

BELGIAN RETAIL NEWSLETTER

23 FEBRUARY 2017



FLEMISH REGION | Major reform of the Flemish permit rules

1. INTRODUCTION

For many years, various Flemish real estate projects (including retail, industrial, etc.) were subject to one or more permits: a building permit¹ for the urban planning aspects, an environmental permit² for the environmental/operational aspects, an allotment permit³ for the allotment aspects and a socio-economic permit⁴ for the (larger scale) retail activity aspects.

As each permit was subject to its own legal procedural framework, this resulted in various separate, un-streamlined procedures.

On 23 February 2017, the Flemish Decree of 25 April 2014 regarding integrated permits (“*Omgevingsvergunningsdecreet*”, hereafter the “Decree”) and its implementing decision of 23 February 2016 entered into force.⁵

The Decree fundamentally reforms the Flemish permit landscape: **one single permit** will “integrate” the previously distinct building permit, environmental permit and allotment permit. As of 1 January 2018, the integrated permit will cover a fourth aspect viz. the retail activity of certain projects.⁶

By way of preliminary remark, the Decree constitutes a **procedural** framework decree, as it provides for an integration of various distinct permit procedures. The **substantive** criteria for an application (is a permit required for the project in question?) and for the evaluation of the application (will the competent authority grant the permit and if so, under which modalities?) remain reflected in the specific sectoral rules.⁷

In this newsletter, we have a look at the Decree’s impact.

¹ “Stedenbouwkundige vergunning”.

² “Milieuvergunning”.

³ “Verkavelingsvergunning”.

⁴ “Vergunning handelsvestiging”.

⁵ However, 302 out of the 308 Flemish communes postponed the implementation date with a few months.

⁶ Hence, as of 1 January 2018 it will no longer be possible to apply for a socio-economic permit. The integrated permit for certain retail activities is subject to a specific legal framework viz. the Flemish Decree of 15 July 2016 regarding the integral policy on commercial establishments. The provisions regarding the integrated permit for retail activities will enter into force as from 1 January 2018.

⁷ Such as the (updated) Flemish Zoning Code (“*Vlaamse Codex Ruimtelijke Ordening*”) for urban planning aspects of the project and the Flemish Decree on General Provisions of Environmental Policy (“*Vlaams Decreet houdende algemene bepalingen inzake Milieubeleid*”) for the environmental aspects of the project.

2. OVERVIEW OF THE NEW LEGAL FRAMEWORK

2.1 One integrated permit

When a contemplated project contains urban planning and/or environmental and/or allotment and/or retail activity aspects, the applicant will have to submit only one permit application with the competent authority. The application is to be submitted in a digital format.

Such an application will trigger one single public enquiry⁸ and will result in the joint evaluation of all requested urban planning, environmental, allotment and/or retail activity aspects of the project.

In particular for so-called “mixed projects” – which include for example an urban planning aspect (e.g. structural renovation of the premises) and an environmental aspect (e.g. the installation of certain cooling systems in the premises) – this new integrated permit procedure is a significant simplification compared to the current permit system where various applications run in parallel.

The permit application will result in the delivery (or the refusal) of **one** integrated permit.

2.2 Two possible first instance procedures

The Decree provides for only two possible first instance procedures viz. a standard procedure (with a public enquiry) and a simplified procedure (without public enquiry). The simplified procedure will only apply in a limited number of cases e.g. for limited changes to an already permitted project or for a project that only includes certain temporary activities or facilities.

The below table summarizes the main procedural steps and timeframe⁹ for both procedures.

	Standard Procedure	Simplified Procedure
Competent authority to which the permit application is to be submitted	Flemish Government, Provincial Deputation or College of Mayor and Aldermen (see further point 2.3 below)	=
Competent authority provides applicant with a written declaration confirming that the application is admissible and complete (= start date of the procedure)	Max. 30 days	=
Environmental Impact Screening	Sometimes	=
Environmental Impact Reporting	Sometimes	Never
Advisory round	Sometimes	=
Integrated Permit Commission	Sometimes	Never
Public enquiry	Always	Never
Decision period	<ul style="list-style-type: none"> Max. 105 days as of start date if Integrated Permit Commission does not intervene Max. 120 days as of start date if Integrated Permit Commission intervenes 	60 days as of start date
Extension of decision period	+ 60 days if second public enquiry is needed or if “administrative loop” is applied (see further point 2.4 (iii) hereafter)	Never
What if no decision is taken within the decision period?	Equals a permit refusal	=
When does the applicant receive a copy of the decision?	Within max. 10 days as of the decision date	=
Waiting period before the permit can be final and enforceable	35 days as of the day following the posting of the permit at the premises, provided that no appeal against the permit has been lodged. However, in case of appeal, the permit can only become final and enforceable when all appeals have been definitively denied.	=

In light of the above, a prudent applicant should take into account that if the competent authority exhausts the regulatory timeframe granted by law, it can take (i) approx. 5 months before the applicant knows if the permit is granted or (deemed to be) refused, and (ii) **approx. 6 months** before the permit granted can be final and enforceable. In practice these timeframes could be shorter or longer.

⁸ “Openbaar onderzoek”.

⁹ Days stated are calendar days.

2.3 Three different decision levels

The authority which is competent to receive an integrated permit application and to decide on such an application, is determined in light of the nature and the size of the project. The below table summarizes the three possibilities for first instance procedures (and the corresponding appeal bodies):

	Competent Authority in First Instance	Appeal Body ¹⁰
So-called “Flemish” projects ¹¹	Flemish Government	Council for Permit Disputes
So-called “Provincial” projects ¹²	Provincial Deputation	Flemish Government
Projects which do not qualify as “Flemish” nor as “Provincial” (<i>viz.</i> in practice the large majority of projects)	College of Mayor and Alderman of the commune where the project is situated	Provincial Deputation

2.4 Four specific points of attention regarding the integrated permit

(i) Indefinite duration

As a matter of principle, an integrated permit will be granted for an indefinite term.

While urban planning permits were already subject to an indefinite duration, this was not the case for environmental permits since these generally only remained valid for 20 years and were up for periodical renewals.¹³

However, the Decree contains a short, exhaustive list of instances where the integrated permit will be granted for a fixed term, such as, for example, for exclusively temporary facilities or activities.

(ii) Conversion of a temporary environmental permit into an indefinite integrated permit

Environmental permits granted since 10 September 2002 for a period of 20 years can be considered as being granted for an indefinite term if certain conditions are met. In order to benefit from this conversion, the permit holder in question must submit a conversion request with the competent authorities between the 48th month and the 36th month prior to the permit’s expiration date.

(iii) Administrative loop

The Decree’s concept of “administrative loop”¹⁴ allows the competent authority to rectify certain irregularities that could lead to the annulment of the permit decision. In that case, the competent authority can decide to organize a second public enquiry and it can request the advice of the Integrated Permit Commission or the advisory bodies for a second time.

(iv) The integrated permit is project related

The integrated permit is not “person/applicant related” but is “project related”. This means that the permit is not granted taking into account the identity of the permit holder (*intuitu personae*) but is granted for a specific project irrespective of the actual occupant or owner. However, a prior and formal assignment of the integrated permit will be required if such permit includes operational aspects *viz.* Class I and/or Class II facilities which are listed as potentially harmful for the environment.¹⁵

¹⁰ The appeal body’s decision can be subject to additional legal review.

¹¹ E.g. large infrastructure works. See the complete list in Appendix 1 to the Decision of the Flemish Government of 13 February 2015.

¹² E.g. a project located in two communes in the same province. See the complete list in Appendix 2 to the Decision of the Flemish Government of 13 February 2015.

¹³ Integrated permits covering environmental aspects of a project will however be subject to periodical evaluations in order to protect human life and the environment.

¹⁴ “Administratieve lus”.

¹⁵ See the list in Annex 1 to the Flemish Decision of 6 February 1991 on the environmental permit (“milieuvergunningsbesluit”).

2.5 Five different dates of entry into force

Thursday 23 February 2017 remains the crucial date for the entry into force of the large majority of provisions of the Decree on integrated permits. However, at present there are four exceptions to this principle. While three exceptions are rather “academic”¹⁶, the fourth exception is important as it relates to the fact that communes under certain conditions had the possibility to (partially) postpone the implementation of the Decree up to a date between 24 February 2017 and 1 June 2017. Out of the 308 Flemish communes, only 6 communes will effectively implement the Decree as of 23 February 2017 and 302 communes effectively decided to postpone the implementation date with a few months.¹⁷

3. CONCLUSION

As of 23 February 2017, one single integrated permit is needed to cover the urban planning, environmental and/or allotment aspects of a project in the Flemish Region. The retail activity aspect will be covered by the integrated permit as of 1 January 2018.

This new system is a simplification of the current system of four separate permits and four separate legal frameworks.

In terms of timing, a prudent applicant should be aware that it will take approx. 6 months – as a minimum – before a final and enforceable integrated permit can be available.

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16 These three exceptions relate in essence to the entry into force of the Decree's provisions on (i) definitions, (ii) the appointment of “integrated permit civil servants”, and (iii) the periodical evaluations of facilities covered by an integrated permit regarding certain operational aspects.

17 See www.omgevingsloket.be (status per 20 February 2017) : only the communes Dilsen-Stokkem, Herstappe, Langemark-Poelkapelle and Staden will implement the Decree as of 23 February 2017. Beersel and Diest will implement the Decree as of 18 April 2017 and 2 May 2017 respectively. All other 302 communes will implement the Decree as of 1 June 2017.