PREFACE

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1. On 5 July, 1989, the Flemish Government, acting on a proposal made by Minister Kelchtermans, adopted the decision to set up an Interuniversities Commission for the Revision of Environmental Law in the Flemish Region. The task of the Commission was to "compile a draft Outline Decree relating to environmental protection, and to make the necessary recommendations to improve the effectiveness of environmental protection law". More particularly, the Commission was to endeavour to achieve the "rationalisation and simplification of environmental legislation" as well as a "more efficient use of suitable environmental policy instruments such as quality objectives, the control of sources of pollution, levies and other economic measures, safety and sanitation measures, the integration of environmental aspects in other essential areas, and environmental policy planning". The Commission also had the specific task of "improving the effectiveness of the criminal law and the other methods of enforcement of environmental law".

The Commission commenced its activities on 1/11/1989. In early 1991, the first parts of the proposed decree, i.e. those relating to environmental covenants and environmental quality standards, were completed and submitted to the Minister. The original period over which the Commission was to perform its duties was two years. This period proved to be too short. As from 1/12/1991, the contract concluded with the Flemish Government was extended for the first time. A second extension, until the end of 1994, followed in July 1993. At this moment, the Draft Decree of the Commission has been entirely completed. It is with a feeling of great satisfaction and no little pride that I, acting in my capacity of Chairman of the Commission, have written this preface to the version of the draft Decree which will be transmitted to Minister De Batselier on 20/2/1995.

2. The draft drawn up by the Commission is in the first instance an attempt at achieving a comprehensive codification of Flemish law of environmental protection. The object is to achieve a systematic body of law comprising all the rules in this area of the law, on the basis of a clear notion of the objectives and instruments of environmental policy. There was an urgent need for such an exercise.

Environmental law, which, in Flanders as in other countries, has experienced a great expansion during the past few decades, has not been constructed in a systematic manner, but has tended to develop on a haphazard basis. In many cases, new legislation represented a response to some concrete incident or to obligations incurred under international or European law. There was seldom any question of tackling the various issues in a global and co-ordinated manner. This is why environmental law developed on an extremely sectoral basis. The absence of any uniformity in the rules concerning the organisation of the decision-making process and its enforcement made sectoral environmental law unnecessarily complicated. Moreover, there was but a limited input from lawyers in the development of early environmental legislation, as a result of which many legal problems of a technical nature arose.

The draft Decree in question therefore attempts to give to environmental law that internal co-ordination which it has hitherto lacked. Only about 25 per cent of the provisions of the proposal would be applied on a sectoral basis. This internal unification of environmental law manifests itself inter alia in the wording of the general objectives principles, as well as in the general rules and the overall application of specific environmental policy instruments which were developed in the course of recent years. A great deal of attention was also given to the
harmonisation of the legal underpinning of environmental policy. The main areas in which this has been done are procedures for decision-making by means of regulations or decisions, the supervision and enforcement of environmental legislation, and the compensation of environmental damage.

From a substantive point of view, the Commission has sought to make environmental law more effective and give it greater authority, without losing sight of its impact on the economy and its social acceptability. In this respect also, the general principles and the systematic application of specific environmental policy instruments, as well as the emphasis on a policy based on environmental quality, occupy a very important place. In addition, the Commission, where appropriate, has developed substantive environmental criteria which are intended to buttress the policy discretion enjoyed by the authorities to give it a more environmentally-friendly direction. By co-operating with technical and scientific experts, the Commission also attempted to ensure that its proposals were based on correct facts and that they be technically feasible. Many of its provisions are, moreover, aimed at guaranteeing an input into the decision-making process by experts from the administrations and from the general public. Mindful of its task, and convinced of the need for an effective enforcement of environmental law, the Commission has also sought to make the available penalties stricter and their range broader.

In addition to substantive environmental objectives, the Commission has also taken into account the legal quality of the applicable environmental law.

Where possible, the draft Decree has sought to ensure legal certainty and predictability. In this respect also, it is important that the discretion in policy making enjoyed by the administration is guided by substantive criteria. Higher standards of legal protection are sought by involving, where possible, the interested parties in the decision-making process by means of co-determination procedures, and by providing them with possibilities of appeal.

This does not take away the fact that the Commission has sought to take account of the options which have already been expressed in existing environmental legislation. One of the major concerns of the Commission in this respect is to harmonise Flemish environmental law with the European and international environmental law. In so doing, an attempt is made to make full use of the increased legislative powers of the Flemish region in the area of environmental policy, whilst remaining fully mindful of the limitations which remain in this field, more particularly in the area of product policy.

3. Anyone comparing the original plan of the activities of the Commission with the table of contents of the Draft Decree in question will notice a number of differences.

One of the most important of these differences already emerges from the title. Instead of a draft Outline Decree on Environmental Protection, the instrument in question became a Draft Decree on Environmental Policy.

There are several reasons for this modification. In the first place, it proved necessary to draw up a number of detailed texts, which would have made it inappropriate to refer to this instrument as “outline legislation”. In addition, the scope of the original subject-matter, i.e. environmental protection, proved to be too narrow. More particularly account was taken of the relationship between measures combating environmental pollution and other areas of environmental policy, such as nature conservation, the protection of natural beauty and the management of natural resources. Nevertheless, the Commission did not go so far as to cover the substance of all aspects of environmental policy. The management of natural resources, nature conservation and the conservation of natural beauty constitute the operational area of others. Obviously there was insufficient time. This is why the broadening of the scope of the
Commission's activities from environmental protection to cover environmental policy manifested itself especially in the general provisions of the draft Proposal. These were conceived in such a way that they provided a centre of gravity around which other areas of a more extensive Environmental Code could be built. In addition, the provisions concerning the decision-making process and the policy on water and soil were worded in such a way as to enable an integrated approach to be adopted in the implementing decisions which exceeds the area of pollution.

There are a number of other, less important, differences.

Contrary to that which was originally provided for, it was decided to express the general rules relating to the formulation of environmental protection standards in a separate title.

A separate part was also devoted environmental management within companies, which is a topic which has only recently come to prominence.

The part which concerns the administrations and the advisory bodies is also new. Here, however, the approach of the Commission is different from that which was adopted in relation to the remainder of the draft Decree. The text in question does not reflect any views on policy entertained by the Commission. Because administrative organisation falls outside the scope of the particular expertise of the Commission members, and also because by virtue of its major political implications it exceeds the scope of a scientific approach, the Commission has restricted itself to adjusting the main existing provisions on the environmental quasi-autonomous bodies to its other proposals. They were also accommodated in a separate part. Should an attempt be made at grouping environmental legislation on a formal basis, the provisions on the advisory councils could also be incorporated into this part.

Contrary to that which was originally planned, the draft Decree does not contain any detailed rules on economic and financial instruments. However, Part 5 does give an indication as to where this subject-matter could be regulated. This does not mean that the Commission considers economic and financial instruments to be unimportant, quite the reverse. However, a decree on environmental levies could not restrict itself to general principles, but must provide detailed rules concerning the basis of these levies. This too exceeds the scope of the expertise of the Commission. This has not, however, prevented the Commission from devoting, in its preparatory studies, a great deal of attention to environmental levies and environmental subsidies, and it also means that, in so doing, it has relied on the outside legal and technical experts such as Mr. Blyau, Prof. Dams, Prof. Matthijis, Prof. Peters and Prof. Van Crombrugge. On the basis of these activities, the Commission accordingly published a number of policy opinions on the subject of economic instruments, as well as a proposed procedure for the collection of environmental levies and for dispute settlement (cf. *inter alia* the Draft Proposal for an Outline Decree on Environmental Protection, Volume I, Department of Environmental Law University of Ghent, 1991 (H. Bocken and P. Verbeek, ed.), 313-327, Vol. II, 32-102).

Nor does the Draft Decree contain any sectoral chapter concerning air pollution. The Commission is of the opinion that the general provisions of the Draft Decree will form an adequate frame of reference for policy on air pollution.

4. The fact that the Commission was able to complete its task successfully, at least as to the formal aspects, is largely attributable to its composition and working methods.

Its members were appointed "in such a way as to ensure the presence of sufficient levels of expertise in those areas of the law which are concerned with environmental law, in particular constitutional law, administrative law, criminal law and private law". The composition of the
Commission was fixed in such a way as to be truly inter-university. Two members were from the State University of Ghent (Prof. Bocken and Prof. Lavrysen), one was from the Free University of Brussels (Prof. De Nauw, who left the Commission as soon as the part dealing with enforcement was completed), one from the catholic University of Leuven (Prof. Boes) and one from Antwerp University (Prof. Lambrechts). Finally, one member of the Commission was associated with the State University of Limburg (Prof. Faure).

During the first two years, the Commission enjoyed the services of four scientific research assistants (one from each of the Flemish universities involved), a full-time secretary (who was also a lawyer) and an administrative worker. There were sufficient funds to cover operational costs, to call upon the services of outside experts, to organise seminars and to commission specific studies.

Each separate topic was dealt with on the basis of one or more of the preparatory studies, most of which were compiled by one of the scientific research assistants to the Commission, and some of which were drawn up by a member of the Commission or by an outside expert. These preliminary studies sought to provide (a) a description of the existing legal rules and of the differences between the various sectoral statutory rules, (b) an indication of the policy issues and doctrinal legal problems, and (c) proposals for possible solutions.

The Commission then took, on the basis of these preparatory studies, a number of policy decisions which were to determine the general direction of the topic being dealt with. Once these general policy decisions were made, the first version of these Articles was drawn up under the direction of one of the Commission members. On more than one occasion, the main contribution to the drafting of the text was made by a scientific research assistant. By way of exception, the services of an outside expert were called upon for the drafting of one particular topic. The person involved was Prof. D. D’Hooghe (Catholic University of Leuven), and the topic in question was the freedom of access to environmental information. The proposal was then discussed by the Commission, and in most cases amended and revised on a number of occasions.

Where the Commission succeeded in reaching agreement on a proposed text, the latter was submitted to a consultation meeting at which the members as well as the advisors from the administration, the universities, the Bench, industry, the environmental movement or from other groups were invited in a personal capacity to take part in an informal discussion. These consultation meetings proved to be essential. They yielded important information on the technical, scientific and economic aspects of environmental policy, and enabled an assessment to be made of the social acceptability of the proposals. Arising from these consultation meetings, a considerable amount of textual fine-tuning was effected, or the proposed decree was adjusted, sometimes fundamentally, sometimes less so.

The comments made on the draft proposals by the SERV and by the Mina Raad proved to be extremely stimulating in many cases. As was the case with the observations made by the Raad van State to the texts proposed by the Government, they had a considerable influence on the definitive versions of the Commission proposals.

5. A word of thanks must be expressed to the Flemish Government, and in particular to the successive Minister of the Environment. Minister Th. Kelchtermans took the initiative to present the proposed study project relating to the revision of environmental law to the Flemish Government. The Commission wishes to thank Minister N. De Batselier for the steadfast confidence which found an expression in the extension of its task until the end of 1994, as well as for the critical, but at the same time positive, technical and political assessment of its proposals. On this subject, both the Minister and the Commission shared the same vision, i.e. that the Commission is a scientific advisory body, whereas Government and
the Flemish Council take the political decisions. Accordingly, the scientific freedom of the Commission was fully respected.

The Commission was pleased to note that at least some of its proposals are capable of standing the test of social, political and legal assessment, and could form the basis for an improvement in environmental law.

The Commission is therefore also extremely appreciative of the fact that Minister De Batselier presented a number of its sub-proposals to the appropriate advisory councils, as well as to the Flemish Government, although in a somewhat adjusted form. The members of the Commission see it as a positive result that, at the time of current writing, the Flemish Council has already approved five Decrees which were inspired by the proposals made by the Commission regarding environmental covenants, waste, soil clean-up, principles of environmental policy containing introductory provisions and definitions, objectives and principles, provisions for environmental planning, environmental quality standards and environmental management within companies.

Each decree obviously display a number of differences with the Draft Proposal submitted by the Commission. This version only features the proposal made by the Commission, although the explanatory memorandum does draw attention to the various differences with the accepted decrees and to the reasons why the Commission thought it appropriate not to support the changes made by the Flemish Council.

The Commission proposals form an entity. In this way, the sectoral provisions cannot be viewed separately from the more general provisions, such as those on the decision-making process and on enforcement. Although the Commission has emphasised the close inter-relation between the proposals, it realises full well that it was not possible to wait until the completion of the Commission’s activities to make a political assessment of the proposals. Moreover, such is the magnitude of the Commission’s proposals that it would be difficult for them to be assimilated all at once by the Government and by the Flemish Council. To make a global assessment would take a great deal of time, while there is an urgent need to make an number of amendments to the existing environmental law. Accordingly, the Commission fully approved the policy of Minister De Batselier, which consisted in dealing with sub-proposals individually. The Commission has, however, recommended that, once the legislature has completed its work in the shape of a number of individual environmental decrees, an attempt be made to restore the coherence of the entire structure. This will be possible by giving the Government the task of co-ordinating the new Decrees.

6. The draft is a collective effort. However, unanimity was reached among the members of the Commission, both on the policy decisions on which the draft Decree is based, and on the text itself. Admittedly there was a considerable degree of divergence in the input of individual Commission members into the various parts of the Draft Decree. This manifests itself in the reference to the names of those Commission members and scientific research assistants who acted as rapporteur for the various subproposals.

From this point of view, the status of the explanatory memorandum is different. In most cases, the various parts of this memorandum refer back to the preliminary studies and the policy decisions made by the Commission, and contain a wealth of data on national, foreign and international environmental law. They therefore have scientific merit in themselves, and are therefore published in full in the original Dutch version (Interuniversitaire Commissie voorde Herziening van het Milieurecht in het Vlaamse Gewest, Voorontwerp Decreet Milieu beleid, Die Keure, 1995, pp. 151–1253), even though at times they exceed the length of a normal explanatory memorandum to a legislative document. The Commission members agree with the tone of the memoranda and with the policy decisions contained in them. Their
detailed drafting thereof is attributable to, and the responsibility of, those members and scientific research assistants who acted as rapporteur for the part of the Draft Decree in question. In view of its length, however, the explanatory memorandum can only be summarised in this publication.

7. The Draft Decree was also a long-term project. The members of the Commission, their research assistants and a number of outside experts worked on it for about five years. The pressure was intense, as indeed was the enthusiasm which made it possible for two or three meetings to be held per month during this five-year period. The seat of the Commission was in Ghent, where Prof. Lavrysen played a prominent part in ensuring, together with myself, a continuous presence. The expertise of the Commission members, as well as the determined commitment shown by many to perform, far beyond the call of professional duty, a great deal of scientific and drafting work, was also a necessary element in ensuring the success of this venture. In my capacity of Chairman, I would therefore wish to thank the Commission members for their sustained sense of team-work.

I would also like to express my thanks to the secretaries to the Commission, i.e. Mrs. P. Verbeek and C. Lambert. Especially during the first stage of our activities, at the time of drawing up the policy decisions, it was essential that minutes was carefully kept. The secretaries also performed useful work when it came to organising the many meetings of the Commission and of the consultation groups, as well as the two interim seminars which were devoted to the activities of the Commission. The publication of the interim proposals of the Commission was also to a large extent attributable to them.

Thanks are also due to the other scientific research assistants who assisted the Commission members with the preparatory scientific analysis, and who in a number of cases also played a crucial part in the drafting of the proposals. For some of them, their participation in the activities of the Commission was brief. Most of them participated for approximately two years. Mrs. D. Ryckbost assisted the Commission during this entire period. Together with Mr. C. Lambert, Mrs. F. Martens and Mr. G. Van Hoorick, she ensured in a most efficient way the internal co-ordination of the subproposals and the preparation of the manuscript.

8. The Administration for the Environment, Nature and Country planning, and in particular Mr. H. De Wel, provided a good deal of enthusiastic assistance to the Commission on the part of the Administration. Mrs. M. Evenepoel was our efficient contact person within the Private Office of Minister Kelchtermans. Within the Private Office of Minister De Batselier, Prof. M. Pallemaerts provided first-class support for the activities of the Commission, and the preparation of the work performed on the subproposals in the advisory councils as well as in the area of legislative drafting. I would like to thank them on behalf of the entire Commission.