

ACCESS TO FACILITY-SPECIFIC ENVIRONMENTAL INFORMATION



BELGIUM

This memo describes the European framework that applies to Belgium as an EU Member State and in the final section discusses and links the country specific implementation of these requirements as well as national variations.

Environmental Information Directive

Belgium is a Member of the European Union and has transposed the [Environmental Information Directive, Directive 2003/4/EC](#). This is a broad-based disclosure requirement that requires transparency for information about the environment.

“The directive defines “information relating to the environment” in a very broad manner, covering “any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites and on activities or measures adversely affecting, or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.”¹

The exceptions where disclosure may be denied are actually fairly limited.² The exceptions include, however, criminal and disciplinary proceedings and proceedings by public authorities which are confidential under national law.³ This particular exception

¹ Resources for the Future, “Public Access to Environmental Information and Data,” 2001, p. 23.

² [Article 4](#): “2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; (b) international relations, public security or national defence; (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy; (e) intellectual property rights; (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law; (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; (h) the protection of the environment to which such information relates, such as the location of rare species.” (emphasis added).

³ There is no explicit authority to include administrative enforcement measures within this definition of exceptions. However, the European Court has ruled that proceedings with possible penalties may come

varies widely by Member State in its implementation. Preliminary investigations can also be excluded. However, the Court of Justice for the European Union has indicated that the reason for confidentiality of certain public proceedings – even where set by national law – may not apply after the proceedings are resolved. See [Flachglas Torgau GmbH v Germany](#), C-204-09, February 14, 2012. Actions related to imminent threats to public health or the environment are also mandated for disclosure. See Article 7(4). The Aarhus Convention⁴ requires that the interest of disclosure of public proceedings must be balanced against the need for confidentiality in each case, so that a blanket exemption is not the intent of the EU Directive implementing the Convention.⁵ All restrictions on disclosure are discretionary with each Member State and national authorities are not necessarily compelled to have the same exemptions in their individual country's laws. See "National Law" section below.

European-Pollutant Release & Transfer Registry

In line with the Aarhus Convention and the EU EID, all emissions data must be publicly available. The EU also maintains the online European Pollutant Release and Transfer Registry or E-PRTR which requires by regulation ([Regulation EC No. 166/2006](#)) the reporting of releases – both accidental and deliberate – to the air, water or soil. E-PRTR searches can be done [online](#). The data base is about two years out of date, but it can be useful to identify past problems at facilities. Reports of discharges or releases from facilities are themselves not confidential under EU law and can also be readily obtained from each Member State.

National Law

Belgium transposed the Directive by the [Law on public access to environmental information, August 5, 2006](#). The law mainly tracks the Directive's language, but one of the exceptions seems overly vague "prejudice to the provisions relating to the duty of confidentiality." Article 24, sec.5,(4). The specific exceptions are in Article

within the exemption as to "secret" information involving internal preparation of a proceeding or decision. See [Mecklenburg v. Pinneberg](#),, C-321-96, 1998 ECRI 3809, 3835. After the matter is resolved by officials, the reason for the exemption is arguably no longer valid. See [Flachglas Torgau](#), supra.

⁴ The [Aarhus Convention](#) on access to justice in environmental matters also has relevant disclosure requirements. The objective is the right to participate in environmental decision-making and the information covered includes administrative measures by public authorities affecting the environment. See Article 2 (definitions). Most of this convention has been incorporated into the Environmental Information Directive at this point.

⁵ See Dirk Bunker, DEFICITS IN US AND EU MANDATORY ENVIRONMENTAL DISCLOSURE, (Springer 2011), p. 141.

27. Two of these potentially limit disclosure of environmental enforcement documents:

- 4. the investigation or prosecution of sanctionable offenses;*
- 5 .pursuit of justice in civil or administrative proceedings and the possibility for everyone to receive a fair trial.*

The second relies on a prejudicial effect (which is absent in resolved past violations). The first is broader. However, the test applied in every exception is whether “the public interest in disclosure is outweighed by the protection of ...[stated] interests.” Article 27, sec. 1. Internal prosecution documents will have to rely on this exception to avoid disclosure, for example., But there is no strong argument that notices sent to a facility have any public interest in confidentiality.

Walloon transposed the EU Directive into law in [Book 1 of the Environmental Code, including D.10 articles. to D.20.18](#) (Walloon region). The exclusions affecting facility compliance history include where disclosure would adversely affect “*the proper course of justice, the ability of any person to a fair trial or the ability of a public authority to conduct a criminal investigation or disciplinary matter...*” Article 19(1.c). There is no blanket exclusion of such information, only where by its character and the circumstances the negative effects cited would occur. Past compliance matters are not exempt from disclosure. Nor all any matters that would not pull the statutory trigger (presumably the existence of a compliance case as a fact itself and potentially the government’s communication to the facility itself).⁶ Emissions data must be disclosed in any event under the EU Directive.

The Brussels region transposition is [here](#). Article 2, sec.2 repeats the same exception to access described above.

The [Flemish Region](#) has a different exemption. Article 15.1 of the Flemish Decree of March 26, 2004 allows confidentiality if the interest of withholding the information overrides the interest in disclosure in the following cases:

- “3. The confidential nature of administrative documents compiled exclusively for criminal action or the action of an administrative penalty;*
- “4. The confidential nature of administrative documents compiled exclusively for the possible application of disciplinary measures, as the possibility of taking disciplinary action exists;*

⁶ Redaction of the parts deemed to be confidential is also possible, allowing a document to be disclosed. Article 20.

This raises similar issues as in the Walloon exemption. But the interest in disclosure seems to be more strongly presumed. The notice of violation to a facility is not confidential in the sense that the facility received it and the only issue is whether its disclosure somehow prejudices the facility's legal rights. The Belgian Federal Appeals Commission for the access to environmental information, [Decision no. 20145](#), March 3, 2014, agreed with this approach, finding no prejudice to pending or future adjudications by release of the names of facilities not complying with the smoking ban in Belgium. Past violations do not raise this issue at all and pending ones seem to at least be disclosable as to the fact that they are pending.

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REV 0: Apr 2015