgevingsrecht*, Brugge, die Keure, 2015, 1-77.

⁴⁰ H. Schoukens, K. De Roo & P. De Smedt (2011), 375-377.

⁴¹ Vlaams Parlement, 2010-2011, Stuk 1249/1, p. 4.

⁴² E.g. Correctionele rechtbank West-Vlaanderen, afdeling Brugge, 17 februari 2016, *TMR* 2016, 606-609; Correctionele rechtbank Oost-Vlaanderen, afdeling Gent, 12 april 2016, *TMR* 2016, 611-614.

⁴³ E. De Pue, L. Lavrysen & P. Stryckers (2016), 120-142.

VI. SEA, EIA, Appropriate Assessment

a. SEA/EIA/Proper assessment

As in the Walloon Region, regulations of the kind at stake in Case C-20/15⁴⁴, have so far been considered in the Flemish Region as not being plans or programs in the sense of Directive 2001/42/EC and thus have not been submitted to SEA. As wind farms are concerned, the provinces have been invited to draft “Wind Plans”⁴⁵, but because those plans or not imposed (or regulated) by law, they have not been the subject of SEA neither. A general study on “Effects of wind turbines on fauna in Flanders”, including recommendations⁴⁶, has however been carried out. Some individual larger wind farm projects have been the subject of an EIA.⁴⁷ Impacts on species are an important issue in those EIA’s that will contain than also a proper assessment.⁴⁸ As windmill farms at sea are concerned, the environmental impacts of those have been assessed, especially in relation to species protection, during the mandatory EIA procedure that includes also a proper assessment⁴⁹. They are also monitored intensively as the Belgian part of the Nord Sea is concerned.⁵⁰

b. Permits

Art. 16 of the Nature Protection Decree provides for a “Nature Check” (“*natuurtoets*”). In case of activities subject to a permit, the competent authority must ascertain that avoidable damage to nature will not occur by refusing the permit or by imposing reasonable conditions to prevent or restrict the damage or, when that is not possible, to compensate for it. This nature check plays an important role in the case law of the Council of State. In case such a check has not been performed or has not been well performed as appears from a defective reasoning, the Council will annul such permit.⁵¹

c. Activities not subject to permit

There is some case law sanctioning activities like motocross or culling of a watercourse on, or with consequences for a site, were protected species occur, because a destruction or

⁴⁴ CJEU, 27 October 2016, C-290/15, *D’Oultremont and Others*

⁴⁵ <http://www.energiesparen.be/groene-energie-en-wkk/nieuwe-projecten>

⁴⁶ <https://www.vlaanderen.be/nl/publicaties/detail/effecten-van-windturbines-op-de-fauna-in-vlaanderen-onderzoeksresultaten-discussie-en-aanbevelingen-effects-of-wind-turbines-on>

⁴⁷ EIA is in the Flemish Region required in case the project will count 20 or more turbines or “4 or more wind turbines, which have a significant impact, or may have such an impact on a particular protected area”. Smaller projects can be made subject to EIA on a case by case basis (screening), but we have not found such cases in the database.

⁴⁸ E.g. <https://mer.lne.be/merdatabank/uploads/merntech2335.pdf>

⁴⁹ See the EIA documentation: http://www.mumm.ac.be/NL/Management/Sea-based/windmills_docs.php

⁵⁰ https://emis.vito.be/sites/emis.vito.be/files/articles/1/2012/effecten_windmolenparken_zee_2012.pdf

⁵¹ H. Schoukens, K. De Roo & P. De Smedt (2011), 110-115; E. De Pue, L. Lavrysen & P. Stryckers (2016), 934-93.

disturbance is considered to be deliberate when this follows from the material act and the perpetrator is aware of the consequences of his acts for the protected species.⁵²

Besides that, the Nature Protection Decree contains a “nature duty of care” (“*natuurzorgplicht*”). Manual interventions or interventions using certain equipment or agents with an impact on nature are subject of that duty of care. This duty of care means that all reasonable measures should be taken to prevent or to limit destruction or damages and compensatory measures should be taken if prevention is reasonably not possible.⁵³

VII. Agriculture and forestry

The Nature Protection Decree is a compromise between nature protection and agriculture. The freedom of operation (of agricultural enterprises) has been warranted in different ways: some of the nature protection instruments are only applicable in the so called “green” areas of the land use plans, the primacy of land use planning above nature protection is recognized to some extent, the operation in accordance with the land use planning is recognized and some exceptions in favor of agriculture have been introduced. But this is only true for the proper domestic conservation measures, not for those deriving from the Birds- and Habitats Directive.⁵⁴

Recently the designation of the “historically permanent grasslands” in view of their conservation⁵⁵ and the “programmatische aanpak stikstof”⁵⁶ for Natura 2000 areas were at the center of intensive debate between nature protection organizations and agriculture.

There are some financial support mechanisms for farmers that take nature conservation measures while farming.⁵⁷ Between 2000 and 2014 the total area of agricultural land concerned by agro-environmental measures has risen from around 32.000 ha in 2000 to 136.000 in 2006, and went then down again to 45.000 ha in 2014.⁵⁸

The Nature Protection Decree contains also provisions on management agreements. Flemish government can provide compensation for land owners that agree to take some conservation measures. An Executive Order provides such a system for professional farmers.⁵⁹

VIII. Role of citizens and NGO's

As legislations, regulations and policies are concerned there is no organized public participation procedure to follow. Flemish Government is however in principle obligated to

⁵² H. Schoukens, K. De Roo & P. De Smedt (2011), 379-380

⁵³ H. Schoukens, K. De Roo & P. De Smedt (2011), 103-110; E. De Pue, L. Lavrysen & P. Stryckers (2016), 932-934.

⁵⁴ E. De Pue, L. Lavrysen & P. Stryckers (2016), 918-922.

⁵⁵ E. De Pue, L. Lavrysen & P. Stryckers (2016), 922-923; <https://www.natuurenbos.be/beleid-wetgeving/beschermde-gebieden/historisch-permanente-graslanden-hpg>

⁵⁶ <https://www.natura2000.vlaanderen.be/pas>

⁵⁷ <http://lv.vlaanderen.be/nl/subsidies/vlif-steu/niet-productieve-investeringssteun>

⁵⁸ <http://lv.vlaanderen.be/nl/voorlichting-info/feiten-cijfers/landbouwcijfers>

⁵⁹ E. De Pue, L. Lavrysen & P. Stryckers (2016), 922-923; H. Schoukens, K. De Roo & P. De Smedt (2011), 633-636.

seek the advice of the Environment and Nature Council (“MINA Raad”) on draft legislations and policies. It is a multi-stakeholder council composed of 24 members, of which 8 representatives of ENGO’s.

As planning is concerned, for those plans that have been regulated by law, in most instances public participation is provided in particular for those plans and programs that require SEA.⁶⁰

The Constitutional Court held in its judgment n° 57 /2016 of 29 April 2016 that not only plans and programs with a potential negative impact on the environment should be subject to public participation, but also, in the light of Art. 7 of the Aarhus Convention, read in conjunction with Art. 23 of the Constitution, plans and programs that are beneficial for the environment. The Court annulled the possibility to adopt the Flemish Natura 2000 program, the programs for the reduction of specific environmental pressures and the nature management’s plans without public participation.⁶¹ Meanwhile the Nature Protection Decree has been amended to provide for that public participation.⁶²

As access to justice is concerned, ENGO’s will normally have standing to challenge acts of parliament, regulations, plans en programs and projects before, respectively the Constitutional Court⁶³, the Council of State⁶⁴ or the Council for Permit Disputes⁶⁵ and, as has been explained, they can now act also as civil party in criminal proceedings⁶⁶ and may claim not only restoration measures, but also damages.⁶⁷

IX. Direct applicability

Case law has accepted the direct applicability of various provisions of the Birds and Habitats Directive.⁶⁸

⁶⁰ H. Schoukens, K. De Roo & P. De Smedt (2011), 26-27, 553; E. De Pue, L. Lavrysen & P. Stryckers (2016), 50-53, 83-86.

⁶¹ Constitutional Court, n° 57/20216, 29 April 2016, *lv Alaerts- Jordens and Others*, www.const-court.be

⁶² Decree of 27 January 2017.

⁶³ Constitutional Court, n° 125/2016, 6 Oktober 2016, *vzw Aktiekomitee Red de Voorkempen e.a., vzw Natuurpunt, Vereniging voor natuur en landschap in Vlaanderen e.a., A.M. e.a.*

⁶⁴ Council of State, n° 233.796, 11 February 2016, *VZW Vogelbescherming Vlaanderen*; n° 233.797, 11 February 2016, *VZW Vogelbescherming Vlaanderen*; n° 233.653, 27 January 2016, *L'association sans but lucratif Conseil cynégétique des Deux Ourthes*; n° 232.181, 14 September 2015, *a.s.b.l. Association du Val d’Aublève, Lienne et Affluents (AVALA)*

⁶⁵ Raad Vergunningsbetwistingen, nr. S/1516/0352, 15 December 2015, *TMR* 2016, 405.

⁶⁶ Cour de cassation, 11 June 2013, Nr. P.12.1389.N, *P.P., P.S.L.V. / Gewestelijk Stedenbouwkundig Inspecteur, Milieusteunpunt Huldenberg*, *TMR* 2013, 392.

⁶⁷ Corr. Oost-Vlaanderen (afd. Gent) 12 april 2016; Corr. West-Vlaanderen (afd. Brugge) 17 februari 2016.

⁶⁸ L. Lavrysen, “Chapter 10. Belgium” in J.H. Jans, R. Macrory & A.-M. Moreno Molina, *National Courts and EU Environmental Law, The Avosetta Series (10)*, Groningen, Europa Law Publishing, 2013, 227-228.

Court of Appeal, Ghent, 7 May 2015 & 18 March 2016	
1. Key issue	Rights of ENGO's in Criminal Proceedings
2. Country/Region	Belgium
3. Court/body	Ghent, Court of Appeal
4. Date of judgment /decision	7 May 2015 & 18 March 2016
5. Internal reference	Openbaar Ministerie, Vzw Vogelbescherming Vlaanderen & Bouwbedrijf Everaert Bvba v. H.v.T, A.C. & E.v.T.
6. Articles of the Aarhus Convention	Art. 9(3) – Art 9 (4)
7. Key words	CITES - Enforcement of Environmental Criminal Law - Rights of ENGO – Civil Party – Moral Damages
<p>8. Case summary</p> <p>On 27 June 2014, the Criminal Court of First Instance of East Flanders (Ghent division) in Belgium pronounced judgement in an important case of illegal trade in protected and endangered birds. The case is the result of a long and extensive judicial inquiry, including international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and The Netherlands. Four defendants have been found guilty of forgery of breeder's declarations and CITES-certificates regarding birds (of prey) listed in Annex A of the EU CITES-regulation 338/97 (which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora within the European Union). Eggs and chicks of the birds, mainly birds of prey, were stolen from the wild among others in the south of France or Spain, and handed over to collaborators responsible for hatching out. The young birds were then hand-reared and ringed. Through forging of rings and breeder's declarations, the defendants obtained CITES-certificates for captive-born and bred species, which allowed them to commercialize the birds in spite of the general prohibition with respect to Annex A species.</p> <p>The birds species included among others Egyptian Vulture (<i>Neophron percopterus</i>), African Fish Eagle (<i>Haliaeetus vocifer</i>), Imperial Eagle (<i>Aquila heliaca</i>), Bald eagle (<i>Haliaeetus leucocephalus</i>), Bonelli's Eagle (<i>Aquila fasciata</i>), Golden Eagle (<i>Aquila chrysaetos</i>), Booted Eagle (<i>Hieraetus pennatus</i>), several falcon species such as Peregrine (<i>Falco peregrines</i>), Merlin (<i>Falco columbarius</i>), Hobby (<i>Falco subbuteo</i>), Red-footed Falcon (<i>Falco vespertinus</i>), Lesser Kestrel (<i>Falco naumanni</i>), Black-winged Kite (<i>Elanus caeruleus</i>), Red Kite (<i>Milvus milvus</i>), Black Kite (<i>Milvus migrans</i>) but also Spoonbill (<i>Platalea leucorodia</i>), Great Bustard (<i>Otis tarda</i>), Great Grey Owl (<i>Strix laponica</i>), Snowy Owl (<i>Nyctea scandiaca</i>), Short-eared Owl (<i>Asio flammeus</i>).</p> <p>The four defendants were also found guilty of participating in a criminal organisation with international branches in Spain, the United Kingdom, Austria, Germany, France and The Netherlands. The purpose of this criminal organisation was the withdrawal of protected bird species from their habitats, obtaining forged CITES-certificates and finally, marketing the birds. Typical of the criminal organisation was a clear hierarchy and division of tasks, the use of (police) officials and the creation of an animal zoo to obtain credibility and access to the market. The defendants were also convicted of fraud regarding CITES export permits, the failure to keep a CITES-register and the use of illegal traps and nets.</p> <p>The birds of prey commerce was extremely profitable. Bonelli's Eagles (<i>Aquila fasciata</i>) were sold for 10.000 euro, Bald Eagle (<i>Haliaeetus leucocephalus</i>) for 5.000 euro, African Fish Eagle (<i>Haliaeetus vocifer</i>) for 6.000</p>	

euro and Booted Eagle (*Hieraaetus pennatus*) for 5.000 euro.

The leading defendant and his wife were convicted of the laundering of the profits through a contractors company. The court underlined that international trade in endangered plant- and animal species has approached a scale and lucrativity comparable to international drugs and arms trafficking. The defendants took advantage of the lack of political priority and thus enforcement of the CITES-regulations. In the decision the courts stresses that the defendants committed a direct and irreversible assault on biodiversity. For profit, the defendants seriously undermined national and international efforts to preserve and protect these already vulnerable bird species.

The four defendants were sentenced to 4 years (1 year suspended), 2 years (1 year suspended), 18 months (suspended) and 1 year (suspended). The court also imposed fines of 90.000 euro, 30.000 euro and 12.000 euro. The court confiscated 835.800 euro of illegal gains of the trade (including real estate). All seized birds were confiscated and entrusted to the Belgian CITES-authority.

The Bird Protection Organisation was recognised as civil party, but as its main claimed damages were considered as pure moral, only a symbolic 1 euro compensation for moral damages was awarded.

The Court of Appeal of Ghent has in its judgement of 7 May 2015, given *in absentia* of the main defendants, confirmed the judgment of the Court of First Instance, except on one aspect. The Court found that the Bird Protection Organisation was entitled to the full compensation of its moral damages. The Court judged that those moral damages could be assessed *ex aequo et bono* to be € 15.000. So the total damages to pay to the Bird Protection Organisation have been increased from € 251 to € 15.250.

In its final judgement of 18 March 2016 on opposition the Court of Appeal has confirmed its judgement in nearly all aspects.

The Supreme Court has rejected on 11 October 2016 most of the appeal lodged against that judgement, except on one minor technical point (the increase of the forfeiture of benefits by the Court of appeal in comparison with the Criminal Court of First Instance).

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9. References	Corr. Gent, 27 June 2014, <i>Tijdschrift voor Milieurecht</i> , 2014, 330-367 Court of Appeal, Gent, 7 May 2015, nyr Court of Appeal, Gent, 18 March 2016, <i>Tijdschrift voor Milieurecht</i> , 2016, 546-574. Cour de cassation, 11 October 2016, <i>Tijdschrift voor Milieurecht</i> , 2017/2
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Country:	BELGIUM
Title (English):	Constitutional Court, N° 7/2016, 21 January 2016
Date of document:	2016.01.21
Type of document:	Judicial decision of a superior court
Court name:	Constitutional Court
Seat of court:	Brussels
Court jurisdiction:	Belgium
Justice(s):	Full Court
Reference number:	N° 7/2016
Available Website:	www.const-court.be
Link to the text online:	http://www.const-court.be/public/n/2016/2016-007n.pdf (Dutch) http://www.const-court.be/public/f/2016/2016-007f.pdf (French) http://www.const-court.be/public/d/2016/2016-007d.pdf
Number of pages:	12
Language of document:	Dutch / French/German
Abstract:	<p>In a criminal case pending before the Criminal Court of East Flanders, Ghent Division (Belgium) concerning illegal hunting practices, a bird protection organisation (<i>Vogelbescherming Vlaanderen</i>) is acting as a civil party on the basis of the case law of the Belgian Supreme Court (<i>see BELGIUM: PP and PSLV v. Gewestelijk Stedenbouwkundig Inspecteur and M vzw</i>)⁶⁹ and is claiming 1.900 euro for material and moral damages. That Court has established case law according which it is impossible to award the bird protection organisation a sum per bird killed as they belong to no-one. In the absence of statutory law, the moral damage of an environmental NGO can according that Court only be compensated symbolically by awarding 1 euro compensation.</p> <p>The Bird Protection Organisation, argued that in doing so, it was discriminated in comparison with other legal and natural persons that are entitled to receive full compensation of their moral damages. The Court referred that constitutional issue to the Constitutional Court for a preliminary ruling.</p> <p>The Constitutional Court comes indeed to the conclusion that the provision of the Civil Code (Art. 1382) concerning fault based liability is violating the Arts. 10 and 11 of the Constitution if it is interpreted in such a way that Environmental NGO's can only claim one symbolic euro as compensation for moral damages. The Court argues that the moral disadvantage an environmental NGO may suffer due to the degradation of the collective interest in the defence of</p>

	<p>which it is established, is in several respects special. In the first place that disadvantage do not coincide with the ecological damage caused, since ecological damage constitutes damage to nature, so that the whole of society is harmed. The damage concern indeed goods such as wildlife, water and air, belonging to the category of <i>res nullius</i> or <i>res communes</i>. Furthermore, the damage to non-appropriated environmental components can as a rule not be estimated with mathematical precision, because it involves non-economic losses. Under civil liability judges must assess the damage <i>in concreto</i> and they may base it on equity if there are no other means to determine it. The compensation must as much as possible reflect reality, even in case of moral damage. It should be possible that in case of moral damage of an environmental NGO the judge estimate the damage <i>in concreto</i>. He should take into consideration the statutory objectives of the NGO, the extend of its activities, its efforts in view of realising its objectives and the seriousness of the environmental damage at stake. Limiting the moral damage to one symbolic euro is in that respect not justified. It would harm in a disproportionate manner the interests of environmental NGOs that play an important role in guaranteeing the constitutional right of the protection of a healthy environment. So the Court is promoting another interpretation. And the Court to conclude that <i>“Article 1382 of the Civil Code does not infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 23 and 27 of the Constitution and Article 1 of the First Additional Protocol of the European Human Rights Convention in the interpretation that it does not preclude to grant to a legal entity pursuing a collective interest, such as the protection of the environment or specific components of it, a compensation for moral damages to that collective interest, that goes beyond the symbolic sum of one euro.”</i> That interpretation, that is consistent with the Constitution, is binding for the referring judge and in fact also for other judges confronted with similar cases. The judgement should put an end to diverging approaches in the case law. Some Courts have awarded in the past already full compensation for moral damages of environmental NGOs (see e.g. CITES crimes - Court of Appeal, Ghent, 7 May 2015)⁷⁰.</p>
Subject(s):	Rights of ENGOs
Keyword(s):	Criminal Proceedings – Plaintiff – Environmental NGO – Standing – Right to claim moral damages - Constitutionality

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