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Plan voor Wetenschappelijke Ondersteuning van een Beleid Gericht op Duurzame Ontwikkeling

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Hefbomen voor een Beleid Gericht op Duurzame Ontwikkeling

LEGAL ASPECTS OF THE CHOICE OF ENVIRONMENTAL POLICY INSTRUMENTS FROM THE POINT OF VIEW OF BELGIAN, EUROPEAN AND INTERNATIONAL LAW

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EXECUTIVE SUMMARY

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1 Introduction:

Current executive summary is the result of the research project “Legal aspects of the choice of environmental policy instruments from the point of view of Belgian, European, and international law”. The project is part of the federal ‘Plan voor Wetenschappelijke ondersteuning van een Beleid Gericht op Duurzame ontwikkeling,’ in particular the programme ‘Hefbomen voor een Beleid Gericht op Duurzame Ontwikkeling.’ It aims to provide for an analysis of the legal framework within which the Belgian federal and regional governments have to pursue their environmental policy.

2 Aims and methodology:

The Belgian federal and regional authorities in principle have a wide variety of environmental policy instruments at their disposal to tackle environmental issues. Their choice for a particular instrument is however subject to constraints imposed upon them by virtue of legal straightjackets, over and above any limitations they may have by reason of considerations of economic policy. This straightjacket may find its origin in Belgian, European, and/or international law. Constraints arise both in a positive and in a negative sense. In a negative sense, in that the use of a given instrument may be prohibited by any of the aforementioned legal orders. In a positive sense, *i.e.* these legal orders prescribing the use of a particular instrument. Current project aims to describe the room for manoeuvre left to authorities within the context of the legal preconditions.

By virtue of the doctrine of direct effect, by which European law in particular may penetrate directly into the Belgian legal order, as well as in view of the fact that international law may require the European and/or the Belgian legislator to implement international obligations without further ado, the distinction between these three layers of legal obligations may be somewhat artificial. Nevertheless, the distinction between these three legal orders has been maintained throughout this research, for didactical reasons mostly. Indeed in line with the authors’ assignment, the study employs the methodological tool of distinguishing between policy instruments. There was a logical choice, in that authorities themselves take policy instruments as a starting point, reviewing any legal constraints only at a later stage.

3 Taxonomy of environmental policy instruments:

3.1 Generally:

Environmental policy instruments are divided into (1) social regulation; (2) planning; (3) financial support; (4) direct regulation; and (5) market-based instruments.

3.2 Instruments of social regulation:

Instruments of social regulation aim to internalise environmental awareness and responsibility into the personal decision-making process of individuals and undertakings. This may take place either by (1) information exchange (campaigns, education, labels, impact assessment, reporting); (2) self-regulation (voluntary agreements, self-assessment); and (3) environmental management systems (including an environmental audit).

3.3 Instruments of planning:

These aim to offer an overview of current environmental issues; the means to remedy any degradation; and the budgetary constraints involved. They can be distinguished along the following parameters: micro- [at the undertaking's level, e.g. via eco-management systems] and macro planning [at the various regulatory levels, from local to international]; non-binding [this is the standard form] and binding [these are the exceptions]; and sectoral [targeting a specific environmental agent] and non-sectoral [encompassing a wider range of issues].

3.4 Instruments of financial support:

This encompasses subsidies, soft loans, and fiscal incentives. The former two speak for themselves, whilst the latter is somewhat more complex, including e.g. incentives to encourage investments in environmentally friendly technology (e.g. via accelerated depreciation, and greater possibilities to set investments off against tax), measures to reduce the cost of environmentally friendly products or activities, and income tax reductions for those investing in environmentally advantageous stocks.

3.5 Instruments of direct regulation:

Classic 'command and control' aims to influence the behaviour of polluters in a direct fashion, by regulating and/or prohibiting polluting activities. One can distinguish in this group between permits (prescribing the use of certain technology, containing emission limits, etc.), prohibitions and limitations, and quality control (including emission limits, requirements for the design of technology, production processes and-methods, etc).

3.6 Market-based instruments:

These aim to influence the cost/benefit analysis of the economically active individuals and undertakings, with a view to encouraging them to opt for environmentally friendly choices. In other words, environmentally less interesting alternatives, are not prohibited, but carry a price. Amongst market-based instruments, one can distinguish between implementation incentives (such as administrative fines, and financial securities), the regulation of liability (either criminal and/or civil liability), deposit-return schemes (entailing a surcharge on environmentally unfriendly goods), tradable permits (creating a market in emissions deemed unfriendly), and environmental levies (imposing a fiscal charge on the environmental pressure caused by the individual or the organisation).

4 Legal aspects of the choice of environmental policy instruments from the point of view of Belgian, European, and international law:

4.1 Generally:

The summary below is not exhaustive. It regroups the most important findings of the study with respect to each instrument.

4.2 *Instruments of social regulation:*

4.2.1 'Green' claims in advertising:

In view of the impact of advertising on consumption patterns, all three legal orders reviewed now include varying degrees of regulation for green claims in advertising. Two scenarios may be distinguished. In a first category of cases, advertising is employed to emphasise the alleged environmentally friendly qualities of the product. Misleading advertising would have both an economic (cheating the consumer in his legitimate expectations) and an environmental impact (potentially leading to increased consumption of environmentally unfriendly products). In a second category, environmentally unfriendly products are advertised. The economic impact of this type of advertising is less direct. The most important issue in this category is precisely the environmental impact. Externalities in both cases may be addressed by the authorities, by prohibitions of certain types of advertising, as well as by restrictions. Such measures obviously may have an impact on trade. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. The European Community has generally harmonised in this area by way of Directives 84/450 and 97/55 (on misleading advertising). Product-specific regulation (in particular for hazardous substances and preparations) includes specific provisions (Directives 67/548, 88/379, 98/8 and 1999/45). Secondary Community law does not regulate straightforward advertising prohibitions. The introduction of such prohibitions by a Member State consequently has to be assessed vis-à-vis the Treaty Articles on the free movement of goods and services. At the Belgian level, one first has to review the division of powers with respect to advertising. Regulating advertising primarily rests with the federal level (Article 6 §1, VI, *in fine*, 4° of the Special Act of 8 August 1980, hereinafter 'Special Act'), a power exercised in the Act of 14 July 1991 on commercial practices and the protection of the consumer (Articles 23, 28 and 29) as well as in product-specific legislation (biocides, pesticides, and hazardous substances in particular).

4.2.2 Labelling:

Any label aims to inform the consumer of all data necessary to use the product sensibly. In this sense, the 'label' full stop differs from eco-labels (see below), which aim to provide the consumer with data so as to influence his decision at the point of sale. Labels in general aim to protect the health of consumers, as well as the environment. In particular the existence of diverging labelling requirements, has an impact on free trade, thus leading to constraints on their use. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. The EC has harmonised extensively in this area, in particular with respect to hazardous substances and preparations, as well as for biocides, and pesticides, considerably reigning in Member States' room for manoeuvre. Member States are principally not in a position to disallow the marketing of a product which meets the minimum standards of these directives (notwithstanding temporary safeguards) At the Belgian level, powers lay overwhelmingly with the federal authorities (through the areas of ecological standardisation and consumer protection in particular). Consequently the Regions have no room at all to regulate the environment through product labelling.

4.2.3 Eco-labels:

Eco-labels have the specific intention to inform consumers of the environmental qualities of a product. The specific risk in this instance is for consumers to become misinformed through a wide variety of labels. Moreover, from an economic law point of view, labels may act as a *de facto* barrier to trade, if and to the extent that the criteria for a product to be awarded the label, are tailor-made for domestic produce. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. At the European level, Regulation 1980/2000 (replacing a previous regulation, specifies the development of the EC-wide eco-label, whilst leaving national eco-labels unchallenged. Purely within the Belgian context, the eco-label is a federal issue, with a limited contentious issue as to the need to involve the regions in the development of the label. However, whilst the legal base exists for Belgium to introduce such label, this has not happened in practice.

4.2.4 Environmental impact assessment:

An environmental impact assessment report is a means for the authorities to review the environmental impact of a planned project. At the international level, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, extends partially into the EC Directive 85/337. The Directive deals with both purely internal (in the Member States) assessment, as well as with Trans boundary issues. Moreover, Directive 2001/42 now provide for an impact assessment of plans and programmes which form the framework for future projects. Within Belgium, the competence for environmental impact assessment runs parallel with the overall environmental competences, thus leaving the bulk of this with the Regions. This is however less clear for the impact assessment of plans and programmes.

4.2.5 Safety reports:

The dioxin disaster in Seveso served as a catalyst for international action on preventive action with respect to dangerous activities. The 1992 Helsinki Convention on the Transboundary effects of industrial accidents was entered into by the EC but not by Belgium. It only applies to industrial accidents with a Transboundary dimension. The relevant EC legislation has a wider field of application. Directive 96/82 focuses overwhelmingly on incidents which do not have a Transboundary character. The Directive includes reporting and notification duties, as well as emergency planning. It also looks into the relationship between town planning and the containment of accidents. The implementation of this Directive in Belgium is hugely complicated, given the country's complicated constitutional structure, and touching simultaneously upon environmental issues (a regional competence), labour protection and general protection of the population. This has triggered the need for a co-operation agreement (1999).

4.2.6 Voluntary agreements:

A voluntary agreement is generally an agreement between the authorities and one or more (organisations of) undertakings where the latter commit themselves to realise a given aim with the means which they themselves select. The authorities commit themselves not to introduce stricter legislation during the validity of the agreement. At the international level, this brings

the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. At the EC level, the Commission has adopted a Communication in 1996, which generally reveals not much enthusiasm for the instrument at the EC level. As for the compatibility of these agreements at the national level with Community law, there are a number of pitfalls, including in particular Articles 81-82 EC, as well as the Treaty Articles on the free movement of goods. It is also noteworthy that Member States cannot employ voluntary agreements for the implementation of Community Directives, to the extent that these grant rights and obligations to individuals. In the Flemish Region, the 1994 Decree on environmental agreements lays down an extensive set of rules with respect to these agreements, as does a federal Act of 1998 (relevant for those sectoral agreements which include product standards).

4.2.7 Environmental management systems:

Environmental management systems aim to organise the undertaking in such a way as to minimise the impact of its activities on the environment. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. The EC has introduced specific rules, most recently through Regulation 761/2001 (Eco-Management and –Audit Scheme, EMAS II), and implementing legislation. The regime is voluntary (albeit that Member States may opt to make the system mandatory, which they have so far failed to do). As for the development of a *national* standard, it is noteworthy that the Member States have lost their powers to develop their own national system, given that they have recognised both the international equivalent (the ISO 14000 series), and the European regime (EMAS). Any national eco-management regimes have to be retracted. Nevertheless, the Regulation does include some provisions which need implementation. These concern in particular some details of the implementation measures. For some of these implementing measures, the Belgian Regions have competence. For others, it is the federal State which needs to co-operate with the Regional authorities.

4.3 Instruments of planning:

Environmental planning is essentially a structural policy instrument which leads to relatively little legal controversy. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. The European Community puts structure into its environmental policy planning essentially via its Environmental Action Programmes (EAPs): these summarise the environmental challenges of the Union and outline the aims and priorities for the future. MAP 6 relates to the period 2001-2010 and focuses on four priority areas: (1) climate change; (2) nature and biodiversity, (3) environment and health, and (4) sustainable use of natural resources and waste. Other than these areas, much emphasis is also laid on obliging Member States to issue plans for a variety of sectors (waste, water, air...). Within the Belgian context, environmental planning does not seem to create substantial issues of division of powers. Indeed in principle, each authority is entitled to plan any measures which it can take within its respective sphere of competence. Each of the three Belgian Regions has its legislative framework for planning measures. At the federal level, mention should be made of the Act of 5 May 1997 concerning the co-ordination of the federal policies on sustainable development.

4.4 Instruments of financial support:

Granting financial support to environmentally friendly investments is subject to a number of conditions which aim to prevent competition from being disturbed. At the international level, both the SCM Agreement (the WTO Agreement on Subsidies and Countervailing Measures) and the Agreement on liberalising trade in agricultural products, provide for a relatively wide flexibility for Members to grant environmental subsidies to their industries. Obviously, for the Belgian context, the conditions imposed by EC law are of paramount interest. The European Commission has set out its policy in this respect in so-called ‘guidelines’ for the assessment of national environmental subsidies under the relevant Articles of the Treaty. These guidelines allow for both direct (direct transfer of sums from the authorities to the undertaking concerned) and indirect subsidies (tax exemptions and the like). Even if practical applications sometimes pose difficulties of interpretation, the Guidelines nevertheless provide for a very useful means for Member States to predict the compatibility of their proposed scheme with the EC Treaty. In the purely Belgian context, means of support are regarded as being part of the general economic policy, for which the Regions are in principle the competent authorities. The Regions’ general competence for environmental issues, may if needed also serve as a legal ground for intervention.

4.5 Instruments of direct regulation:

4.5.1 Permits:

The permit has always been a regulatory instrument of high importance, including in the environmental area. There are a number of international treaties, for instance, which either encourage or indeed even oblige States to include permit requirements in their legislation. There is however no general international framework which would deal with the issue of permits in a general fashion. EC environmental policy employs permits as a preferred instrument to control emissions and their consequential polluting effects. Directive 96/61 confirmed the principal role of permits. It provides for Integrated Pollution Prevention (IPPC), thus addressing the disadvantage of having separate permits for various environmental agents. The IPPC Directive leaves no room for manoeuvre to the Member States with respect to the core element of introducing IPPC; obviously, the Directive prescribes the use of a permits for this aim, and details its required content. Importantly, sectoral Directives (such as for water and waste) likewise impose a permit requirement for the specific issue that they regulate. In Belgium, the principal responsibility for permit issues in the environmental arena, lies with the Regions (exception made for ionising radiation, including radioactive waste).

4.5.2 Prohibitions and limitations:

The introduction of a prohibition or of limitations to trade, obviously has a serious impact on trade. At the international level, this brings the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) into play. At the European level, prohibitions and limitations may either be imposed by European regulation itself, or by unilateral Member States action. In both events, these measures may be subject precisely to WTO scrutiny. Moreover, unilateral action by an individual Member State, is subject to the limitations imposed by the Treaty. To the extent that an issue is ‘exhaustively’ regulated by the EC, Member States must not resort to any unilateral action – except if this is specifically

provided for by the legislation at issue. In those cases where the harmonising legislation is either based on Article 95 EC (the Internal Market Article of the Treaty), or on Article 176 EC (the environmental title), unilateral measures are always possible – even after harmonisation – provided, however, that such measures abide by the limits and conditions imposed by the Treaty Articles on the free movement of goods. Within the purely Belgian context, measures which have a disproportionate impact on the Belgian Economic and Monetary Union, are disallowed. The concept is similar to the European concept of the same name, and implies a serious limitation to the exercise by the Regions of their environmental powers. Moreover, the Regions' environmental rules must not disproportionately impact on the freedom to exercise a trade.

4.5.3 Quality requirements:

A wide variety of means falls under this heading. These include quality standards, process standards, and emission standards and are usually explicitly sanctioned by either international or European legislation. Quality standards as well as process standards are a competence of the Region. As for emission standards, the Regions are competent for production units, and the federal State for products.

4.6 *Market-based instruments:*

4.6.1 Enforcement incentives:

With respect to public international law, the issue of criminal enforcement of environmental law has only recently been put on the agenda. Reference can be made in particular to the activities of the Association Internationale de Droit Pénal (A.I.D.P.), more specifically the recommendations of its Rio de Janeiro conference. The Council of Europe likewise has looked into this issue. Reference can be made to the Resolution on the contribution of criminal law to the protection of the environment, which calls upon Members to provide for criminal enforcement of the laws for the protection of water, soil, and air. The 1988 “Convention sur la protection de l’environnement par le droit pénal” essentially obliges Parties to provide for criminal sanctioning of serious environmental infringements. A wide variety of articles moreover deals with issues of a criminal procedure – with respect to some core issues of Parties' criminal law. The Convention also has a pillar which deals with international co-operation in investigating environmental crimes – this is however less developed than the other part of the Convention. As for the other parts of enforcement – administrative enforcement and financial securities – these have as yet not been addressed at the international level. European environmental law has so far not yet focused on either criminal law or financial securities as a means of enforcement of environmental law (albeit that a proposal in that direction is currently making its way through the Institutions). The Treaty does offer the possibility for the Commission to request a monetary charge from those Member States that refrain from enforcing a judgment of the Court of Justice – including in the environmental area. Indeed the first ever fine granted in this respect was against Greece, for not imposing a judgment on the issue of waste law. In secondary Community law, the choice of instruments for implementing Community environmental law, is usually entirely left to the Member States. As for Belgium, the division of competences with respect to criminal environmental law, has now been refined (following a number of cases in the Court of Arbitration, which dealt with Flemish attempts to develop a true Flemish environmental criminal law. Currently, the competence to require a financial security, is shared by the national and regional authorities.

4.6.2 Liability:

The 1993 Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment (Convention of Lugano) aims to develop a tort rule with respect to damage inflicted on the environment, by dangerous activities. The Convention does however also pay some attention to the prevention and the remediation of damage. It centres upon faultless liability, based upon the polluter pays principle, and additionally provides for a right to access on environmental data. Observers generally take the view that this Convention in fact is unlikely ever to enter into force. The reason for this are not only the far-reaching implications of the Convention, but also the fact that it interferes strongly with regional initiatives to regulate the issues concerned. Reference is made in this respect to the efforts at the European level, to introduce a Community-wide environmental liability regime. Within Belgium, the federal legislator is in principle competent to regulate the issue, albeit with an additional, implied power for the Regions.

4.6.3 Deposit and return schemes:

At the international level, the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) come into play. There is no secondary legislation in the European Community providing for a harmonised system – thus leaving the area as yet to the Treaty Articles on the free movement of goods in particular. The Belgian division of powers in this area is extremely complex.

4.6.4 Environmental levies:

At the international level, the rules of the World Trade Organisation, in particular of the General Agreement on Tariffs and Trade (1994) come into play. At the European level, Member States' room for manoeuvre is limited by Article 90 EC. The room for national environmental taxation in the EC is embedded in a number of articles which are not totally identical to GATT, but nevertheless remarkably similar. Tax discrimination and -differentiation are a powerful tool to direct trade streams, notably in favour of domestic production. The EC Treaty therefore has introduced Articles 90 *et seq.* EC in order to prevent the re-partitioning of the market, which would be contrary to the principle of the free movement of goods set out in Articles 28 *et seq.* (previously Articles 30 *et seq.*) EC. Disparities between national tax laws may penalise cross-border operations and lead to trade distortions. The EC Treaty aims to remedy this through the harmonisation of the tax laws of the Member States and through eliminating discriminatory indirect taxation of imported goods. Importantly, in its present stage, the view of the Court is, that Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it is based on objective criteria, such as the nature of the raw materials used or the production processes employed; and if it pursues economic or social policy objectives which are themselves compatible with the requirements of the Treaty and secondary law, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of domestic products. A recent application by the Court in the environmental field (the *Outokumpu Oy* case) however would seem to signal less flexibility. Within the purely Belgian context, the division of powers is complicated, with the powers of the Region limited

both by procedural concerns, and by the concern to maintain the Belgian economic and monetary union.

5 Conclusion:

From the executive summary above, it will be clear that a wide array of means indeed is at the disposal of environmental authorities. It should also be noted that the extensive legal environment of these instruments, makes for sometimes rapid legal developments. Extensive analysis of each of the instruments referred to above, is included in the report.
