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Recent developments on climate law and litigation

Country reports for the Avosetta meeting in Uppsala 27-28 May 2022

Recent developments on climate law and litigation

Belgium

Recent developments in lawsuits directed against the State

Replicating the rationale underpinning the Urgenda case in the Netherlands, the Klimaatzaak -- Dutch for "climate case" -- was brought by an organization of concerned citizens, and 58,000 citizen co-plaintiffs, arguing that Belgian law requires the Belgian government's approach to reducing greenhouse gas emissions to be more aggressive. The suit named the Belgian State, the Walloon Region, the Flemish Region, and the Brussels-Capital Region as defendants.[1]1 Specifically, plaintiffs called for reductions of 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050. The case was officially started in 2014. However, due to a long-standing discussion on the language to be used during the legal proceedings. The Flemish Region, one of the defendants, adamantly argued that the proceedings ought to have taken place in the Dutch language, a claim that was ultimately dismissed by the Cour de Cassation in 2018, i.e. an astonishing four years after the official start of the case.

From February 2019 through March 2020, the parties submitted their main conclusions and final conclusions. In their main conclusions, the plaintiffs seek a Court injunction directing the government to reduce emissions 42 to 48% in 2025 and at least 55 to 65% in 2030. Oral arguments were heard from March 16 to 26, 2021.

On June 17, 2021, the Brussels Court of First Instance held that the Belgium government breached its duty of care by failing to take necessary measures to prevent the harmful effects of climate change, but declined to set specific reduction targets on separation of powers grounds (trias politica).

In its long-awaited decision, the Court first analyzed whether the claim was admissible, and, in doing so, whether the plaintiffs established that the proceedings would provide a benefit to them. Article 17 of the Judicial Code excludes actions brought in the general interest – actio popularis - that only indirectly benefit the plaintiff. In its decision, the Court found that both the 58,000 co-plaintiffs and the Klimaatzaak organization have a personal interest in the action. The citizen co-plaintiffs have a direct, personal interest because they seek to hold Belgian authorities responsible for the climate consequences on their daily lives, and the fact that other Belgian citizens may also suffer damages does not transform their interest into a general one. The Klimaatzaak organization has a direct, personal interest in part because environmental organizations have a privileged status to sue to defend the environmental from harm. The Court referred to Article 9(3) of the Aarhus Convention to reach this conclusion, which was already used by the Cour de Cassation in its earlier jurisprudence to relax the standing rules for environmental NGOs in civil and criminal cases.

As to the substance, the Court found the federal state and the three regions jointly and individually in breach of their duty of care (‘zorgplicht’) for failing to enact good climate

[1] Since 1993, Belgium has constitutionally been a Federal State composed of three Regions and three Communities. This federal mechanism has repercussions on environmental competences, as these are shared between the Federal authority and the three Regions. The three Regions are federated, separate entities which are not subordinated to the Federal authority or the other Regions. They exercise their own authority in accordance with their territorial base which defines their scope of geographic action.

governance. The Court found that despite being aware of the certain risk of dangerous climate change to the country's population, the authorities failed to take necessary action, meaning that they failed to act with prudence and diligence under Article 1382 of the Civil Code. It based its decision on the concept of civil liability of public authorities ('overheidsaansprakelijkheid'), Further, by failing to take sufficient climate action to protect the life and privacy of the plaintiffs, the defendants were in breach of their obligations under Articles 2 and 8 of the European Convention on Human Rights. In reaching this conclusion, the Belgian court explicitly referred to the decision of the Dutch Supreme Court in the Urgenda-case. It held that the global nature of climate change did not relieve the Belgian authorities from their individual (partial) responsibility to implement effective climate mitigation and adaptation policies. What makes the rationale of the Court slightly more ambivalent, especially when compared with the Urgenda-jurisprudence, is that the Belgian Court mainly based its decision on the outright non-compliance of the Belgian authorities with the applicable EU reduction targets for 2018 and 2019, which indicates that the case might have been equally based on EU-law instead of the duty of care and the invoked human rights-duties. It is remarkable that the Court had to admit that had no clear figures before it to comprehensively assess whether the Belgian state 'as a whole', i.e. the sum of all the mitigation efforts of all competent authorities, met the applicable reduction targets.

In a remarkable section devoted to the internal division of competences, which renders climate litigation against 'the State' in a federal country such as Belgium relatively complex compared with other countries, the Court had to assess the many obstacles inherent to the Belgian state structure in the context of climate policy. To be clear, while environmental protection mainly constitutes a regional competence in Belgian, also the federal level retains some major competences in the field of nuclear energy and renewable energy on the Belgian Part of the North Sea. Whereas the Court acknowledged that the climate policy constituted a shared competence, and thus related both to regional and federal competences, it concluded that this posed no justification whatsoever for the lack of effective climate policy. The Court concluded in rather harsh words that the existing lack of cooperation between the distinct Belgian competent governments seriously put into jeopardy the compliance with the Belgian international and EU obligations.

In light of the above-mentioned considerations, one might expect the Court to impose clear-cut reduction targets to the Belgian competent governments. In sharp contrast with the Urgenda-jurisprudence, however, the Belgian Court declined to issue an injunction ordering the government to set the specific emission reduction targets requested by the plaintiffs. The Court found that the separation of powers doctrine – *trias politica* - limited the Court's ability to set such targets. Neither European nor international law required the specific reduction targets requested by the plaintiffs, the Court held. In addition, the Court underscored that the scientific report the claimants relied on, while scientifically meritorious, was not legally binding. The specific targets, therefore, were a matter for the legislative and executive bodies to decide, the Court reasoned. Contrary to the Urgenda-rationale, which was amongst others exhibited by the Dutch Supreme Court in its December 2019 decision, the Belgian court was not swayed by the need to provide effective legal protection in instances where human rights violations occurred. It did not see any legal contradictions on this point, which might, to some extent, by explained by the fact that – as underlined above – the Court mainly used the applicable EU-targets as benchmark to assess the climate liability of the competent Belgian governments. In this light, forcing the competent authorities to do even more than the applicable EU targets might have appeared counterintuitive to the competent judges.

And thus the Klimaatzaak led to a remarkable, somehow ambivalent outcome. Whereas the Court held the competent authorities liable for not complying with their positive duties under international human rights law and the duty of care, the Court did not attach any specific consequences to that finding. Even so, the precedent character of the decision is not to be understated in the Belgian context. The decision is hailed as the first decision in which the climate responsibility of the competent authorities in Belgium was upheld, which might trickle down in future civil lawsuits regarding – amongst others – climate based-compensation claims in the years to come. Still, the outcome left a bitter taste in the mouth of the claimants. On November 17, 2021, Klimaatzaak appealed the judgment of the Brussels Court of First Instance. The appeal is primarily aimed at the Tribunal's refusal to set specific binding targets related to the reduction of greenhouse gas emissions over time. Klimaatzaak notably argues that the Brussels Court of First Instance has confused two distinct sources of liability in its analysis of Article 1382 of the Belgian Civil Code in that it confined itself to taking as a reference only the emission reduction targets laid down by rules of positive international, European and Belgian law, and refrained from analyzing the authorities' conduct in the light of their knowledge of the danger and of what needed to be done to help prevent or limit it. The defending Governments are expected to reply to this petition and the Brussels Court of Appeal will review the factual and the legal components of the case in the course of the appeal procedure. The case will be pleaded in the course of 2023.

Initiatives against private companies

As of today, no climate-related cases have been launched against private companies in the Belgian legal order.

Project review and climate considerations

Until recently, no lawsuits focused on the role of climate targets and pledges in the context of planning procedures. However, in 2021 that changed with a rather remarkable decision of the Council of Permit Disputes (Raad voor Vergunningsbetwistingen) in a noteworthy case regarding a planning and environmental permit for a petrol station in the municipality of Boechout. Initially, the permit application was declined by the local municipality, which relied, amongst others to its climate pledge. To be more precise, the municipality of Boechout had signed the Convenant of Mayors[2] and argued that authorising a petrol station, without any additional renewable energy facilities, would run counter to its climate pledges. This decision was overturned on appeal, by the Provincial authority of Antwerp (Deputatie), who held that climate-related considerations had no role to play in assessing the compatibility of a permit application with the applicable environmental and spatial planning rules. The municipality of Boechout challenged the legality of this rationale before the Council of Permit Disputes in 2020.

In two rulings, the latter ultimately sided with the municipality. In a first decision of 21 April 2021, the Council suspended the permit with reference to Article 4.3.4 of the Flemish Spatial Planning Code. This provision allows permit issuing authorities to decline permit applications which clash with the sectoral objectives and due diligence obligations that are applicable in other environmental policies. International and EU obligations which, although they lack

[2] The EU Covenant of Mayors for Climate & Energy brings together thousands of local governments voluntarily committed to implementing EU climate and energy objectives. The Covenant of Mayors was launched in 2008 in Europe with the ambition to gather local governments voluntarily committed to achieving and exceeding the EU climate and energy targets.

direct effect, force competent authorities to implement certain environmental objectives fall within the scope of the said provision. The municipality of Boechout had put forward that this provisions provides a legal ground to take into account the climate pledges that were included in the Convenant of Mayors. The Council agreed, stating that 'care for climate' can be brought with the material scope of Article 4.3.4 of the Flemish Spatial Planning Code. Whereas the Council acknowledged the fact the binding force of the climate targets imbedded in the Paris Agreement remained rather ambivalent, the signing of the Convenant of Mayor reasserted the duty to care for climate incumbent on the local authority.

In its subsequent decision of 9 December 2021, in which the Council annulled the permit refusal, the Council reaffirmed its position. In doing so, it added two additional lines of argumentation. First, it recalled Article 1.1.4 of the Flemish Spatial Planning Code, which stipulated that the rights of future generations are to be taken into account when executing the Flemish spatial planning policy. This provision indeed puts forward the principle of sustainable spatial planning ('duurzame ruimtelijke ordening'), which ought to be at the heart of the Flemish spatial planning policy and, according to the Court, can be used as lever to integrate climate considerations in permitting procedures. Second, the Court also underlined that the climate pledges of the municipality are not merely voluntary. It is not precluded, the Council held, that citizens will in due course hold also local municipalities accountable for not meeting their climate targets. In doing so, the Council indirectly linked the principle of climate responsibility of governments and public authorities to the permitting policies. It is the first time that climate liability was also invoked in the context of local authorities. Third, the Council also indicated that achieving the climate pledges does not only require additional commitments on the part of the municipality, but also on the part of the inhabitants and companies present on the territory of the municipality.

Seeing the vigour with which the Council of Dispute Settlements motivated its decision in the above-mentioned case, one can safely assume it will not be a one-trick pony. Even so, the decision is to be contextualized. For one, the Council did not rule that climate considerations have now become a binding benchmark when authorizing planning permits.

It merely held that climate considerations can be invoked in assessing planning applications. Also, the permit application at hand did not include any additional efforts in terms of renewables, such as solar panels or facilities for electric cars, which turned it into a rather outdated permit application. The question arises to what extent a permit refusal was still possible when renewables had been integrated in the permit. Also doubt remains as to the material scope of this so-called 'optional' climate test, which appears to be grounded partially on the Convenant of Mayors, which in itself lacks binding force.

Lawsuits against national banks and financial institutions

On April 13, 2021, ClientEarth filed suit against the Belgian National Bank for failing to meet environmental, climate, and human rights requirements when purchasing bonds from fossil fuel and other greenhouse-gas intensive companies. The claimant argued that the Belgian National Bank has participated in the European Central Bank's Corporate Sector Purchase Program (CSPP), in which six national central banks purchase bonds from eligible companies to improve financing conditions by lowering debt costs. ClientEarth alleges that over half of bonds purchased under the CSPP were issued by greenhouse-gas intensive sectors and that the program, therefore, exacerbates the climate crisis. ClientEarth alleges that the Belgian National Bank's participation in the CSPP, by not taking into account climate, environment,

and human rights impacts, violated Article 11 of the Treaty on the Functioning of the EU and Article 37 of the EU Charter of Fundamental Rights (both concern the obligation to integrate environmental protection into EU policies). In December 2021, the Brussels Court of First Instance rejected ClientEarth's application on procedural grounds. ClientEarth announced in early 2022 to appeal the decision of the Court of First Instance.

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Czech Republic

Climate Action - an overview

The Czech Republic does not have any climate law or similar statute. However, one climate action has been filed.[3] The oral hearing is due in June at Municipal Court in Prague.[4]

A group of legal persons and individuals consisting of registered society (NGO), foresters, a farmer, a municipality, and a man from Prague suffering from environmental depression filed an action against the Ministry of Environment, the Ministry of Industry and Trade, the Ministry of Agriculture, the Ministry of Transport and the Czech Government.
Plaintiffs had sent a pre-action letter of claim to all defendants in 2020. However, only the Ministry of Environment responded. The response was conciliatory and tried to show that the Czech Republic fulfils its international obligations and is on a climate mitigation track. Nevertheless, the plaintiffs were not satisfied with the response and filed the action in 2021.

The action consists of two fundamental claims. The first one aims to acknowledge that current policies (Climate protection policy, State energy policy, and Czech program on Energy and Climate) are not being fulfilled following the Paris Agreement and 2050 EU carbon neutrality. The second claim is to immediately adopt necessary measures which protect rights infringed by climate change. Adopted measures should follow the carbon budget (under the Paris Agreement), and all laws, statutes, policies, and financial instruments have to start fulfilling Czech Climate Adaptation Strategy immediately.

The action was filed under the Code of Administrative Justice (Act No. 150/2002 Coll.). Plaintiffs try to have defendants discontinue their climate passivity through unlawful interference action[5]. Plaintiffs are also trying to force the Czech Republic to fulfil positive obligations connected to fundamental (human) rights (such as the right to life, health, environment, etc.) under the Czech Constitution[6] and Charter of Fundamental Rights and Freedoms[7].

Climate law

The Czech Republic does not have any specific legal regulation or legislation that would directly implement international obligations or the general need for a transition to low emission or zero-emission economy. However, some newly introduced acts or recently

[3] Climate litigation society https://www.klimazaloba.cz/en/
[4] Case number: 14 A 101/2021.
[5] § 82 Code of Administrative Justice
[6] Constitutional Act No. 1/1993 Coll.
[7] Constitutional Act No. 2/1993 Coll.

amended acts are said to be enacted to mitigate the effects of climate change. These acts are: Water act (Act No. 254/2001 Coll.) newly contains provisions on draught and lack of water and procedures on how to limit or restrict or ban the use of drinking water (e.g., restriction on watering of garden or ban on running water into pools or even limitation on use of communal water source).[8]

The soil in the Czech Republic is endangered by erosion (mainly water and wind); therefore, the Ministry of Environment issued an anti-erosion ordinance (Ordinance No. 240/2021 Coll., on Protection of Agriculture Soil against Erosion). The ordinance defines specific soils according to their fitness for agriculture use based on their attributes (physical, biological, etc.), the evaluation process of the possibility of water erosion endangerment, the acceptable level of endangerment of water erosion, and preventive measures against erosion.

In 2021 the Czech Parliament enacted Act No. 367/2021 Coll., on Measures needed for Transition of the Czech Republic to Low-carbon Power Industry. Even though the name suggests that the act aims at climate change mitigation and provides such measures, it was enacted only to support nuclear energy and its future development. This can be seen in definition provisions in which a low-emission energy source is defined as a source with a nuclear reactor[9], and an eligible investor is a person who was authorised to produce electricity in a nuclear powerplant[10].

Noteworthy issues

For several years Czech forests have been plagued by the bark beetle. This is due to poor forestry management and the inability to adapt to climate change. Foresters are trying to combat it and planting new trees, but the renewal will take a long time. The Czech forests are in such a bad condition that they can no longer serve as carbon sinks.

Another recent issue (that currently seems resolved) that is not directly connected to climate change but plays a significant role in protecting the environment and human health is connected to the Polish Turow open-cast lignite mine. The mine is located a few hundred meters from the Czech borders, and mining activities are draining underground water from the Czech side (especially drinking water sources). Therefore, the whole case constitutes a cross-border issue. The Polish authorities had decided to prolong the mining concession of the Turow mine without a proper environmental impact assessment. The Czech Government lodged a formal complaint under art. 259 TFEU against Poland in 2020. Later that year, the European Commission issued a reasoned opinion that acknowledged that Poland had infringed its obligations under the EU law. The Czech Republic filed an action against Poland at the European Court of Justice in 2021. The CJEU issued an interim measure in which it ordered Poland to stop mining activities in May 2021.[11] However, Poland did not comply. Thus, the Czech Republic applied for a periodic penalty (€ 500.000/day). The Court issued another interim measure and ordered Poland to pay the penalty.[12] Advocate General Pikamäe issued his opinion on 3. February 2022 acknowledging several Czech pleas in law.[13]

[8] § 87a - § 87m Water Act.

[9] § 2(a) Act No. 367/2021 Coll.

[10] § 2(c) ibid.

[11] Order of the vice-president of the court of 21 May 2021, Case C-121/21 R, ECLI:EU:C:2021:420.

[12] Order of the vice-president of the court of 20 September 2021, Case C-121/21 R, ECLI:EU:C:2021:752.

[13] Opinion of the Advocate General of 3. February 2022, Case C-121/21, ECLI:EU:C:2022:74.

However, the next day (February 4th), the newly elected Czech government withdrew the action because of the governmental Agreement on Turow that was signed on 3. February. The Agreement promises a total sum of € 45 mil to be transferred to the Czech side and several other measures that the Polish side should pay or undertake to protect the environment and human health.[14] However, academics, scientists, NGOs, and political parties disapprove of the Agreement because it does not prevent future degradation of the environment and protection of underground water sources. Furthermore, some NGOs are planning on lodging a complaint at the European Commission, and one Czech affected municipality by mining activity filed a constitutional complaint at Czech Constitutional Court against the Agreement.

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Finland

The new Climate Change Act

The government bill for the new Climate Change Act was given in March 2022. The parliament will approve it in June before summer holidays and it will come into force 1.7.2022. The Act will not be revolutionary, but it will intensify climate policy in Finland.

The most important matter is that it includes new goals for climate policy: 1) climate neutrality in 2035; 2) climate emissions at least 60 % less in 2030 and at least 80 % less in 2040 (compared to 1990); 3) climate emissions at least 90 % less in 2050; 4) climate change adaptation, climate risks control and climate sustainability.

The planning system of the Act will develop so that there will be 1) long term climate plan (30 years' time span, every 10 years); 2) national climate change adaptation plan (every other parliamentary period, meaning normally 8 years); 3) mid-term climate plan (covers only effort sharing sector, but includes also information concerning development, every parliamentary period, 4 years normally); 4) land use sector climate plan (every other parliamentary period). The Act in force includes these plans except the land use sector plan.

The Act will also include provisions concerning e.g. consultation of the Parliament related to plans, annual report to the Parliament, climate change panel, Sami people climate council (new), appeal possibility to the Supreme Administrative court. At the moment, it is not clear what kind of responsibilities there will be to local municipalities, but most probably not very strict.

Building legislation

The renewal process of the land use planning and building legislation did not deliver totally new legislation concerning land use planning because the Government could not agree on the content. In the proposal of the working committee that was preparing renewal there were couple of new obligations related to climate change mitigation for land use planning, but those provisions should wait for a new Government after elections in 2023. However, as result there will be a separate new Building Act that will include some interesting climate

[14] For more information see: https://www.mzp.cz/en/news_20220203_The-Czech-Republic-and-Poland_signed_a_cooperation-agreement

obligations. (The Act in force includes both land use planning and building control.) According to the Ministry of Environment the government bill will be given in September and the Act will
enter into force 1 January 2024.

The two new obligations are concerning low carbon and life cycle requirements of the buildings. Firstly, there should be climate declaration for new buildings and large renovations of buildings (of course with some exclusion). The declaration should cover the whole life cycle of building (normally at least 50 years, but could be longer). The declaration should include carbon emissions of building materials, building work and also energy consumption of the building during life cycle. There will also be limit values of carbon emissions for buildings that are not allowed to exceed. Limit values will be set by the intended use of the building. Secondly, there will also be new obligations related to life cycle features of the buildings. This includes among other things that material and product description in machine readable form.

Litigations

There have not been climate change related litigations that are based on general climate legislation (e.g. the Climate Change Act or similar) or human rights or general administrative legislation or other general legal principles. There are of course climate related appeals in "normal" environmental matters (e.g. land use planning and environmental permitting) though success based on climate matters is limited, because traditional environmental legislation – at least at the moment - does not acknowledge these issues.

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France

Actions brought by associations or by local authorities against the state and actions brought by associations and local authorities against companies

Actions against the public authorities

Liability litigation

Administrative Tribunal of Paris : Notre affaire à tous & al./State

- ⇨ 3/2/2021, N°1904967, 1904968, 1904972, 1904976/4-1, Association Oxfam France, association notre affaire à tous, Fondation pour la nature et l'homme, Association Greenpeace France
- ⇨ 14/10/2021, N°1904967, 1904968, 1904972, 1904976/4-1, Association Oxfam France, association notre affaire à tous, Fondation pour la nature et l'homme, Association Greenpeace France[15]

The Tribunal enjoins the French government "*to take all necessary measures to repair the ecological damage and prevent the aggravation of the damage up to the uncompensated share of greenhouse gas emissions under the first carbon budget, i.e. 15 million tons of CO2 equivalent*" as of the date of the judgment" (...). The tribunal states that it "*appears*

[15] http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf

reasonable that this remedy be effective by December 31, 2022 at the latest" and that the measures be adopted "*within a sufficiently short period of time to prevent the aggravation of these damages*". However, the Tribunal considers that there is no reason to attach a penalty to this injunction. Similarly, the judge specifies that it is not for the tribunal to assess the sufficiency of the measures taken to reach the objective of reducing greenhouse gases by 40% in 2030 compared to 1990 level, considering that this issue was already assessed by the Council of State in the case Commune de Grande-Synthe of July 1, 2021.

Legality litigation

Council of State : Commune de Grande Synthe et Damien Careme (maire) /State

- ⇨ 19/11/2020, n° 427301 (see french report Avosetta 2021)
- ⇨ 1/07/2021, n° 427301[16]

As a reminder, in the light of the data communicated by the public authorities, the Council of State concludes that *the reduction in greenhouse gas emissions for 2020 cannot (...) be considered sufficient to establish a trend in emissions that respects the trajectory set to achieve the 2030 objectives*. The Council of State orders the adoption of all useful measures to curb the curve of GES produced on the national territory (...) before 31 March 2022.

At the beginning of May 2022, the French government published its response to the Council of State in order to demonstrate that the French objectives will be met[17]; in particular, the government lists various legislative and financial levers that have been mobilized since July 2021: the Law 2021/1104[18] to combat climate change and strengthen resilience to its effects[19] (which takes up some of the measures recommended by the citizens' climate convention), the France 2030 Investment Plan of 30 billion euros (50% for the ecological transition). It also mentions the commitment of the President of the Republic in February 2022 to multiply by 10 the solar production capacities by 2050, the creation of about 50 offshore wind farms and the construction of 6 EPR2 nuclear reactors by 2050. A future programming Law on Energy and Climate is also envisaged for 2023 as part of a strategy on Energy and Climate and roadmaps to be adopted in 2022. It remains to be seen how these commitments will be implemented by the new government under the aegis of the new Prime Minister Elisabeth Borne, who is in charge of ecological and energy planning.

Actions against companies

Notre affaire à tous & autres contre Total

- ⇨ Judicial Tribunal of Nanterre : Ordonnance du 11/2/2021, Notre affaire à tous & autres contre Total (N° RG 20/00915 - N° Portalis DB3R-W-B7E-VQFM)

As a reminder, five associations and 14 local authorities have brought an action against Total considering that this company did not take account sufficiently the climate risks it generated, in contradiction with the obligation of due vigilance prescribed by the Law 2017 on the duty of vigilance. The plaintiffs asked to the Court to order to Total to adopt and implement sufficient measures to reduce climate risks and assume its responsibilities. The Tribunal rejected TotalEnergies' objection of lack of jurisdiction. The Tribunal ordered TotalEnergies

[16] https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301

[17] https://www.ecologie.gouv.fr/sites/default/files/dp-rep-gouv-gs.pdf

[18] So-called «*Law Climate & Résilience* ».

[19] https://www.legifrance.gouv.fr/jorf/jo/2021/08/24/0196

to pay the plaintiffs the total amount of 6,000 euros, to be divided equally between them. Total has appealed the ordinance of the judicial Tribunal of Nanterre.

- ⇨ Versailles Court of Appeal : Judgment of 18/11/2021, Total/Commune de Bize Minervois & al

The Court of Appeal confirms the jurisdiction of the Nanterre judicial Tribunal and confirms its ordinance of February 11, 2021. It ordered Total to pay the plaintiffs the sum of 12,000 euros pursuant to the provisions of Article 7000 of the Code of Civil Procedure in the event of an appeal. The Court rejected all other claims[20].

Greenpeace, Les Amis de la terre et Notre affaire à tous/TotalEnergies

- ⇨ Judicial Tribunal of Paris : March 2022 Legal action filed by Greenpeace, Friends of the Earth and Notre affaire à tous/ Total[21]

March 2022 Legal action filed by Greenpeace, Friends of the Earth and Notre affaire à tous, against Total for unfair business-to-consumer commercial practices[22] ("Greenwashing"). This lawsuit follows the mobilization of these associations against an advertising campaign of the Total group launched in May 2021 concerning its commitment to the fight against climate change (net zero 2050) [23]. In addition, a study published in November 2021 in the journal Global Environmental Change "*Early warning and emerging accountability: Total's responses to global warming 1971-2021*"[24] has amplified criticism of the multinational's responsibility in the current climate crisis.

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Germany

2021-2022

Court cases on climate change

The order of the 1st senate of the FedConstCt of 24 March 2021 was already thematic at last year's meeting. Its doctrinal structure has caused much debate among scholars. It's a bit an example of what is called "habent sua fata libelli" – and one might add: "et iudicia", because much of the lengthy reasons given is a quite enigmatic. The spectrum of reactions are even represented in our group, Bernhard being profoundly contra and me profoundly pro. In very short terms my own reconstruction is this: almost all fundamental rights (FR) depend on the availability of energy. Due to the climate effects of greenhouse gas emissions from fossil

[20] Total/Commune de Bize Minervois & al. 18/11/2021, N° RG 21/01661 - N° Portalis DBV3-V-B7F-UL6E, https://www.actu-environnement.com/media/pdf/news-38574-DECISION-CA-Versailles-incident-competence.pdf

[21] https://cdn.greenpeace.fr/site/uploads/2022/03/Assignation_Greenpeace_AT_NAAT_c.-TOTAL_02032022.pdf

[22] Article L 121-2 of the Consumer Code "commercial practice is misleading if the false claim concerns "*the scope of the advertiser's commitments, in particular with regard to the environment*" introduced by the Law 2021 Climate and Resilience.

[23] 23/5/2021 : Citizen Tribunal against managed by the association 350.org & Notre Affaire à Tous & GreenFaith

[24] https://reader.elsevier.com/reader/sd/pii/S0959378021001655?token=5C1859BAF8272204310C54C1704530656BAC26EA506721FD28519B7AAE5D84310A63EE27F9D734A2991A15D09A340068&originRegion=eu-west-1&originCreation=20220524203323

energy must be made scarce because of related greenhouse gas emissions. If that is not done now the state will ever more drastically limit the use of fossil energy and thus encroach upon FR (no individual cars, no pools, no holiday air travel etc anymore). This future intervention (which tragically will be legitimate) has the "advance effect" that the use of fossil energy must be restricted today so that some is saved for the future. In doctrinal terms this means that the negative obligation of the state not to interfere in future is transformed into a positive obligation to interfere today.

In an order of the 1st chamber of the 1st senate approved this construct but rejected the application which was that the emission budgets approach which the court had used in its earlier decision should also be applied to the Bundeslaender. It basically said that the budget approach is only a way of illustrating its construct of advance effect, but not a precise method commanded by fundamental rights.

Courts are more and more asked to ensure that climate effects are taken into consideration on lower levels of decision-making. One instrument would be the EIA. Its content must also cover climate effects of projects (see Art. 3 Dir 85/337 and Annex 1 no f SEA Dir 2011/42). Does this mean that the CO2-emissions generated from cars running on a new highway must be factored in as environmental impact? The FedAdmCt avoided to require this in cases concerning older highway construction authorisations arguing that only the amendment by Dir 2014/52 of the EIA Directive included general climate effects in the scope of EIAs while before only effects on the local climate were to consider. But more recent projects and plans must certainly look at climate effects. The question only is how to calculate the emissions and how to assess their relevance. There is a long way to go from the individual road km to the state wide emission budget. An intermediate link could be the emission budgets the German Climate Protection Act assigns to 6 sectors of emission sources one being traffic. The responsible ministry would have to break this down into sub-sources but hesitates to do that. Learning to calculate and assign scarce budgets is I believe something public authorities and the participating public will have to learn soon.

One order of the NRW Higher Administrative Court (of 29.12.2021, Case 20 B 1690/21) may be instructive in this regard. A deposit site for waste from a limestone quarry was authorised. The applicant [not clear who that was, possibly a neighbour living nearby – unfortunately German courts do not disclose much about parties -] asked for annulment of the decision arguing among others that GHG emissions were not sufficiently taken into consideration [again no precise explanation how such emissions may emanate in the case]. The court said general interests like climate effects cannot be invoked by individual claimants because climate protection law aims at general, not individual interests, in other words is not a Schutznorm for individuals. But as an alternative the court referring to the mentioned BVerfG order of 24 March 2021 accepted that the applicant may invoke fundamental rights based positive obligation of the state to protect him/her. Only, the court says, the quantity of emissions is not sufficiently large to really cause damage to him/her. The court did not dig into the above question how to bridge the gap between individual and collective shares.

Climate Legislation

In reaction to the mentioned order of the FedConstCt of 24 March 2021 the Climate Protection Act was sharpened by elevating the reduction target from 55 to 65 % (by 2030, referenced to 1990) and correspondingly shrinking the yearly emission budgets for 6 sectoral

sources. However, no effective sanction is provided if the competent sectoral ministry doesn't plan and manage its budget (see I 3. above).

Sectoral sources: more and more source sectors come under the umbrella of EU regulation.

a. CO2 - emissions from automobiles: emission limits for automobiles are harmonised by EU law (to be criticised because privileging large over small cars); national law remains to regulate traffic, privilege public transportation, reserve bicycle lanes, manage parking space etc. On capping emissions from fossil fuels see below d. ii.
b. Insulation of buildings: National policies are rather facilitating than directing. The thrust is on subsidy programmes, information (energy passport), cost sharing between landlords and tenants; binding insulation standards are established for new buildings and major renovations, while concerning existing buildings government hesitates to put pressure on house owners; there plans to phase out fossil fuel heating and switch to geothermal sources plus zero energy buildings.
c. Methane and CO2-emissions from agriculture: much neglected. Discussion mostly related to the EU Agricultural Policy insofar as subsidies can be tied to eco-conditions. No political courage to restrict intensive livestock farming. On plans to draft a comprehensive act on agriculture see Bernhard's report.
d. Pricing emissions from fossil energy use by all sectors:
    i. energy tax (Energiesteuergesetz), based on EU law, to be paid by producers and stockists of fuels (e.g., ca. 650 €/1000l): originally traditional tax on consumption of goods but incrementally transformed into eco-tax
    ii. charge on CO2 emissions to be paid by traders of fuel; emission rights are capped and sold, later to be auctioned) (Act on emission trading for fuels - Brennstoffemissionshandelsgesetz)

Germany has since long been engaged in renewable energy policy. There are various policies to promote investment (feed in privileges and price guarantees for renewable electricity producers and transmission system operators, EEG-levy to be paid by electricity consumers to compensate producers and grid operators for losses). On conflicts climate protection vs biodiversity see Bernhard's report.

General environmental law

The new coalition of social democrats, free democrats and the greens produced an ambitious coalition agreement entitled "Dare more progress. Agreement for freedom, justice and sustainability" and propagating a "social-ecological market economy". The major focus is climate and renewables policy which however has come under pressure from the war in Ukraine. Plans to phase out fossil fuels have been diverted because the 50 % of gas supply bought in Russia shall within months be largely replaced from other sources including liquified gas from environmentally damageable US shale gas and gas from states that are politically not less dictatorial than Russia.

Concerning environmental policies beyond climate

a. water: there are plans to prepare for management of scarce water resources in times of drought, privileging household uses over industrial ones

b. various instruments to improve the circular economy of production and products but the momentum is on the EU level, see the very ambitious Commission proposal for a Product Design Regulation (COM 2022/142) (problem: powers of intiatives to regulate product classes concentrated at Commission level; it will take decades to cover the most important products. A system of involving active MS might be preferable.
c. nature protection plans to strengthen contractual instruments; adjustment of species protection to renewables projects (see Bernhard's report)
d. accelerating planning and licensing procedures (deadlines for public participation, early hearings, project managers, plan approval by law, reducing access to court review)
e. hydrogen based energy high on the research agenda

Author: Gerd Winter

Greece

The new National Climate Law

In November 2021, the Draft National Climate Law was launched and was subject to public consultation for two months. Recently, the first National Climate Law was approved by the Parliament (Law 4936/2022, Official Government Gazette Issue 105/A/27.05.2022). The basic elements of the national climate Law are the following:

a) The setting of intermediate emission reduction targets for 2030 (at least 55% emission reduction) and 2040 (at least 80% emission reduction), so that the central objective for climate neutrality can be achieved by 2050 (article 1 of the Law 4936/2022).

b) The elaboration of a national strategy for the adaptation to climate change and regional plans for the adaptation to climate change (articles 4-6 of the Law 4936/2022)

c) The setting of carbon budgets for certain sectors of the economy (transport, buildings, non-inter-connected islands, industry, agriculture) [article 7 of the Law 4936/2022].

d) The setting of targets on renewable energy and energy efficiency, which are rather vague. In particular, it is laid down that respective measures and policies should adopted and implemented with the aim to ensure the widest possible penetration of renewable energy sources in the energy market through the use of best available techniques and to achieve energy efficiency to the widest extent possible. The provisions also set out that the specific targets for the final energy consumption, the increase of energy efficiency, the use of energy produced by RES in the sectors of electricity production, transport, heating and cooling are set in the National Plan for Energy and Climate (article 10 of the Law 4936/2022).

e) Electricity production from solid fossil fuels and especially lignite will be prohibited from 1.1.2029. It is also laid down that the phase-out of the lignite-based energy production can be accelerated through the adoption of a decision of the Minister for energy and the environment after the consideration of the energy security issue. The national Climate Law does not set any legally binding target for the phase out of the use of the natural gas. Moreover, it does not set a timeframe for the phase-out and the prohibition of the hydrocarbon research, exploration and extraction activities (article 11 of the Law 4936/2022).

f) The Law contains certain provisions on electric mobility. In particular, it is laid down that from 1.12024 one quarter of the new corporate cars must be electric or hybrid, with emissions of up to 50 grams per kilometer. It is also provided that from 2030, all new vehicles must have zero emissions and that from 1.1.2026, all new taxis and one third of the new rental cars in the region of Attica and in Thessaloniki must be electric (article 12 of the Law 4936/2022).

g) The Law contains also certain provisions for the fuels used for heating. In specific, it is set out that from 1st January 2025 the sale and the installation of new oil boilers for heating is prohibited. Moreover, it is laid down that from 1st January 2030, the sale of heating oil will be permissible under the condition that the oil is thirty percent at least mixed with renewable liquid fuels (article 17 of the Law 4936/2022).

h) Apart from the preparation of the National and the Regional Adaptation Plans, the Law sets also certain measures for the Adaptation to Climate Change, such as the establishment of an observatory to climate change adaptation (article 25) and the national Council for the adaptation to climate change which would be the central advisory body on the issues concerning adaptation to climate change and resilience ((article 28). It is worth referring that the provision for the compulsory insurance of new buildings in areas of high vulnerability from 2025 onwards, which was included in the draft document, was removed from the final document.

j) The National Climate Law aims to strengthen the climate change dimension in the environmental licensing procedure. In particular, Article 18 of the Law 4936/2022 modifies Annex II of the Law 4014/2011 which relates to the content of the EIA studies. In accordance with the repsective provisions, in addition to the existing requirements, the EIA Study must also contain an analysis of the impact of the project on the climate, including the nature and the extent of the projected emissions also in relation to the current situation, an analysis of the vulnerability of the project with regard to climate change and an assessment of the compatibility of the project with regard to the achievement of the objectives set in the National Plan on Energy and Climate.

Acceleration of the efforts to explore and exploit potential oil and gas

The Greek Government announced recently that it will accelerate the efforts for the exploration and exploitation of oil and gas, so that the first drilling test will take place next year.[25] Hydrocarbon exploration licenses were issued for five offshore zones and one on land.

Climate Change Litigation

There is no case of strategic climate change litigation (i.e., any legal action mainly in the form of petition for annulment against the government inaction with regard to climate change or the insufficiency of the measures taken to deal with climate change) before the Greek Courts and in particular the Council of State so far. There are certain cases in which the applicants challenged the legality of the environmental permits of lignite-fired power stations or the permits for the exploration of hydrocarbons and the Council of State was called to rule on these issues.

[25] For further information see https://balkangreenenergynews.com/environmentalists-oppose-greeces-plan-to-accelerate-fossil-gas-exploration-extraction/.

In this context and in line with its previous jurisprudence, the Council of State ruled that the renewal of the relevant environmental permits of the two lignite-fired power stations of the Public Power Corporation (DEI) in Peloponnese was not valid, because the renewal was not based on new EIA Studies and the initial environmental permits had been expired a long time before the renewal of the permits was issued. (Decisions 1606/2019 and 1607/2019 of the Greek Council of State).[26]

The Court ruled also that the seismic research for hydrocarbon exploration should not be subject to the EIA procedure, because it cannot be classified either as depth drilling in the context of the EIA Directive or as research drilling in accordance with the respective Ministerial Decision. The non-application of the EIA procedure was justified on the ground that the administration assessed the content of the Strategic Environmental Impact Assessment Study on which the Environmental Action Plan for Seismic Research for hydrocarbon exploration in the specific area (on land) was based and that this assessment resulted in the conclusion that the environmental impact would be minimal, and the application of the EIA procedure was not necessary. Moreover, Article 6 of the Directive 92/43 (Habitats Directive) does not prohibit the research, exploration and extraction of hydrocarbons in the protected areas or in their vicinity provided that the relevant provisions for the appropriate impact assessment are observed. In this context, the Court ruled that the respective provisions were observed, because an appropriate impact assessment was conducted before the adoption of the Environmental Action Plan and the conclusion of this assessment was that the seismic research would not jeopardize the conservation objectives of the respective protected area**.** Finally, it is worth noting that the climate perspective of the hydrocarbon research activities has not been taken, at least explicitly, into account. (Decision 961/2020 of the Council of State).

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Italy

Recent developments in the first legal action against the Italian State
In Italy, the most significant development in the field of climate litigation so far is the legal action brought against the Italian State under the heading '*Giudizio Universale*' ("Last Judgment"). The 203 claimants include citizens (including both adults, and minors represented by their parents) and environmental associations, including the environmental NGO "*A Sud*" (the first claimant in the action) assisted by a legal team of practitioners and university professors who are also part of the network '*Legalità per il Clima'*.

The legal proceedings officially started on 5 June 2021 when the plaintiffs filed the suit depositing the writ of summons before the Civil Court of Rome. At the basis of their claim is the alleged insufficient action of the Italian Government to reduce GHGs emissions. In that respect, the claimants allege, in particular, that the policy measures envisaged in the current National Integrated Plan for Energy and Climate, adopted in 2019, can at best achieve an

[26] It is worth noting that the Court ruled that the environmental NGO "Clientearth" that was one of the applicants, did not have legal standing to challenge the renewal of the environmental permit of one lignite-fired power station. The Court based its reasoning on the fact that the environmental NGO "Clientearth" did not claim that it had a specific link with the administrative act (renewal of the envirionmental permit) that it challenged also in geographical terms and that it did not demonstrate that the continuation of the operation of the lignite-fired power station would have direct and significant transboundary environmental impact.

emission reduction of 36% compared to 1990 level. This would be incompatible with the fair share of emission reduction which Italy is expected to implement in order to respect the 1.5° emission reduction objective agreed in the Paris Agreement (source: *atto di citazione*: https://asud.net/wp-content/uploads/2021/10/Atto-di-citazione-A-Sud-VS-Stato-Italiano-2021.pdf).

On this basis, the plaintiffs claim that, by failing to take the actions necessary to meet the Paris Agreement objectives of emission reductions, the Italian State is violating fundamental rights, including the right to a stable and safe climate. In that respect, the claimants stress the inextricable link, already recognized in other contexts by the Italian Court of Cassation (see *Ordinanza* No 5022/2021) between the existence of a stable climate and the enjoyment of any fundamental right ("*senza stabilizzazione del sistema climatico il nucleo essenziale di qualsiasi diritto fondamentale non è più garantito*"). They argue that the human right to a stable and safe climate rests on this assumption, that every human being has the right to demand for the non-regression of their own human development and of the essential core of their own right face to the dramatic urgency posed climate emergency (*atto di citazione*, V.7 and 8).
Therefore, with their claim, the plaintiffs ask the Court to:

- Declare the Italian state is responsible for its inaction to fight the climate emergency; and
- Order the State to reduce GHGs emissions by 92% compared to the 1990 levels, by 2030.

The first hearing of the case was held in December 2021 and in that context, the Presidency of the Council of Ministers (representing the Italian State) requested the Court to declare the complaint inadmissible and to dismiss the claim. The second hearing took place on 21 June 2022. At the hearing the plaintiffs submitted scientific evidence to demonstrate the inadequacy of the measures so far adopted by the Italian state to contrast climate change, and asked the judge to evaluate that evidence. On its part, one of the arguments brought by the Italian State in its defence is the judge's lack of jurisdiction to adjudicate government's policy choices concerning the climate.

Initiatives against private companies

Alongside the above-mentioned action against the Italian Government, some of the plaintiffs acting in *Giudizio Universale* (such as *A Sud*, and *Rete Legalità per il Clima*) are pressing the private oil company ENI to reform and revise its industrial plan arguing that it is allegedly incompatible with the emission reduction targets needed to address the climate emergency. The initiative is, at the moment, pursued extra-judicially, through a submission to the OECD National Contact Point within the framework of the OECD Guidelines for multinational enterprises. The submission to the OECD contact point follows a previous letter of notice (diffida) sent to ENI by *Rete Legalità per il Clima*.
The explicit introduction of 'environmental protection' in the Italian Constitution

The recent and future developments in the field of climate litigation in Italy must also be examined in the light of another landmark development, namely the final approval by the Italian Chamber of Deputies, on 8 February 2022, to the proposed constitutional law

introducing environmental protection amendments to Articles 9 and 41 of the Italian Constitution. [27]
The reform of Article 9 is particularly significant as the amendment adds a new paragraph, which reads as follows: "*The Republic…. protects the environment, biodiversity, and the ecosystems, also in the interest of future generations. State legislation shall govern the forms and modalities for the protection of animals*".

Additionally, the amendment to article 41 introduces explicitly the protection of the environment as a limit to economic initiative, by stating that "*private economic initiative is free. It cannot be carried out in a way to cause damage to health, the environment, security, freedom and human dignity*". It also adds that "*the law shall determine the programmes and the appropriate checks so that public and private economic activities are directed and coordinated for social and environmental purposes*".

While it is still early to fully assess the real practical impact of those amendments, the inclusion of a specific provision on environmental protection among the constitutional principles (i.e. the amendment to article 9) might arguably have the effect to further strengthen the position of claimants advocating the adoption by the State of stricter environmental (and climate) protection measures.

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Ireland

This brief report covers two important developments in the field of climate law and litigation during the period under review: the enactment of the Climate Action and Low Carbon Development (Amendment) Act 2021 and the decision of the Supreme Court in *An Taisce – The National Trust for Ireland v An Bord Pleanála* [2022] IESC 8.

Climate Action and Low Carbon Development (Amendment) Act 2021

The 2021 Act entered into force on 7 September 2021. It introduced significant amendments to the earlier Climate Action and Low Carbon Development Act 2015.[28]
The 2021 Act provides for a 'national climate objective' which commits the State to achieve the goal of carbon neutrality by end 2050. Or, more specifically, in the words of section 3(1), it commits the State: to 'pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy'.

The role of the Climate Change Advisory Council is strengthened considerably under the 2021 Act. In particular, the Council is tasked with proposing a programme of carbon budgets to be approved by the Government. The carbon budgets cover the periods 2021-2025; 2026-

[27] See for a commentary of this reform and its relevance for climate litigation: R Luporini, M Fermeglia and M A Tigre, 'Guest Commentary: New Italian Constitutional Reform: What it Means for Environmental Protection, Future Generations & Climate Litigation', Climate Law Blog, 8 April 2022, available here.
[28] An administrative consolidation of the 2015 Act as amended by the 2021 Act is available here. See further: D Torney, *Comparative Assessment of the Climate Action and Low Carbon Development (Amendment) Act 2021* (October 2021).

2030 and 2031-2035.[29] The first two proposed carbon budgets must provide for a reduction of 51% in the total amount of greenhouse gas emissions by end 2030, relative to 2018 levels. The Government must now approve 'sectoral emissions ceilings' to determine how different sectors of the economy will contribute to the achievement of the carbon budgets. The sectoral emissions ceilings are expected to be brought to Government for approval over the summer.[30] The Climate Action Plan 2021 sets out a roadmap of the actions required to deliver Ireland's climate targets. The plan must be updated annually. Each local authority must make climate action plans on a five-year basis.

An Taisce – The National Trust for Ireland v An Bord Pleanála [2022] IESC 8

This Supreme Court judgment concerned a challenge by way of judicial review to a decision of An Bord Pleanála (the Board) to grant planning permission for the construction and operation of a cheese manufacturing plant in County Kilkenny. This note focuses on the argument based on alleged breach of EIA obligations. Hogan J explained at para 7 of the judgment:

> The central issue in this appeal is whether the Board was under an obligation to assess – whether for the purposes of an environmental impact assessment under the EIA Directive or an appropriate assessment under the Habitats Directive – the upstream consequences of the operation of the proposed cheese factory and, specifically, the milk that is necessary to supply this factory.
>
> At the heart of the appellant's [An Taisce's] objections to this grant of permission is its contention that such is the scale and size of the proposed factory that it will consume very large quantities of milk – estimated to be some 4.5% of the national milk supply in 2025 – and that this milk can only realistically be sourced by an expansion of the national herd, leading in turn to enhanced methane and other GHG emissions. These are said to be the indirect consequences which will flow from the construction of this factory.
>
> The respondents [An Bord Pleanála et al] maintain, however, that there is in fact no causal link between the anticipated increase in milk production and the factory. They contend that this increase in milk production will occur in any event, so that even if this increase in milk production results in increasing GHGs, these indirect environmental effects will not be as a result of the operation of the factory.

Hogan J described these as 'difficult and troubling questions' (para 8).

An Taisce maintained that the Board did not properly take into account the upstream consequences of the operation of the proposed cheese factory. Specifically, it asserted that there was no adequate EIA of the 450 million litres of milk necessary to supply the factory. It also asserted that such supply will have consequences for Ireland's climate obligations in that, e.g. the supply of milk at these quantities will have consequences for methane and nitrate emissions.

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[29] See further: Carbon Budgets | Climate Change Advisory Council (climatecouncil.ie).
[30] 'State to set 2030 carbon budget targets to the highest levels for every sector' *Sunday Business Post* 22 May 2022.

An Taisce therefore maintained that the Board was under an obligation under Article 2(1) of the EIA Directive to assess these wider (if indirect) environmental impacts due to the demand for milk likely to be created by the project. Importantly, in the course of the Supreme Court appeal, and in response to a written request from the Court before the oral hearing seeking clarification of this point, An Taisce expressly accepted that the milk supply did not form part of the project itself but was, rather, an indirect effect.

As regards the question whether the proposed project would strengthen the overall demand for milk, at para 78 Hogan J stated:

> … While the Board found – and, on the evidence, was fully entitled to find – that the factory's requirements would be met from the existing Glanbia milk pool, this still cannot take from the inevitable conclusion that this project is likely to strengthen the overall demand for milk, with implications for general milk production on non-Glanbia farms and, as a consequence, environmental emissions arising as a result.

He continued at para 79:

> In effect, therefore, in the light of these findings from the Board … the EIA question reduces itself to this: are the implications for general milk production on non-Glanbia farms and, as a consequence, environmental emissions arising as a result part of [the] "indirect significant effects of a project" within the meaning of Article 3(1) of the EIA Directive which the EIA itself was required to identify and assess?

As Hogan J explained in para 80, a 'project' for the purposes of the EIA Directive is defined in Article 1(2)(a) as meaning:

> [T]he execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources.

The definition of what constitutes a 'project' for the purposes of the EIA Directive is, as Hogan J explained, 'of critical importance' here (para 81).

'Project' for the purposes of the EIA directive corresponds in substance to the term 'proposed development' under Irish planning law (para 81, citing *Fitzpatrick v An Bord Pleanála* [2019] IESC 23). Hogan J noted at para 81 as regards the scope of a 'project':

> It might, for instance, be argued that where ostensibly off-site activities are so closely and functionally connected with the on-site development that they should really be classified as part of the project itself. Thus, for example, the offsite assembly – perhaps even at a location remote from the site – of industrial plant or buildings which are then transported to the site might, perhaps, be such an example.

And at para 82:

> Apart from these special cases, there are also cases where there is a clear and unbreakable inter-relationship between the project itself and certain off-site activities such that a causal relationship between the construction or operation of the project and certain direct or indirect environmental consequences has been clearly established.

By way of an example, Hogan J cited *Ó Grianna v An Bord Pleanála* [2014] IEHC 632. Here, Peart J in the High Court determined that the proposed construction of wind turbine development, on its own, serves no purpose if it cannot be connected to the national grid. It followed from this analysis that connection to the grid was 'fundamental to the entire project' here, and 'in principle at least' the cumulative effect of both the construction of the wind turbines and the connection to the national grid had to be assessed in order to comply with the EIA Directive (see para 83).

Hogan J also cited *Fitzpatrick v An Bord Pleanála* [2019] IESC 23 where Finlay Geoghegan J, speaking for a unanimous Supreme Court, concluded that a single proposed data centre, which formed one part of a larger scheme or 'masterplan' (in this case the possible construction of a further seven data centres) was a stand alone project 'in the sense of not being functionally dependent on future phases of the masterplan.' There was therefore no requirement on the Board in this particular case to undertake a full EIA of the entire masterplan at this stage. It is the specific project for which planning permission is sought that must be subject to an EIA.

Hogan J continued at para 86:

> At all events, in contrast to its the position at an earlier stage in these proceedings, An Taisce has now made it clear – at least for the purposes of this appeal – that it accepts that off-site milk production (whether by Glanbia farmers or otherwise) is not part of the project itself.
>
> One is accordingly obliged to ask: what do these words in Article 3(1) actually mean in the context of a case such as this and to what extent must the environmental effects of off-site activities be taken account and assessed by an EIA? There would seem to be two possibilities.

Hogan J examined two possible interpretations of what is meant by 'significant indirect effects of the development' in Article 3(1):

First: that it should be read 'in an open-ended fashion'

Hogan J examined the relevant Irish jurisprudence (including *An Taisce v An Bord Pleanála* [2015] IEHC 633 (Edenderry)), relevant CJEU rulings and the decision of the High Court (England and Wales) in *Finch v Surrey County Council* [2020] EWHC 3566 (Admin).

The difficulty Hogan J identified with an open-ended interpretation of Article 3(1) (at para 93) 'is that it does not seem possible to place any a priori limit on the range of indirect effects which would have to be assessed for EIA purposes if such an interpretation were to be accepted.'

In *Finch*, Holgate J considered the 'legal test' to be 'whether an effect on the environment is an effect of the development for which planning permission is sought'.

As Hogan J explained in para 96:

> It is, indeed, this connection to the project or development which Holgate J saw as critical to the question of whether an indirect effect falls within the ambit of the EIA Directive or not. In this respect, he considered the "legal test" to be "whether an effect on the environment is an effect of the development for which planning permission is sought" (paragraph 101), which he suggests can be determined by reference to "the use of land for development and the effects of that use" (paragraph 112) (emphasis added). Thus, for Holgate J, "indirect effects" are those consequences which are "less immediate" than direct effects, but which are nevertheless "effects which the development itself has on the environment." (at paragraph 110) (emphasis supplied).

At para 99:

> The upshot of Holgate J's analysis of these cases is that they reinforce the view that, first, an EIA must address the environmental effects, both direct and indirect, of the project or development for which planning permission is sought – there is no requirement to assess matters which are not environmental effects of the development or project; and second, that an effect of a project or development is one that is "concerned with the use of land for development and the effects of that use.

At para 100, Hogan J expressed his agreement with these conclusions, subject to one possible caveat which he covered later in para 102 (see below). He also noted that a similar view was taken by the Court of Session (Inner House, First Division) in *Greenpeace Limited v The Advocate General* [2021] CSIH 52. In the words of Hogan J:

> It seems to me that if Article 3(1) is given a remorselessly literal and open-ended interpretation there is no principled basis by which the limits of any EIAR [Environmental Impact Assessment Report] assessment could confidently be ascertained.

<u>Second</u>: that the indirect effects must be those which the development itself has on the environment

This is the approach canvassed by Holgate J in *Finch* and by the Court of Session in *Greenpeace*. In other words, it is the direct or indirect 'effects which the development itself has on the environment' that must be assessed. At para 102 per Hogan J (emphasis added):

> … This means that matters such as the construction of the plant or emissions from the plant etc. must be identified and assessed, but, generally speaking, not matters such as environmental impacts of the inputs (e.g., milk production) or outputs of the factory (e.g., the environmental consequence of the plastic wrapping of the cheese).

> This brings me to my caveat in respect of Holgate J's analysis in *Finch*. There may well, however, be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable. In those special and particular cases the significant indirect environmental effects of these off-site activities would fall to be identified and assessed and, for all the reasons I have already stated, cases such as Edenderry and *Ó Grianna* fall into this category.

Choosing between the two possible interpretations

The first option presents the difficulty that it is open-ended and 'leads to conclusions which are not practicable or feasible' (para 103). If such 'an open-ended test' were to be adopted, 'then in principle there would be few limits to the range of possible inquiry to which those tasked with preparing an EIAR would be put' (para 104).

At para 105:

> … It is the fact that such an open-ended interpretation of Article 3(1) would lead to the imposition of an impossibly onerous and unworkable obligation on developers preparing an EIAR that leads me to the conclusion that this interpretation should be rejected.

Hogan J considered that this conclusion was underscored by the language of Article 5(1) and Annex IV of the EIA Directive which sets out the nature of the information that must be included in the EIAR (para 106):

> All of these provisions strongly suggest that the information to be supplied must be firmly tethered to the project itself, so that the indirect significant effects to be assessed must be intrinsic to the construction and operation of the project.

Para 107 is key as regards how the Supreme Court envisages the role of EIA in the context of assessing the climate change effects of projects (emphasis added):

> … Important as the EIA Directive undoubtedly is, it was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) [i.e. when the EIA Directive was last amended] the climate change effects of such a project.
>
> Yet the proper scope of the EIA Directive should not be artificially expanded beyond this remit and, in particular, it should not, so to speak, be conscripted into the general fight against climate change by being made to do the work of other legislative measures such as the [Climate Action and Low Carbon Development (Amendment) Act 2021]. In this respect, I agree with Humphreys J [in the High Court] that these wider indirect environmental consequences of milk production and the dairy sector must really be assessed at a programmatic level by national or sectoral measures in the manner provided for by s. 5 of the 2021 Act.

Hogan J concluded (para 108) that the Board was entitled to find on the evidence before it that the existing and projected Glanbia milk pool was sufficient to cater for the needs of the proposed new cheese factory:

> … To that extent, therefore, it seems at least implicit in the findings of the Board … that the proposed factory would not have any significant indirect environmental effects, precisely because – as [the Board] found – this milk was going to be produced in any event by Glanbia farmers and any additional agricultural emissions which might thereby result had already been identified and assessed. In these circumstances, it follows that there will be, in fact, no significant indirect environmental effects as a result of the construction and operation of the factory by reason of the Glanbia milk production.

Hogan J did acknowledge at para 109 that 'having regard to basic economic principles relating to supply and demand, this project is likely nonetheless to strengthen the overall demand for milk production.' He observed at para 110 that 'viewed from an economic level, any enhanced milk production in the State which follows in the years to come is likely not to be entirely independent of the operation of the factory.' But, and this is the key point here:

> Beyond this, however, proof of causality such [as] would satisfy the requirements of the EIA in respect of "direct and or indirect significant environmental effects" remains entirely elusive, contingent and speculative.
>
> Its very elusiveness means that it is incapable of measurement or assessment and, hence, cannot be the sort of significant indirect environment effect which Article 3(1) of the Directive must be taken necessarily to contemplate.

And, finally, at para 111 (emphasis added):

> While it is true that this wider economic analysis does not feature in either the EIAR or the … or the Board's findings, this, in my view, is irrelevant because any environmental effects which thereby result from the strengthening of the overall demand for milk production cannot be said in any realistic interpretation of this phrase to amount to "indirect significant environmental effects" of this project within the meaning of Article 3(1).
>
> This is not to deny the existence of these potential effects or to downplay their significance. Still less is it to say that these effects should not be measured or assessed having regard to the long-term commitments to a carbon-neutral society manifested in the 2021 Act.
>
> It is rather that these effects are so remote from the present project that they cannot realistically be regarded as falling within the scope of Article 3(1).

Whether to make a reference to the CJEU under Article 267 TFEU?

An Taisce had pressed the Supreme Court, if necessary, to make a reference concerning the interpretation of Article 3(1) of the EIA Directive 'so far as it concerns the meaning in particular of the words "the indirect significant effects of a project"'.

Hogan J explained why it was not considered necessary to make a reference on any question of the interpretation of EU law here:

> [156] It is true that the Court of Justice has not had to pronounce on the proper interpretation of the "significant indirect effects" aspect of Article 3(1) of the EIA Directive. There may indeed be instances of where a court of last resort might feel called upon to make an Article 267 reference on this very point, but I do not consider that the present case is really one of them. The difficulty here is that no acute point of interpretation is really presented by this appeal: it really shades into issues of fact and the application of established principles of EU law. If there were two possible conflicting a priori interpretations of Article 3(1) the Directive the resolution of which could guide this Court and assist in the disposition of this appeal, it would, of course, be a different matter. Yet none have presented themselves, whether for the purposes of this appeal or, for that matter, in the course of the earlier case-law.
>
> [157] For those reasons I consider that the present appeal in substance concerns the application of EU law, rather than any question of interpretation as such. It is for this reason that I consider that no Article 267 TFEU reference is, in fact, necessary.

'Important and practical issues' raised here

It is notable that in para 159 Hogan J acknowledged that although An Taisce's challenge to the grant of planning permission has been dismissed 'it has nevertheless raised important and practical issues regarding the development consent process'.

In a subsequent judgment [2022] IESC 18, delivered on 4 April 2022, the Supreme Court confirmed its earlier provisional view that each party should bear its own costs. The Court again took the opportunity to emphasise (at para 2) that there was 'no doubt at all but that the appeal raised very important – even fundamental – issues of environmental law regarding the operation in particular of the EIA Directive'.

Author: Áine Ryall

Latvia

Climate Litigations

Similarly, as indicated last year, there have been no climate change related litigations so far.

Climate Legislation

In July 2021 the Ministry of Environmental Protection and Regional Development (MEPRD) started drafting a completely new law aimed at encompassing all requirements with respect to climate change issues (provisions on adaptation, mitigation, targets, emission trading, responsibilities, financial instruments etc.) establishing an 'umbrella law' – the "Climate Law." Up to the end of April 2022, the draft law has reached a stage of consultations with different parties, including general public, NGOs etc. The aim of the draft Climate law is formulated quite ambitiously: to facilitate resilience to climate change and contribute limiting

climate change so that climate neutrality would be achieved at the latest in 2050 and after it to strive to achieve negative balance of the GHGs in Latvia.

On the one hand, the draft law is reintroducing (or keeping) the requirements with respect to climate issues detailed so far by the Law on Pollution. The latter is to be amended in parallel of adopting the new Climate law to delete relevant articles that would be included in the Climate law (e.g., on ETS permits, procedures, aviation emissions, CCS etc.) On the other hand, the Climate law is aimed at introducing a new system for distributing and defining responsibilities among different sectors affecting climate change and determining responsible public authorities (Ministries) involved in policy developments and decision-making.

The draft law introduces the requirements on setting sectorial targets as well as methodology on how the targets must be determined and distributed. A task of setting specific sectorial targets is however delegated to the Government. Thus, the most challenging process (of agreeing on sectorial responsibilities for limiting emissions) will be up to the Government after adoption of the Climate Law.

The determination of the aim of achieving climate neutrality by 2050, setting sectorial targets and determining responsibilities are indeed new provisions aimed to be defined at the level of law. It is however difficult to predict whether the ambitious approach of setting targets and responsibilities will survive through the legislative process that has been just recently started.

At this stage, the draft law includes quite significant changes if compare with the existing system stemming from the Law on Pollution. Just to mention some of them:

1. With respect to a carbon capture and storage regulation: The Law on Pollution has established prohibition stating that:

"Storage of carbon dioxide in geological formations, as well as in the water column is prohibited in the territory of Latvia, the exclusive economic zone and continental shelf thereof." (Art.8^{-2})

The draft law aims to allow CCS in principle (under certain conditions and except "in the water column").

2. Surprisingly weakened are the public participation rights and rights to information, as well as access to justice, in fact, to the level that would breach the Aarhus Convention, if adopted.

3. On the positive note three points to highlight at this stage:

    3.1. A new approach aimed to be established (inspired by the UK system) providing that the Government is obliged to report to the Parliament every year on the achievements and actions in the field of the national climate change policy. There are not a lot of issues on which the Government is obliged to report to the Parliament (and on annually bases seems to be only one so far, i.e., on the foreign affairs policy).

    3.2. Ambitious aim of the law.

3.3. Ambition to (finally) set the responsibilities and targets for all involved sectors moving away from the approach that the climate change issues are only for the Ministry of Environment to deal with (and "solve").

Additionally, the law aims to establish a system for managing funding for climate related projects setting the responsibilities and priorities including with respect to funding obtained from auctioning emission allowances. It is worth noting that the envisaged system contains only those financial mechanisms that are (or will be) under the responsibility of the MEPRD (including the Modernisation Fund). The law sets priority areas of funding (connected with climate change mitigation and adaptation) but leaves the process, preconditions and details for allocation of funding to the level of Government regulations (on project bases).

Unfortunately, the draft law does not contain provisions on establishing an independent expert panel (or body) that could provide the assessments of achievements: success and failures of the policies and actions affecting the climate change. The idea of establishing the panel has been discussed as one of effective instruments to be on track of achieving the ambitious goals. But it did not result in any provision to that respect in the published draft. In the draft law, the same Ministry which is responsible for coordinating the climate policy and its subordinated institutions are also responsible for monitoring, reporting, preparing achievements reports, as well as Climate change strategy.

The Law might be adopted by the end of this year (at the earliest).

Author: Zaneta Mikosa

The Netherlands

Climate change litigation: Urgenda

On 9 February 2022 (!) it was announced that the 2015 court order (25% reduction form 1990 levels by the end of 2020) in the Urgenda-case had been achieved (25,5% less emissions of ghg). Problem is that the goal was achieved by coincidence or rather by corona. Preliminary data on emission in 2021 show that emissions were on the rise again and Urgenda (the foundation) has states that the Urgenda judgment is not adhered to, and it wants a meeting with the government.

Climate change legislation: The Dutch Climate Act

Ever since the Urgenda-case was world news in 2015, the legislator has been working on legislation to make such claims less likely to succeed. The Netherlands has a Climate Act since 2019. However, climate change mitigation efforts keep getting stricter (e.g., as a consequence of the EU Green Deal) the intention of the Dutch government is to adopt amendments to the Climate Change Act of 2019 in order to align with the EU targets. The National Climate Plan (2021-2030) is required by the Dutch Climate Act and provides measures that shall be implemented in the given timeframe in order to achieve the 2030 goals. To a large extent these measures have been negotiated with government, industry and societal partners (including NGOs) in the 2019 Climate Agreement. Although the Act and its goals are considered binding for government, the explanatory memorandum does explain that citizens nor (E)NGOs can appeal to a court in order to force government to achieve the goals it has set for itself (or implement the required measures).

Many of the measures reach the news once they are on the verge of implementation. Recently a coal-fired power plant made the news. It had applied for and was granted a subsidy to seize operation of its facility in the near future. As the deadline to stop operations came closer (and war in Ukraine started) the owner simply let the government know that he will not be using the subsidy and will (for now) keep producing electricity by burning coal. The government was and is not amused.

Climate change litigation: Milieudefensie v Shell

The successful case of Milieudefensie Nederland (Friends of the Earth Netherlands) against Royal Dutch Shell (RDS) was decided by the The Hague district court on 26 May 2021 (ECLI:NL: RBDHA:2021:5339; English). Also see: https://en.milieudefensie.nl/climate-case-shell. The court ordered 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels' Based on a duty of care (interpreted using scientific facts/data, widespread consensus and internationally accepted standards, including a reference to human rights) and the fact that Friends of the Earth had sufficiently proven that the current Shell policy was insufficient to reduce the level of emission of Shell and its suppliers and buyers in line with the Paris climate agreement.

While appeal is pending (complaints by shell on March 22; statement of defence by October 18; perhaps a hearing in the spring of 2023 or 2024 and judgment 5 months after that), Milieudefensie has asked 29 (other) large contributors (companies like Unilever, KLM, airport Schiphol and many Dutch banks, pension funds and energy companies) to send their Climate Change Mitigation Action Plan to them. Milieudefensie will assess whether these companies are doing their part and otherwise launch new proceedings against any of these companies. Next to that, it has warned all board members of Shell to reconsider their decisions (or inactions) under the threat of personal liability for mismanagement (by not doing enough against climate change).

Biodiversity: the aftermath of the Dutch Programmatic Approach to Nitrogen

As a result of the ECJ judgment about the Dutch programmatic approach on Nitrogen (deposition), where the court basically ruled that the particular Dutch programmatic approach was in violation of Article 6 Habitats Directive, the Dutch still face an endless line of judgments on conservation of Natura 2000 sites where Nitrogen deposition is at the center of attention (nature conservation permits; zoning schemes/land use plans; building permits; environmental permits).

Several sorts of cases demand the attention of the competent authorities and the courts in the Netherlands. On the one hand NGOs have asked many competent provincial authorities to revoke permits for certain projects (mostly cattle farms) in order to improve the conservation status of Natura 2000 sites. So far this has not (yet) been successful, although several courts have asked the administrative authority to improve their argumentations and research before deciding on these applications. Also. the same NGOs have asked the same competent authorities for enforcement measures against those companies/industries that cause nitrogen deposition and had no permit at all or received a permit or notified a new activity under the

(annulled) Programmatic Approach to Nitrogen. On the other hand, new projects have secured permits for developments that are being appealed by local residents and NGOs (many cases involve newly developed cow barns that supposedly cause less deposition on nearby Natura 2000 sites and therefore allow for housing more cows). Another problem exists in the fact that many of the measures the government has now introduced to diminish nitrogen deposition on Natura 2000 sites are to a certain extent flawed in the eyes of the courts; e.g. courts are not always convinced that the new cow barns will indeed diminish nitrogen deposition on nearby Natura 2000 sites; reducing the maximum speed limit on highways to 100 km/h was deemed to be effective but recently a court was convinced that the effect of reducing the speed limit on the highway had led to more traffic on provincial roads (where either 80 or 100 km/h is allowed) and had therefore possibly led to more nitrogen deposition on the nearby Natura 2000 sites. The pending question at the moment is whether courts will accept the (new) national general binding regulation that deposition caused by construction activities shall be disregarded (because of other general measures that reduce nitrogen deposition.

At the moment government is implementing a program/programs to either subsidize farmers to stop operating and/or expropriate their lands and companies in order to achieve the goals of the Habitats Directive.

All and all, this Dutch Nitrogen-crisis seems to be a never-ending story of either goals that are very (too) hard to achieve and/or legislation that is insufficient or too lenient.

Access to justice in environmental matters: Aarhus Convention
In light of the ECJ judgment (Varkens in Nood) about access to justice in cases within the scope of the Aarhus convention, the Dutch administrative courts have granted access to either anyone who is not an interested party (a deviation of national law) but did participate in the decision-making procedure and to all interested parties regardless of whether they participated in the decision-making procedure a deviation of national law). Not just for those decisions that are within the scope of the Aarhus Convention but simply all environmental law decisions that are subject to or should be subjected to the decision-making procedure arranged for in section 3.4 of the Dutch General Administrative Law Act (that allows for participation by the possibility to submit views about a draft decision that is made publicly available). As the court are deviating from the GALA the Dutch legislator has recently made public a proposal to amend the Dutch GALA.

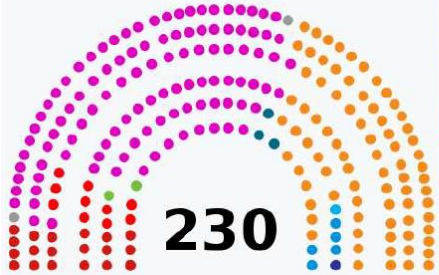
Author: Kars de Graaf

Portugal

Recent climate developments

The most relevant climate related development in Portugal is the first climate law, published in January 2022. It is a landmark both for its ambitious content and for the context of its approval. Formally it is a Law from the Parliament (not a decree law from the Government). The discussion of the law in the plenary of the Parliament was coincident with the refusal of the Budget for 2022 by the majority of the deputies. The consequence of the non-approval of the budget were anticipated elections. and there was the risk that the draft law, discussed for months and finally approved by the Environment, Energy and Territorial Planning

Commission of the Parliament[31] was not approved by the deputies. There was a large consensus around the law. Only the left and extreme right did not approve it. The communist party (10 MP) abstained, and the extreme right "liberal initiative" (1 deputy) voted against the law.



Partido	2019 out. 26 [4]	2020 fev. 3 [5]	2020 jun. 25 [6]
Partido Socialista	108	108	108
Partido Social Democrata	79	79	79
Bloco de Esquerda	19	19	19
Partido Comunista Português	10	10	10
CDS – Partido Popular	5	5	5
Pessoas–Animais–Natureza	4	4	3
Partido Ecologista Os Verdes	2	2	2
CHEGA	1	1	1
Iniciativa Liberal	1	1	1
Não inscritos	0	1	2
LIVRE	1	0	0

It is worth mentioning the fact that the original draft legal proposal discussed in the Parliament Commission did not include the recognition of a stable climate as Common Heritage of Humankind. It was due to the influence of an NGO (https://www.commonhomeofhumanity.org/) that both the parties and the President accepted the last-minute inclusion of a new responsibility of the Government to promote the international recognition of a stable climate as Common Heritage of Humankind through climate diplomacy. The law was published on the 31st of December. Here is a non-official translation of the most relevant article, Article 15 on climate foreign policy:

«1 - The Government adopts a global and integrated vision of the pursuit of climate goals, respecting the limit of the sustainable use of the Planet's natural resources and the routes of development of each country, actively advocating in matters of foreign policy within the framework of climate diplomacy:

a) The reinforcement, anticipation and fulfillment of targets for the reduction of greenhouse gas emissions, sufficient not to exceed 1.5º C of global warming, compared to pre-industrial levels;

b) The binding and effective international commitments regarding climate and preservation of the environment and biodiversity;

c) The densification of international criminal protection for the environment;

d) The definition of the concept of climate refugee, its status and its recognition by the Portuguese Republic;

[31] https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45442

e) International cooperation and solidarity with the countries of the Global South, providing support the implementation of the measures foreseen in the Sendai Framework;

f) Recognition by the United Nations of a Stable Climate as Common Heritage of Humanity.

2 - Foreign policy promotes the fight against carbon leakage and climate dumping, namely through the international convergence of environmental standards of trade agreements and the comprehensiveness of carbon prices, ensuring, in particular, their repercussion on imports.

3 - The Portuguese Republic promotes the adoption and implementation of sustainability standards in international agreements, in particular trade agreements.

4 - The Portuguese Republic takes into account climate risks as sources and multipliers of global instability, particularly in its neighborhood policy.

5 - The Portuguese Republic collaborates and participates, within the framework of international relations, in mechanisms to help countries and citizens affected by extreme weather events and their consequences»

The NGOs and the civil society are now pushing the Government for the adoption of new regulations to implement the new legal obligations that are in force since last January.

The case of Cláudia DUARTE AGOSTINHO and others against Portugal and 33 other States is still pending in the ECHR (Request No. 39371/20 submitted 7 September 2020[32])

There are no climate cases in Portuguese courts.

Author: Alexandra Aragão

Slovenia

To my knowledge, there is no climate law litigation pending in Slovenia. The court having jurisdiction for such an action against the general rules (laws, statutes, regulations…) would be the Constitutional Court, but I know that no such action has been filed. Of course, following the approach in *Urgenda case*, it could be that the regular – civil law – courts can also have jurisdiction.

However, I think that inaction is also due to the lack of a general law on climate (change). Instead, rules on emissions are included in sector-based regulations. And there are many of them. Therefore, it would be necessary to start procedures against different regulations, one by one.

On the other hand, plans to reduce emissions are included in the soft law only; already above mentioned *The integrated national energy and climate plan* is a strategic document setting goals, policies and actions up to 2030 (with an outlook to the year 2040) for the five dimensions of the Energy Union:
1. decarbonization (greenhouse gas (GHG) emissions and renewable energy sources (RES)),

[32] https://youth4climatejustice.org/wp-content/uploads/2021/05/2020.11.20-objet-de-laffaire-professional-translation.pdf

2. energy efficiency,
3. energy security,
4. the internal energy market, and
5. research, innovation and competitiveness.
However, it is "only" a soft law and as such not capable of adjudicating at the courts.

The only proposal for a statute dealing in detail with decreasing the emissions was a proposal for the Act on climate change, but it was not adopted. It dates back to 2010.

Author: Rajko Knez

Spain

Climate Change Legislation

The national Parliament approved the Act 7/2021, of 20 May, on Climate Change and Energy Transition (*Ley de cambio climático y de transición energética).* This is the very first comprehensive legislation passed at national level on climate change. In precedent years, though, some regions ("Comunidades Autónomas") had passed their own statutes on the matter, for instance: Andalusia: Act 8/2018, of 8 October, and Catalonia: Act 16/2017, of 1 August. Apart from that, other autonomous communities are also preparing and/or discussing during the present year their own laws on climate change. For example, the Basque Country (Bill on energy transition and climate change).

Of course, this triggers the issue of the compatibility and/or overlappings that might exist between State legislation and regional legislation on the matter (especially with the regional statutes approved before the enactment of the Act 7/2021). We cannot discuss in full this matter, but just mention that this situation gave rise to some constitutional conflicts and proceedings, some of which have already been adjudicated (for instance, the ruling of the Constitutional Court Nr. 87/2019, of 20 June 2019, adjudicated the appeal filed by the Government against the Act of Catalonia 16/2017 and declared unconstitutional some of its articles).

For the sake of concision, our attention should focus on the National Act 7/2021, of 20 May 2021, which entered into force just two days later. As noted supra, this piece of legislation is the first national law approved in Spain, dealing comprehensively with Climate Change. It has 40 articles and numerous complementary provisions. It introduces novel provisions in the field of Climate Change, and it amends a bunch of existing legislation in different sectors. Its most noticeable features are the following ones:

- It sets ambitious climate change goals: (a) a target of total GHG emissions reduction of -30% (reference year, 1990), to be reached by 2005 at the latest; (b) a penetration of renewable energies of at least 42% of the total final energy consumption; (c) a system of electricity generation using at least 72% of renewables; (d) a reduction of energy consumption of at least 39,5%.
- It enshrines the principle of "no regression", which had not been previously enacted, at least at State level.
- It establishes that Spain should arrive to the stage of climate neutrality by 2050
- It orders the government to approve a decarbonisation strategy, with the horizon of 2050.

- It regulates comprehensively the drafting process for the Integrated National Plan on Climate and Energy ("PNIEC").
- It includes interesting provisions on fuels and sustainable mobility
- In a novel way, it introduces legal rules on Climate Change adaptation and regulates the national plan on this matter.
- It defines what "fair/just transition" means and provides rules on the matter.

Two other relevant measures are also worth mentioning, as the new law declares that no new authorisation or permit will be delivered by any governmental agency for new projects involving oil prospection, drilling or exploitation, or for fracking projects.

Climate Litigation

Recently, two legal proceedings questioning the national policy and plans on Climate Change were triggered by e-NGOs, which are shortly described below:

.- *Greenpeace v. Spain (I):* In September 2020, several major e-NGOs, among which Greenpeace, filed a claim in the Supreme Court (Administrative chamber). The applicants claimed that the Spanish government was not taking adequate action on climate change and asserted that in failing to take adequate action, Spain was in violation of EU Regulation 2018/1999 (Governance of the Energy Union). According to the applicants (a) Spain should have approved a National Energy and Climate Plan (NECP) for 2030 and 2050, (b) the draft plan that had been publicized was not consistent with the Paris Agreement and other related instruments, and not ambitious enough. The Supreme Court declared the claim admissible but in March 2021 the government actually approved the Integrated National Energy and Climate Plan (*Plan nacional integrado de energía y clima*, PNIEC) and subsequently filed a motion to dismiss for lack of subject matter jurisdiction. The court dismissed the motion to dismiss. The proceeding is still pending but immediately the same plaintiff targeted the approved national Plan in courts, giving birth to:

.- *Greenpeace v. Spain (II):* In late May 2021, Greenpeace and other major e-NGOs, filed another claim in the Supreme Court (Administrative chamber) against the Spanish central government. On this occasion, they claimed that the PNIEC (supra) was not ambitious enough to meet international and EU climate change standards and goals as well as Spanish capabilities and responsibilities; that more ambitious reduction targets should have been enshrined in the plan; and that no effective public participation was allowed during the decision-making. The Supreme Court also declared the claim admissible, and the parties are now interchanging the several submissions and observations provided for in the Law on Administrative Jurisdiction. This case is still pending.

It is hard to predict which will be the outcome of these two proceedings, but in our view, it is highly probable that they will be dismissed on the merits. There are different reasons for that: (a) this is the very first climate change litigation of this type in national courts, Spanish courts are no front-runners on novel problems; (b) the system of administrative justice in Spain is very formal, the law details very neatly the forms of governmental action that can be appealed, the specific grounds (legality) and the remedies to be asked from the court; (c) the arguments of the plaintiffs are not very solid, they mainly rely on comparative law judicial precedents (which have no force in Spain) and there is no convincing demonstration of a "vice of legality"; (d) administrative courts usually employ a high level of judicial deference

towards the Executive when complex policy-choices are involved. Finally, even if the claim would be upheld, it would be very difficult, in practice, to implement it.

Authors: AM Moreno and A García-Ureta

Sweden

Climate law and litigation

As for climate law and litigation, there is little to report from Sweden. No new cases have been initiated or decided since last spring, and as regards legislation, the Parliamentary lacuna in these issues is almost total (see below). The initiatives taken have all concerned the facilitation for more "green" industry and the opening of "green" mines, often to the detriment of other interests (land rights of the Sami people, nature conservation, water quality, etc.). Under the field call "climate neutrality", the Government in March issued a concession for the Kallak (Gallok) mine in the northern part of the country. The iron ore in this area is of a very poor quality and will last for only 14 years, while strongly impacting the reindeer herding activities. The Sami village of Gallok is one of the last in Sweden with traditional herding and will now be forced to transport the animals with trucks instead. It is widely expected that the courts will quash the governmental decision – either in the judicial review proceedings in the Supreme Administrative Court or by the Land and Environmental Court in the subsequent permit proceedings under the Environmental Code – but that remains to be seen.

As for the Swedish position in the EU negotiations for "Fit for 55", we largely stand behind the Commission's proposal on stricter requirements in order to lower the emissions of greenhouse gases, both within and outside the EU ETS. Sweden is also presenting a proposal of its own, namely that each Member State within its own territory shall reach climate neutrality. Today, my country is probably the only Member State which reaches this goal, primarily due to a very high amount of "negative emissions" through the forest sink. Concerning emissions from cars, Sweden wants a stop for the sale of vehicles with combustion engines from 2030, which is 5 years earlier that the Commission's proposal.

On the other hand, as regards renewable fuels and the carbon sink in the landscape, Sweden proposes weaker demands compared with the Commission. We strongly oppose all requirements on sustainable forestry in the production of biofuels, arguing that that issue lies outside the competence of the EU to decide upon. Further, in contrast with 2021, Sweden today also opposes demands on increased levels of carbon storage in the forests (LULUCF).[33]

Recent developments of national environmental law

First of all, it should be noted that the previous Government – based on the cooperation between the Social Democrats, the Green party and the "Center party" (a conservative party, mostly representing farmers) fell in August 2021. Instead, we have a minority government with Social Democrats only. As the Swedish democratic system is designed, this leads to a situation where all legislative power rests on different majorities in the Parliament. Thus, a number of important proposals for reforms in the field of environment law – for example in order to facilitate wind farming – have not succeeded in passing the elected assembly. Along

[33] For an interesting opinion on this subject from the Swedish Forestry Industry, see; https://www.forestindustries.se/our-views/current-issues/current-issues-within-forest-and-climate/LULUCF/

with a very contentious climate between the parties, it's fair to say that we have a lacuna in politics that will rest until the next elections in September (except for the NATO issue of course).

Due to a poor EIA, the application for a new permit to extract limestone on Gotland by the company *Cementa* was rejected by the Land and Environmental Court of Appeal in July 2021. This – amplified by disastrous media coverage – led to a public outcry and calls for the Government to intervene. Pointing to the risk for cement shortage for the construction business and thus the green transition (!), the Government and the Parliament swiftly implemented the derogation possibility in Article 2.4 of the EIA Directive (2011/92) into the Environmental Code. Directly thereafter, the Government issued a permit for *Cementa* to extract the amount of limestone already covered by the old permit which ran out of time during the fall. Thus, the old permit was extended in time for another year under the argument that this was an "exceptional case" and no alternatives were available. According to the procedure under Article 2.4, the Commission was alerted, and the decision communicated among the Member States. To date, no reaction has been known to come from Brussels on this issue.

After a strong campaign by the forestry industry together with the Forest Agency, the Government decided to reform the legislation on species protection in Sweden (see C-473/19 and C-474/19 *Skydda skogen*). The argument was that the judgement meant that every single bird of even ordinary species – such as the *Chaffinch* –must be protected because of the Swedish implementation of EU's nature directives, which would entail excessive costs for the forestry. As of today, the Birds Directive and the Habitats Directive have been implemented into the Environmental Code with a single set of rules, jointly applicable on birds and listed species, taking account to their conservation status. The background to the controversy is that the Land and Environmental Courts in a surprisingly high degree have disallowed the investigations made by the Forest Agency concerning habitats for species of bird's sensitive for forestry (Capercaillie, Siberian jay, Willow tit, etc.). To make things clearer, the Government has now stated that the two directives will be separated, thus removing anything protecting the birds' habitats that goes beyond the Birds Directive. Hopes now to run high among the forest industry, wind farm operators, city developers and others that they now will be exempted from the protection of birds. While these aspirations seem futile in many of these situations, the reform poses a real threat to endangered species in the forest as they now may get stripped from the protection of their living areas. At the end of the day, however, this comes down to how the courts understand the prohibition against "deliberate disturbance" in relation to, for example, the living areas of the Siberian jay or the breeding grounds of the capercaillie. So far, they have been quite strict on this interpretation.

Finally, it should be mentioned that as a result of both *Cementa* affair and the *Chaffinch debate*, the role of the courts has been questioned by representatives from farmers their parties. This is also true in the *wolf issue*, but now the criticism seems to be wider in the industrial circles and is followed with demands for interventions from "the politics", be that from the Government directly or the Parliament. I take it this patter is recognizable from other Member States.

Author: Jan Darpö

Switzerland

The "Klimaseniorinnen"-case

A group of senior female citizens had demanded from the national authorities that the Confederation should adopt more ambitious climate measures in order to protect their right to life and to the respect for private and family life as guaranteed under the Federal Constitution and the ECHR. Their concrete request before the courts was that the federal authorities should hand out a declaratory ruling confirming this omission under section 25a Federal Act on Administrative Procedure. Thus the discussion before the federal courts concerned the procedural question, whether the claimants had an interest worthy of protection to obtain this declaratory act. Both, the Federal Administrative Court as well as the Federal Court on appeal denied that the claimants had such an interest and qualified their request as an inadmissible popular conplaint. Rather, did the courts argue, they should bring their cause to the political scene by launching e.g. a popular initiative.

After exhaustion of the national remedies the case is now before the ECHR (application no. 53600/20), where the Chamber to which the case had been allocated relinquished jurisdiction in favor of the Grand Chamber by a decision of April 29, 2022.

Red wall case

Protesters had sprayed the walls of a bank office in Geneva with (washable) red color to protest against the banks activities in climate-sensitive fields. According to the Criminal Chamber of the Federal Court this constitutes vandalism and "an act of violence" incompatible with the right to freedom of expression. The case therefore cannot be compared to a Turkish case before the ECHR where protesters put paint on a statue of Atatürk, which was considered a protected means of expression. (Federal Tribunal, decision 6B_1298/2020 rendered on September 28, 2021). The competent cantonal court which had to handle the case after its referral by the Federal Court was more lenient: It held that the appellant was guilty of damage to property, but could benefit from mitigating circumstances: honorable motive, profound distress and deep dismay. The pecuniary sanction was therefore minimal. (Court of Justice of the Canton of Geneva, decision AARP/77/2022 rendered on March 31st, 2022.)

"Tennis match" in a banking hall case

The protesters had played tennis in the banking hall in order to protest against fossil fuel investments and to urge Roger Federer to end his sponsorship with the bank. At first instance, the protesters, were found not guilty due to the imminent danger of the climate crisis. The Administrative Chamber of the Federal Court however denied a situation of necessity according to criminal law and held that the liberty of reunion did not include the right to gather on private property without the consent of the owner. (Federal Court ATF 147 IV 297).

Pending popular initiatives on the federal level:

1. "Glacier Initiative": This popular initiative wants to enshrine the net-zero goal in the Federal Constitution and includes a ban on fossil fuels by 2050 with the only exception of technically non-substitutable applications. The Federal council rejects the initiative, but formulated a counter proposal, which as accepted by one chamber of parliament already.

There will be a mandatory vote on this issue requiring a majority both of the people and the Cantons for the adoption of the proposal.

2. "Biodiversity initiative": The initiative wants to better protect nature, the landscape and the architectural heritage. It would mainly bring two new elements to the Federal Constitution: An explicit obligations of the Cantons to preserve landscapes, sites and historical monuments, and a narrow framework for weighing up the interests in the case of significant interventions in protected objects. The Federal Council rejects the initiative, but formulated a counter proposal demanding amongst others the implementation of the concept of ecological infrastructure in a Federal Act as well as the enshrinement of the goal to establish core zones for biodiversity on 17 per cent of the Swiss land area in law. The initiative (and the counter-proposal) will soon be debated in Parliament. Then there will be a vote by the people and the Cantons.

3. "Landscape Initiative": This instrument basically demands a freeze when it comes to the number of buildings situated outside of construction zones. Therefore, new buildings outside the settlement area could only be constructed, if existing ones are deconstructed. The Federal Council proposes to reject the initiative, even though the government shares some of its main aspects (clear division between construction and non-construction zones, aspiration to limit the number of buildings outside of construction zones etc.). The debate in Parliament will soon commence.

Author: Markus Kern

Turkey

In terms of international regulations, the first and most significant development is the ratification of the Paris Convention with a declaration (*Official Gazette, No.31621. November 7, 2021*). The declaration is related to the claim about Turkey's position under the UNFCCC that has been declared for years by Turkey[34]. As a consequence of the previous efforts Turkey was removed from the Annex 2 of the UNFCCC[35]. However, he is still placed among developed countries listed in the Annex 1 despite Turkey's claim about removing also from that list. So, the Declaration emphasize that Turkey is a developing country. Second development is the ratification of the Kigali Amendment to the Montreal Protocol with a declaration (*Official Gazette, September 28, 2021)*. The declaration is related to the dealings "with the countries that Turkey has no diplomatic relations within the framework of the UN Environment Programme activities".

In terms of national legislation, the majority of below mentioned recent developments are related to the energy, renewable energy and energy efficiency. The principal aim of all these new regulations and amendments to the existent ones is to carry out the government' policy to

[34] Declaration: "The Republic of Turkey on the basis of "equity, common but differentiated responsibilities and irrespective capabilities" clearly and accurately recognized under the United Nations Climate Change Convention of 9 May 1992 and the Patis Agreement and by recalling decisions 26/CP.7, 1/CP.16, 2/CP.17, 1/CP.18 and 21/CP.20 adopted by the conference of parties to the convention declares that she will implement the Paris Agreement as a developing country and in the scope of her nationally determined contribution statements provided that the Agreement and its mechanisms do not prejudice her right to economic and social development".

[35] After this removal decision, taken at the meeting COP 7-Marrakesh, Turkey ratified the UNFCCC.

promote the use of renewable energy resources as much as possible and to reach the determined targets to combat the climate change.

- Through the amendment to the Law on Environment (*Official Gazette November 30, 2020)* the sentences of "encouragement of electrical vehicles and vehicles without engine", and "to combat climate change" are included among the general principles regarding prevention of pollution, protection and improvement of environment under Article 3.

-The Law on Nuclear Regulation was adopted (*Official Gazette March 8, 2022*) taking into account the Paris Convention on nuclear energy[36]. It aims to minimize the risks to workers, public and the environment from the nuclear facilities and their wastes, and it includes a civil liability for operators.

-By-Law on the Inspection of Nuclear Energy and Ionization Radiation (*Official Gazette March 5, 2021*).

-The Framework By-law on the Energy Labeling was adopted taking into account the relevant regulations of the EU (*Official Gazette March 2, 2022*). It aims to encourage the consumers to choose the products that will decrease energy consumption.

-By-law on the Design of the Energy Products According to the Environment (*Official Gazette February 5, 2022).* It aims to protect the environment and to contribute to sustainable development through environmentally sensible design of the energy products.

-The By-law on the Amendment to the By-law on Spatial Plans (*Official Gazette 13 March 2022*). This amendment requires the preparation of the city transportation plans taking into account the aim and target to increase the energy efficiency.

-The By-law on the Amendment to the By-law on the Energy Performance in the Buildings (*Official Gazette February 19, 2022).* It enlarges the total construction field to promote the use of renewable energy resources for a certain period (between 1.1.2023 and 1.1.2025).

-The By-law on the Amendment to the By-law on the Certificating and Supporting of Renewable Energy Resources (*Official Gazette. March 1, 2022).* The amendment is related to the rate of the calculation of the payment obligation of providers.

The below-mentioned amendments to some existent by-laws, protect the interests of energy and energy investors against other environmental interests, and give priority the aim and targets of the government with regard to climate change. Consequently, they caused conflicts among different environmental interests, and are protested by environmentalists.

-The By-law on the Amendment to the By-law on the Amendment of the By-law on the Procedures and Substances Related to the Determination, Record and Approval of Protected Areas. *(Official Gazette. March 5, 2022)* removes some prohibitions, and gives more discretion to the responsible authorities to allow the construction of more renewable energy facilities (wind, hydraulic and solar energy) in the protected areas.

- The By-law on the Amendment to the By-law on the Implementation of the Coastal Law *(Official Gazette. April 16, 2022)* allows to the competent authorities to determine new shorelines that will replace the existing ones for a certain coastal area after analyzing whether these areas have coastal character or not.

- The By-law on the Amendment to the By-law on the Mining *(Official Gazette. March 1, 2022)* allows mining activities that will be conducted to response the Country's electricity need in the areas that are registered in the "official record" as "olive fields".

Ministry of Environment and Planning has been renamed as Ministry of Environment, Planning and Climate Change (*Official Gazette September 11, 2021).*

[36] Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982.

CLIMATE LITIGATION

The first climate case in the country is brought before the competent administrative court in March 2022 by the fishermen whose economic interests have been damaged because of the dried Marmara Lake. This lake used to have a very significant function in the Marmara Region in terms of social- economic and environmental aspects. In 2017, it was placed among wetlands that have national importance under the Ramsar Convention to which Turkey is a party. Unfortunately, between 2011 and 2021 it lost 98 % of its surface. Consequently, currently, it impossible to fish there anymore. In spite of that, and ironically, the relevant public authority claimed the rent from the association established by the local fishermen for the fishery shelter used by them. Lawyers of the plaintiffs argued that the main reason of that situation is both the wrong policies and practices as well as inaction of the State. As a legal basis, lawyers of the plaintiffs referred to the commitments of Turkey under the above-mentioned international climate conventions as well as the Ramsar Convention. So, the claim is to obtain a "declaratory judgment" from the court indicating that the State is responsible for the alleged situation because he acted against all his legal commitments[37].

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United Kingdom

Climate Change Litigation

Strategic climate change policy

The Climate Change Act 2008 continues to be the core national legislation governing climate change. It sets a duty on Government to secure a 100% reduction of greenhouse gases by 2050, duties to establish interim carbon budgets every 5 years to help ensure a smooth trajectory to 2050, and duties on Government to report annually to Parliament on progress. Integral to the regime is a statutory independent Climate Change Committee with duties to advice Government on budgets and provide and publish critical reviews on progress. The Climate Change Act combines proceduralrequirements , statutory duties concerning goals, and a great deal of government political accountability to Parliament.

NGOs dissatisfied with the rate of progress and the adequacy of policies are testing the provisions of the Climate Change Act in the courts. But it is clear to date that the courts are fully aware of the fairly complex institutional checks and balances set up under structure of the Climate Change Act and are reluctant to impose their own critique of policy substance.

Plan B. Earth and others v The Prime Minister and others. Administrative Court 21 December 2021

Under the Act the Government has a duty to prepare proposals and policies as it considers will enable to regular carbon budgets to be met. Meeting the carbon budget is a legal duty, but the Government must also report to Parliament if it has failed to meet a budget and explain what it will do to rectify the situation.

[37] https://ekolojibirligi.org. (Accessed in 9 May 2022)

The claimants challenged the legality of the most recent set of proposals and plans to meet the budget. They pointed to various criticisms by expert bodies including the Climate Change Committee.

The court held that the Government had prepared and published programmes. Disagreements with the merits of the programmes and policies did not mean that there had been a breach of statutory duties. Criticisms by the Climate Change Committee, *"far from demonstrating that the 2008 Act is not being complied with, demonstrates that the 2008 Act is working as Parliament intended. Parliament plainly contemplated that the periodic provision of reports and responses would feed into an evolution of policy over many years while successive Government's grapple with the vast and unprecedented challenge of climate change".*

A parallel claim in the case under Human Rights also failed. The Court pointed to the importance of the Climate Change Act as providing the framework for combatting climate change. It was a moving target constantly changing, and the Climate Change Committee had described the most recent net zero strategy as a credible package.

There has recently been a change of senior judges in the UK Supreme Court, and the current indications are that the Supreme Court will be rather less interventionist in matters of government policy than has sometimes been the case in recent years - and to some extent this is a reaction to intense political criticism that the court might have overreached itself during Brexit related litigation following the Brexit Referendum. In this case the judge quoted with approval the judgment of the Supreme Court in a 2021 decision concerning social security. Where, as here, there are high level economic and social measures involving complex and difficult judgements, the State enjoys a wide margin of appreciation in matters of that kind. Whilst all the circumstances must be taken into account, it remains the position that the judgment of the executive or legislature in such areas "*will generally be respected unless it is manifestly without reasonable foundation*".

In the Plan B case, the court noted, "*That approach respects the constitutional separation between the Courts, Parliament and the executive. It also reflects the fact that the Court is not well equipped to form its own views on the matters in question. I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation, I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area and will always be dependent on competing extracts from a global debate. Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted"*

Friends of the Earth, and others v UK Government (Administrative Court, High Court, 18 July 2022)

An unexpected partial victory for claimants challenging the Government's set of policies and programmes under the Climate Change Act, *Net Zero Strategy*, published last October, designed to meet the 6th carbon budget (2033-2037).

The court held that when officials provided information to the Secretary of State they had not provided him with sufficiently detailed information on how individual policies would contribute to the reductions needed. The Secretary of State needed that information to make a judgment of the risks involved. However, the court rejected the claimants' argument that all

the policies had to be quantified in their effects – the nature of making predictive assessment many years ahead meant that some uncertainty was bound to be involved.

Under the Climate Change Act the Government has a duty to lay before Parliament a report on the policies intended to achieve the targets. The court held that the report lack sufficient detail, and should have contained more information on individual policies and their contribution, as well as the risks of delivery, even though that officials had that information.

Project Development, environmental assessment and climate change

There are two recent decisions concerning projects for oil development where the courts had to consider whether the indirect effects for environmental assessment should include the effects of consumer use of the final products derived from the extraction. They involve the appellate courts in Scotland and England. In Scotland the court said clearly such effects were not included with environmental assessment of the project. But in England, the court deliberately said that there could be circumstances where legally such downuse effects could be encompassed – but without giving any guidance when this might be the case. So there is a rather unsatisfactory legal situation since both courts have equal status within their respective jurisdictions. Only if the Supreme Court took on the issue would there be a definitive ruling for the whole of the UK.

Greenpeace v Advocate General, BP Oil and others. Court of Session (Inner House Scotland [2021] CSIH 53, 7 Oct 2021

The case concerned a project to extract oil from the North Sea and the scope of the environmental assessment. In accordance with government advice, the assessment did not include the indirect emissions associated with the end use of oil or gas to be produced – 'the assessment of indirect effects is limited to those effects which relate to the construction and operational activities of the project.'

The Scottish court concluded that, *'The question is whether the consumption of oil and gas by the end user, once the oil and gas have been extracted from the wells, transported, refined and sold to consumers, and then used by them are "direct or indirect significant effects of the relevant project". The answer is that it is not. The exercise which the applicant had to carry out, and the Secretary of State had to assess, was a determination of the significant effects of drilling the two wells and removing the oil and gas. That involved considering the effects of depositing and operating an exploration rig or rigs on site. The ultimate use of a finished product is not a direct or indirect significant effect of the project. It is that effect alone which, in terms of the Regulations, must be assessed.*

Finch v Surrey County Council and others Court of Appeal, England and Wales [2022] EWCA 187, 17 Feb 2022

Planning permission was sought for the extraction of crude oil on land. In considering the scope of the environmental assessment, the local planning authority addressed the immediate contribution to greenhouse gases by the operation of the proposed project. It considered that the project was compatible with the Government's long-term climate policy where the need to the maximize indigenous oil and gas as part of the transition was recognized. But the

assessment did not consider the effects of the greenhouse gases from use of the eventual products derived from the crude oil.

The lower court concluded that the local authority had been legally correct. The concept of 'indirect' effects under environment assessment were confined to the effects of the project itself and could not encompass the effects of the product as later refined and used in unknown places by unknown consumers.

The Court of Appeal accepted that the local planning authorities has a great deal of discretion in considering the scope of environmental assessment, and courts should not interfere with their judgments unless they could be said to be acting irrationally. Here the court by a majority of 2 – 1 felt the authority has been rational in its approach, and so the decision to exclude the downstream effects was valid.

But the court went on to hold that the lower court had been wrong to hold that the effects of the eventual products derived from a project could not *legally* be considered within the scope of environmental assessment. The Court of Appeal held that the concept of 'indirect effects' could as a matter of law encompass downstream greenhouse gas emissions. In this case, according to the court, "*the crude oil extracted at the application site could only find its way to the various uses that might be responsible for the impacts in question once it had passed through several other distinct processes and activities, including, initially, its refinement, followed by the onward transportation and distribution of the refined products, and their eventual sale for use as fuel, which would only then, in various places at various times, produce emissions of greenhouse gases."*

But the court held that in other factual situations different conclusions might be reached. *"Whether in other cases, in different circumstances involving development for the extraction of hydrocarbons, "downstream" impacts might properly be regarded as "indirect" effects on the environment, so that it would be reasonable and lawful for a local planning authority in those circumstances to require their assessment, is not a question we have to decide. The specifics of such projects will vary greatly from one kind of "fossil fuel" to another. The need for a wider assessment of greenhouse gas emissions may sometimes be appropriate, and possibly not contentious. One can imagine possible scenarios. But I do not think it would be helpful for us to set about inventing examples on hypothetical facts unrelated to the case before us"*

The Court of Appeal judgment is a little unsatisfactory. It emphasises how much the scope of environmental assessment especially as to indirect effects is a matter of judgment by local authorities. Courts should be reluctant to interfere with such judgments unless the authority in question can be said to be acting irrationally. The Court upholds as rational the authority's decision to exclude the green gas effects of the downstream products derived from the crude oil. But it then says that as a matter of law there might be other factual circumstances where such downstream usage could be included as indirect effects. Local authorities are faced with the initial decision as to the scope of the assessment, and the decision gives them no guidance on how to approach the issue in future. The case is going to the Supreme Court in Autumn 2022.

Author: Richard Macrory.

Recent case-law from the CJEU

Judgments by the EU Court of Justice in environmental matters (1-1-21 till 30-4-22)

During the period in question, the CJEU gave 66 judgments, among them 22 from the General Court. The legal basis ws Article 258 (9 cases), Article 279 (2 cases), Article 263 (32 cases) and Article 267 (23 cases). The average procedure under Article 258 took – between the (first) letter of legal notice and the judgment 90 months, thus more than seven years. The cases C-22/20(Commission v. Sweden on waste water treatment) with 139 months, and C-286/21 (Commission v. France on air pollution) 149 months were particularly long.

Climate change decisions

In Case C-565/19P, the Court rejected an appeal against a judgment of the General Court which had held inadmissible the application of certain individual persons and an environmental organization against the insufficiency of EU measures to combat climate change. The CJEU continued to base its reasoning on the Plaumann-formula (C-25/62 of 1963!) and held that the applicants, who had claimed the infringement of their fundamental human rights, were not individually concerned by the measures.

Access to internal communication

In case C-619/19, the CJEU had to interpret the term „internal communication" of directive 2003/4 on access to environmental information, regulation 1367/2006 and the Aarhus convention. Under these provisions, public authorities could refuse access to information on internal communications. The CJEU held that any information which circulated within the administration was internal, as long it was not disclosed. This included information which had come from outside the administration and concerned facts. The Court mitigated this approach by the argument that the information could only be withheld as long as it was „justified". The Court did not discuss the obligation of public authorities, laid down in the above-mentioned provisions, to proceed to an „active and systematic" dissemination of information.

The Turów case

The CJEU closed case C-121/21 without a decision in substance. That case had opposed Czechia and Poland (Article 259 TFEU). Czechia argued that a prolonged authorization, without an environmental impact assessment, of an open-air lignite mine in Turów (Poland), close to the Czech frontier, had led to a strong lowering of the groundwater level in Czechia, affecting the drinking water supply to the bordering population and causing damage to buildings. Under Article 279 TFEU, Czechia asked the bordering population and causing damage to buildings. Under Article 279 TFEU, Czechia asked the CJEU as an interim measure, to order to closing of the mine, which the Court did. Poland refused to execute this interim measure, arguing that the miners would be licensed and the energy supply of part of its population would be impaired which was not compatible with the Polish constitution. Czechia then asked as an interim measure a financial sanction against Poland, for not implementing the first interim order. The CJEU ordered the payment of 500.000 euro per day of non-compliance with the first interim decision. Poland refused payment.

Then Czechia agreed to withdraw its application, having obtained 45 million euro from Poland as compensation, which led the Court to close the case. In view of the war in Ukraine,

it is not clear, whether the Commission will insist in the payment of the financial sanction, which amounts to several millions of euro.

Need to conserve all protected species

Next tot he Camargue in France, Donana in Spain might be the most important nature protection area under Natura 2000. In case C-599/19, the CJEU found that Spain had not done enough to stop the unauthorized abstraction of water (estimations are that there are about 1000 illegal abstractions, for irrigation purposes). The case had gone on since 2009 (first letter of formal notice of 23-10-2014). The regional Spanish government, confronted with regional elections, announced that it had no intention to stop the illegal irrigation.

Access to the EU court for cities

In case C-177/19P etc, the cities of Paris, Madrid and Bruxelles had brought a case against the European Commission, because the Commission had introduced, by an „adaptation to technical progress" decision, a provision according to which the car emission levels for NOx were allowed to be permanently increased with regard to EU regulation 715/2007 and subsequent regulations. The three cities were of the opinion that their measures to combat air pollution, were seriously affected by the amendments. The General Court had upheld the applications, because it considered that the amendments would have to be adopted by the EP and the Council, but not by the Commission (ultra vires). On appeal, the Court held that the applicants were not directly affected by the measure and that their application was thus inadmissible. It is worthwhile reading the Opinion of Advocate General Bobek on this case, who held the application, in conformity with the General Court, to be admissible.

Legislation as a "plan "under directive 2001/42

The Court confirmed, in case C-300/20, its earlier jurisdiction (C-567/10), according to which a plan, under Directive 2001/42, could also be „required", when its elaboration was not mandatory. It was sufficient that the act – even a legislative act - determined the competent authorities and the procedure for the elaboration of the plan. As to the question, when a legislative act had to be classified as a plan, the Court remained general. It declared that this was the case, when the act contained „sufficiently detailed rules" for the future measures.

Fishermen against wind parks

A conflict between an association of fishermen and constructors of an offshore wind park was the basis for the Court's decision in case T-777/18. French fishermen opposed to construction of six such wind parks with the argument that their fishing activity was disturbed by the construction and operation of these wind parks. The General Court held the action to be inadmissible. It declared that, as the fishermen were not „interested persons" in the sense of regulation 2015/1589, they were not directly and individually concerned, stating explicitly that „each interested party, according to Article 1(h) of Regulation 2015/1589, is directly and individually concerned by a decision not to raise objections [under Article 108(2) TFEU] "(my translation from the French text). That Article 1 (h) declared: „interested party means any Member State and any person, undertaking or association of undertakings, whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations".

In substance, thus, the General Court stated that primary law (this admissibility of an application under Article 263(4) TFEU), was determined by secondary law (whether the applicant was an interested person). The case is on appeal.

Precautionary principle and cost-benefit analysis

In case T-740/18, the General Court repeated its assessment (from case T-584/13) that a decision which was based on the precautionary principle – in the present case the non-authorization of a chemical substance, because it was suspected to have toxic effects – had to be preceded by a cost-benefit analysis; otherwise, it could be declared void. The Court came to that conclusion, because the Commission communication on the precautionary principle (COM (2000) 1) had mentioned such an analysis.

The Court confounded the legal effect of a Commission Guidance and a communication. A Guidance, adopted in a largely formalized procedure with public participation and intended to orient the future attitude of the EU institutions and the Member States, is binding, because it is intended to give legal certainty. In contrast, a communication is not more than an information (by the Commission) on a specific problem or aspect. It is not intended to orient the future attitude of the EU institution. The case is on appeal.

Other cases

T-9/19 Action for internal review of EIB decisions admissible. Case on appeal
C-900/19 Hunting birds with lime is non-selective and thus not allowed
C-499/18 Neonicotinoides are dangerous for bees. Restrictions justified (precaution)
C-420/20P Palmoil could be declassified as renewable energy source
T-185719 No free access to harmonized industrial standards, for copyright reasons. On appeal.

Author: Ludwig Kramer.