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Case Summary posted by the Task Force on Access to Justice

Belgium: IMMO Dominique, Council of State, Nr. 221.784/2012	
1. Key issue	Access to justice – Two small businesses, located 3 and 5 kilometres away from a planned large scale shopping center, were granted standing in the Council of State to challenge the environmental permit for the establishment that had been issued by the Minister of the environment of the Flemish region. As to the substance of the case, the Council of State suspended of the permit, as the principle of care had been violated in the decision making and the negative impacts of the establishment would be impossible to rectify at a later stage.
2. Country/Region	Belgium
3. Court/body	Council of State
4. Date of judgment	2012-12-18
5. Internal reference	Council of State, Nr. 221.784, 18 December 2012, BVBA Immo Dominique
6. Articles of the Aarhus Convention	Art. 2, para. 2, art. 3, para. 9, art. 6, para. 8, and art. 9, para. 2 and 4
7. Key words	Environmental Permit – Large scale commercial complex – EIS – Insufficient measures to avoid important traffic problems – Access to Justice – Legal standing – Sufficient interest – Injunctive Relief – Effective Remedy

8. Case summary

On administrative appeal, the Minister for the Environment of the Flemish Region granted an environmental permit for the operation of a large scale shopping complex (*Uplace)* near Brussels Airport. The area was covered by a brownfield agreement between the developer, the Flemish Government, the municipality and the Flemish Waste Management Agency. The Minister for Land Use Planning of the Flemish Region had previously approved a land use plan for the area and granted a building permit. The environmental permit, however, had been denied by the provincial government, due to concerns about traffic congestion. According to the SEA/EIA, the complex would generate almost 50 % increase in traffic on already saturated motorways. The permit applicant argued that because of the expected increase in traffic congestion, people would be more likely to utilize public transportation. Public transportation did not currently exist in the area but was planned for in the brownfield agreement. On appeal, the Minister for the Environment of the Flemish Region found that if all the transportation-related measures described in the brownfield agreement were taken, the traffic situation would be acceptable.

Two small businesses subsequently filed a demand for annulment and for suspension of the environmental permit. The Council of State found that the first two requesting parties, located 3 and 5 kilometers away from the planned complex, had a sufficient interest in the case, and therefore standing, because they were likely to be faced with significant changes in traffic density in their vicinities, according to the SEA/EIA-report. The fact that they had not challenged the land use plan or the economic permit did not impact their interest in the case.

As to the substance of the case, the Council of State stated that in the context of an environmental permit, the competent authority must carefully examine the project concerned, take into consideration the nuisances and risks for man and the environment, then come to a well-reasoned final conclusion. The authority has to assess whether the nuisances exceed what is normally acceptable, taking into consideration all elements that are sufficiently reliable at the time the decision is taken. A permit may not be granted without a sufficient inquiry into the environmental effects and how they may be mitigated. All environmental effects generated by the project must be taken into account. The Council of State found that in this respect the decision of the Minister was not well reasoned. The mitigating measures described in the brownfield agreement were far from being realized, and most of them still needed permits themselves. Furthermore, the public participation rights of third parties had been violated by presenting necessary infrastructure investments that still lacked permits as quasi-realized, and the principle of care had been violated by the finding that the environmental impacts of the project would be reduced to acceptable levels.

The Council of State granted a suspension of the environmental permit. Referring to the SEA/EIA-report, the Council found that one of the parties would face serious harm that was difficult to rectify if the permit were executed immediately. Though it was argued by the Flemish government and the developer that the permit should not be suspended on the basis of a 'balance of interest' test, the Council of State found that the parties to the case were better served by a suspension of the permit than by a possible annulment of the decision in the future, after the permit has already been executed. Negative impacts that would occur if the permit was executed immediately would be impossible to rectify at a later stage. Therefore, only injunctive relief was an effective remedy in this case.

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