

Flexibilities with regard to meeting EU regulatory objectives and requirements

Report on Belgium

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I. Policies of prioritizing economy and ecology

Although in Belgium there are no initiatives comparable to the *Austrian Deregulation Act 2017*, similar policy approaches are nevertheless taken in one manner or another.

According to the Federal Government (centre right) Agreement of 9 October 2014¹ it is the Federal Government's ambition to implement a growth policy, by strengthening competitiveness so that it is ensured that additional jobs are created. The reforms mentioned are mainly in the field of the labour market, taxation, social security, e-commerce, finance and the reduction of administrative burdens in the field of fiscal and social legislation. There is, however, a paragraph stating that "*there will be no "gold plating" when EU Directives are transposed unless a deviation from the minimum requirements of the directive can improve our international competitiveness position without extending the transposition procedure significantly*"². Furthermore, speaking about the evaluation of energy prices and taxes and of their impact on emissions of harmful substances it is mentioned "*that negative effects on the competitiveness of enterprises will be prevented*". Remarkably it has been announced that the eco-tax on throwaway packaging would be abolished – which has since been done³ – because the tax "has reached its objective of behavioural change, so that its proceeds are no longer covering the administrative costs of the government and industry".

A similar approach may be found in the Government Agreement of the (also centre right) Flemish Government of 22 July 2014⁴: "In the first place, this government wants to give a boost to our economy and to our care. A Flanders that ... has a place among the top 5 of the EU in terms of prosperity and well-being, based on a strong economy. We focus on our own powers and on our strengths. And like so on innovation and entrepreneurship. We are resolutely committed to a demand-driven and market-driven government policy that inspires confidence and gives confidence.

¹ http://www.premier.be/sites/default/files/articles/Accord_de_Gouvernement_-_Regeerakkoord.pdf

² *Idem*, p. 187.

³ This has led to a significant increase in the usage of such packaging in practice, so that the regions are considering now alternative measures...

⁴ <https://www.vlaanderen.be/nl/publicaties/detail/het-regeerakkoord-van-de-vlaamse-regering-2014-2019>

And thus appreciates entrepreneurs and offers them legal certainty. *We connect entrepreneurs and government policy more strongly with each other through fewer and simpler structures and instruments with faster and simpler procedures, more transparency and a customer-friendly one stop shop approach.*” In the field of land use and environmental policy the emphasis lays on integration of planning and permitting procedures.⁵ As EU Environmental law is concerned, we can read in the Agreement: “As starting points for the formulation and for the transposition and implementation of European regulations *we will apply the principles of Level Playing Field respectively the No Gold Plating*, to ensure that ecological values and economic growth go hand in hand. On the one hand, we strive for a timely, complete and correct transposition and application of European rules, to prevent the environment and nature from becoming a victim of the market or of competition. On the other hand, we strive for an effective, efficient and balanced implementation of 'non-gilded' European rules, so as to provide production and product-based companies with a 'level playing field'.”⁶

In the Government Agreement of the (centre left) Government of the Brussels Capital Region⁷ we can read: “The Government will simplify the urban planning procedures, among other things to enable the realisation of large public and private real estate projects that are intended for housing, public infrastructure and economic activities. Overall, the Government will ensure for all projects that they are dealt with both fast and in compliance with the urban planning procedures. The existing structures are being rationalised so that the applicant and the designer only have a single regional interlocutor who will handle both urban planning permits and certificates and environmental permits as well as all other related matters (EPB, soil contamination and prevention advice of the fire brigade)”.

In het Agreement of the (then centre left) Walloon Government of 23 July 2014 we can read that the Government will be more attentive to assess the socio-economic impacts of new environmental measures under development, and compare this with practices in neighbouring regions and states.”⁸. In the 2017 Agreement⁹ of the new (centre right) government one can read: “The Walloon authorities will aim at a radical simplification of the administrative life of economic actors. The principle of trust will replace systematic controls with more targeted a posteriori random checks. The regional services will aim to identify a single point of contact as soon as an application is submitted to an administrative entity.” Yet, we can also read: “In search of environmental excellence, we want to reorient our economies towards an innovative dynamic of creation of wealth, based on the sober use of resources, and a more equitable redistribution of created value (...) This environmental transition we will be working on will benefit all families and business creators of Wallonia. More than an inevitable budgetary and financial cost, it represents an investment in favour of the future of all Walloons! Apart from the development of its human capital, the energy transition is a major economic, environmental and social challenge for Wallonia. It's about identifying a long-term energy vision and strategy that corresponds to the objectives of security of supply and meets environmental obligations, while supporting economic activity as well as social policies.”¹⁰

⁵ See on this issue: <http://avosetta.jura.uni-bremen.de/belgiumquest2016.pdf>

⁶ *Idem*, p. 104

⁷ <http://be.brussels/files-nl/over-het-gewest/de-gewestelijke-bevoegdheden/regeerverklaring-2014-2019>

⁸ http://nautilus.parlement-wallon.be/Archives/2014_2014/DPR/20_1.pdf, p. 51.

⁹ http://nautilus.parlement-wallon.be/Archives/2016_2017/DPR/880_1.pdf, p. 6.

¹⁰ *Idem*, p. 13-14.

II. Techniques aimed at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

In March 2004 an intra-Belgian burden-sharing agreement for the period 2008-2012 was concluded in view of reaching the national emission reduction target of 7,5 %, compared to 1990, in accordance with the EU burden-sharing agreement:

	Reduction in % (compared with 1990)	Total emission (in million ton CO ₂ -equivalent)
Flemish Region	- 5,2 %	83,37
Brussels Capital Region	+ 3,475 %	4,13
Walloon	- 7,5 %	50,23

It was agreed that the regions themselves could decide on the proportion of emission reductions on their own territory and by obtaining CER's and ERU's.

As one can see, this burden-sharing would fall short in attaining the national reduction objective. The Federal Government had to cover the gap by taking measures within its competence to reduce the emissions annually with 4,8 Mton CO₂-equivalent¹¹ and by acquiring for 12,2 Mton CO₂-eq emission credits on the international market.

In December 2015, a new burden-sharing agreement was reached for period 2013-2015 in which the national emission reduction target for non-ETS sectors according the EU effort sharing decision is -15 %, compared with 2005: Flemish Region -15,7 %; Walloon Region: -14,7 %; Brussels Capital Region: - 8,8 %.

(in kiloton CO ₂ -eq.)	2005	2013	2014	2015	2016	2017	2018	2019	2020
Vlaams Gewest	47.950.276	48.048.531	46.959.027	45.869.526	44.780.029	43.690.536	42.601.068	41.511.563	40.422.083
Waals Gewest	27.189.028	26.029.033	25.623.785	25.218.534	24.813.281	24.408.026	24.002.753	23.597.506	23.192.241
Brussels Gewest	4.455.021	4.302.261	4.268.082	4.233.901	4.199.720	4.165.537	4.131.345	4.097.167	4.062.979
België	79.620.356	78.379.825	76.850.894	75.321.962	73.793.030	72.264.098	70.735.166	69.206.235	67.677.303

a) EU-ETS

1. In the Flemish Region the ETS Directive was transposed initially by the Decree of 2 April 2004 and the Executive Order of the Flemish Government of 7 December 2007 that contained a chapter on the use of CER's and ERU's in the first commitment period (2008-2012). Provisions for the second commitment period (2013-2020) can now be found in het Executive Order of 20 April 2012¹². The operator of a plant submitted to ETS could use, in the period 2008-2012, CER's and ERU's to a percentage of its assigned allowances, in conformity with the national allocation plan (for the period

¹¹ In reality, the Federal Government did not meet this target. It reduced the emissions with 4,1 million ton CO₂-equivalent: <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/federaal-klimaatbeleid/beleid-en-maatregelen>

¹² <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1021727¶m=inhoud&ref=search&AVIDS=>

2006-2007, there was no limitation). This percentage was fixed at 9,1743 %.¹³ In the current commitment period, operators in the Flemish Region may use CER's and ERU's up till 11 % of the allowances allocated to them in the first commitment period or of the amount of international credits that were permissible in the first commitment period. Newcomers are entitled to a percentage of 4,5 % of their verified emissions in the second commitment period. In the Brussels Capital Region that percentage was fixed at 8 % in the first commitment period. In the Walloon Region, where the matter is regulated by the Decree of 10 November 2004¹⁴ and the Executive Order of the Walloon Government 8 July 2010,¹⁵ the percentage was limited to 4 %.

2. In the first commitment period, 7,9 % of the restitutions in Belgium consisted of CER's and ERU's, with notable differences between the regions.¹⁶ There are no public data available about the restitutions of CER's and ERU's in the current commitment period.¹⁷

3. The change to a domestic emissions reduction target from 2021 onwards appears not yet to have been addressed in detail in Belgium: *"While the 2030 targets have already been set at European level, negotiations are still ongoing on their repartition between the Member States. At the intra-Belgian level, the figures on the European table allow us to get an idea of the future binding national target in terms of reducing greenhouse gas emissions and of contributing to the European energy efficiency targets and generation of green electricity. The first exploratory work would therefore start soon within the National Climate Commission, based on the work related to the integrated national energy climate plan 2030, the future energy pact and the impact analysis of the 'Clean energy for all' package, and their related issues. This exercise, supplemented by various recommendations and basic principles, will form the basis of proposals for the distribution of the burdens among the various entities (federal state and regions). The political negotiation will then only be able to start."*¹⁸

b) Effort Sharing (Non-ETS)

1. In the Flemish Region, the Executive Order of the Flemish Government of 7 December 2007 contained a chapter on the acquirement of "Kyoto Units". Almost identical provisions can now be found in the Executive Order of 20 April 2012. The total amount was determined in the Flemish Climate Plan 2006-2012. Initially estimated at 23,93 Mton CO₂-equivalent, the amount was fixed at 21,4 Mton CO₂-equivalent towards 2012. The Flemish Climate Mitigation Plan 2013-2020 holds that, within the quantitative and qualitative boundaries set by EU law, the Flemish government should acquire 9 Mton CO₂-eq CER's and ERU's, subject to yearly evaluation. In the Walloon Region, the matter is regulated by Chapter IV of the Decree of 10 November 2004 and the Executive Order of the Walloon Government 8 July 2010.

¹³ http://www.climat.be/files/7413/8210/4791/BE_20NAP_202008-2012_20v20080619.pdf

¹⁴ <http://environnement.wallonie.be/legis/air/air042.htm>

¹⁵ <http://environnement.wallonie.be/legis/air/air062.htm>

¹⁶ See: [summary compliance table of the previous two commitment periods \(CP0, 2005-2007 and CP1, 2008-2012\)](#).

¹⁷ See: [summary compliance table of the current commitment period \(CP2, 2013-2020\) \(table with aggregated data\)](#)

¹⁸ <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/nationaal-beleid/lastenverdeling>

Although Belgium is not on track for the post 2020 objectives, recent figures indicate that for the period 2013-2020 Belgium can probably make it without using carbon credits from projects outside the EU or emission allowances from other EU member states, thanks to the accounting rules that allow for the deficit at the end of the period to be compensated by exceeding the target at the beginning of that period.¹⁹

2. Belgium realised an emission reduction of 14 % in the period 2008-2012, compared with the 7,5 % objective, but the non-ETS sectors had a deficit of 4,9 Mton CO₂-eq.²⁰ The Federal Government acquired the necessary emission rights on the international market.²¹ Additional credits were furthermore required under the responsibility of the regional governments. In total, for the period 2008-2012, 29,449 Mio units were acquired.²² The reason is obvious: in the absence thereof, not all reduction targets would have been met.

3. In the Proposal of 20 July 2016 for a Regulation of the European Parliament and the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030²³, a reduction target for Belgium of -35 % for 2030 compared with 2005 is foreseen. The maximum use of cancelled ETS certificates would be 2% for Belgium. The maximum amount of credits for net removals from deforested land, afforested land, managed cropland and managed grassland (LULUCF credits) for Belgium would be 3,8 Mton CO₂-eq. In the Commission Evaluation Report of the Effort Sharing Decision one can read: *“A total of 24 Member States are projected to meet their national targets domestically, while four Member States (Austria, Belgium, Ireland and Luxembourg) are expected to need additional measures or use flexibility instruments within the ESD to reach their targets. These Member States may exceed their emission limits for one or more years of the 2013-2020 period with existing measures in place. However, they are expected to comply with their legal obligations for each year in 2013-2020, thanks to AEA surplus from earlier years in the 2013-2020 period, which Member States can use to cover any emissions gap up to 2020 or by implementing additional measures at home.”*²⁴ Given the difficulties Belgium will face to meet the post 2020 targets (see also above para 1), it can be expected that one favours this additional flexibility options. In its first political position on the proposal, the Flemish Government stressed the need of promoting “user-friendly, efficient and effective flexibility mechanisms to improve further the cost-effectiveness of the EU's overall objectives”.²⁵

¹⁹ <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/rapportering/verwachte-voortgang>

²⁰ <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/nationaal-beleid/lastenverdeling>

²¹ <http://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/federaal-klimaatbeleid/aankoop-van-emissierechten/>

²² Belgium's Sixth National Communication under the UNFCCC, 2013, p. 84

http://www.klimaat.be/files/2013/8753/3173/NC6_EN_LR.pdf

²³ COM/2016/0482 final

²⁴ Commission Staff Working Document, Accompanying the document Report from the Commission to the European Parliament and the Council on evaluating the implementation of Decision No. 406/2009/EC pursuant to its Article 14, SWD/2016/0251 final, p. 15

²⁵ http://www.vlaanderen.be/int/europese-unie/sites/iv.devvlh.vlaanderen.be.int/europese-unie/files/documenten/2016_09_VR_2016_2810_MED%200415_1.pdf, p. 34

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives

1. In the Flemish Region, the possibility of establishing less stringent environmental objectives has been transposed in the Decree of 18 July 2003 concerning integrated water management (artt. 53 and 54). The conditions correspond to those of the Water Framework Directive. A similar situation can be found in the Walloon Region (art. 22 of the Walloon Water Code).

2. In the *River Scheldt Basin*, although there was an overall improvement of water quality during the previous planning period, not one of the 176 water bodies in the Flemish Region reached the “good ecological status” or the “good ecological potential”.²⁶ As far as the Walloon part of that River Basin is concerned, 6 water bodies achieved a good status, while 77 did not.²⁷ The situation is better for the *River Meuse (and Seine) Basin* in the Walloon Region, tallying 132 bodies with good status on a total of 259.²⁸ The prorogation of the less stringent environmental objectives for the current planning period (2016-2021) has been justified by technical, economical (disproportionate costs) and natural conditions.²⁹

3. The less stringent environmental objectives in the river management plans are reviewed at the end of each 6-years planning cycle.

4. The River Basin Management Plans are approved by the respective regional governments, after having followed a public participation and consultation process, during which the public can have its voice heard. The public at large (7 %), stakeholder-organizations (8 %) and multi-stakeholder advisory bodies (4 %) made some use of the participation and consultation opportunities during the preparation of the current plans, but the bulk of the input came from different local and regional authorities. In the Flemish Region, 700 reactions have been received in total and all of them received an answer³⁰. The Plans are “administrative acts” of a regulatory nature and can thus be challenged before the Supreme Administrative Court by any person or organization with legal personality that has an interest in doing so. Consultation of the jurisprudence database of the Council of State did not show a single case in which the environmental objectives of the river basin plans were challenged.

²⁶ http://www.integraalwaterbeleid.be/nl/stroomgebiedbeheerplannen/stroomgebiedbeheerplannen-2016-2021/documenten/Vlaams_deel_stroomgebied_Schelde.pdf, p. 289-292.

²⁷ http://eau.wallonie.be/MB/GW_Document_definitif_DHI_Escaut_FR.pdf, p. 46.

²⁸ http://eau.wallonie.be/MB/GW_Document_definitif_DHI_MeuseSeine_FR.pdf, p. 61.

²⁹ http://www.integraalwaterbeleid.be/nl/stroomgebiedbeheerplannen/stroomgebiedbeheerplannen-2016-2021/documenten/Vlaams_deel_stroomgebied_Schelde.pdf, p. 306-313 and tables 80 and 81, p. 378- 386; http://eau.wallonie.be/MB/GW_Document_definitif_DHI_Escaut_FR.pdf, p. 50-51 and 58; http://eau.wallonie.be/MB/GW_Document_definitif_DHI_MeuseSeine_FR.pdf, p. 65-66 and 74-75.

³⁰ See: <http://www.volvanwater.be/de-overwegingsdocumenten/overwegingsdocumenten-bij-de-stroomgebiedbeheerplannen-2016-2021>

b) Industrial Emissions Directive: Setting less strict emission limit values

1. In the Flemish Region, the possibility to set less strict emission limit values according art. 15 (4) of Directive 2010/75/EU has been transposed in art. 1.4 of the Executive Order of the Flemish Government of 16 May 2014³¹. The conditions for deviation are the same. We find the same situation in the Brussels Capital Region, where the deviation clause can be found in art. 12, § 4, of the Executive Order of the Brussels Capital Government of 21 November 2013³² and in het Walloon Region, where the deviating clause has been introduced by a 2013 Amendment in art. 7bis of the Decree of 11 March 1999.³³

2. Until recently, there was little public available information on the application of the derogation clauses in Belgium. If the clause was used at all, one had the impression that it is very exceptional³⁴. Very recently more information has become available, at least as the Flemish Region is concerned. It seems that all in all 3 derogations on the basis of Art. 15 (4) have been granted³⁵. We understand that the criterion “geographical location” has not been used yet and it is considered very unlikely that it will ever be used in the Flemish Region³⁶. “Technical characteristics of the installation concerned” is the main criterion, with “local environmental conditions” and/or “geographical location” being of less importance in Flanders³⁷. The initial assessment involves a screening of the derogation criteria referred to in the application. Where the reference is not clear or even missing in the application, the competent authority will request the operator to provide more information. The evaluation of the derogation starts only when this additional information is provided.³⁸

3. For the moment the derogations in the Flemish Region have been granted for a period of 7 years.

4. As the derogation is given by the Minister, it is an administrative act that can be challenged with the Council of State, whereas the permit in which the derogation is incorporated can be challenged with the Council of Permit Disputes (Flemish Region) or the Council of State (other regions).

³¹ <https://navigator.emis.vito.be/mijn-navigator?wold=61193>

³²

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013112112&table_name=wet

³³ http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1999031139&table_name=loi

³⁴ *Assessment and summary of the Member States implementation reports for the IED, IPPCD, SED and WID Industrial Emissions Directive, Final Report*, Prepared by Amec Foster Wheeler Environment & Infrastructure UK Ltd in collaboration with Milieu Ltd, March 2016, p 35-40;

https://circabc.europa.eu/webdav/CircaBC/env/ied/Library/studies/article_reports/final_reports/IED%20implementation%20final%20report.pdf

³⁵ European Commission Directorate General Environment, *Application of IED Article 15(4) derogations, Final Report*, March 2018, Amec Foster Wheeler Environment & Infrastructure UK Limited

[https://circabc.europa.eu/sd/a/9b59019b-df6c-4e6c-a5c2-](https://circabc.europa.eu/sd/a/9b59019b-df6c-4e6c-a5c2-1fb25cfe049c/IED%20Article%2015(4)%20Report.pdf)

[1fb25cfe049c/IED%20Article%2015\(4\)%20Report.pdf](https://circabc.europa.eu/sd/a/9b59019b-df6c-4e6c-a5c2-1fb25cfe049c/IED%20Article%2015(4)%20Report.pdf), p. 28 29.

³⁶ Id., p. 40.

³⁷ Id., p. 44.

³⁸ Id., p. 45; [https://circabc.europa.eu/sd/a/f9ae1a17-31a3-47dd-8968-f841a578ad95/IED%20Article%2015\(4\)%20Report%20Annex%20A.pdf](https://circabc.europa.eu/sd/a/f9ae1a17-31a3-47dd-8968-f841a578ad95/IED%20Article%2015(4)%20Report%20Annex%20A.pdf), p. A 12 A 15;

[https://circabc.europa.eu/sd/a/48dc3ece-0bb9-45fa-a1e9-71bc186e8bc9/IED%20Article%2015\(4\)%20Report%20Annex%20B.pdf](https://circabc.europa.eu/sd/a/48dc3ece-0bb9-45fa-a1e9-71bc186e8bc9/IED%20Article%2015(4)%20Report%20Annex%20B.pdf), p. B 8 - B 10.

3. Exemptions and offsetting combined: the case of NATURA 2000

1. The obligation to take compensatory measures in view of the coherence of the *Natura* 2000 Network as part of the appropriate assessment is transposed in national law. In the Flemish Region, the provision can be found in art. 36ter, § 5, of the Nature Protection Decree of 21 October 1997 (as Amended by the Decree of 19 July 2002)³⁹. The requirements of the Directive have been taken over as such. In the Brussels Capital Region a similar provision can be found in Art. 64, § 2, of the Nature Protection Ordinance⁴⁰ and in het Walloon Region in art. 29 § 2, of het Nature Protection Act of 12 July 1973 (as Amended by the Decree of 6 December 2001).⁴¹

2. National law closely follows the wording of the Habitats Directive and should thus, if interpreted correctly, be in conformity with the case law of the CJEU. As practice shows, that is not always the case. E.g., the Regional Development Implementation Plan for the ‘Demarcation of the maritime port area of Antwerp — Port development on the left bank’ was challenged and led to the judgment in Joined Cases C-387/15 and C-388/15, *Orleans and Others* of the CJEU⁴². The CJEU held in that case that the Article 6(3) of the Habitats Directive “*must be interpreted as meaning that measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such measures can be categorized as ‘compensatory measures’, within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.*” As a consequence thereof, the plan in question has been partially annulled by the Council of State⁴³. With reference to the *Orleans* case of the CJEU, the Council of State suspended⁴⁴ and annulled⁴⁵ several other Regional Development Implementation Plans. Yet another plan was annulled with reference to the CJEU’s *Briels* (Case C-521/12) and *Sweetman* (Case C-258/11) cases.⁴⁶

3. I am not aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the *Natura* 2000 framework. Neither am I aware of discussions on this subject pushing for a change of the law.

4. I am furthermore unaware of any debate in Belgium suggesting that we should improve incorporation of the socio-economic services of natural resources.

³⁹ <https://codex.vlaanderen.be/Portals/Codex/documenten/1005915.html#H1011144>

⁴⁰

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2012030115

⁴¹ <http://environnement.wallonie.be/legis/consnat/cons001.htm>

⁴² Judgment of the Court (Seventh Chamber) of 21 July 2016, *Hilde Orleans and Others v Vlaams Gewest*

⁴³ Council of State, N° 236.837, 20 December 2016, *H. Orleans c.s.*; Council of State, N° 238.186, 12 May 2017, *H. Orleans c.s.*

⁴⁴ Council of State, N° 238.763, 4 July 2017, *vzw Bond Beter Leefmilieu Vlaanderen c.s.*; Council of State, N° 240.0079, 5 December 2017, *vzw Limburgse Milieukoepel c.s.*

⁴⁵ Council of State, N° 241.078, 20 March 2018, *vzw Bond Beter Leefmilieu Vlaanderen c.s.*

⁴⁶ Council of State, N° 238.181, 12 May 2017, *vzw Natuurpunt Limburg c.s.*