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Case Summary posted by the Task Force on Access to Justice

CONSTITUTIONAL COURT, 17 JUNE 2021, NR. 92/2021

<i>1. Key issue</i>	A company with a purely commercial interest can lodge an admissible appeal with the Council for Permit Disputes against a permit granted to a competitor
<i>2. Country/Region</i>	Belgium – Flemish Region
<i>3. Court/body</i>	Constitutional Court
<i>4. Date of judgment /decision</i>	2021-06-17
<i>5. Internal reference</i>	BV Horeca Totaal Brugge v. Flemish Government
<i>6. Articles of the Aarhus Convention</i>	Artt. 9(2) and 9(3)
<i>7. Key words</i>	Access to Justice – Standing – Interest – Commercial Interest

8. Case summary

The Constitutional Court had to rule on a reference for a preliminary ruling from the Council of State with regard to Article 4.8.11, § 1, first paragraph, 3°, of the Flemish Spatial Planning Codex. That provision requires that one demonstrates an interest in being able to challenge a permit decision before the Council for Permit Disputes. According to the Council of State and the Council for Permit Disputes, that provision must be interpreted as meaning that a mere commercial interest is not sufficient.

The Council for Permit Disputes (RvVb) is an independent Flemish administrative court that handles appeals about, among other things, urban planning permits (currently integrated environmental permits). In order to be able to challenge a license decision before the RvVb, it is required that the applicant should experience "direct or indirect hindrance or disadvantages" from that decision. That provision therefore provides for an interest requirement with regard to third parties.

In the present case, the BV « Horeca Totaal Brugge » filed an appeal with the RvVb for annulment of a planning permit granted by the provincial government of Antwerp to another company for the conversion of existing warehouses into a distribution center. The RvVb dismissed the appeal as inadmissible. According to the RvVb, the bv « Horeca Totaal Brugge » invoked a purely commercial or competitive disadvantage, in particular a disadvantage based on the fact that the applicant and the permit holder are direct competitors, while the hindrance or disadvantages referred to in Article 4.8.11, § 1, first paragraph, 3°, of the VCRO must be of an urban development nature. The bv « Horeca Totaal Brugge » lodged an appeal in cassation with the Council of State against the judgment of the RvVb. After having established that the position of the RvVb is in line with its case law, the Council of State decides to refer a question to the Constitutional Court for a preliminary ruling on the compatibility of Article 4.8.11, § 1, 3° VCRO with the right of access to the courts, as guaranteed by article 13 of the Constitution and article 6 of the European Convention on Human Rights (ECHR).

The Court first of all reiterates its settled case-law according to which access to a court may be subject to conditions of admissibility, such as a requirement of interest. Those conditions must not, however, limit access to justice to such an extent as to detract it from its very essence. That would be the case where a restriction is not reasonably proportionate to the legitimate aim.

The Court notes that Article 4.8.11, § 1, first paragraph, 3°, does not distinguish according to the nature of the required nuisance or disadvantages, and therefore does not provide for the exclusion of persons who only area commercial adversely affected by the contested permit decision. Nor can such a restriction be inferred from the parliamentary preparation of that provision. On the contrary, in the parliamentary preparations it is stated that the intention was to define access to the RvVb very broadly and to exclude only the *actio popularis*, or the interest that everyone has that the law is complied with.

According to the Court, in the light of that objective, it is not reasonably justified to deny access to that court in a general way to a certain category of litigants who may suffer adverse consequences from an urban planning permit decision, even if those consequences are purely commercial of nature. After all, the Court ruled that it cannot be assumed *a priori* that such litigants would not be personally affected by an urban planning permit decision. The argument of the RvVb regarding the finality of the regulations on spatial planning and urban planning is not followed by the Court. According to the Court, a distinction must be made between the interests pursued by an applicant, which relate to the effects of the contested legal act on her personal situation, and the interests protected by the rules with which the court concerned complies guarantees. The question to what extent a violation of the regulations on spatial planning and urban planning can be invoked at the RvVb by a requesting party that pursues interests that are foreign to the protection of good spatial planning and a healthy living environment, is not for the order in the assessment of the interest requirement in the appeal as a condition for access to the RvVb, but is related to the assessment of the interest that the requesting party has in the pleas it puts forward.

The Court, that refers also to art. 9(2) and (3) of the Aarhus Convention, therefore decides that article 4.8.11, § 1, first paragraph, 3°, , in the interpretation given by the RvVb and the Council of State, is not compatible with article 13 of the Constitution and article 6 ECHR.

However, since the interpretation of the Council of State and the RvVb is neither supported by the text of the provision in question nor in the parliamentary preparations, the Court finds that the provision in question must be interpreted in such a way that persons who demonstrate a purely commercial interest have a sufficient interest in challenging a permit decision with the RvVb. It is up to the RvVb, if necessary under the supervision of the Council of State as a cassation judge, to assess whether there is a sufficiently individualized causal link between the commercial disadvantages invoked and the contested permit decision. In that interpretation, the provision at stake is compatible with article 13 of the Constitution and article 6 ECHR.

9. *Link to judgement/ decision*

<https://www.const-court.be/public/n/2021/2021-092n.pdf>

https://unece.org/sites/default/files/2021-07/BE_Urban_Planning_Permit_case_judgment.pdf

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