

The Aarhus Convention at Ten

Interactions and Tensions between Conventional
International Law and EU Environmental Law

Edited by Prof. Marc Pallemmaerts

The Avosetta Series (9)

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Voor zover het maken van kopieën uit deze uitgave is toegestaan op grond van artikel 16h t/m 16m Auteurswet 1912 *juncto* het Besluit van 27 november 2002, Stb. 575, dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3060, 2130 KB Hoofddorp). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (artikel 16 Auteurswet 1912) dient men zich tot de uitgever te wenden.

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Typeset in Scala and Scala Sans, Graphic design by G2K Designers, Groningen/Amsterdam

NUR 828; ISBN 978-90-8952-048-7

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Implementation of the Aarhus Convention in Belgium: Some Elements

Michel Delnoy



I Introduction

It seems reasonable to consider that the current assessment of Belgian law with regard to the requirements of the Aarhus Convention is positive overall:

- Public participation has been sanctioned by law¹ for a long time. The relationship between the administration and individuals has undergone a marked transformation over the past twenty years. The first stage of this transformation was the establishment, in 1991, of a formal obligation for public authorities to provide a written statement of the reasons for their administrative decisions.² Two years later, a new provision was introduced in the Constitution recognizing the freedom of access to administrative documents (Article 32). The same year, a special right of action was introduced, available in particular to environmental protection organisations, allowing them to seek, through an accelerated procedure, injunctive relief against manifest violations of environmental law or the threat thereof.³ From 2000, the rights of participation and access to information were progressive strengthened, by further legislative measures transposing the provisions of the Convention and the EU directives adopted for its implementation. The latest important development occurred in 2007-2008 as a result of the transposition into domestic law of Directive 2004/35/EC on environmental liability, which established the right of initiative that it provides to individuals and environmental organizations.⁴
- Generally speaking, the case-law of the Belgian courts gives full effect to these laws, at least those that result from the first two pillars of the Convention.⁵
- The Convention has been introduced into the internal legal order by the various legislatures with domestic jurisdiction over environmental policy, both at the federal level and in each of the three Regions.⁶

¹ The applicable legislative and regulatory texts under Belgian law can be found on four main websites, namely <http://www.cass.be/loi/loi.htm> (federal level), <http://wallex/wallonie.be/> (Wallonia Region), <http://navigator.emis.vito.be/milnav-consult/faces/consultatieOversicht.jsp> (Flemish Region) and <http://www.brucodex.be/> (Brussels Capital Region).

² Law of 29 March 1991 concerning the formal motivation of administrative decisions.

³ Law of 12 January 1993 concerning a right of action in matters of environmental protection.

⁴ See for example, for the Walloon Region, the Decree of 22 November 2007 modifying Book I of the Environmental Code as concerns the prevention and restoration of environmental damage.

⁵ As an example, the Council of State gives a greater legal effect to the results of participation than is actually required by the Convention (see Delnoy (2007)), by requiring the administrative authority that receives them not only to have knowledge of them and analyze them, but also to take them into account, either by modifying its draft decision or, otherwise, by explicitly refuting them, in the formal statement of reasons of its decision.

⁶ Decree of the Walloon Parliament of 13 June 2002; Brussels Ordinance of 7 November 2002; Decree of the Flemish Parliament of 6 December 2002; Federal Law of 17 December 2002.

- Recent laws continue to develop and refine the first two pillars in internal law.⁷
- More concretely, references are made to the Convention more and more frequently in internal litigation, by litigants as well as by judges.⁸

However, everything is not perfect in Belgian law. Some case-law and administrative practice is not always in compliance, with the requirements of the Convention, but, in view of the space constraints for this chapter, I will only identify some of these cases here.⁹

2 General obligations

2.1 Clear, transparent and consistent legal framework

Obviously, Belgian law relating to the three pillars of the Convention does not fulfill the requirement for a “precise, transparent and coherent framework” as laid down in Article 3(1) of the Convention. This is partly a consequence of the division of jurisdiction between the federal government and the federated entities resulting from the Belgian institutional system, which implies that no less than four separate legislatures can adopt laws in matters of environmental protection.¹⁰

⁷ See for example the Law of 5 August 2006 concerning public access to information in environmental matters, the Law of 13 February 2006 concerning the evaluation of the impact of certain plans and programmes on the Environment, the Decree of the Walloon Parliament of 16 March 2006 modifying Book I of the Environmental Code as concerns the public right of access to information in environmental matters, the Decree of the Walloon Parliament of 31 May 2007 concerning public participation in environmental matters, the Brussels Ordinance of 18 March 2004 on public access to environmental information in the Brussels Capital Region, the Decree of the Flemish Parliament of 26 March 2004 concerning administrative transparency. Among these laws, we note for example the new Article D.29-5, § 1, 2nd indent, of the Walloon Environmental Code, which transposes Article 6(5) of the Convention.

⁸ See for example the Judgments of the Constitutional Court Nos. 135/2006 and 137/2006 of 14 September 2006. The Court takes the Convention into account in the context of an examination of the standstill effect of Article 23 of the Constitution. See also among others the Judgments of the Council of State No. 173.912 of 7 August 2007, No. 171.018 of 10 May 2007, No. 161.727 of 8 August 2006, No. 160.171 of 15 June 2006, No. 135.408 of 24 September 2004, No. 133.834 of 13 July 2004 and No. 88.687 of 7 July 2000. As concerns the civil courts, see for example, Thonet (2008) at 274. The initiative of the Council of State to make available to the public its electronic database covering its recent jurisprudence (<http://juridict.raadvanstate.be/index.php?lang=fr>) should be welcomed, as it complies with the last sentence of Article 9(4) of the Convention.

⁹ For an exhaustive summary, readers may refer, among others, to the excellent work by Larssen (2001) and Jadot (2007).

¹⁰ In very broad outline, let us note here that each of the three regions of the country (Flemish Region, Walloon Region and Brussels Capital Region) has jurisdiction, within its territory, for most environ-

It is no doubt useful to recall this,¹¹ although it is not the only – or even the most important – cause of the problem. Actually, within the same entity, despite the adoption of codes and other organic laws, the diversity of procedures relating to the first two pillars of the Convention remains broad¹². For individuals in Belgium faced with the legal framework transposing the Convention the confusion is moreover increased by the duality of jurisdictional orders: faced with an act or omission, individuals, even with counsel, often encounter problems in determining which of the two judicial systems – the Council of State (administrative court) or the civil courts – they should refer the matter to, which often leads them to refer the matter to both. Some commentators question whether it is still justified to maintain this duality, especially with regard to matters falling within the scope of the Convention.¹³

Notwithstanding their intrinsic importance,¹⁴ the rare provisions of general scope liable to be cited in the context of the implementation of the Convention do not allow me to contradict these authors:

- Article 32 of the Constitution only mentions access to information.
- In my view, neither Article 7*bis* nor Article 23 of the Constitution, which is moreover deprived of direct effect, concerns public participation in

mental policy issues, but that the federal state retains jurisdiction for nuclear activities, the marine environment and product standards. As an example, since each of the federal and federated entities has its own system of government, this is why at least four separate legislatures have transposed the first pillar of the Convention into the internal legal order. In fact, there are as many as nine legal systems of passive disclosure of information by public administrations in Belgium (Neuray (2005) at 21). The same finding obviously holds for active dissemination: there will soon be four regional reports on the state of the environment: three prepared on a regional basis, and the fourth, published by the federal authorities, announced for 2010, prepared partially on a geographical basis (the maritime territories under Belgian jurisdiction) and partly on a substantive basis (radioprotection, product standards, etc.)

¹¹ We could obviously question the concrete usefulness of this finding, since it could be viewed as implying that the Aarhus Convention calls into question the federalization of the Belgian state. Despite this federalization, the institutional system also provides for an instrument enabling the constituent entities of the Belgian state to reach agreement on common texts in the form of ‘cooperation agreements’ (see Article 92*bis* of the Special Law of 8 August 1980 on institutional reforms). In any case, said finding should at least encourage these entities to do everything possible to facilitate access to information on the applicable legal framework, in such a manner as to strengthen its transparency, if not its coherence. For this purpose, a cooperation agreement might be useful.

¹² As an example, there is no overall legislative framework under Walloon law that gathers all the provisions applicable to public enquiries. However, the legislature is progressively working towards this objective (see Articles D.29-7 *et seq.* of the Walloon Environmental Code, which does not however cover public enquiries under the Code of Spatial Planning, Zoning and Heritage).

¹³ See for example Larssen & Jadot (2005) at 243. For his part, J.-F. Neuray especially criticizes the division of jurisdiction between the two jurisdictional orders (Neuray (2005) at 171).

¹⁴ Especially as concerns the third pillar and the conditions for a person to have standing to take legal action.

environmental matters.¹⁵

- The constitutional provisions that mention the various courts and their respective roles are many, but none specifically cites protection of the environment.
- The laws that reflect the concept that the environment is a ‘common resource’ shared by all inhabitants¹⁶ could certainly be interpreted as relevant to the implementation of the three pillars of the Convention.¹⁷ However, these laws, on the one hand, do not have constitutional value and therefore do not impose obligations on the various internal legislatures, and, on the other hand, their content is in fact indeterminate.

2.2 Environmental education and awareness

The Belgian administrative authorities, in their daily practice, sometimes continue to be hampered by the prerogatives of public power.¹⁸ Important training efforts have however been accomplished during the last few years in this area and this is clearly beginning to bear fruit. More and more often today, if the executive power continues to be wary of action by individuals in matters of environmental protection, it is perhaps due to these individu-

¹⁵ Even though the importance of the ‘principle of participation’ in sustainable development was emphasized during for the drafting process of Article 7*bis* of the Constitution, (Senate Doc., 2005-2006, 3-1778/1, at 4), neither of these two texts mentions public participation, whereas the second pillar is expressly mentioned in Article 32 of the Constitution (see Delnoy (2007) at 773). It is no more self-evident to infer procedural rights from a law that mentions a substantive right, than it is to infer a substantive right from a law, like the Convention, that only mentions procedural rights (Delnoy (2008) at 57); cf. Pâques & Jadot (2008). As concerns Article 23, it should however be stressed that the Council of State has judged that compliance with this provision implies the right to participate in environmental management and therefore to have one’s point of view heard in this regard (Judgment of the Council of State No.123.057 of 18 September 2003, *Vanderputten*).

¹⁶ See, among others, Articles 714 of the Civil Code, and Book I of the Walloon Environmental Code and of the Walloon Code of Spatial Planning, Zoning and Heritage.

¹⁷ See *inter alia* Jadot (1996) at 126; regarding Article 1, Delnoy (1999) at 48.

¹⁸ J.-F. Neuray speaks, with regards to participation, of ‘imitation’ because most often the decision is made before the public is consulted (Neuray (2005) at 31). This objective finding is no doubt in accordance with reality. I am not however certain that we can infer from it that participation is only an illusion or a parody. Everything depends, in reality, on the essential purpose that one attributes to public participation: does it involve a referendum, qualitative assistance in administrative decision-making, a tool to protect individual rights, a method of controlling the actions of the executive, etc.? In the latter case, for example, despite the objective finding in question, the participation is nonetheless real. The same author moreover goes on to assert that ‘the exercise of motivation [of administrative decisions] is not so simple when the cards are marked.’ In any event, it is undeniable that it involves an ‘area where the mentality prevails over the rule’ (Neuray (2005) at 19).

als themselves, whose reactions continue to be of the NIMBY¹⁹ variety. This is where public authorities should concentrate their efforts from now on²⁰ in the area of environmental education, with a view to ensuring that individuals act more in terms of the public interest.

2.3 Support for non-governmental organizations

The system of public financial aid provided to non-governmental organizations for the protection of the environment largely lacks clarity, which sometimes results in questionable practices on the part of the executive authorities.²¹

3 Access to information

Taking into account the progressively favorable developments in the 'administrative mentality', the question of the effectiveness of the right of access to information is gradually losing importance in Belgium. I will return to this in the context of an examination of the third pillar of the Convention.

The right of access to information nevertheless remains impeded by, among other things:

- the public's ignorance of the possibility of obtaining administrative documents without having to demonstrate any particular interest in seeking their disclosure;
- the lack of clarity relating to the effectiveness of the decisions made regarding the appeals lodged against decisions refusing disclosure taken by administrative authorities;
- the absence of effective sanctions against authorities that illegally reject a request for access to information.

For the rest, it is no doubt in matters of pro-active dissemination of information that the Belgian authorities have most work to do to implement the first pillar of the Convention, particularly in the spontaneous creation of databases and in making them available to the public, and even more especially, in the regular preparation of reports on the state of the environment.²²

¹⁹ To which the work of a parliamentary committee was dedicated (see Doc., P.W., 1995-1996, No. 182 – the documents of the Walloon Parliament are available at <http://parlement.wallonie.be/content/default.php?m=04&p=04-02>).

²⁰ Individuals should be reminded that the fundamental right to the protection of a healthy environment in Article 23 of the Constitution is accompanied a reference to the corresponding duties.

²¹ The commitments resulting from the adoption of a charter on the relationships between public authorities and associations (*La Libre Belgique*, 1 June 2007) could however have a favorable impact in this field.

²² In Wallonia, pursuant to Article D.32 of Book I of the Walloon Environmental Code, the government is supposed to publish a report on the state of the environment 'each year before the budget is presented

4 Public participation

Certain decisions or administrative actions of general scope even today escape public participation, without any particular justification having regard to the terms of Convention²³. A few of the most flagrant examples include not only the regulations adopted by the Walloon Government in spatial planning as well as environmental matters,²⁴ but also administrative directives and ministerial circulars.

As concerns the beneficiaries of public participation, it seems to me that, having regard to Article 6(7) of the Convention, internal law does not grant sufficient space to the permit applicant²⁵ in the consultation process, which should progressively include more consultation, or at the very least, more dialogue between supporters and opponents of a project.

In terms of procedural methods, we could suggest that the relative dearth of information available to the public to allow it to participate be in some way compensated by the ease of access to this information via new information technologies: the possibility of consulting or downloading from an internet site the plans for a project, the environmental impact statement, the opinions of advisory bodies, etc.

Finally, we note that in the jurisprudence of the Council of State, although a violation *ratione materiae* of the scope of application of the participation procedures (the list of activities subject to such procedures) is liable to be challenged by any person in general, whomsoever or almost, its violation *ratione personae* (the list of persons entitled to participate), or a violation of the applicable procedural rules can only be by challenged by a party who has been personally prejudiced, although this violation may also have prevented other persons from adequately participating. This is an idiosyncrasy that the Council of State could no doubt easily remedy.

and at the latest before 15 November.' In fact, such reports are not published annually, but their scope and formal also varies whenever they are issued, which hinders comparability and qualitative monitoring of the public policies implemented. (see for example <http://environnement.wallonie.be/ew/default.aspx>) I am not arguing that no information is available, but that it could be made more visible, comparable and accessible.

²³ Delnoy (2007) at 181 *et seq.*

²⁴ This concerns, on the one hand, the zoning regulations, and on the other hand, the general, sectoral and overall conditions applicable to facilities subject to an environmental permit.

²⁵ However, Article D.29-14, §1, 6°, of the Walloon Environmental Code provides that the 'opinions, observations and suggestions issued in application of the applicable regulations' shall be 'included by the competent authority in the file submitted for public scrutiny as of their receipt,' but this law is far from being applicable to all permit applications, as it does not, in particular, apply to public enquiries concerning planning permit applications.

5 Access to justice

5.1 Standing for environmental NGOs in review procedures

In Belgium, the two high courts before which appeals are most often filed by environmental protection organizations have, one after the other, attempted to limit the admissibility of such appeals,²⁶ by interpreting the requirement of a sufficient interest on the part of the appellants in a manner that can be judged to be contrary to the objectives of ‘wide access to justice’ as stated in Article 9(2), and of ‘guaranteeing’ the right of access to justice in accordance with Article 1 of the Convention.

The Belgian Court of Cassation has developed such strict jurisprudence²⁷ rejecting actions brought in the defense of collective interests,²⁸ that, in environmental matters, the legislature itself has felt it necessary to react, in 1993, by adopting a law establishing a special, expedited and potentially effective judicial review procedure for the benefit of environmental protection organizations that fulfill certain conditions, that can be used in cases of obvious violation of a rule of law relating to environmental protection.

In some commentators’ view, this legislative response²⁹ is insufficient to ensure compliance with the Convention.³⁰ Indeed, the requirement for applicant organizations to have been incorporated at least three years prior to the date on which the action is brought, as well as the limitation of the scope of application of the law to cases of obvious infringements or serious risks of infringement seem too restrictive to ensure full compliance with, among others and at the very least, Article 9(3) of the Convention.

Nevertheless, the Court of Cassation itself recently reacted to the 1993 law, by subjecting the success of an action brought pursuant to it to an additional condition, namely the existence of environmental damage.³¹ This new condition, not explicitly provided for in the law itself, is clearly contrary to Article 9(2) and (3) of the Convention.

²⁶ For example *Neuray* (2003) at 407; *De Sadeleer, Roller et al.* (2002a).

²⁷ And clearly contrary to the Convention. See *Jadot* (2007) at 175.

²⁸ According to the Court, as concerns legal entities, their individual interest, distinct from the general interest, only includes matters relating to their very existence, their assets and their moral rights. Harm to their statutory purpose does not apply, ‘since any entity can propose to pursue any goal’ (Judgment of the Court of Cassation No.99.0568.F, 28 September 2001). But isn’t it appropriate for a legal entity to be created with a specific purpose and to have a corporate objective (see for example Article 454, 2°, of the Corporate Code or Article 2, §1, 4°, of the Law of 27 June 1921 regarding non-profit associations, international non-profit associations and foundations)?

²⁹ Whose text, combined with Article L.1242-2 of the Walloon Code of Local Democracy and Decentralization, moreover allows the inhabitants of a municipality that refrains from exercising this right of action to do so in lieu of it (see *Pijcke & Tulkens* (2007) at 205.

³⁰ *Jadot* (2007) at 446.

³¹ Judgment of the Court of Cassation No.C.05.0128.N, 2 March 2006.

For its part, the Council of State has developed an interpretation of the notions of personal interest, aims set in an association's bylaws, and legal capacity to act, that resulted in preventing most NGOs from taking action before it.³²

This jurisprudence has, diplomatically though clearly, been considered to be contrary to Article 9(2) and (3) of the Convention by its Compliance Committee.³³

It is difficult, at the time of writing,³⁴ to determine with certainty if the Council of State has altered its jurisprudence in order to comply with the Committee's recommendations,³⁵ since NGOs, in the meantime, have shown extreme caution in both the definition of their corporate objectives as well as in their choice of actions to be filed. Nevertheless, it seems that there are positive developments. Thus, in 2008, the Council of State declared admissible an appeal by an environmental protection organization that had clearly been created on the occasion of the launch of an urban development project for the very purpose of opposing it.³⁶ We hope that this first impression will be confirmed in future jurisprudence.

5.2 Connection between standing in review procedures and participation

As concerns the first pillar of the Convention, the Council of State considers that a person whose request for access to information has been rejected can introduce an appeal against the denial decision without having to justify any interest whatsoever in obtaining the information.³⁷ On the other hand,³⁸ at this time, the same court considers that it is not sufficient for a person or organization to participate in a decision-making process in order to

³² See for example the Judgment of the Council of State No. 161.727 of 8 August 2006, A.S.B.L. *Liège Ardennes*. Cf. *inter alia* Jadot (2005) at 120; Sambon (2005) at 131.

³³ See the Findings and Recommendations of the Aarhus Convention Compliance Committee of 16 June 2006, ECE/MP.PP/C.1/2006/4/Add.2, in case ACCC/C/2005/11, submission by *Bond Beter Leefmilieu Vlaanderen VZW*.

³⁴ Research for this chapter was completed in May 2008.

³⁵ For its part, the federal legislature, which is competent in matters of access to justice, is considering legislative proposals intended to modify the applicable legislation, as well as the above-mentioned Law of 12 January 1993. At the time of writing, these proposals have not yet been adopted, but these initiatives have been considered positive by the Compliance Committee in a report dated 2 April 2008 (ECE/MP.PP/2008/5/Add.3).

³⁶ Judgment of the Council of State No.178.585 of 15 January 2008, A.S.B.L. *Collectif des Grands Prés*: an organization cannot be blamed for having been created at the time of the disputed project and the case file reveals that concrete actions have been carried out in pursuit of its corporate objective.

³⁷ See for example, Judgment of the Council of State No.83.494, of 16 November 1999, *Antoun*; but cf. Judgment of the Council of State No.112.494 of 12 November 2002, *Liederkerke de Pailhe*; Judgment of the Council of State No.81.740 of 9 July 1999, *Scheppers de Bergstein*.

³⁸ The comparison between the two is however no doubt justified (see Delnoy (2007) at 461).

have a sufficient interest to take legal action against the administrative decision adopted at the end of that process.

One may wonder whether the Convention, to the contrary, does not imply, having regard to Article 9(2) and the definition of ‘public concerned’, that any natural or legal person who participated in the decision-making process leading to an authorization should be considered to have a sufficient interest to take action against such authorization. Indeed, firstly, the assessment whether the interest to take action is ‘sufficient’ must be consistent with the requirement of ‘wide access’ and, secondly, the ‘public concerned’ includes any person who ‘has an interest in the environmental decision-making’, which is no doubt the case for a person who has made the effort to participate in this process.³⁹ This question deserves further consideration.

5.3 Availability of a review procedure to challenge any decision, act or omission

Under Belgian law, there are two kinds of measures of general application adopted by the executive branch:

- Regulations, whose provisions are binding for all, and to which no exceptions can be made except under the conditions provided by law or by the regulation itself;
- Guidelines, which may be formalized as needed in ‘administrative directives’, whose provisions must in principle be complied with by public authorities, unless special circumstances in a particular case require or allow them to be set aside, in which case the individual decision to that effect must state the reasons justifying the derogation.

According to the jurisprudence of the Council of State, it is possible to obtain from it the annulment of a regulation, but impossible to introduce before it an appeal against administrative guidelines.⁴⁰

However, such guidelines clearly produce legal effects, even if these are not as strict as those arising from regulations, and their concrete importance in the relationship between individuals and public authorities is undeniable. Moreover, in its Article 8, the Convention mentions not only regulations, but also ‘generally applicable legally binding rules’, a notion which, under Belgian law, clearly includes administrative guidelines of the kind discussed here. The case-law of the Council of State, in its interpretation of the law that defines its jurisdiction,⁴¹ is therefore contrary to Article 9(3), and possibly also of Article 9(2).⁴²

³⁹ Neuray (2005) at 38.

⁴⁰ See for example Judgment of the Council of State No. 177.008 of 22 November 2007, *Gebroeders Pieck*.

⁴¹ Article 14 of the Consolidated Laws concerning the Council of State.

⁴² Jadot & Larssen (2007) at 1401.

5.4 Availability of a review procedure for the re-examination of requests for information

In Walloon environmental law, the commission in charge of re-examining requests for information comprises, on the one hand, a judge who is also a member of the court before which any appeal against the outcome of this re-examination must be filed and, on the other hand, the Director-General of the principal administration liable to have its decisions re-examined.⁴³ It is not obvious that this situation is contrary to Article 9(1) of the Convention, since this provision provides that the re-examination procedure can be entrusted to a 'public authority'.⁴⁴ However the same provision also requires that the review body be independent.

6 Cost of review procedures

The Belgian legislature recently established a mechanism allowing for winning parties in civil proceedings to claim lawyer's fees,⁴⁵ which implies that the losing party must pay his adversary a lump sum indemnity, intended to cover the latter's lawyer's fees and set by the judge within the limits of a certain range.

This new mechanism is unlikely to favor access to justice in environmental matters,⁴⁶ at a time when the judges' power with respect to litigation is becoming ever more important in the Belgian legal system.⁴⁷

Individuals considering legal action to obtain compensation for damage are already regularly confronted with one undeniable difficulty in environmental law: that of having to advance the costs for experts' fees, which are often indispensable.

The new Article 987 of the Code of Civil Procedure however allows the judge discretion to ensure that the need for an expert opinion does not necessarily constitute a brake on access to justice, and thus is not inconsistent with the

⁴³ It is not my intention here to express any doubt regarding the practice of this commission, whose activities are of a high quality.

⁴⁴ Paragraph 2 of Article 9 clearly sets this 'public authority' apart from the 'independent and impartial body', solely mentioned, however, in paragraph 1 of the same article. It is therefore unclear whether this authority can also be considered to be an independent and impartial body. Maybe the requirement of 'effective remedies' in Article 9(4) could be cited in support of an affirmative answer?

⁴⁵ See the Law of 21 April 2007 concerning attorneys' fees and expenses and the Royal Decree of 26 October 2007 setting the rates for procedural indemnities as mentioned in Article 1022 of the Code of Civil Procedure.

⁴⁶ 'For example in the UK, having to pay the costs of the other side in the event of losing the case was called the single most effective barrier to access to justice in environmental cases'. (De Sadeleer, Roller et al. (2002b) at 33).

⁴⁷ See for example Martens (2007).

requirements of 'adequate and effective remedies' which are 'not prohibitively expensive' as laid down in Article 9(4) of the Convention. Indeed, by stipulating that the judge can set the amount of the deposit to cover experts' fees and costs to be paid by each party and determine the reasonable portion of the deposit to be released for this purpose, Article 987 of the Code authorizes the judge, among others:

- to have this deposit paid by the party whose liability has been established, when the expert report is needed only to establish the exact nature and amount of the damage incurred;
- to set a reduced amount of deposit to be paid by the claimant if the expert report is intended to establish factual elements that are relevant to determine the existence of a fault on the part of the defendant and/or the causal link between the latter and the damage.⁴⁸

7 Conclusion

Belgian law and administrative practice are largely in compliance with the Aarhus Convention. This is especially true as concerns the first two pillars of the Convention. Nevertheless, in this area, public authorities should still make more efforts in order to ensure, among others, greater clarity in the organization of the relevant laws and regulations and the systematic and regular publication of reports on the state of the environment, and to promote the development of consultation and recourse to new information and communication technologies, to the benefit of individuals.

Where the shoe pinches the most in Belgian law is in matters of access to justice. Legislative developments are more awaited in this area than elsewhere, but tend to lag behind. This may be due, on the one hand, to financial reasons related to the cost of operating the courts, but also, on the other hand, to the fact that the organization of civil and administrative justice still essentially falls within the jurisdiction of the federal state, while environmental policy is mainly within the jurisdiction of the regions. This being said, a good many attempts, in terms of making Belgian law comply with the Convention, in reality target the prevailing jurisprudence.

The future will tell us whether or not Belgian judges will act so as not to increase the number of cases on Aarhus-related issues brought before the Aarhus Convention Compliance Committee, the European Court of Human Rights, or the Court of Justice of the European Union.

Finally, as we have seen, the public itself no doubt also has a role to play in developing compliance with the Convention in internal practice, albeit that it could benefit from further help towards achieving this goal from public authorities in terms of awareness-raising and education.

⁴⁸ Cf. Mougnot (2007).