

EDITORIAL

Phew ! Without knowing the full details of the new 'soil decree' (which passed its first reading under the previous Walloon Government) the professionals of the industry have finally got the impression that somebody has listened to them, at least partially ! The decree that is presently in force, which was created by the previous parliament, has indeed been broadly reviewed, including article 21, which defines the triggering factors for the obligations. This article has not yet been put in force because... it is unenforceable, particularly in terms of timeframes. It would have been a disaster for the Walloon economy and in particular for SMEs. In fact, who would dare to buy a plot and/or a building and get caught up in a system that they do not understand (preliminary study, environmental assessment study, even soil clean-up) ? Who would risk jeopardizing a negotiated agreement according to the results of coring runs, which may give rise to an extended schedule ? Why put a buying company, enthusiastic to develop, and a selling company, which needs the money to continue to expand, reimburse a bridging loan or just to survive, both in difficulties ? Why continue putting a bankrupt company and its staff in a difficult situation, waiting in hope ?

The Walloon Minister for the Environment, Philippe Henry, has therefore decided to remove the 'triggering factors' for real estate transfers from the much-maligned procedure. This is already a step forward, despite maintaining bankruptcy, as well as the clarification of many points welcomed by the Union des Classes Moyennes and the Union Wallonne des Entreprises.

To keep the real economy moving it is essential to consider the pace of business life and therefore plan quick and effective procedures in the buying/selling process.

The Minister, who inherited a poorly designed decree, has clearly understood the need to improve the text. Hopefully further work on it will adequately reflect the reality of the situation on the ground that solicitors and specialised real estate agents are dealing with daily. With the aim that the new decree (in force by the end of 2013 ?) fits in well with the pragmatic requirements of the economic world of Wallonia.

Christophe Nihon

Soil decree : how to avoid a time bomb

The legislation has been in force for several months but is inapplicable in some areas. Mr Henry, the Minister concerned, has reviewed the text, and the changes are leading in the right direction. Are all the real estate professionals reassured ?

The professional real estate sector had hoped for it and it happened, last Thursday the Walloon Government adopted the proposal of the Minister Philippe Henry at its first reading, a decree amending the existing 'soil' decree.

As a reminder, this decree aims «to prevent soil-nutrient depletion, the occurrence of soil pollution, to identify potential sources of pollution, to organise investigations to establish the existence of pollution and to determine the way that soil pollution is cleaned up».*

«Those who wrote the first text did not meet investors and are not faced with the reality in the field». This conclusion is widely shared by real estate professionals who are harsh on the current version of the decree passed by the previous government in 2008. «It was not, however, fully operational due to the absence of the Banque de Données de l'Etat des Sols (Soil State Databank) and the Code of Good Practice, a collection of reference guides to conduct the studies and soil clean-up plans» the minister's office explains. «The reference guides have been developed during this term of office, and an interim procedure has been put in place to get many projects moving.» A notorious exception, the famous Article 21 on the definition of triggering factors (including the sale of businesses) leading to the obligation to carry out studies.

«Due to some difficulties and inconsistencies in the text we wanted to review the decree, without changing its philosophy» his office points out. The new text was so eagerly awaited because its impact on the real estate sector, and more broadly on the Walloon economy, is significant.

In effect, this legislation concerns virtually all purchases and sales of land, and everybody that is involved in the transaction. In addition, it does not only apply to historically industrial areas. «All ground in Wallonia is polluted in one way or another» notes Sophie Tilman, who finds this sad reality in her daily work as head of Pluris, a research unit. As an example, above and beyond the traces of pollution left by certain economic activities, it is not so long ago when every village had its own landfill site and where many workshops flourished in the areas behind residential houses.

«Unfortunately there are people who have bought land in good faith which is worthless» continues Sophie Tilman, adding that «some projects become unaffordable». This is the case for all sites with the potential for real estate development. Without dangerous pollution in the ground, the soil decree involves extremely costly clean-up procedures often costing close to 50€/m³ of excavated earth. This is the case on numerous sites in Liège, e.g. Bavière. These sites were often backfilled in the 19th century with ground taken from coal or steel plants...



What is meant by pollution ?

There is an extensive list but here are some examples :

- hydrocarbons (e.g. if there are reservoir tanks...etc.)
- chlorinated solvents used in many surface treatment processes (dry cleaning, car bodywork, metal processing...etc.)
- polycyclic aromatic hydrocarbons that are often found in landfill sites
- heavy metals (e.g. lead found in garages where batteries are stored carelessly)

The decree is more severe on new pollution (deemed such if it has occurred since 30th April 2007) than on historical pollution.

Whiter than white ? Not realistic !

It is financially impossible to clean up everywhere in Wallonia. How far should we feel responsible for the past, and can we wash whiter than white ? In any case, in its current configuration the soil decree has set the bar very high, too high anyway also for the government that inherited a decree deemed inapplicable in many ways.

In plain terms, several aspects are problematic (and that is an understatement) to many professionals in the sector who consequently have great expectations for the modifications provisionally approved by the Walloon administration last Thursday.

In this context, Article 21 (not yet in force) is hardening the oppositions.

Sandrine David, environmental advisor at the Union des Classes Moyennes (UCM) explains, «This text addresses several specific cases: the sale of land having or having had plants and/or activities listed in Annex 3 of the decree, the application for an environmental permit in the same context, the bankruptcy or liquidation of an activity listed in Annex 3, as well as environmental damage affecting the ground (i.e. generating a serious impact on human health)».

Which companies are affected ?

This notorious Annex 3 lists more than 200 plants or activities. As Sandrine David says: «This list affects most SMEs, almost all are considered to put the soil at risk, with different threshold values». It goes from metalworking to laundry facilities, through car repair workshops and textile companies. Even a part of a company's activity, proportionally very small when compared to the cadastral plot, can be affected.

In short, there are very few activities that can 'escape' from it. But, escape from what ? A procedure for which we do not know the outcome or the cost, but once started it is impossible to stop.

Concretely, it appears that any real estate transaction involving stakeholders of economic activities on the site in question is forced to follow a path with punctuated steps: conduct a preliminary study, conduct a soil characterization study if necessary, carry out soil clean-up when appropriate, not to mention the potential safety measures and/or follow-up that need to be done.

From then on the door is open on a path which has unknown pitfalls, and therefore consequences. We are caught up in a system that we do not understand...

An untenable schedule

Without even coming to a decision about the merits of its requirements there is one point that shows that this Article cannot be enforced : the timeframe. The text calls for a schedule of procedures that is impossible to keep to, as two examples amply show.

The property owner has 90 days to conduct the preliminary study, so to find and choose a research unit, complete a historical study before carrying out coring runs and analyses, since the response strategies are decided on the basis of the history of the site.

Many actors hold this historical information (land registry services, municipal archives, the archives of the former operator...etc.), that is a series of players who are not necessarily welcoming, available or equipped (with human resources and tools) to provide accurate information in a very short time.

Second example: the complete procedure takes about 480 days (depending on the time it takes to put the file together, the responsiveness of the authorities or possible extensions).

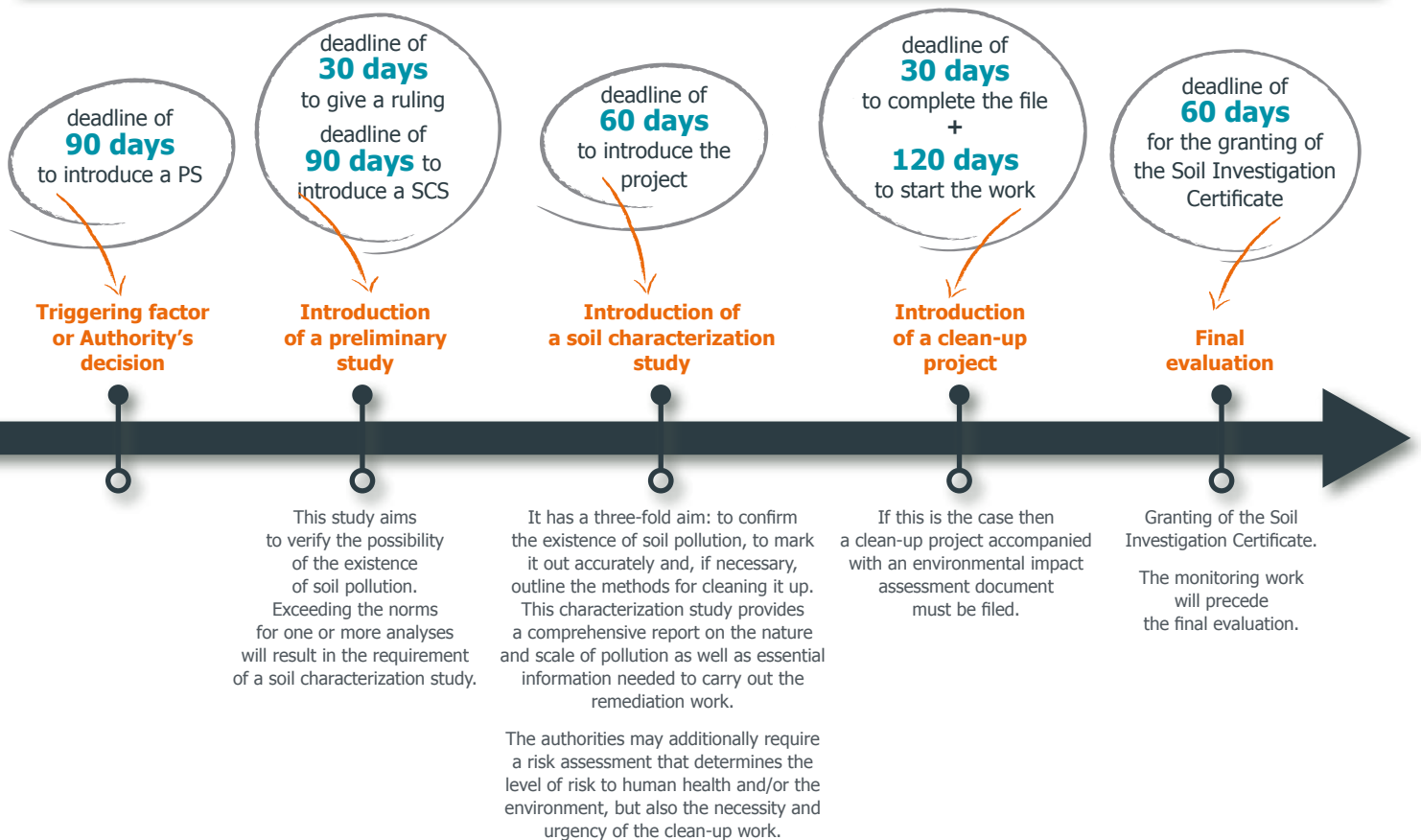
This timeframe is far from the economic reality: for example, if a company needs a plot or building in order to develop it cannot launch itself into a procedure without knowing the outcome or the cost to be shared between the buyer and seller. What investor would have the patience to wait ?

What banker would guarantee the validity of a loan for such a period ? What architect would agree to work for such projects ? What mortgage lending value would be given in theory to a potentially 'polluted' site ... in retrospect ? Etc.

For its part the Walloon Government assures us, from several anonymous sources, that it does not have the capacity to cope with such a heavy workload, especially with such a tight timeframe.

How do soil studies and the ensuing work take place ?

The procedure involves several phases summarised here with the help of the Union des Classes Moyennes whose missions include giving information about the environmental field to SMEs and the self-employed.



Experts authorized by Wallonia must carry out all studies.

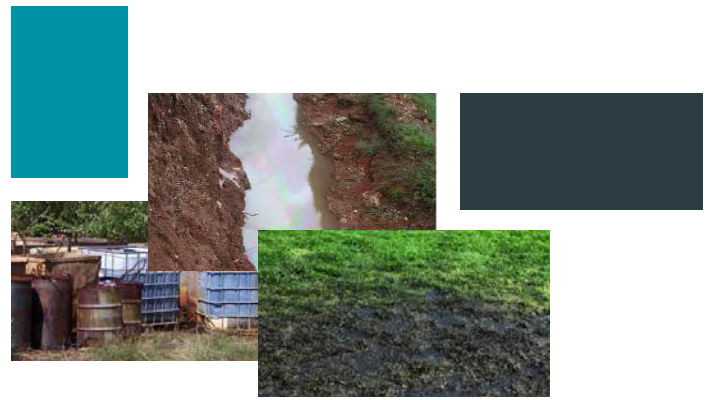
Moreover, in some cases safety measures will have to be taken (e.g. restrict the possibilities of land use with a markdown in the value) and/or follow-up (e.g. analyse some samples of groundwater on an annual basis to see if the pollution level has increased).

A database to be built... hoping not to be on it !

Article 21 is based on the Banque de Données de l'Etat des Sols (Soil State Databank) which is being developed by the Department of Soil Protection (Walloon Government), which has begun this job by bringing together the information that is currently scattered around. It refers in particular to data on the soil held by the authorities following studies and clean-up projects. It also draws on inventories of polluted land and potentially contaminated land i.e. housing or having housed an activity or plant which may pollute the soil.

Consultation with plot owners and the authorities was expected. Current legislation also provides for the establishment of a Support and Follow-up Committee, which will decide when the database is robust enough to make Article 21 operational. According to several sources, it will not be possible before the end of the year given the significant workload.

Costs ?



Unpredictable costs

In practice the acting notary in a sale should know if the property is included on the database of soil conditions. If this is the case the sale will be concluded in its own right subject to the conditions of the procedure described in Article 21. This contract suspension will last a maximum of two years, extendable with the agreement of both parties.

Under the condition of anonymity a notary has told us «I have yet to meet anyone who has told me that their land is polluted. Buyers already face charges such as electrical installation inspection, the PEB (the energy performance of buildings),... imagine the cost of site decontamination». And that is without counting the loss in value of many properties.

«Today, most often, coring runs are made and plots are sold knowingly» Christophe Nihon, Managing Director of ImmoQuest explains. «This information is included in the contracts». Knowing that the buyer wishes to have a coring run as opposed to the seller, the Walloon broker has found a winning formula: «it is he who is at fault who pays, and this process works !»

This situation is expected to last at least until the end of the year, the time taken to implement the new text that replaces the current decree about which many questions remain. «Ideally, we should look forward to seeing the establishment of a framework that allows different actors to identify their obligations, albeit binding, in comparison with the legal uncertainty that has surrounded the land management sector for years», says Sabine Radas, President of Fedexsol (the federation of soil pollution study experts in Wallonia and Brussels).

«Many things may be required but what means will the Region have ? What is the leeway between the obligations and the freedom of discretion for the expert ? Identical rules should be imposed on all study units and investigations should be undertaken so that everyone is on an equal footing.»

The need for clarification, and also realism, is equally the desire of the Union Wallonne des Entreprises (Walloon Business Federation) and the UCM, which, like others, consider that the conditions needed for economical and industrial redeployment in Wallonia pass through clear and pragmatic legislation.

News about the forthcoming decree and the hopes of a profession

The straightforward transfer of land will no longer be a 'triggering factor' for the engagement of the feared procedure provided for under Article 21. This will avoid blocking many transactions. «Nevertheless, for each land transfer operation the transferor will be required to pay for a consultation with the Banque de Données d'Etat des Sols (databank) in order to produce a compliant extract» the minister's office states. This obligation to inform buyers is also in force in Flanders and Brussels. Industry professionals hope to have permanent access to this database in the form of a subscription, for example.

Furthermore, a clear distinction between the concepts of 'soil' and 'waste' is also given, notably to allow better coordination for the management of excavated soil.

The proceedings and work will be subject to a «single permit» procedure, with lists of activities (potentially) polluting added to the list of environmental permit activities.

Finally, soil clean-up will be postponed to the end of operations when there is no urgency, providing a financial guarantee; careful, because this system will burden the bank credit line and thus penalise the company in its future investments.

The new text will be submitted to various consultations before its second reading after the summer, with the aim of implementing the new version by the end of the year.

Soil decree ...

N.B. : N.B. : The present decree can be consulted at
<http://wallex.wallonie.be/index.php?doc=13358&rev=13633-14167>