

MiNa-Council

Environment and Nature Council of Flanders

**Advisory opinion
of 24 February 2005
on the implementation in Flanders of the
Aarhus Convention**

No. 2004| 10

Guidelines for reading the advisory opinion and lines of force

The Aarhus Convention is a very “living” Convention. It is constantly fleshed out further through (up till now) one protocol and a series of decisions by the Parties. A number of mechanisms were called into being under the Convention to improve compliance with it. Furthermore, the Convention has an impact on the way in which international decision-making on the environment works. It is transposed into all kinds of regulations and measures, at EU level as well as at the Belgian and Flemish levels.

Following the request which the MiNa-Council received to give advice on a Flemish draft implementation report on the Convention, the Council briefly examines in this advisory opinion what the content of the Convention is and how it is further fleshed out (Chapter 1.1). In addition, this advisory opinion contains a summary of the state of affairs at European (Chapter 1.2) and at Flemish level (Chapters 2 through 8). If possible, it is indicated for the different parts of the text where more information can be found that may be useful for implementing the Convention. The Council formulates recommendations for most parts of the review of the Flemish situation, so as to improve the implementation of the Convention even more (Chapters 2 through 8).

The main recommendations to the Flemish government are:

- Keep abreast of the relevant developments at the level of the UNECE, the EU and other international fora and start transposing them into Flemish law and policy in time.
- Use the implementation report not just as an instrument to summarise the Flemish state of affairs, but also to improve the own situation.
- Fit nature and environmental education (NEE) in with sustainable development education and ensure a better steering and co-ordination of and co-operation between all relevant NEE actors. Strengthen the basis of the NEE policy by collecting relevant information on target groups and by using relevant research. Develop a more systematic NEE policy on the basis of this.
- Elaborate the annual reports of the appeal body “passive openness”, so as to allow the environmental information system on the one hand and the general system on the other to be evaluated separately. Try to cluster the information of all important authorities falling within the scope of application of the new Flemish Parliament Act. A joint Internet application which allows these authorities to register applications in a simple manner, may be a good aid.
- Continue the training efforts for civil servants and launch an information campaign in order to better inform citizens about their Aarhus rights. Add to the existing web site on open government a section with “frequently asked questions”, the publication of the decisions taken by the appeal body, and a Flemish clearinghouse for all Flemish Aarhus information. This can all be done in co-operation with the municipalities (Association of Flemish Cities and Municipalities/VVSG) and the provinces (Association of Flemish Provinces/VVP).
- Develop an information system that makes a minimum inventory of the completed documents. The system may also comprise an overview of documents that are being drawn up and make completed documents available electronically. The MiNa-Council regards this as a point of interest to be given priority to. Above all set up a system for making public those documents that are essential to the decision-making process of the Flemish Government.
- Also give priority to the announced (and legally required) implementing order that governs active openness of environmental information in a general manner. This Order should impose a minimum of active openness on all levels of government, should contribute to increased harmonisation between all existing initiatives and should stimulate the government to provide basic information in such a way that it is also accessible to the

- public at large.
- Develop a strategic communication plan that further fleshes out the main lines regarding communication in the environmental policy plan. Develop operational communication plans tailored to target groups. Or formulated more generally, aim at differentiation of the communication, tailored to target groups.
 - Take, in implementation of Article 29 of the Flemish Parliament Act on Open Government, the lead in developing, managing and opening up a joint database with signposting information and first line information of the different government bodies. Do so in consultation and collaboration with the different levels of government.
 - Consider the implications of access to information and participation for the organisation of the government. Take measures so as to be able to handle requests to make information public in a swift and proper manner. Ensure co-ordination of the communication within the Environment, Nature and Energy policy domain.
Support (in particular) smaller municipalities so as to have them also provide access to environmental information and support the further development of participation at local level. Foster intermunicipal co-operation in this respect.
 - Make an inventory of and update – departing from a coherent policy vision – the specific provisions in Flemish environmental law that have to do with active openness and participation in concrete decision-making procedures. Review existing environmental decision-making procedures with special attention to “timely” participation. After the period of participation (either legally defined or not) has expired, draw up a sound participation report indicating which is the product of the participation in terms of content and how this content is taken into account.
 - The traditional approach to participation (public consultation) has limitations. Therefore, (also) develop innovative participation methods that enhance the effectiveness of direct participation by individual citizens.
 - Examine, among other things on the basis of the available literature, opportunities for improving citizens’ access to justice and to (appeal procedures within the framework of) administrative decision-making processes.
 - Adjust (the regulations concerning) the Annual Integrated Environmental Report in order for it to comply with the PRTR Protocol. Also follow the developments within the EU with regard to the E-PRTR and ensure that this regulation is transposed in time. Aspects to be considered as well are the included information and citizens’ access to this information.

Table of contents

Guidelines for reading the advisory opinion and lines of force . **Fout! Bladwijzer niet gedefinieerd.**

Table of contents 4

Introduction **Fout! Bladwijzer niet gedefinieerd.**

Text of the advisory opinion **Fout! Bladwijzer niet gedefinieerd.**

1 Situation in the international law context **Fout! Bladwijzer niet gedefinieerd.**

1.1 The Aarhus Convention and its compliance mechanisms..... **Fout! Bladwijzer niet gedefinieerd.**

1.2 Transposition of the Convention into the EU legal order..... **Fout! Bladwijzer niet gedefinieerd.**

1.3 Other international developments **Fout! Bladwijzer niet gedefinieerd.**

1.4 Recommendations **Fout! Bladwijzer niet gedefinieerd.**

2 The state of affairs in Flanders: introduction..... **Fout! Bladwijzer niet gedefinieerd.**

2.1 Current state of affairs..... **Fout! Bladwijzer niet gedefinieerd.**

2.2 Recommendations **Fout! Bladwijzer niet gedefinieerd.**

3 The state of affairs in Flanders with regard to the general obligations **Fout! Bladwijzer niet gedefinieerd.**

3.1 Guidance from public officials and authorities to the public with regard to the three pillars **Fout! Bladwijzer niet gedefinieerd.**

3.2 The government shall promote environmental education and environmental awareness among the public, especially with regard to the three pillars (Article 3, third paragraph) **Fout! Bladwijzer niet gedefinieerd.**

3.3 The government shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation (Article 3, fourth paragraph)..... **Fout! Bladwijzer niet gedefinieerd.**

3.4 The government shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their

involvement (Art. 3, eighth paragraph).....	Fout! Bladwijzer niet gedefinieerd.
4 The state of affairs in Flanders regarding access to environmental information.....	Fout! Bladwijzer niet gedefinieerd.
4.1 Current state of affairs.....	Fout! Bladwijzer niet gedefinieerd.
4.2 Recommendations	Fout! Bladwijzer niet gedefinieerd.
4.2.1 In general	Fout! Bladwijzer niet gedefinieerd.
4.2.2 Passive openness	Fout! Bladwijzer niet gedefinieerd.
4.2.3 Active openness	Fout! Bladwijzer niet gedefinieerd.
5 The state of affairs in Flanders regarding participation.....	Fout! Bladwijzer niet gedefinieerd.
5.1 Current state of affairs.....	Fout! Bladwijzer niet gedefinieerd.
5.2 Recommendations	Fout! Bladwijzer niet gedefinieerd.
6 Open government and the organisation of the government	Fout! Bladwijzer niet gedefinieerd.
7 The state of affairs in Flanders regarding access to justice.....	Fout! Bladwijzer niet gedefinieerd.
7.1 Current state of affairs.....	Fout! Bladwijzer niet gedefinieerd.
7.2 Recommendations	Fout! Bladwijzer niet gedefinieerd.
8 The state of affairs in Flanders regarding the PRTR Protocol	Fout! Bladwijzer niet gedefinieerd.
Annex I: Analysis of the annual reports by the civil servant in charge of handling appeals regarding passive openness	Fout! Bladwijzer niet gedefinieerd.
Annex II: Terms.....	Fout! Bladwijzer niet gedefinieerd.

Introduction

On 28 January 2005, the MiNa-Council received a request for advice on the draft implementation report of the Aarhus Convention from the Flemish Minister, responsible for the Environment.

The Minister requested to receive the advisory opinion within a one-month period.

The advisory opinion was prepared by the Instruments Working Group. The request for advice was interpreted widely. The draft implementation report caused the Council to examine to what extent the Convention is being practically implemented in Flanders.

The advisory opinion was adopted unanimously.

Hubert David

MiNa-Council Chairman

Text of the advisory opinion

1 Situation in the international law context

1.1 The Aarhus Convention and its compliance mechanisms

- [1] **The Aarhus Convention.** The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in the Danish city of Aarhus on 25 June 1998. It was also signed by Belgium on that same date. It became effective on 30 October 2001 after having been signed by a sufficient number of Parties to the Convention. As Belgium ratified the Convention on 21 January 2003, it has had to comply with it from that date onwards.
- [2] **Brief overview of the obligations imposed by the Convention on the government and of the rights it grants to certain actors.** The Aarhus Convention contains a series of minimum obligations for public authorities. Member states can always take more far-reaching measures. The minimum obligations can be subdivided into more general obligations on the one hand and three more concrete pillars on the other: public access to environmental information, public participation and access to justice.

Usually (though not always), the obligations for public authorities find their mirror image in a right for a certain entitled party. This entitled party is generally “the public”. Participation in decisions on specific activities and access to review procedures and judicial bodies are grosso modo a right for the “public concerned”. Rights are also granted to a limited extent to non-governmental organizations. Below, a diagram is given of the most important rights that are granted and of the entitled party.

	Obligation for the public authority which yields a right for an actor	Entitled party
General obligations (Article 3)		
1	Provision of guidance by public officials and authorities with regard to Aarhus rights (Art. 3.2.)	The public
2	Promotion of environmental education and environmental awareness (Art. 3.3.)	The public
3	Appropriate recognition of and support to (Art. 3.4.)	Associations, organizations or groups promoting environmental protection
4	Ensuring that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement (Art. 3.8.)	The entitled party in conformity with the relevant provision

Access to environmental information (Art. 4 and 5)		
5	Passive openness (access to specific environmental information on request) (Art. 4)	The public
6	Active openness, in particular: Making available environmental information in electronic databases (information on the state of the environment, legislation, policy, action plans and programmes and other information insofar as it is available electronically) (Art. 5.3.) Disseminating (international and internal) legislation and policy documents relating to the environment (Art. 5.5) and a national report on the state of the environment (Art. 5.4) Encouraging operators whose activities have a significant impact on the environment to inform the public regularly of this (Art. 5.6) Publishing information relevant in framing major environmental policy proposals (Art. 5.7) Making available product information which enables consumers to make informed environmental choices (Art. 5.8) Progressively establishing a publicly accessible database including pollution inventories or registers (Art. 5.9, further elaborated in the PRTR Protocol)	The public
Public participation (Art. 6, 7 and 8)		
7	Granting participation in decisions on specific activities. It applies at least to the activities listed in Annex I to the Convention and preferably also to all other activities that may have a significant effect on the environment. The public authority must start participation by providing information about the activity and the decision thereon. The participation must meet a number of quality requirements. The public authority shall take account of the outcome of the public participation and promptly inform the public of the decision as soon as it has been taken (Art. 6)	The information is provided to the "public concerned". The participation is provided to "the public".
8	Providing participation concerning plans, programmes and policies relating to the environment (Art. 7)	The public
9	Providing participation during the preparation of executive regulations (Art. 8)	The public (directly or through representative consultative bodies)
Access to justice (including administrative procedures) (Art. 9)		
10	Review procedure with regard to request for passive openness (Art. 9.1) The procedure is started before an independent and impartial body (administrative review). It can also be established before a court of law, but in that case a reconsideration must also be possible by the public authority.	Anyone who submitted a request to gain access to information.
11	Review procedure for decisions on proposed activities listed in Annex I (Art. 9.2)	Members of the public concerned having a sufficient

	The procedure is started before a court of law and/or an independent and impartial body (administrative review).	interest Non-governmental organizations meeting certain requirements
12	Administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of the national law relating to the environment (Art. 9.3)	Members of the public, when they meet the criteria laid down in the national law

In accordance with Art. 2.4 “the public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

Art. 2.5 defines “the public concerned” as the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

As already said, the Convention sometimes also imposes obligations on public authorities without them finding their mirror image in a certain entitled party. The main ones are:

- transposing all provisions of the Convention into the proper national law, and taking the proper measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention (Art. 3.1);
- promoting the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment (Art. 3.7);
- collecting and updating environmental information, among other things by imposing mandatory systems in this respect on actors (Art. 5.1).

[3] **The PRTR Protocol.** In implementation of Art. 5.9 and Art. 10.2 of the Convention one single protocol was drawn up. The PRTR Protocol (Protocol on Pollutant Release and Transfer Registers) was adopted at an extra-ordinary meeting of the Parties to the Aarhus Convention on 21 May 2003 in Kiev (the Ukraine).¹ It was signed by Belgium.

In accordance with the Protocol, each Party must establish a register. The government must impose on facilities the obligation to annually report the required information. The register must at least make an inventory of the releases and transfers of the 86 pollutants specified in the Protocol. It concerns, among other things, greenhouse gases, releases that add to acidification, ozone depleting substances, heavy metals and some carcinogenic substances such as dioxin. It involves the releases and transfers from a number of key point sources such as power stations, the mining and metal industries, chemical plants, waste and waste water treatment plants, and the paper and wood industries. However, it is also about the available data regarding releases from diffuse sources such as transport and agriculture. The data must be entered into a structured, computerized database. They must be standardized and timely. The database must be freely accessible to the public through the Internet, be searchable through a number of different parameters (facility, pollutant, geographical location, activity, etc.), be user-friendly (with links to other relevant registers). The public must participate in the development and modification of the register.

¹ Articles 5.9 and 10.2 of the Convention served as the legal basis for the Protocol.

The Protocol imposes minimum obligations. The Parties to the Convention can go even further, for instance by including additional pollutants or by considering more sources.

A Working Group on PRTR was established following the Meeting of the Parties to prepare and guide the coming into force and implementation of the Protocol. This Working Group is preparing an Implementation Guide.

- [4] **Mechanisms for promoting compliance with the Convention.** The Convention itself contains a mechanism for monitoring its implementation. It consists of two components, one mandatory mechanism and the possibility to establish optional arrangements. The mandatory mechanism means among other things that the Parties must report at regular intervals. At their Meeting, which takes place every two years, the Parties must review the implementation of the Convention on the basis of this reporting. More in particular *“they review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them”*.² In accordance with the Convention, the Meeting of the Parties can also establish optional arrangements for reviewing compliance, which in the meantime has been done.³

Apart from that, UNECE also established a clearinghouse for information related to the Convention.

- [5] **Development of the mandatory compliance mechanism: the implementation report.** The first Meeting of the Parties adopted Decision I/8. It meets the provision in the Convention on the mandatory compliance mechanism. The decision was that the Parties to the Convention are to submit an implementation report to the secretariat in advance of the second Meeting of the Parties. The report must give an overview of the legislative, regulatory or other measures the Party has taken to implement the provisions of the Convention. The report must be drawn up in accordance with the format set out in the annex to the decision. The format does not consider the Articles governing the general functioning of the Convention (such as the Meeting of the Parties and the right to vote, the Convention secretariat, the procedure for amending the Convention,...). It merely contains questions about the implementation of the Convention provisions imposing obligations on the individual Parties to the Convention. In a nutshell, the format inquires about the regulation or measures relating to the key provisions on the basis of which citizens can exercise their rights (see summary table in no. 1.1). The Parties to the Convention must prepare their reports through a transparent and consultative process involving the public.

The Convention secretariat will prepare a synthesis report on the basis of the different country reports. This report will be presented at the second Meeting of the Parties in Almaty, Kazakhstan (25-27 May 2005).

This process is repeated in advance of each subsequent Meeting of the Parties. To this end, the Parties to the Convention must each time update the report.

² Article 10, and in particular Art. 10.2.a.

³ Article 15 of the Convention stipulates that these arrangements must be of a non-confrontational, non-judicial and consultative nature and allow for appropriate public involvement. In order to implement this provision, the first Meeting of the Parties adopted Decision I/7 establishing the Compliance Committee for the review of compliance by the Parties with their obligations under the Convention.

- [6] **Exchange of information.** The Aarhus Clearinghouse for Environmental Democracy (<http://aarhusclearinghouse.unece.org>) was opened to the public by UNECE on 13 July 2004. This mechanism creates an exchange platform as well as a co-ordination centre for exchanging relevant information. It serves to collect and disseminate information on (national) laws, measures and “good practices” relevant to the rights of the citizens under the Convention. This should make it easier to implement the Convention. Moreover, it contains information relating to the application of Principle 10 of the Rio Declaration on Environment and Development (1992).⁴

International organisations, (national) governments, NGOs as well as academics can provide information to this information node. As a result, it contains information, currently over 500 documents, for a wide range of users.

- [7] **Recommendation with regard to GMOs.** A second Meeting of the Parties to the Aarhus Convention is due to take place from 23 to 25 May. An important item on the agenda concerns the provisions with respect to genetically modified organisms (GMOs). GMO activities are not included in the list to which public participation applies. A working group has been dealing some years now with the question as to what extent provisions regarding GMOs should be included in Article 6. The position of the EU will probably be determined at the EU Environment Council on 10 March 2005. The MiNa-Council argues in favour of Flanders defending a position, during negotiations for the Belgian position, which includes at least the provisions regarding consultation from Directive 2001/18/EC. In this way, the same obligations would become applicable to all Parties to the Aarhus Convention as those that currently already apply to EU member states.

1.2 Transposition of the Convention into the EU legal order

- [8] **In general.** In accordance with Article 17 of the Convention, the EU can also become a Party to the Convention. The Union signed the Convention on 25 June 1998. It has not yet ratified the Convention, but the procedure has already progressed far.⁵ The EU hopes to complete it before the second Meeting of the Parties (May 2005).

The EU is attending to the transposition of the provisions of the Convention into its internal legal order. The regulation resulting from this transposition is important to the Flemish citizens in two ways. First of all, a regulation is in the pipeline which imposes obligations on the EU institutions. Secondly, the EU develops regulation that must be transposed and implemented by the member states. Insofar as this regulation goes further than the Convention, it has additional implications for the Flemish Region. Moreover, the transposition of the Aarhus Convention into EU regulation creates additional (far-reaching) opportunities

⁴ Principle 10 reads as follows: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

⁵ On 24 October 2003, the European Commission adopted a proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters (COM(2003) 625 final). On 20 December 2004, the European Council (Environment) reached political agreement on this Decision. It will be formally adopted at the forthcoming Environment Council meeting.

for enforcing proper compliance with international law.

Below, a brief overview is given of the European regulation and measures in implementation of the Convention. Whenever possible, it is indicated whether, and if so in which aspects, the EU goes further than the Convention.

- [9] Regulation applicable to EU institutions.** On 24 October 2003, the Commission adopted a Proposal for a Regulation on the application of the provisions of the Aarhus Convention to EC institutions and bodies. The proposal comes down to the application of the three pillars of the Aarhus Convention to EC institutions and bodies.⁶ On 20 December 2004, the European Council (Environment) reached political agreement on this proposal. Normally, it will be formally adopted at the next Environment Council as a common position.

In terms of content, the proposal builds on the existing regulation from 2001.⁷ However, this regulation is limited to access to information. The proposed regulation has a wider range of application. The proposal also completes the existing regulation with regard to other aspects. The Commission is obliged to progressively make environmental information accessible through electronic databases. All EU institutions are obliged to provide opportunities for public participation when preparing plans and programmes relating to the environment. Finally, NGOs that meet a number of criteria are entitled to ask EU institutions to reconsider administrative acts taken under environmental law. In accordance with the political agreement in the Council, environmental organisations would not have the right to lodge an appeal with the EU Court of Justice in Luxembourg, unless they can prove that their interests are directly and personally violated by one or other EU Directive. That is why Belgium voted against the proposal as the only EU member state.⁸

- [10] Regulation that is to be transposed and applied by the member states: access to environmental information.** The public access pillar of the Convention was transposed into the EU legal order through Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. The Directive must be transposed by the member states by 14 February 2005.

Although the Directive is very similar to the Aarhus Convention, it goes further than the Convention in some aspects. It thus provides for more openness.

- [11] Regulation to be transposed and applied by the member states: participation.** The most important instrument for transposing the Aarhus provisions relating to participation is Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003

⁶ The proposal takes account of the existing regulation in this field, namely Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and the Communication from the Commission of 11 December 2002 "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission" (COM(2002) 704 final).

⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁸ Rita Cambré, EU ontzegt NGO's recht op beroep in Luxemburg, De Tijd, 21 December 2004

providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

This Directive updates the provisions on participation in the regulation regarding the environmental impact reporting and environmental permit (IPPC Directive). It also contains rules regarding public participation in the drawing up of plans and programmes provided in the Directives relating to waste, air pollution and pollution caused by nitrates. The Directive must be transposed by the member states by 25 June 2005.

Other Directives, such as the strategic environmental assessment Directive (2001/42/EC) and the Water Framework Directive (2000/60/EC) also contain relevant provisions.

- [12] Regulation that is to be transposed and applied by the member states: access to justice.** The aforementioned Directives 2003/4/EC (access to environmental information) and 2003/35/EC (participation) contain provisions relating to the access to justice.

Moreover, the Commission adopted a Proposal for a Directive on access to justice in environmental matters on 24 October 2003. In this way, it not only aims at transposing the Convention, but at the same time it wishes to contribute to eliminating shortcomings in the enforcement of environmental law.

This Proposal is still under discussion in the Environment Council.

- [13] The PRTR Protocol and the EPER Decision.** Since 2000, the EU has had a system of emission reporting, the European Pollutant Emission Register (EPER). In accordance with the EPER Decision⁹, the member states are to report every three years on the emissions to air and water of some fifty pollutants from industrial facilities. Meantime, the member states reported in 2003 on the 2001 emissions. The European Commission has drawn up a first EPER Review Report on this. The report reviews the reporting process and the data delivered by the member states.¹⁰

The PRTR Protocol was also signed by the EU. In order to fully comply with Art. 5.9 of the Aarhus Convention and in order to be able to ratify the Protocol, the existing EPER should be completely replaced by a more extended European PRTR (E-PRTR). The E-PRTR is to enhance public access to environmental information and contribute to the prevention and reduction of pollution. The EU also wants to seize this occasion to simplify and streamline the existing reporting requirements. To this end, Council Directive 91/689/EEC on hazardous waste and Council Directive 96/61/EC concerning integrated pollution prevention and control are amended.

On 7 October 2004, the Commission adopted the following proposals:

- Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC;¹¹

⁹ Commission Decision of 17 July 2000 on the implementation of a European pollutant emission register (EPER) according to Article 15 of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC), Official Journal L 192, 28/07/2000, p. 36.

¹⁰ See <http://www.eper.cec.eu.int/eper/gaps.asp>

¹¹ COM/2004/0634 final

- Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the UNECE Protocol on Pollutant Release and Transfer Registers.¹²

The European Commission aims at having the E-PRTR Regulation come into effect in 2006. The new system would then be reported under for the first time in 2007.

- [14] **Other relevant European regulation.** Directive 2003/98/EC on the re-use of public sector information governs the commercial or non-commercial use by other governments and private economic actors of information they receive from the public sector body, either on the basis of active or passive openness or not.

1.3 Other international developments

- [15] **Participation in international fora.** Under the influence of the Convention (Art. 3.7) a discussion is currently being held on the application of the principles of the Aarhus Convention to international fora. These fora include, among other things, multilateral environmental treaties and treaties with substantial environmental impact, intergovernmental conferences relating to the environment and/or development, international policy fora such as the UN/CSD and UNEP and international financial institutions. A group of experts was established to develop guidelines that will be submitted for approval to the Meeting of the Parties. At the same time a proposal is on the table to draw up a compendium of good practices.

1.4 Recommendations

- [16] **Keep abreast of the relevant developments at the level of the UNECE, the EU and other international fora and start transposing them into Flemish law and policy in time.** As indicated by the description above, the Aarhus Convention is a very “living” Convention. It is constantly fleshed out further through (up till now) one protocol and a series of decisions by the Parties. A number of mechanisms were called into being under the Convention to improve compliance with it. Furthermore, the Convention has an impact on the way in which international decision-making on the environment works. It is transposed into all kinds of regulation and measures, at EU level as well as at the Belgian and Flemish levels.

Up till now, Flanders has been intensively involved in the international evolution. It is a matter of continuing this commitment and using the gained knowledge in order to transpose the international Aarhus regulation into Flemish law and policy in a timely and correct manner.

¹² COM/2004/635 final

2 The state of affairs in Flanders: introduction

2.1 Current state of affairs

- [17] **Ratification of the Convention.** The Aarhus Convention was adopted unanimously¹³ by the Flemish Parliament through the Flemish Parliament Act of 6 December 2002. Shortly after that, on 21 January 2003, Belgium ratified the Convention. This means that Flanders has committed to duly implementing and observing the Convention and that, in addition, there is broad political support for this.
- [18] **The Flemish implementation report.** Belgium is the Party to the Convention and must therefore, in its entirety, draw up an implementation report. The Aarhus Convention is a mixed convention. Important parts of it belong to the regional competences. That is why, both the federal government and the Regions must draw up a sub-report.

The Flemish sub-report, which was the reason for this advisory opinion, was prepared by the Flemish environment administration. A public consultation was also organised. In the period between 1 and 30 November 2004 the Flemish draft report was put on the Internet.¹⁴ Anyone could submit written remarks to the government.

The present implementation report must be evaluated with regard to the international law framework that was outlined above (see 0). According to international law, the system of implementation reports is primarily intended to improve the transposition of the Convention and its implementation. The Council wishes to contribute to this through this advisory opinion.

- [19] **The environmental policy plan 2003-2007.** The plan attaches much importance to target group policy. Although it strongly relates to the Aarhus themes, it is above all geared to other actors, such as economic actors and their federations. In addition, the plan contains a part which is specifically oriented towards citizens (p. 245-248). It is no accident that this part refers to the Aarhus Convention. The most important policy lines presented in it are:
- the development of a system of documents so as to provide citizens access to public documents through a one-stop shop;
 - making it easier to participate in public consultations and participation procedures (such as the environmental policy plan itself, the Flemish Ecological Network, ...);
 - setting up experiments with interactive decision-making, information and communication during policy implementation.

At other points in the plan too, measures are presented that have to do with specific Aarhus themes (see below).

- [20] **The policy memorandum Environment and Nature 2004-2009: in general.** The policy memorandum Environment and Nature 2004-2009 states that industry, trade unions and citizens want to be more directly involved in policy-making. By responding to this, the government can increase the social support for policy. As a result, there is a shift in

¹³ Flemish Parliament, plenary meeting proceedings, 2002-2003, No. 16 (27 November 2002)

¹⁴ www.mina.be/aarhus.html

government action from hierarchical steering to decentralized steering in interaction and through networks including a wide range of social actors.

The memorandum finds that both at international and at European levels these developments are responded to through the Aarhus Convention (and its implementation at European level). That is why the memorandum attaches importance to the implementation of this Convention and the corresponding European directives in Flanders. The operational objective it puts forward is that environmental policy should be based on participation and social support (active and passive openness regarding environmental information, participation of citizens and enterprises in policy through involvement and provision of advice). It points out, however, that this objective should not get in the way of the environmental policy which is “efficient” and “coherent”. Furthermore, environmental protection is everyone’s responsibility and not just the government’s. That is why everyone should “participate”.¹⁵

The memorandum also discusses a number of specific Aarhus themes, such as environmental education and environmental awareness, active openness and finally participation. The description of the state of affairs in Flanders concerning these themes (see below) contains more information about this.

2.2 Recommendations

- [21] Use the implementation report (and the other relevant compliance mechanisms) also to improve the proper situation.** The Flemish environment administration drew up the draft implementation report in agreement with the standard format laid down at international level. This format allows the Convention Secretariat to systematically compare the regulations of the Parties to the Convention (see 0). Unfortunately, the format results in a report which is not very accessible to outsiders. In addition, the format mainly requires an overview of the regulation issued by a Party to the Convention, or of the measures it has taken with regard to the Aarhus themes. The difficulties experienced during the elaboration and application of regulation and measures, as well as the possibilities to improve them, largely remain undiscussed. That is why the implementation report is not a good starting point for a policy discussion on the improvement of the regulation and the application thereof in Flanders itself, which is a pity. Even more so, because clearly a lot of work has gone into the report and it contains a great deal of useful information.¹⁶

The Council proposes that during the next update of the implementation report (in principle within less than two years) a part be annexed to the report which is intended for the Flemish public. This should deal with the problems and possibilities for improvement in Flanders in as comprehensible a language as possible, both at practical and at legal level. This part is best supported on all kinds of reports and on the scientific research carried out into Aarhus themes. In this way, the annual reports of the appeal body “passive openness”¹⁷ and the co-

¹⁵ See among other things p. 21-22, p. 25 and p. 57 of the memorandum.

¹⁶ The web site by Frankie Schram, who took his doctor’s degree on the subject of open government in 2002, contains a similar amount of information. It does not only contain information about Flanders, but also about the other Regions and Communities and about the federal government. It also mentions links to international law and the law of other countries. See <http://users.online.be/fschram/openbaarheid.html>

¹⁷ Article 27 of the Flemish Parliament Act of 26 March 2004 on open government, which is hereinafter referred to in short as DOB.

ordinated annual reports of the Flemish Government relating to active openness¹⁸ will no doubt prove to be useful sources of information. An analysis of the synthesis report – which is drawn up by the Convention Secretariat on the basis of the implementation reports of the Parties to the Convention (see 0) – will no doubt provide information for making improvements. The Clearinghouse developed by the UNECE also contains an enormous amount of information.

3 The state of affairs in Flanders with regard to the general obligations

3.1 Guidance from public officials and authorities to the public with regard to the three pillars

[22] Current state of affairs. The Flemish regulation contains relevant provisions (for instance the principle of customer-friendly service provision in the code of ethics for the staff members of the services of the Flemish Government). Flanders also took measures. These may be ad hoc, such as the announcement of a possibility for participation in the media. Apart from that, there are more structural initiatives which include a guidance component in addition to an active openness component (for instance the Communication Officer and the Flemish Info Line).

3.2 The government shall promote environmental education and environmental awareness among the public, especially with regard to the three pillars (Article 3, third paragraph)

[23] Current state of affairs. Currently, mainly the Environment and Nature policy domain is active in the field of nature and environmental education. The policy vision is incorporated into the environmental policy plan 2003-2007, the co-operation agreements with the local authorities and the vision and policy memorandum NEE 2004-2009. This results in concrete actions by local authorities and NGOs, activities in visitors centres, environmental care at school, etc.

[24] The policy memorandum Environment and Nature 2004-2009: environmental education and environmental awareness. The policy memorandum contains passages relating to environmental education and the promotion of environmental awareness. The memorandum (p. 25; strategic objective and p. 34; operational objective p. 59) finds that the population expects the government to act decisively in case of urgent and acute environmental problems, but that in the other cases government action is soon regarded as patronizing. Hence, it is essential to realise support for the implementation of an environmental and nature policy.

The Minister wants to create this support by involving citizens and industry in the design of the environmental policy and by pointing out their own responsibility to them.

Influencing attitudes is no longer the ambition. Instruments such as communication, information, awareness-raising and education are used to clarify environmental issues, environmental policy or environmental solutions and to disseminate knowledge in this respect. Through dialogue, consultation, agreements and co-operation the Minister will

¹⁸ Article 33 DOB

ensure that the public and organisations can assume responsibility themselves.

[25] Recommendation: Fit nature and environmental education (NEE) in with sustainable development education and ensure a better steering and co-ordination of and co-operation between all relevant NEE actors.¹⁹ NEE should be part of a more extended sustainable development education (SDE). Within this context, however, it must continue to have a role and identity of its own.

For SDE as well as NEE, partnerships should be developed within the own policy domain, with other policy domains of the Flemish government, with other levels of government and with relevant target groups.

Co-operation between the entities of the Environment, Nature and Energy policy domain should be reinforced with regard to NEE. Attention should be paid to this when further implementing the decisions taken within the framework of Better Administrative Policy (BBB). The proposed combination of NEE, communication and target group policy into one new entity is a major step in the right direction.

As regards the co-operation with other policy domains of the Flemish government, the Education and Culture policy domain is the first and most important point of interest. NEE should feature here in the attainment targets and in all kinds of concrete training programmes respectively. Other policy domains are important as well. Priority is given to the policy domains of Agriculture, Economy and Mobility. To realise co-operation with these policy domains, instruments can be used that are developed in the better administrative policy process. Management agreements with agencies and result areas of leading civil servants may contain objectives with regard to NEE.

During the debate on core tasks, agreements were made on the co-operation between the levels of government, which must be implemented.

Co-operation with a wide range of social actors is essential. There are different types of social actors such as the target groups of (environmental) policy, organisations with a (sub-)operation in the field of NEE, etc. Co-operation with the most important target groups must be of a structural nature. There should be a clear division of tasks between the government and organisations specialised in NEE, in order for them to become complementary to one another. In this context, attention should be devoted to the role of volunteers.

Apart from the forms of bilateral co-operation between the different types of actors, strategic steering and operational co-ordination is required. The Nature and Environmental Education and Information Unit (Environment, Nature, Land and Water Management Administration) applies the honeycomb concept in order to represent the network of relationships between all NEE actors. This concept provides an insight into the need for steering and co-ordination. Strategic steering is a task for the political government, after it has been prepared by its administration. According to the Council, the contribution of social actors to the strategic steering of NEE will mainly take place through the NEE permanent commission of the new MiNa-Council.²⁰ The Council proposes to broadly flesh out the terms of reference of this

¹⁹ This recommendation is based on a previous advisory opinion of the MiNa-Council, that is the advisory opinion of 3 June 2004 on Flemish policy relating to Nature and Environmental Education.

²⁰ Article 11.4.2 of the Flemish Parliament Act of 5 April 1995 on general provisions regarding environmental policy (title "Strategic Advisory Council", incorporated into the 30 April 2004 Flemish Parliament Act) provides for a permanent working commission on nature and environmental education under the new strategic **MiNa-Council – advisory opinion on the implementation in Flanders of the Aarhus Convention** p. 18 / 40

commission by attuning them to the terms of reference of the provided Target Groups and Communication Policy entity.

The existing Flemish NEE consultation platform serves as an ideal forum for operational consultation. This structure functions on the basis of the aforementioned honeycomb concept. The platform consists of a central working group co-ordinating several sub-working groups. The Council is an advocate of the model. It is a flexible co-ordination mechanism which can be easily adapted to changing circumstances. It allows for an overview to be made of all NEE activities and at the same time ensures an efficient operation. That is why the Council recommends extending the model to all relevant NEE actors.

A structural relationship between both bodies can be given shape through an organised and formal contribution by the permanent commission to the platform.

- [26] Recommendation: strengthen the basis of the NEE policy.**²¹ NEE policy requires target group-oriented knowledge (target group profiles, information on questions and needs which target groups have with regard to NEE) and high-quality evaluating research. The Environmental Policy Sciences Support Centre and MIRA-BE can help develop that knowledge.

Therefore, the Council considers it a good thing that a draft “Vision and Policy Memorandum Nature and Environmental Education (NEE) Flanders 2004-2009” was developed. The Council asks the political government to give its opinion about this. The vision and policy memorandum are a good starting point for incorporating a recognisable NEE policy component into the strategic communication policy (see the strategic communication plan mentioned in the environmental planning).

3.3 The government shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation (Article 3, fourth paragraph)

- [27] Current state of affairs.** Regulation exists on the basis of which environmental and nature associations are recognised and subsidised. Both a structural and a thematic subsidisation are possible.

The specific goal of project 26 of the environmental policy plan 2003-2007 is to strengthen the active role which environmental and nature associations play in nature and environmental policy, and more generally to involve social (socio-economic and socio-cultural) organisations in policy to an increased extent.

advisory council of the policy domain. The Council has already had a similar commission since its establishment in 1991.

²¹ This recommendation is based on a previous advisory opinion of the MiNa-Council, that is the advisory opinion of 3 June 2004 on Flemish policy relating to Nature and Environmental Education.

3.4 The government shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement (Article 3, eighth paragraph)

[28] **Current state of affairs.** The right to freedom of opinion and the right to protection of a healthy living environment are constitutionally embedded in Belgium. Still, problems may still arise in our country as well. That is why alertness is still required.

4 The state of affairs in Flanders regarding access to environmental information

4.1 Current state of affairs

[29] **Basic regulation on passive and active openness.** Access to environmental information is regulated to a pretty large extent in Flanders. The basic regulation is the 26 March 2004 Flemish Parliament Act on open government. It applies to all public authorities within the Flemish Region, as well as to the provinces and municipalities. In this way, the pillar regarding active and passive openness of the Convention is formally transposed into the Flemish legal order. The Flemish Parliament Act also transposes the European Directive.

[30] **Specific regulations on active openness.** Apart from the basic regulation referred to, Flemish environmental law also contains specific obligations to make environmental information public in an active way. Usually, it concerns the making public of dossiers, (draft) plans or regulation. This is the case, for instance, for the environmental report, the regional environmental policy plan, the EIR notification, the application dossier for the environmental licence, the town planning licence and the application for dividing land into plots, draft implementing orders regarding environmental conditions, draft environmental policy agreements, the draft demarcation plan of the Flemish Ecological Network areas within the framework of the 21 October 1997 Flemish Parliament Act on nature conservation and the natural environment, etc. These specific types of active openness are often also linked to participation (see below).

[31] **The Flemish coalition agreement.** The coalition agreement contains a passage on openness and participation (p. 59-60). The government must be accessible, within reach and understandable to citizens, companies and facilities. Through the new means of communication it must enter into a fully-fledged dialogue with citizens and companies. In its communication policy, the Flemish government will respond to the communication needs of citizens and companies in a demand-led way by keeping them informed of both the existing and new policy, as well as of the existing and new services which are of interest to them. An integrated e-government policy will be introduced. One-stop shop applications, either based on Internet technology or not, will be further developed.

[32] **The policy memorandum Environment and Nature 2004-2009: access to environmental information.** The policy memorandum does not contain any specific passages on passive openness, but does so on active openness.

The environmental communication of the government is increasingly oriented towards specific target groups; consultation structures with target groups and stakeholders are more clearly co-ordinated (strategic objective, p. 32).

There are two operational objectives (p. 58). First, an implementing order on active openness

of environmental information is added to the 26 March 2004 Flemish Parliament Act on open government. Secondly, the (environmental) authority will from now on communicate clearly about who is competent (and therefore accountable) for what, who takes which decisions, why a certain decision is taken, which appeal procedures can be lodged against a decision, what is the course of implementation of a decision, etc.

4.2 Recommendations

4.2.1 In general

[33] **A good general regulation.** It is the opinion of the MiNa-Council that, thanks to the new Flemish Parliament Act of 26 March 2004 (and the implementing order and the circular of that same date), Flanders has advanced very well in the implementation of the pillar “access to information”. Valuable efforts have been made, not only at legal level but also with regard to the provision of information and training on the consequences of the new Flemish Parliament Act. Many training sessions were organised, and there is also an interesting web site.

Up till now, communication was mainly oriented towards civil servants and not towards citizens.

[34] **Harmonisation of the different Belgian regulations.** With the Flemish Parliament Act of 26 March 2004, the Flemish government has succeeded in issuing a regulation that applies to all authorities for which it is responsible (including a lot of local authorities). This does not mean that there are no other applicable open government regulations that are relevant to citizens. The federal Act of 11 April 1994 on open government is the most important one. From the point of view of the citizens, it would be a good thing to achieve an efficient harmonisation of the federal Act and the Flemish Parliament Act (or even of a co-operation agreement and a joint regulation). This harmonisation is relevant, since – given the international law developments - it is matter of the federal Act being reviewed.

[35] **Transposition of the Directive on the re-use of public sector information.** The Directive on the re-use of public sector information referred to in no. 1 is, as said earlier, important for the use that can be made of public information and for the conditions under which this is done. The Directive is yet to be transposed into Flemish regulation, although the Government is said to be working on a draft Flemish Parliament Act in this respect. Because of its concern for the simplicity of Flemish regulation, the Council recommends examining whether the intended regulation can be embedded into the existing DOB in a transparent manner, or whether it would be advisable to draw up a separate Flemish Parliament Act. In any case, it must be examined whether Article 20, § 3, third and fourth paragraphs DOB 2004 (the delivery of a copy of public information at the payment of an amount on the basis of a “reasonable cost price”, respectively the ban on using information for commercial purposes) are in agreement with this Directive.

4.2.2 Passive openness

[36] **Passive openness at the Ministry of the Flemish Community (MVG) and the municipalities.** Passive openness, as referred to in the Flemish Parliament Act on open government (2004) includes the principle that public information can always be applied for by anyone. The Flemish Parliament Act makes slight distinctions in this principle by a number of reasons for exception. One of these reasons for exception concerns the confidential nature of commercial and industrial information, insofar as this information does not relate to

emissions in the environment.

In accordance with Article 18 DOB (1999) the civil servant who was in charge of handling appeals relating to passive openness at the level of the Flemish government had to draw up annual reports on his activities. A report has indeed been drawn up each year. In Annex I the information from the reports is analysed in detail. A summary is given below.

Summary of the annual reports of the civil servant in charge of appeals relating to passive openness

The reports contain data on the number of applications for making information public which the Ministry of the Flemish Community and its entities receive each year. These are just approximate figures. An increasing number of applications for information is informally dealt with by the government (the applicant does not refer to the DOB and the government handles the application without any formalities). The registration of formal requests for making information public is not always done in a correct way either.

The data reveal that the Town and Country Planning, Housing and Monuments and Sites Administration (AROHM) and the Environment, Nature, Land and Water Management Administration (AMINAL) receive a large proportion of the applications. Thus, the number of dossiers falling within the environmental information regime probably forms a substantial part of the overall number of dossiers.

The number of applications that is complied with in first instance is very high, always amounting to over 95%. It is a sign that the principle of (passive) open government has found relatively great acceptance in the Flemish government.

The annual reports also contain information about the number of submitted appeals and the outcome of those appeals. This information makes one suspect that an appeal is lodged for most applications that were rejected. In quite a number of cases the appeal body changes the decision in the first instance or acts in a mediating capacity. All in all, an important number of the applications is unjustly refused in the first instance. The absolute number of appeals, however, continues to be limited.

Furthermore, all annual reports mention the fact that the appeal body received a lot of questions each year about the correct application and interpretation of the 1999 Flemish Parliament Act on open government. The Association of Flemish Cities and Municipalities (VVSG) also receives many questions about this matter.

In 2002, “De Wakkere Burger vzw” carried out a sample survey among the Flemish municipalities on the access to information²². The survey provided an insight into the state of affairs at that level of government.

Summary of the survey by De Wakkere Burger

The number of applications for receiving access to administrative documents is very low in

²² De Wakkere Burger vzw, Onderzoeksrapport Inzagerecht in bestuursdocumenten – steekproef in de Vlaamse gemeenten, 2002, 13 p.

smaller and medium-sized municipalities in Flanders. Most of them receive only few or no applications at all. Only the two surveyed municipalities with over 40,000 inhabitants had a more than decent score.

If citizens want to use their right to access after all, they usually want to consult dossiers or plans relating to town and country planning, urban planning and the environment as well as the minutes of the municipal council and the board of aldermen.

The majority of local authorities applies fairly acceptable copying prices.

The outcomes of the survey run parallel to the previously existing impression which De Wakkere Burger had, namely that citizens are badly informed about their right to access public information, let alone about the procedures and possibilities for appeal.

The MiNa-Council requests that the annual reports which the appeal body “passive openness” is to draw up in the future (Art. 27 DOB 2004) would contain separate data on dossiers falling within the environmental information regime on the one hand and on dossiers falling within the general regime on the other. This should allow the operation of each of the two regimes to be evaluated separately.

In addition, the annual reports should contain figures on all important authorities falling within the scope of application of the new Flemish Parliament Act (Ministry of the Flemish Community, Flemish public institutions, provinces and municipalities).

The Flemish government should probably develop an Internet application allowing all intended authorities to register applications in a simple manner. Art. 17, § 3, third paragraph, makes such a registration obligatory. The annual reports state that this obligation is not always efficiently complied with. This Internet application would also enable the government to easily collect information about the application of the regulation.

The Council considers it useful for the government to continue to make efforts to better inform civil servants who take decisions in the first instance and citizens about their duties and rights respectively. The new Flemish Parliament Act (2004) may give rise to new problems relating to interpretation and application. Moreover, the quoted documents reveal that citizens are not aware of their right to gain access to administrative documents and receive information about them.²³

Additional efforts are possible. The web site of the Flemish government on open government²⁴ does not contain a section of frequently asked questions yet. Decisions of the appeal body are not published on the web site either. After the example of the UNECE “Aarhus Clearinghouse for Environmental Democracy” the web site can also be used as a clearinghouse for any available information about Aarhus which is applicable to Flanders. Training initiatives can be taken and the web site can be developed in co-operation with the municipalities (Association of Flemish Cities and Municipalities) and the provinces (Association of Flemish Provinces). As a matter of fact, since the entry into effect of the DOB 2004, the scope of application of the Flemish regulation has been extended to the local authorities.

[37] A document information system is a prerequisite for efficient passive openness.

Passive openness is pretty well regulated in terms of procedures. Once a citizen knows which environmental information he or she requires, there is a clear and smooth regulation

²³ Informatieambtenaar, Jaarverslag 2003-2004, p. 13; De Wakkere Burger, onderzoeksrapport, p. 11.

²⁴ <http://www3.vlaanderen.be/openbaarheid/index.php>

on the basis of which he or she will obtain – in most cases (except when the government invokes a ground for exception) – the desired information.

Although there are still possibilities to legally improve the regulation, the biggest practical problem for the citizen who is looking for information is to know which information is available. The government puts out a lot of study contracts to tender. A large amount of documents is also drawn up within the government itself. Sometimes these documents are put on a web site, but often they are not. There is no central inventory available. That is why the MiNa-Council attaches much importance to the development of an information system for documents that are being drawn up or documents that already exist. A step in the right direction is the database on intended regulation that was proposed by the Regulatory Management Unit. An operational objective was rightfully included in the environmental policy memorandum (p.64) to make the results of policy-supporting research more accessible through a properly functioning and open, accessible data management system. This system can make an inventory of the completed documents. Furthermore, it can indicate which study contracts have been put out to tender (see the Applied Scientific Research on the Environment) and which documents are being worked on internally. In this case, it is preferably indicated who is working on which document and by what date the document will probably be completed. Finally, the transition to active openness can be made and the finished documents can be made available electronically to the public. For proposals with regard to the specific category of documents that are important for the decision-making of the Flemish government, see no. 0.

4.2.3 Active openness

- [38] **Attend to the implementing order on active openness.** A 'stepping stone' provision has been incorporated into the 26 March 2004 Flemish Parliament Act with regard to the active openness of environmental information. The provisions in the Convention, however, are discussed in greater detail. They need to be further implemented. The environmental policy memorandum announces that this will be worked on. A lot of preparatory work was already carried out during the previous term of office. The MiNa-Council considers it very important that an order is drawn up within a reasonable term which will govern the active openness of environmental information in a general manner.

The fact that no implementing order has been drafted yet does not prevent Flanders from making efforts with regard to the active openness of environmental information in all kinds of ways. It concerns, among other things, the Flemish codex which also includes environmental regulation, MIRA (environment and nature report) and NARA (nature report), the web sites of the various administrations of the policy domain, various publications of the administrations (De Verrekijker, Opgeruimd, annual reports,...), the (electronic) publications and web sites of the advisory councils, VITO (Flemish Institute for Technological Research) /EMIS (Energy and Environmental Information System), the target group consultation project, etc. Initiatives are also taken at other levels of government.

The implementing order would have to impose a minimum of active openness on all levels of government. Furthermore, it should contribute to a better harmonisation of all existing initiatives. The plans of better administrative policy, that is to arrive at one single entity for target groups and communication for the environment policy domain, also deserve to be carried out.

Active openness must not only benefit experts. Continuous efforts have to be made in order to make basic information accessible to the public at large, among other things by using easily comprehensible language and/or summaries of relevant information. The non-technical summaries that are customary in environmental impact reporting and safety reporting can serve as an example.

[39] Make an inventory of and update the specific provisions in Flemish environmental law that have to do with active openness (and participation). The implementation report already comprises a partial inventory of the obligations relating to active openness. Mainly it involves obligations to make documents public (and to organise participation in it) within the framework of specific decision-making procedures. The Council proposes to complete the inventory. In a second stage, all specific obligations should be evaluated. Should an obligation be maintained? Or has it become superfluous in the light of the provisions of the intended implementing order on active openness? Should an obligation be updated? The government can only answer the latter question if it has a clear view on providing active public access to documents. This view should of course be in line with the policy vision on participation. A lot of work has already been done within the framework of a study carried out by the KUL (Catholic University of Louvain) on the authority of the Minister responsible for the Environment.²⁵ It is advisable to continue to build on this.

[40] Set up a system for making public those documents that are essential to the decision-making process of the Flemish Government. When preparing decisions of the Flemish Government (plans, policy intentions, ...) and regulation (Flemish Parliament Acts, Decrees), documents and advisory opinions are developed that allow the Government to evaluate, and if necessary adjust, the decision-making. Most documents are imposed by the rules of procedure of the Flemish Government. It concerns among other things (depending on the content of the dossier and the stage of the decision-making process):

- background studies;
- successive versions of regulations or decisions, either including an explanatory memorandum or not, that are submitted to the Government by the minister(s) listing the agenda items in first, second or third reading;
- a memorandum to the Flemish Government that is drawn up by the minister listing the agenda items for the first reading, and is updated in second and third reading;
- the advice given by the Finance Inspector in preparation of the first reading and in which he examines the financial implications of intended decisions/regulation, as well as their appropriateness;
- agreements of the different ministers, such as the budgetary agreement of the Minister responsible for the Budget, drawn up on the basis of the advice of the Finance Inspector and on the basis of a contribution by ABAFIM, and the agreement of the Minister responsible for the Civil Service (impact on the personnel policy);
- also “light” regulatory impact analyses (RIAs) since 1 January 2005; RIAs must be appended to the memorandum to the Flemish Government;
- advisory opinions from advisory councils of the Government and the Parliament (Mi-Na Council, Flanders’ Social and Economic Council/SERV, Flemish Science Policy Council/VRWB,...), drawn up on the basis of the policy document adopted in first reading;
- an advisory opinion of the Council of State, Legislation Division, given on regulation that is adopted in second reading.

With the exception of background studies, all these documents are put in a dossier which is submitted to the ministers through the Chancellery in preparation of a Government meeting. This Chancellery keeps these dossiers in an archive. The dossier documents are actively made public only to a limited extent.

Article 12 of the rules of procedure of the Flemish Government even provides an exception to the principle of passive openness. It reads as follows: “*The Flemish ministers are obliged to respect the personal and confidential nature of all Government documents (agendas, memoranda, communications, decisions, minutes, etc...) or to have them respected.*”

²⁵ SCHRAM, F., DE GENDT, T. en DEKETELAERE, K., Onderzoeksproject de juridische, administratieve en organisatorische implicaties voor Het Vlaamse Gewest van het Verdrag van Aarhus, KUL, 2001.

The Council fears that, due to its general formulation, this provision is in contravention of Art. 32 of the Constitution and of the Flemish Parliament Act on Open Government (DOB). As a result of Art. 32, the principle of open government can only be derogated from in Acts or Flemish Parliament Acts. The DOB does not provide such a broad exception. Although there are relevant grounds for exception, they are less extensively formulated. As far as environmental information is concerned, Art. 15, § 1, 2° protects the secret nature of the deliberations of the Flemish Government. Art. 15, § 1, 9° protects the confidentiality of the actions of an environmental authority, insofar as this is necessary for (among other things) the political decision-making.²⁶

Regulation. Unlike the EU (among other things the Official Journal C which has existed for a long time now), the Flemish government does not actively make the intended regulation adopted in first or second reading, public. In accordance with Article 8 of the Aarhus Convention, however, it should make efforts in this respect, as a step to the participation in regulation, which is provided in that same provision.

Ever since the beginning of this Government's term of office (2004-2009), the Regulatory Management Unit has been providing an overview of regulation that is being drawn up on its web site. The table makes an inventory of the preliminary draft Flemish Parliament Acts and draft Decrees from the first approval in principle by the Flemish Government.²⁷ The actual regulatory texts are not made available. Sometimes, such texts can be found on the web sites of VITO/EMIS and of the Mina-Council, but this is not systematically by far.

The coalition agreement announces the introduction of a regulation agenda. This should allow a continuous insight into the regulation that is being drawn up.²⁸ The policy memorandum on administrative affairs further fleshes out this idea. The current table 'regulation that is being drawn up' will be further developed in the short term. Its objectives are: more information for other policy domains, improved communication through the appointment of a contact person, texts that are more readily available for consultation and the development of an instrument for a better policy development. At a later stage, an actual regulation agenda will be aimed at.²⁹

Memorandum to the Flemish Government. A memorandum to the Flemish Government is the key document in a Government dossier. It summarises the decision-making course that

²⁶ The explanatory memorandum (Flemish Parliament, 2002-2003, document 1735, no. 1, p. 31) elucidates the scope of the protection of the political decision-making.

"The following, among other things, is meant by this: the discussions between government partners that are not formal deliberations, the advice given by members of the minister's office to their minister, mayor, etc. within the framework of political considerations or deliberations.

The concept of political deliberations is to be interpreted in a strict sense. A dossier which is in the hands of a minister's office, for example pending a decision of a minister, a member of the provincial executive, a mayor or alderman, is to be considered as an administrative document eligible for being made public. It does not belong to the information that strictly has to do with the political deliberation. On the other hand, a document that is drawn up by an assistant (to a minister's office) with a view to giving advice to take a decision and which considers various political, social, economic, and financial interests, need not be made public. Otherwise, the political decision-making will become impossible."

²⁷ The overview is a selection based on the agenda, the minutes and the decisions of the Flemish Government. The overview is constantly updated. See <http://www.wetsmatiging.be/general/publicaties.cfm>

²⁸ Flemish coalition agreement 2004, p.60

²⁹ Policy memorandum on administrative affairs 2004-2009, p.12

was followed and the content of the policy intention. In accordance with the rules of procedure of the Flemish Government, a memorandum should contain the following elements in terms of content:

- the followed procedure including, if the occasion arises, an overview of previous Government positions or decisions;
- the impact on the budget (financial impact);
- the impact for local authorities;
- the impact for the human resources framework and human resources budgets;
- a short summary of the Regulatory Impact Analysis (RIA);
- a proposal of decision.

Regulatory Impact Analysis (RIA). A regulatory impact analysis is a structured analysis of the intended objectives and of the expected positive and negative effects of an intended regulation in comparison with alternatives. The Government provides two types: the 'light RIA' (the rule) and the 'heavy RIA' (the exception). They each have their own content³⁰, scope of application and division of tasks. The light RIA is compulsory as of 1 January 2005. The analysis results in a 3 to 5 page document. The Regulatory Management Unit has yet to formulate a proposal for the introduction of the heavy RIA.

An RIA must be drawn up for preliminary draft Flemish Parliament Acts and draft Decrees that have a regulatory impact on citizens, industry or non-profit organisations.

As appears from the memorandum to the Flemish Government to the decision to implement the regulatory impact analysis, the RIA has three objectives: 1) increased preparation and support of the content of regulations; 2) more transparency with regard to the advantages and disadvantages of alternative policy solutions, in function of the political and social debate; 3) policy harmonisation across policy domains.³¹ According to the MiNa-Council these goals cannot be achieved, unless the RIAs themselves and the intended regulation which they analyse is actively made public.

Advisory opinions of strategic advisory councils. Most advisory councils, including the MiNa-Council and the SERV, make their advisory opinions entirely public through their web site, as soon as they have been submitted to the competent minister(s) and the Parliament. They also distribute the advisory texts in printed form. In fact, the Flemish Parliament Act of 18 July 2003 governing strategic advisory councils (Article 4, § 4) states that all advisory opinions issued by a strategic advisory council are public.

Advisory opinions of the Council of State. Advisory opinions on preliminary draft Flemish Parliament Acts are actively made public through the documents of the Flemish Parliament, although this making public comes at a very late stage in the decision-making process. Advisory opinions of the Council of State on draft implementing orders are not actively made public.

³⁰ A 'light RIA' deals more specifically with the following aspects or questions: 1) description of the intended regulation; 2) description of the problems or circumstances the regulation wants to remedy and of the objective put forward by the regulation; 3) identification of the most relevant options for realising this objective; 4) analysis of the expected advantages and disadvantages (positive and negative effects) of each option; 5) mention of the consultations that took place during the preparation of the regulation; 6) discussion of the recommended implementation and compliance strategy of the chosen option; 7) summary of the arguments why the chosen regulation was opted for; 8) name and contact information of the person who is available for questions on the impact analysis or the intended regulation.

³¹ Memorandum to the Flemish Government upon introduction of the regulatory impact analysis (see http://www.wetsmatiging.be/MFiles/nota_lichte%20RIA%20040604.pdf)

It is the opinion of the Council that the Government must actively make all important documents public in the short to medium term. In the first instance, the Council has in mind all substantial policy-preparing studies, regulations that are being drawn up (as soon as they are adopted in first reading), memoranda to the Flemish Government, RIAs and, finally, all advisory opinions of the Council of State, Legislation Division. The announced development of the table 'regulation that is being drawn up' is an excellent starting point. This development may consist of a database 'intended regulation' which, as is now the case, gives an overview of and direct electronic access to all documents referred to. This is in line with the objective which has been put forward by the Minister responsible for the Civil Service, namely to ensure that texts are more readily available for consultation.

[41] The communication policy of the Flemish Government and the Ministry of the Flemish Community. Each parliamentary year, the Flemish Information Officer draws up a bulky report outlining all communication efforts of the Government and the Ministry of the Flemish Community. The Flemish public institutions mostly remain out of the picture. Traditionally, a series of recommendations is given at the end of the report. Unfortunately, these recommendations are lacking in the two latest annual reports.³² Even without the recommendations the reports provide a good insight into public communication. They serve as the basic material for the formulation of a communication policy.

Based on the information in the annual report 2003-2004³³, the following recommendations, for instance, can be formulated:

- The government should orient its communication more specifically to target groups. This requires additional efforts, but it is more efficient and even necessary to reach more difficult target groups at all. This recommendation also results from Art. 28 DOB (2004).
- Art. 29 DOB (2004) obliges all government bodies to participate, after consultation, in the development of a common database which contains signposting information and first line information from the different government bodies. Although this obligation follows naturally from Art. 21, § 4 DOB (1999), it goes a lot further. It will still take a long time to fit together the existing pieces of the puzzle which various governments have and to fill the gaps. Citizens, organisations, companies, as well as civil servants themselves need such a database in order to be able to find their way in the jumble of government responsibilities and government information in Flanders. The Flemish government is responsible for the development and management of this common database and for opening it up, although the different authorities themselves are responsible for updating their own information.
- The 2004 Flemish Parliament Act changes the title of Information Officer into Communication Officer. It puts more emphasis on the two-way traffic between citizens and government instead of on the more sender-oriented title of Information Officer. According to the MiNa-Council, this new emphasis must also be realised in practice (see also participation).

[42] The communication policy of the Environment, Nature (and Energy) policy domain and the 5 October 2000 advisory opinion of the MiNa-Council on communicative instruments in Flemish environmental policy. The communication of the policy domain is fragmented. Especially the Flemish environmental public institutions (environmental Flemish

³² At the time when these reports were drawn up and published, no Information Officer was in office. The former Information Officer was given leave for assignment.

³³ Informatieambtenaar, Jaarverslag 2003-2004, p. 14.

public institutions) have a well-developed (thematic) communication policy. Each environmental Flemish public institution has a well-developed communication service with resources and staff to conduct an effective communication policy. Over the years, the environmental Flemish public institutions have built up quite some knowledge in the field of environmental communication. This is particularly the case for themes on which they focus their activities, such as the communication on waste at the Public Waste Materials Company for the Flemish Region (OVAM).

With AMINAL the expertise is divided among the different divisions. There is no communication strategy for AMINAL. Certain divisions have a well-developed communication policy, in other divisions this is rather limited. Not every division has the necessary staff to develop a sound communication policy.

Each entity follows its own communication strategy which is based on different starting points (Flemish Parliament Acts, environmental policy plans,...). Each entity has defined its own communication goals based on its own vision and mission and follows its own methodology in order to realise these goals. Within the policy domain there is no methodology for harmonisation.

The communication is mainly sender-led and communication channels are not always chosen in function of the target group. For some target groups there is a surplus of information whereas for others there is a shortage.

A coherent strategy behind the multitude of actions is lacking. In addition, there is a lack of visual identity for the Flemish environmental authority. There is also a need for systematic quality control and impact measurements as well as practice-oriented research with regard to public communication and environmental communication.

The Internal Communication Consultation on the Environment in Flanders (ICOLEV) was established so as to achieve increased harmonisation.

This resulted in an annual communication plan being drawn up. This plan is merely a co-ordinated list of communication actions subdivided by communication channel (leaflets, study days, media campaigns,...) and by entity.

In its bulky advisory opinion on communicative instruments in Flemish environmental policy the Council pointed out the importance of communicative instruments. They should help to provide an insight into the complex environmental policy and by extension into the even more complex matter of sustainable development. Moreover, (target group) consultation and participation are of major importance in the development of a policy in the field of sustainable development.

Communication can be both a process instrument and a policy instrument. In the first case, unilateral or multilateral (interactive) communicative instruments are used at the stage of policy preparation. In this context the Council argues in favour of developing innovative methods for reinforcing the effectiveness of individual citizens' direct participation. In the second case communicative instruments are used to implement the set policy objectives. Usually, communication plays a supporting (but not to be underestimated) role as a policy instrument in the use of legal or economic instruments. Sometimes, the instrument stands alone.

In practice, the Council's advisory opinion argues in favour of a differentiation of the communication, tailored to target groups, of the drafting of a strategic communication plan which further elaborates the main lines in the environmental policy plan regarding communication and of operational communication plans, tailored to target groups.

[43] **The communication policy of municipalities.** In 2004, the Katholieke Hogeschool Mechelen (Catholic College of Malines) studied, in co-operation with the Association of Flemish Cities and Municipalities the communication activities in Flemish municipalities.³⁴ This study approached the communication policy departing from the relevant regulation³⁵.

Summary of the study carried out by the Katholieke Hogeschool Mechelen (communication part)

Since 1997, the municipalities in Flanders have made on average quite some progress in the field of communication. An increasing number of municipalities have given an alderman the explicit political responsibility for communication. The function of communication officer was upgraded in many municipalities. These past two years, 1 out of 10 municipalities created for the first time the function of web editor. The operating means for communication (excluding personnel costs) have doubled since 1997 to a current average of 4 euro per inhabitant. More than in the past, municipalities have been working on a deontological communication code and a house style, although in both cases nearly half of the municipalities still has a long way to go.

The municipal information magazine continues to be the most important means of communication. On average, the second most important communication channel is the municipal web site: 93% of the local authorities have one. Some pioneering municipalities have started up an e-zine (13% of the local governments).

However, the progress of the municipal communication took place at two speeds. In many fields, municipalities with less than 10,000 inhabitants perform considerably worse than the medium-sized and large municipalities and cities. Nearly 1 out of 5 municipalities does not comply with the legal obligation to appoint an information officer. Less than half of the small municipalities has an alderman for communication. Only 1 small municipality in 5 has a more or less fully-fledged communication service. Small municipalities issue an information magazine less frequently than their larger counterparts. Only in exceptional cases (14%) do they have a communication policy plan. The communication in small municipalities is considerably less oriented towards specific target groups. Finally, in comparison to other local governments, there is much less opportunity for communication between citizens and the government. The researchers dare speak of a communicative crisis in small Flemish cities and municipalities. Naturally, a communication policy is more expensive for smaller

³⁴ Goubin, E. and Kint, E. (2004). In kaart gebracht: de communicatiewerking van de Vlaamse steden en gemeenten, Onderzoekspresentatie. KHMechelen; en Persbericht - Onderzoek legt schrijnende communicatiezwaktes bloot van kleine gemeenten, http://www.memori.be/DOWNLOADS/Persberichtcommunicatie_gemeentes.doc

³⁵ Since the coming into effect of the 12 November 1997 Act on open government in provinces and municipalities (29 December 1997) all cities and municipalities in Flanders were legally obliged to execute a communication policy. They had to appoint an information officer, publish a municipal signposting guide, point out in correspondence the civil servant who was in charge of the dossier and refer to the possibilities to appeal against decisions.

The 26 March 2004 Flemish Parliament Act on open government extends the obligations and fleshes them out more concretely. The most important additions are the following. A general obligation to inform the public is imposed on authorities. Information officers become communication officers with a more extended task description. From now on, public centres for social welfare (OCMW) must have a communication officer as well. Instead of the municipal signposting guide a common database with signposting information and first line information will be established for the Flemish government and the local authorities.

municipalities in comparison to larger ones.

No specific research was carried out into environmental communication. Only the general communication policy was studied. Nevertheless, the study results are also relevant to the environment. Especially, as environmental communication (definitely in the wider sense of the Aarhus Convention) is an essential part of the overall communication.

The Aarhus Convention also imposes obligations on the local authorities.³⁶ The more general obligations regarding active openness of the Convention are translated into Article 28 et seq of the DOB (2004). The concrete obligations should, in implementation of Art. 30 DOB, still be embedded in an implementing order. It involves the obligation to make the own regulation (policy regulations), and provincial or municipal environmental reports, plans and programmes available electronically.

Smaller municipalities are generally expected not to meet these obligations. The Council recommends the Flemish government to help eliminate the identified shortcomings through a supporting policy. Intermunicipal co-operation also seems useful in this respect.

5 The state of affairs in Flanders regarding participation

5.1 Current state of affairs

- [44] **Specific decision-making procedures.** Point [12] gives a series of examples of specific active openness obligations and points out that this often goes hand in hand with participation. This is the “traditional” form of participation.
- [45] **Non-traditional initiatives.** The Flemish government also experiments with new forms of participation. The Flemish Institute for Science and Technology Assessment (ViWTA), which is attached to the Flemish Parliament, organises projects which pay much attention to citizen participation. To this end it also provides methodological support, among other things by distributing a manual. Since a few years, a project on target group consultation has been running within the Environment and Nature policy domain. The environmental policy sciences support centre carries out research in this respect on the authority of the minister responsible for the environment and in co-operation with the administration. Recently, a research project “transition management” has been launched in implementation of TWOL (Applied Scientific Research on the Environment) 2004. Within the framework of this project a participation methodology that has recently been developed in the Netherlands is applied to the theme of “sustainable building and living”.
- [46] **Advice by and consultation with civil society organisations.** Civil society organisations which have objectives in the field of environmental and nature policy, socio-economic and other civil society organisations participate in advisory and consultative structures with administrative and political authorities. They sit on the advisory councils of Flemish (MiNa-

³⁶ The Aarhus Convention imposes obligations on “public authorities”. Article 2.2.a. explicitly indicates that public authority means government “at national, regional and other level”.

Council, the Manure Steering Group) and local authorities. They are also asked to attend monitoring groups of studies, projects and working groups in order to prevent and/or solve specific problems.

[47] The policy memorandum Environment and Nature 2004-2009: participation. The policy memorandum attaches much importance to participation. The minister opts to make the preparatory phases of policy-making accessible to citizens and enterprises. Participation in procedures for public consultation will become easier. Contacts with industry and relevant target groups such as sector federations and trade unions will be intensified. In this way, Flemish businesses are given increased security (strategic objective p. 32).

The operational objectives are (p. 58):

- to screen, and possibly adjust, the Flemish regulation in order to guarantee conformity with European Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;
- to put into practice Title XI of the Flemish Parliament Act of 5 April 1995 on general provisions regarding environmental policy (DABM) relating to the provision of strategic advice by the MiNa-Council and the SERV (sic);
- to examine how the developed target group policy should be embedded and whether the operation should be extended and generalised to a number of target groups that are of priority importance from the environmental point of view;
- to work with info sessions, white papers and roundtables when new and important legislative initiatives are launched.

5.2 Recommendations

[48] Review existing environmental decision-making procedures with special attention to “timely” participation. As mentioned earlier, the KU Leuven (Catholic University of Louvain) carried out a study into the consequences of the Aarhus Convention.³⁷ The aspect of participation was examined as well. As far as the MiNa-Council knows, however, no regulatory initiative is planned to update the existing decision-making procedures in Flemish environmental law from this point of view.

This is necessary, however. Art. 6.4 of the Convention stipulates, for instance, that participation must be provided for activities listed in annex I to the Convention and for proposed activities not listed in annex I which may have a significant effect on the environment. Participation shall be provided at a time when “all options are open and effective public participation can take place”. In Flanders, this is not always the case, for instance for decision-making procedures in the field of mobility and town and country planning (activities, plans,...).

The MiNa-Council intends to discuss this issue in greater detail later on.

[49] Attention to participation does not end when the term for participation which has been provided in the procedure expires. In order for the participation and quality of the decision-making to be trustworthy, it is of the utmost importance that such a participation

³⁷ SCHRAM, F., DE GENDT, T. and DEKETELAERE, K., Research project: the legal, administrative and organisational implications for the Flemish Region of the Aarhus Convention, Catholic University of Louvain, 2001.

report is drawn up. This should indicate which was the outcome of a public consultation or another form of participation in terms of content and how this content has been taken into account in the object of participation (plan, programme, regulation, decision). It is essential that what has been laid down by the political or administrative authority is implemented correctly. Even when this issue – with the exception of access to justice – falls outside the scope of the Aarhus Convention.

- [50] **Look for new approaches to realise citizen participation.** The traditional approach to participation (public consultation) clearly has limitations. This shows from experiences gained for instance with regard to the participation in the environmental policy plan. New approaches have to be explored. This can be done on the basis of the work which the Environmental Policy Sciences Support Centre carried out these last years with regard to this subject.
- [51] **The participation policy of the local authorities.** As appears from the text in the frame below, the participation concept also needs to be further developed at local level.

Summary of the study carried out by the Katholieke Hogeschool Mechelen (participation part)

The study of the Katholieke Hogeschool Mechelen and the Association of Flemish Cities and Municipalities which was quoted earlier reveals with regard to participation that 71% of the Flemish cities and municipalities claim that in one way or another they ask the inhabitants after their opinion in policy decisions. A more detailed outlook on the results shows, however, that this is still only done occasionally. Moreover, the applied methods are restricted and hardly contain any actual commitments.

6 Open government and the organisation of the government

- [52] **Open government and the organisation at the Flemish level and within the Environment, Nature (and Energy) policy domain.** Good internal communication and organisation are preconditions for successful passive and active openness and for participation. Each public service must take the necessary measures so as to be able to deal with applications for making information public in a swift and correct way.

Art. 31 DOB (2004) stipulates that the Flemish Government must appoint a communication officer to each of the thirteen Flemish ministries and each internal autonomous agency with legal personality. Internal autonomous agencies without legal personality have the possibility to do so in accordance with the Flemish Parliament Act. The boards of directors must appoint a communication officer in the external autonomous agencies. The last provision of the Article also alludes to the need for co-operation between the communication officers. Currently, the Flemish information officer already co-ordinates the communication at the level of the services of the Flemish Government.

The MiNa-Council believes that within the Environment, Nature and Energy policy domain too, sufficient attention should be paid to the co-ordination of the communication at the level of this policy domain. For the moment, the activities relating to communication and participation are fragmented, although a platform has been established through COLEV (Environment Communication Flanders) for more co-ordination and harmonisation in the field

of communication. The need for the development of new methodologies for participation also requires a better co-ordinated or integrated approach. The establishment of an entity for target groups and communication which is proposed in the better administrative policy plans could be an important step forward in the field of access to information, and building on that, of participation. In this way, a communication policy could be drawn up for the entire policy domain for all matters that are important to the entire domain. Next to this, each institution can have an additional communication policy of its own for all matters that are specific to the institutions.³⁸

[53] Open government and the organisation at municipal level. Available research on passive and active openness reveals that at municipal level there is a large gap between the smaller and larger municipalities. The larger municipalities provide decent to good access to information. In smaller municipalities this is rather the exception than the rule. The study by De Wakkere Burger reveals that at municipal level there is a large demand for “environmental information” in the wide sense given to it by the international regulation (therefore the concept also means – at least to a partial extent – town and country planning, landscapes, etc). Although the research has a general set-up, this finding fosters the suspicion that the outcomes can be extrapolated to environmental information.

Participation at municipal level only takes place occasionally, with limited means.

There clearly is a structural problem as far as access to information in smaller municipalities and participation in most municipalities are concerned. This may be tackled with the support of the Flemish government and by stimulating intermunicipal co-operation.

7 The state of affairs in Flanders regarding access to justice

7.1 Current state of affairs

[54] Aarhus is not limited to access to justice. The Aarhus pillar “access to justice” largely concerns a federal matter. However, this pillar is not limited to access to justice. It also contains possibilities for access to administrative decision-making procedures, more specifically appeal possibilities (see examples in the table below 1.1). In that sense, it is also a Flemish responsibility.

7.2 Recommendations

[55] There are other possibilities. The role of public and environmental associations is not per se limited to the access to administrative decision-making procedures on the licence application. This is illustrated by the text in the frame below. That is why, in the spirit of the Aarhus Convention, the MiNa-Council proposes to examine additional possibilities. A means to this end is the “Handbook on Access to Justice under the Aarhus Convention”

³⁸ See also Article 31 DOB in this context. This provision provides a communication officer for each Flemish ministry, for each internal autonomous agency (IAA) with legal personality and for each external autonomous agency (EAA). The Flemish Government can also appoint a communication officer to IAAs without legal personality.

that was drawn up by the REC.³⁹

Request for study

Late 2003, the then Flemish Minister responsible for the Environment, requested the SERV and MiNa-Council to give advice on a study version of a title with regard to enforcement and safety measures, to be incorporated into the DABM. This study version proposes to give third party stakeholders the opportunity to contribute to the efficiency of enforcement through a “sanctioning request”. The SERV takes the following stand on this:

“The Council, however, believes that the request for sanctioning is not the ideal instrument for this. It is up to the competent authority to examine whether a violation or offence is actually being committed and which (if necessary a sanction) is the most appropriate procedure to remedy this. The third party stakeholder, however, must have a channel to call the government to account with regard to the enforcement of environmental policy, by analogy with the right of administrative institutions to lodge a complaint. This also means that the government should be obliged to comply with the request of the third party stakeholder by investigating the case. Such a ‘request for investigation’ has the same result for the enforcement of the environmental policy, whereas this instrument is to be recommended from an administrative point of view.”⁴⁰

8 The state of affairs in Flanders regarding the PRTR Protocol

[56] Annual integrated environmental report. With the Flemish Government Decree of 2 April 2004 introducing the annual integrated environmental report (which has been reduced in the meantime) some information obligations of businesses were clustered and the EPER Decision was fully transposed in Flanders.

The Flemish government must now examine what adaptations are to be made to the Decree (including the accompanying form in annex), in order for it to comply with the PRTR Protocol. It must also keep fully abreast of the developments in the EU with regard to the E-PRTR and ensure that this regulation is transposed in time.

In addition, the provisions of the Aarhus Convention relating to the access of the public to the database must be put into practice. Points of interest are: free access to the Internet, searchability, user-friendliness, and participation in the development and adaptation of the register. In all of this, account must be taken of the protection of industrial information as referred to in Article 12 of the PRTR Protocol.

³⁹ STEC, STEPHEN (ed.), Handbook on Access to Justice under the Aarhus Convention, The Regional Environmental Centre for Central and Eastern Europe (REC), March 2003, Szentendre (Hungary), 256 p. To be downloaded from: <http://www.rec.org/REC/Programs/EnvironmentalLaw/PDF/accesstojustice.pdf>.

⁴⁰ SERV, Advies over de Voorbereidende teksten Handhaving en Veiligheidsmaatregelen, 12 November 2003, p. 13.

Annex I: Analysis of the annual reports by the civil servant in charge of handling appeals regarding passive openness

In accordance with Article 18 DOB (1999), the civil servant who was in charge of handling appeals relating to passive openness had to draw up annual reports on his activities.

As yet, these reports contain data on the number of applications for making information public which the Ministry of the Flemish Community receives each year. These are just approximate figures. It appears from the annual reports that an increasing number of applications for information is informally dealt with by the government (the applicant does not refer to the DOB and the government handles the application without any formalities). The registration of formal requests for making information public is not always done in a correct way either. The figures have been grouped by department even though an overall number has been calculated for the entire Ministry of the Flemish Community as well. No separate figures are available on the environmental information regime on the one hand and the non-environmental information regime on the other. The annual report does not contain any figures on the Flemish public institutions either.

The figures below give an outline of the 1999-2004 period in which the Flemish Parliament Act on open government of 18 May 1999 was effective.

First, the overall figures are given for the entire Ministry of the Flemish Community. After that, the figures are mentioned for the entire Environment and Infrastructure Department (LIN), the Environment, Nature, Land and Water Management Administration (AMINAL) and for the Town and Country Planning, Housing and Monuments and Sites Administration (AROHM). The combination of the two latter series of figures probably gives a good insight into the number of applications falling within the environmental information regime.

Table 1: Number of applications for making information public in first instance for the entire Ministry of the Flemish Community and share of the applications which received a positive reply

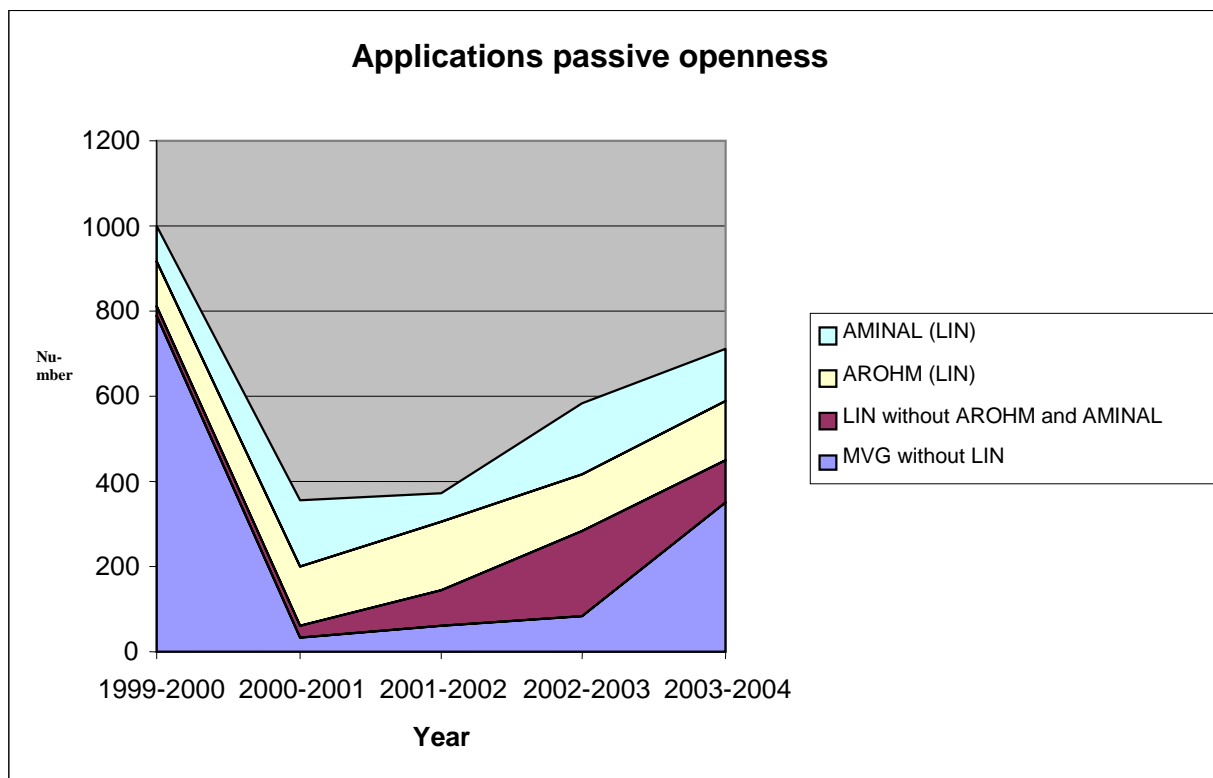
Parliamentary year	Total number of applications	Total number of applications complied with	% complied with
1999-2000	1,003	907	90.4
2000-2001	358	346	96.6
2001-2002	370	350	94.6
2002-2003	586	560	95.6
2003-2004	712	689	96.8

Table 2: Number of applications for making information public in first instance for the entire department LIN, for AROHM and for AMINAL and share of the applications which received a positive reply for LIN⁴¹

Parliamentary year	Total number of applications LIN	Share AROHM	Share AMINAL	Complied with LIN	% complied with
<hr/>					

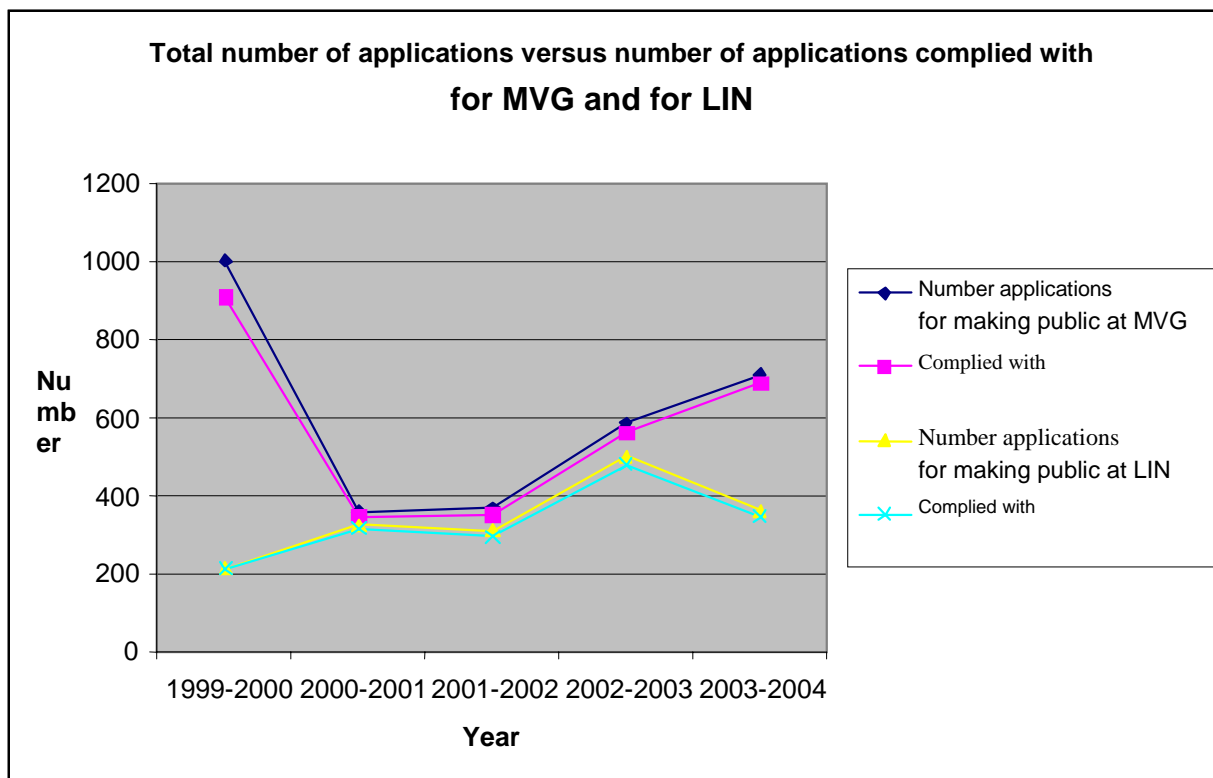
⁴¹ No separate data are available on the total number of applications of AMINAL and AROHM which received a positive reply.

1999-2000	215	112	82	212	98.6
1999-2001	327	137	158	316	96.6
1999-2002	309	163	64	294	95.1
1999-2003	500	138	168	482	96.4
1999-2004	362	141	121	345	95.3



The data reveal that the AROHM and AMINAL Administrations receive a substantial part of the applications. An exception is made for the non-representational year 1999-2000⁴². Here, it involves 36 to 82% of the overall number of registered applications. Thus, the number of dossiers falling within the environmental information regime probably forms a substantial part of the overall number of dossiers.

⁴² As appears from the annual report for the period of 1 July 1999 to 30 June 2000, this period is not representative because in that year 723 applications were received for making reports of school audits public.



The number of applications that is complied with in first instance is very high, always amounting to over 95%. In this respect there is no difference between the Ministry of the Flemish Community and the LIN Department.

The annual reports also contain information about the number of submitted appeals and the outcome of those appeals. They are summarised in table 4. Using the available information, an attempt was first made to assess which is the proportion between the number of applications in first instance that was not complied with and the number of appeal dossiers (table 3).

Table 3: proportion between the number of applications not complied with in first instance and the number of appeal dossiers

Total number of applications MVG in first instance	Number complied with	Number not complied with	Total number of appeals	% applications not complied with in first instance which appeals
1003	907	96	24	25
358	346	12	27	225
370	350	20	22	110
586	560	26	17	65.4
712	689	23	20	87.0

Table 4: appeals lodged with the appeal body and their outcome

Parliamentary year	Total number of appeals	Intervention appeal body		% fully granted	% intervention appeal body
		Granted appeal	Mediated		

		complete- ly	partially			
1999-2000	24	6 + 1 ⁴³	-	-	29.2	29.2
2000-2001	27	5	2	3	18.5	37.0
2001-2002	22	12	2	-	54.5	63.6
2002-2003	17	6	-	1	35.3	41.2
2003-2004	20	2	3	-	10	25

Table 3 clearly shows that the data kept about the number of applications in first instance and the way in which they are complied with or not cannot be entirely correct. Nevertheless, it is suspected that an appeal is lodged for most applications that are denied.

Table 4 shows that in a considerable number of cases the appeal body changes the decision in first instance or acts as in a mediating capacity. In a nutshell, it can be suspected that a large part of the applications turned down in first instance are wrongfully declined. The absolute number of appeals, however, continues to be limited.

⁴³ A seventh dossier was declined in first instance on the basis of the then applicable Flemish Parliament Act of 1991. The application was complied with on appeal on the basis of the 1999 regulation that had just become effective.

Annex II: Terms

Participation. Participation is the opportunity to make one's opinion or wishes known in a matter one is involved in. It does not also mean the right to co-decision.

Environmental communication. All forms of communication that are directly or indirectly aimed at raising the environmental awareness of individuals or organisations and at reducing the environmental stress of their activities. This term can be seen as a collective term which covers the more specific instruments such as information provision, awareness-raising, (policy) information, education, propaganda, advertising, market, public relations, etc. Communication covers more than active openness, although it is not so easy to draw the line.

Nature and environmental education (NEE). Education includes all kinds of education and training, both within and outside the education system, aimed at imparting information and at developing skills and attitudes that are important for the professional opportunities or general development of the individual concerned. As education is based on the consent of both the sender and the recipient, it is a central form in the set of communicative instruments. Although NEE has a pedagogical side to it, it is also an instrument of environmental policy. As a pedagogical instrument, NEE belongs to the policy domains of Education and Culture. As a policy instrument, NEE belongs to the wide range of communicative instruments of the Environment and Nature policy domain.

Passive and active open government. Passive and active openness are combined into the concept "access to information". These are terms that refer to the role which the government plays in providing information. In the first case, it concerns the public's right to peruse and copy documents and the citizen's right to ask the government for an explanation. In the second case, the authority itself takes initiatives to provide information. So, it is exactly passive openness which requires citizens to adopt an "active" attitude.