EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT
Directorate A - Legal Affairs and Cohesion
ENV.A.1 - Enforcement, infringements co-ordination and legal issues
The Head of Unit

Brussels, 04/07/2012
ENV.A.1/MV/ts
CHAP (2012) 01663/D04

Subject: your complaint on the construction of a prison at Beveren

This letter is the reply to your complaint, which was registered under CHAP (2012) 01663.

Your complaint is based on the infringement of Directive 2001/42/EC (hereafter: the SEA Directive) and Directive 85/337/EEC (now Directive 2011/92, hereafter: the EIA Directive).

As a general remark, we would like to underline that the COM will only open infringement procedures if the complainant has provided sufficient serious indications of an infringement of EU law, accompanied by relevant and reliable evidence.

Alleged infringement of the SEA Directive

You allege that the Flemish authorities infringed the SEA Directive when they decided not to carry out an SEA on the modification of the existing regional land use plan (GRUP) which would be the basis for authorising the construction of a prison in Beveren.

Article 3(3) of the SEA Directive reads:

> "3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects."

According to your complaint the authorities reasoned that the new land use destination ("community utilities") is sufficiently comparable to the land use existing under the old plan ("mixed industries") and for which an SEA was carried out in the past. For that sole reason the authorities did not carry out a new SEA on the modification of that plan.

It seems that the authorities thus relied on the exception foreseen in Article 3(3) of the SEA Directive for minor modification to existing plans. Exceptions to the main rule have to be interpreted narrowly according to the European Court of Justice. But it is difficult to see why the authorities could not reasonably have come to the conclusion that this modification of the land use plan only concerns a minor modification. Your argument against this assessment by the authorities, namely that the number of people concerned exposed to effects such as noise and air pollution in either an industrial zone or in a prison is not convincing. The previous land use plan did not set an upper limit to the number of persons working in the area. It is therefore difficult to maintain that this number would always have been substantially lower than the number of detainees (317) and the personnel envisaged.

Your main argument in this respect however seems to be with the consequences of this modification of the regional land use plan for Beveren for the discussion on the closure of the Antwerp ring road (the Oosterweel) and for which at this moment another SEA is carried out. The new prison in Beveren would be built exactly at the location where you have proposed in the SEA an alternative route for the new Antwerp ring road (the so-called Meccano alternative). For this reason you argue that the modification to the Beveren land use plan cannot be considered minor, because it has major consequences for another SEA, namely the SEA currently conducted on the Oosterweel connection. You consider in this respect that the modification to the Beveren plan is major, because first, it implies that the Meccano route is no longer an alternative and second because in your opinion the Meccano alternative is even the better environmental option to the route favoured by the authorities so far.

In this respect you have raised an argument used by the Court in its ruling of 22 September 2011 (C-295/10) on the SEA Directive according to which the authorities must consider the cumulative effect of other plans. This argument fails. The modification of the plan for Beveren and the subsequent construction of the prison at Beveren do have consequences for the SEA on the Oosterweel connection. But as far as EU environmental law is concerned, the relevant consequence is that the Meccano route may no longer be seen as an alternative to other routes of that ring road which the authorities may want to consider in the context of the SEA on the Oosterweel. The need to take the cumulative effects into account cannot reasonably be interpreted as meaning that the authorities should never be allowed to modify an existing land use plan (or authorise a project) if that plan (or project) excludes the adoption of an alternative to another plan, even if that alternative might be a better environmental option.

Alleged infringement of the EIA Directive

In this respect you have put forward alleged breaches related to the granting of the construction permit on the one hand and of the environmental permit on the other hand.

As to the granting of the permits for construction of the prison on 9 August 2011: the services agree that the need for a broad interpretation of the scope of application of the Directive likely leads to the conclusion that the construction of a prison is a project of urban development, sufficiently comparable to a hospital, for which at least a screening must be done before concluding that here is no need for an EIA. You allege that the authorities have not recognised this and have rejected your arguments regarding the need for an EIA. You correctly refer to the judgement of 24 March 2011 in case C-435/09 in which the Court proclaimed that the current Flemish legislation is not compliant with the EIA Directive. According to the Court, when screening the possible consequences of a project on the environment, all criteria of Annex III to the Directive should be taken into account (cumulatively) and not merely criteria based on dimensions as is the case in the current Flemish legislation. You refer to the letter *Omzendbrief* in which the Flemish authorities emphasise the need to screen on the basis of all criteria of Annex III to the Directive but allege that the authorities did not even screen the project before authorising it on 9 August 2011.

It does not transpire from the permit granted whether, and if so, how the effects of the construction of the prison were screened before the project was authorised on 9 August 2011. We consider therefore that on this point you have provided sufficient indication of a breach of the EIA Directive. The services intend to ask clarification from the Flemish authorities whether they screened the project before authorising the project, and if so,

what their conclusions were and how the result of the screening was reflected in the permit. The services will put these questions to the Belgian authorities for clarification through the EU Pilot and keep you informed of the reply received.

The argument based on an infringement of the internal division of competences does not raise an issue of EU environmental law which could be pursued, because such matters are for the discretion of the Member States authorities, according to the principles of subsidiarity and institutional autonomy. It may be contrary to national or regional law where the authority who issues a permit also takes the decision on the screening required under the EIA Directive, but such a situation is not contrary to the Directive. The Directive requires the authorities to verify whether the requirements of the Directive have been fulfilled correctly by the developer (which may be the same or another authority) before they may authorise the project.

As to the granting of the permits for operation / exploitation of the prison: this permit does not seem linked to a project as such. As the Court has ruled on 17 March 2011 in case C-275/09 (Brussels-Capital region a.o. vs Flemish region), the definition of project implies any works or interventions involving alterations to the physical aspect of the site. A permit authorising the exploitation or operation (such as of an airport or of a prison) which does not imply such works or interventions involving alteration to the physical aspect of the site is not a project and consequently the EIA directive does not apply to such a permit authorising the operation. All grounds related to the absence of an EIA (screening) before granting the permit authorising the operation / exploitation of the prison cannot therefore lead to the conclusion that the EIA Directive has been infringed.

Apart from the point on screening on possible effects of the construction permit mentioned, for which an investigation will be launched, we did not identify serious indications of a breach of EU environmental legislation on the other points mentioned in your letter and will not propose to the Commission to pursue them in an infringement procedure. However, if you have information which may modify that decision, please send it within four weeks of receipt of this letter.

Yours sincerely.

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Head of Unit