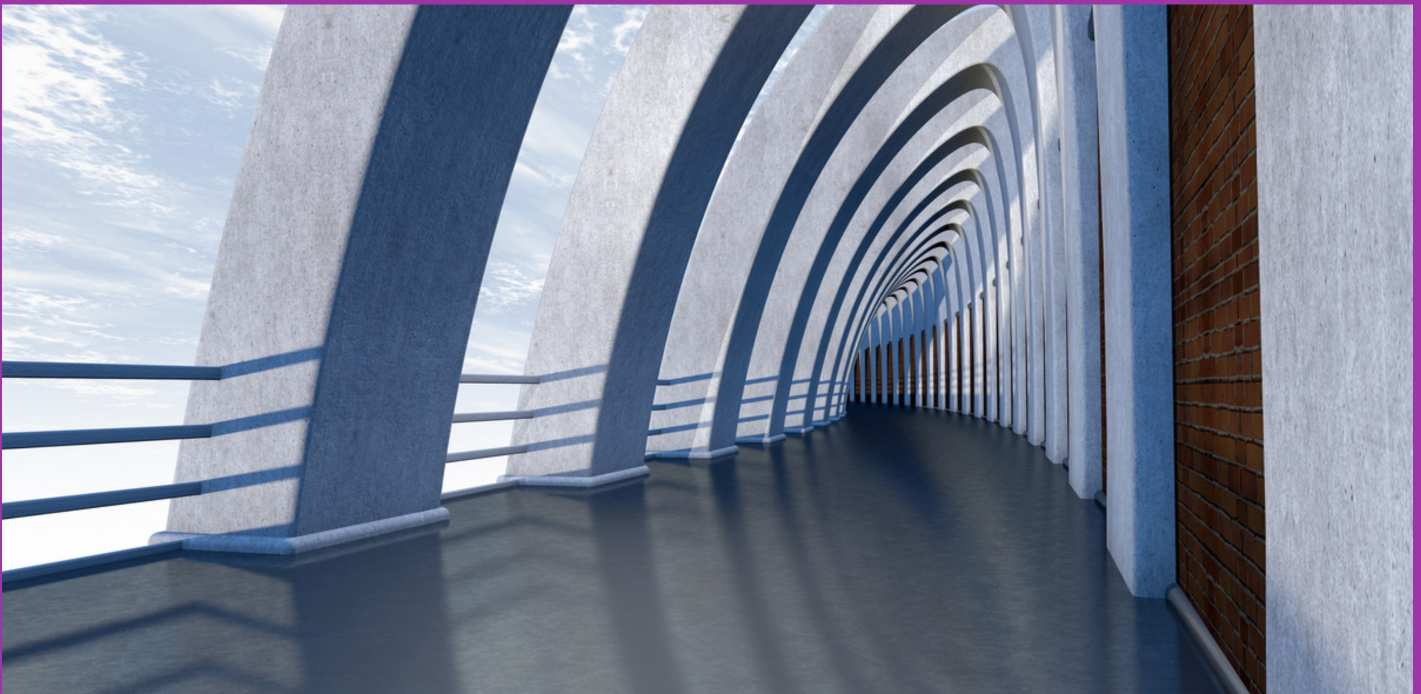
milieu
Law & Policy Consulting

RED SPINEL
D.4.3.

# REPORT
# NON-DISCRIMINATION INSTRUMENTS: EU & MEMBER STATES-LEVEL

## *A FOCUS ON CLIMATE CHANGE*

*Edited by Milieu SRL*



This project receives funding from the European Union's Horizon Europe research and innovation programme under the Call HORIZON-CL2-2021-DEMOCRACY-01 – Grant agreement n°101061621

2024

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

## TABLE OF CONTENTS


1. EU level report........................................................................ p.1

2. Country Report: Belgium........................................................ p.21

3. Country Report: France........................................................... p.53

4. Country Report: Germany....................................................... p.86

5. Country Report: Spain............................................................ p.100

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

*Climate litigation at EU-level REPORT*

This study/report has been prepared by Milieu Consulting SRL under Horizon RED SPINEL Project N°101061621. The main authors of the study/report are Marthe Vandenbossche reviewed by Marta Ballesteros.

The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.
**Milieu Consulting SRL**, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: marta.ballesteros@milieu.be; laura.vona@milieu.be; web address: www.milieu.be.

October 2023

# Table of contents

Abbreviations.................................................................. p.03

1.Introduction.................................................................. p.04

2. Overview of Strategic Climate Litigation cases in the EU........ p.05

3. Analysis.................................................................. p.12

4. Conclusion and Challenges.................................................. p.14

# Abbreviations

| | |
|---|---|
| CEU | Central European University |
| CoE | Council of Europe |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article49 of the TEU and the Preambles to the Treatyand to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law. The 2020 Rule of Law report by the European Commission confirms this meaning and states 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [3].

Within this context, dissenting actions broughy up by citizens against public institutions' decisions are at the heart of EU democracies and aim at ensuring necessary progress on issues of public concern. These cases are considered positive examples of dissensus because they are carried out in line with the rule of law and democratic principles and without breaching the law. As analysed in other reports within this project, there are also examples of dissenting actions by populists or nationalist movements seeking to subvert democratic principles, fundamental rights and the rule of law. For the purpose of this work, "dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors,including state and non-state actors,seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy" (Brack and Coman 2023).

This report provides an overview of relevant case law related to strategic litigation actions related to climate change, initiated by citizens and NGOs before national courts. The report will also analyse the arguments and impact of these cases in relation to EU and national strategic objectives. The timeframe for this research has been set in the period between the signature of the Paris Agreement in 2015 and today.

---

[1] COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.
[2] Regulation (EU, Euratom)2020/2092 of the European Parliament and of the Council of 16 December2020 on a general regime of conditionality for the protection of the Union budget available at https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG
[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT, THE COUNCIL,THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEEOF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

# 2. Overview of Strategic Climate Litigation cases in the EU

In the European Union 13 cases related to EU climate policy have been brought to the European Court of Justice between 2015 (date of the signature of the Paris Agreement) and today. They evidence the trend and critical importance that this type of strategic litigation action is having in the European Union.
The EU possesses its own legal personality (Article 47 TEU), distinct from international law. EU law has an effect, either directly or indirectly, on the legal frameworks of its Member States, thereby environmental and climate change legislation is integrated into the legal systems of each Member State. The EU itself is a source of legal norms. The EU legal framework is typically categorized into primary legislation (comprising the Treaties and fundamental legal principles), secondary legislation (derived from the Treaties), and complementary legal provisions [4].

According to articles 11 and 191-193 of the Treaty on the Functioning of the European Union (TFEU), the EU has the authority to take action in various environmental policy areas, including addressing climate change. However, the EU has shared competence with Member States on environmental policy which means that this authority is constrained by the principle of subsidiarity [5]. Under that principle, the EU can act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States,either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Fighting climate change is a competence that is jointly shared between the EU and its Member States, allowing both entities to establish legally binding regulations. Nevertheless, Member States can only enact such regulations when the EU has not already exercised its authority or has explicitly relinquished it [6]. Additionally, within each Member State, specific environmental responsibilities may be delegated to local or regional governments [7].

Standing in the EU legal system is based on the concept of sufficient legal interest for all natural and legal persons. Article 263 of the TFEU grants legal standing to both individuals and organisations to challenge EU actions in Courts. This standing is provided if the EU measure is targeted at them, if they possess a direct and individual interest in the matter, or if they are contesting a non-regulatory act that has a direct impact on them and does not involve further implementation steps.

Private individuals and companies have the option to initiate proceedings to annul an EU law if they can demonstrate that the law directly and individually affects their interests. To pursue such proceedings, it is advisable to seek legal advice and representation. If individuals or companies have suffered harm due to the actions or inaction of an EU institution or its personnel, they have two avenues for legal recourse. It is possible indirectly through national courts, which may opt to refer the case to the Court of Justice (under Article 267 TFEU). Another option is directly before the General Court if an EU institution's decision has had a direct and individual impact on their interests.

However, environmental protection or climate change,are of a public interest nature and proving direct interest in an act or omission related to environmental protection would not be possible unless the natural or legal persons are legally recognised as parties with direct legal interest under the Aarhus Regulation (EC) No 1367/2006.

[4] https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law
[5] https://climate.ec.europa.eu/eu-action/eu-competences-field-climate-action_en
[6] Articles 11 and 191-193TFEU and the principle of subsidiarity.
[7] https://climate.ec.europa.eu/eu-action/eu-competences-field-climate-action_en

Within the framework of the Aarhus Regulation 1367/2006, both environmental NGOs and other members of the public can initiate an internal review of acts adopted by EU institutions or bodies [8]. This is the first step in addressing environmental matters.

To file a request for internal review, the NGO must meet eligibility criteria. This includes demonstrating independence, a non-profit status,a primary objective of promoting environmental protection, at least two years of active pursuit of this objective, and alignment of the subject matter with the NGO's activities. Specific documents, such as statutes, annual reports, and legal registrations, are required to be provided as evidence [9]. As of 29 April 2023,members of the public can also submit requests for internal reviews, however they must be represented by an environmental NGO or lawyer [10]. This internal review is possible if the administrative act appears to violate EU environmental law. Within eight weeks of the administrative act's adoption or publication in the Official Journal, a request must be made [11].

If necessary, parties can take a second step by filing legal action before the Court of Justice when not satisfied with the outcome of the internal review, or when it is believed that the EU institution or body did not rectify the non-compliance. This second step is a means of seeking legal redress and ensuring that environmental laws are upheld at EU level [12]. The requirements under the TFEU for individuals and NGOs to initiate a case before the CJEU are stated in Article 263(4) TFEU under which any natural or legal person may, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The CJEU interpretation of Article263 (4) TFEU of the concepts of direct and individual concern based on the Plaumann jurisprudence [13] excludes the possibility for NGOs to challenge decisions on the grounds of a public interest. The jurisprudence defined acts of 'direct and individual concern' as decisions that affect natural or legal persons 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. The Plaumann test has been applied to different cases, irrespective of the subject matter of the acts challenged. The jurisprudence triggered by such case has not changed after the Lisbon Treaty or the ratification of the Aarhus Convention.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. Member States are also allowed to take action in the EU Courts, but do not have to fulfill the requirement of direct and individual concern. It is thus easier for Member States to reach the threshold of standing.

---

[8] Article 10 of the Aarhus Regulation.

[9] Article 2 of the Commission Decision (EU) 2023/748 of 11 April 2023 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the EuropeanParliament and of the Councilas regards requestsfor the internalreview of administrative acts or omissions.

[10] Article 11 (1a) of Regulation (EC) No 1367/2006.

[11] Directorate-Generalfor Environment, "Requests for internal review",2023, https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en .

[12] Directorate-Generalfor Environment, "The Aarhus Convention and the EU", 2023, https://environment.ec.europa.eu/law-and-governance/aarhus_en .

[13] Plaumann & Co v Commission, Case 25/62, 15 July 1963.

## 2.1 ClientEarth and Others v. Commission, Case T-215/23 of 18 April 2023 [14]

We consider this case as strategic litigation because ClientEarth and Others used the judicial route, after first filing for internal review of an act, to stop Regulation 2020/852 (the Taxonomy Regulation). The internal review is a possibility granted by the Aarhus Convention, for NGOs and citizens to have access to justice in climate related matters.

*Facts*

The applicants are seeking to annul a decision by the Commission that rejected their request for internal review, citing four main legal arguments related to climate consistency assessment, the interpretation of regulations, classification of activities as transitional, and the requirement to "do no significant harm" to environmental objectives in Regulation 2020/852.

*EU Legislation*

The legal basis for the case is Article 6(4) of Regulation (EU) 2021/1119, Article19 of Regulation (EU) 2020/852, and Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 known as the 'Taxonomy Regulation'.
Legal standing is based on Article 263 TFEU and Article 10 of the Aarhus Regulation 1367/2006. After an internal review request rejected by the Commission, the NGO is considered to have direct interest on the decision regarding the internal review request but not on the Taxonomy Regulation 2020/852.

*Arguments*

The complainants raise four key pleas in law against the Commission's Decision to reject the request for internal review, dated 8 February 2023. The internal review was filed in order for the Commission to review its Taxonomy Regulation. During this judicial action,the applicant want to prove that the Commission erred in its rejection of the internal review and argue why they believe this Regulation is not adequate.

Firstly, they assert that the Commission erred by neglecting to perform a mandatory climate consistency assessment, as stipulated by Article 6(4) of Regulation (EU) 2021/1119, thereby violating the regulation.
Secondly, they contend that the Commission made interpretative and evaluative mistakes regarding Article 19 of Regulation (EU) 2020/852, including issues related to 'conclusive scientific evidence and the precautionary principle,' the economic activity lifecycle, and stranded emissions assets.
Thirdly, the complainants argue that the Commission inaccurately classified certain activities as transitional,impacting fossil gas-based activities, emissions thresholds, alternative technologies, greenhouse gas emission reduction requirements, and low-carbon alternatives.
Lastly, they claim that the Commission failed to prevent significant harm to the six environmental objectives set forth in Regulation 2020/852, constituting another error in its actions.

*Decision*

This case is still pending and there is thus no court decision yet.

[14] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62023TN0215
[15] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62023TN0214

## 2.2 Greenpeace and Others v European Commission, Case T-214/23 of 18 April 2023 [15]

We consider this case as strategic litigation because the applicants are challenging a Commission Decision, arguing that it errs in interpreting and applying regulations related to climate issues, in particular with regards to nuclear and fossil gas activities.

*Facts*

The applicants are requesting the Court to annul the Commission's Decision dated 6 February 2023, which rejected their request for internal review, and to have the defendant bear the costs of the proceedings. With the internal review procedure, the applicants were trying to get the Taxonomy Regulation reviewed by the Commission. They argue their case based on fourteen legal arguments, challenging the Commission's interpretation of Technical Screening Criteria (TSC) requirements in Regulation (EU) 2020/852, particularly with regard to nuclear and fossil gas activities, and asserting that these activities do not meet the sustainability criteria outlined in the regulation.

*EU Legislation*

The legal basis for the case is Article 290(1) TFEU and Articles 3, 9, 10(2), 17 of Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 known as the 'Taxonomy Regulation'.
Legal standing is based on Article 263 TFEU and Article 10 of the Aarhus Regulation 1367/2006.

*Arguments*

The applicants present a total of fourteen pleas in law to support their action. They first argue that the Commission's decision, dated February 6, 2023, contains legal errors and/or assessment errors regarding the interpretation of Article 19(1)(f) of Regulation (EU) 2020/852 concerning Technical Screening Criteria (TSC) based on conclusive scientific evidence and the precautionary principle.

Specific to nuclear activities, they contend that the decision is flawed for rejecting arguments related to TSC compliance with the 'best performance in the sector' requirement, transition to a climate-neutral economy, and substantial contribution to climate change adaptation. Additionally, they assert that the decision overlooks the 'do no significant harm' requirement for nuclear activities.

Concerning fossil gas activities, the applicants argue that the emissions thresholds, development of low-carbon alternatives, availability of low-carbon alternatives, and the potential for carbon-intensive asset lock-in are all improperly addressed. The applicants also challenge the Commission's failure to conduct a Climate Consistency Assessment, Impact Assessment, and effective consultation with relevant groups and non-compliance with Article 290(1) TFEU.

*Decision*

This case is still pending and there is thus no court decision yet.

## 2.3 Austria v. European Commission, Case T-625-22 of 7 October 2022 [16]

We consider this case as strategic litigation despite of being initiated by a country because Austria argues that the contested Delegated Regulation violates principles and procedural rules related to climate regulations, specifically in the areas of nuclear energy and fossil gas.

*Facts*

Austria seeks the annulment of Commission Delegated Regulation (EU) 2022/1214 related to economic activities in certain energy sectors and specific disclosure requirements. The issues raised include alleged infringements of procedural rules, the classification of nuclear energy as environmentally sustainable, and the threshold values for fossil gas activities, among others.

*EU Legislation*

The legal basis for the case is Article 263 TFEU. According to this article, a Member State has the right to institute proceedings against decisions, actions, or the failure to act by the European Commission, the Council and the European Parliament. It is easier for Member States than for individuals to have standing before the CJEU,since the latter have the additional requirement of the contested act being of direct and individual concern to them.
As mentioned in the introduction under point 2, legal standing is easier for MS and undertakings.
The key EU legal provision challenged is Commission Delegated Regulation (EU) 2022/1214 related to economic activities in certain energy sectors and specific disclosure requirements.

*Arguments*

The complainants present16 legal arguments, the first eight pertaining to nuclear energy and the remaining eight concerning fossil gas, challenging the regulation on various grounds, including procedural violations, environmental impacts, and non-compliance with climate objectives and principles.

Firstly, they argue that the Commission violated principles and procedural rules from Regulation (EU) 2020/852 and the Interinstitutional Agreement on better law-making in adopting the contested regulation, as it omitted essential elements, impact assessment, and public consultation, while also inadequately involving expert groups and the Platform. Furthermore, they claim that the assessment of compatibility with the European Climate Change Act was lacking. The second plea alleges infringements related to the applicability of Regulation (EU) 2020/852 to nuclear energy, asserting that it does not meet specific requirements and suffers from an investigation deficit and a lack of reasoning. The third plea challenges the classification of nuclear energy as environmentally sustainable, arguing it infringes several criteria and falls short in recognizing risks. Similar arguments apply to fossil gas in subsequent pleas. Firstly, the applicant raises concerns about the Commission's adherence to procedural rules tied to better law-making, specifically focussing on potential oversights in the regulatory process for fossil gas activities. Then, the prescribed threshold values are discussed, contending that they deviate from crucial climate targets like in the Paris Climate Agreement, possibly hindering progress toward climate goals. Furthermore, the applicants introduced concerns about technological neutrality and non-discrimination, suggesting potential biases in the regulatory framework. Subsequent arguments emphasise the perceived inadequacy of the Regulation in contributing significantly to climate protection while it highlights economic pressures on fossil gas and potential risks of creating devalued assets.

The last argument challenges the classification of fossil gas as an essential contribution to climate change adaptation, questioning its alignment with established climate-related articles and principles, and thus to be considered as a contribution to sustainability. Finally, the plea questions the Commission's interpretation of Regulation (EU) 2020/852.

[16] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022TN0625&from=EN

*Decision*

This case has only been applicated to the Court and has not yet been adjudicated.

## 2.4 ClientEarth and Others v. Commission, Case T-579-22 of 17 September 2022 [17]

This is strategic litigation by ClientEarth and Others using the second step in light of the Aarhus Convention where they take the judicial route, after first filing for internal review of an act, to halt Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ('theTaxonomy Regulation') as it currently stands. The internal review is a possibility granted by the Aarhus Convention, for NGOs and citizens to have access to justice in climate related matters.

*Facts*

ClientEarth and others are seekingto have the Court overturn the Commission's decision to reject their request for internal review.With the internal review procedure, the applicants were trying to get the Taxonomy Regulation reviewed by the Commission, based on four arguments. What were they asking the Commission to review? When?

*EU Legislation*

Standing is based on Article10 of the Aarhus Regulation and Article 263 TFEU in this case,since the Aarhus Convention regulates access to justice in environmental matters. In a first step, this entails the request for internal review of a decision. When not satisfied with the outcome, like in this case since the request was rejected, parties still have the option to undertake judicial action.The EU provision challenged relates to Regulation 2020/852on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 known as the 'Taxonomy Regulation'.

*Arguments*

The applicant relies on four pleas in law to support their case. Firstly, they argue that the decision under challenge displays multiple legal errors regarding the Commission's competence, as it failed to consider essential elements of the Taxonomy Regulation when creating the Delegated Regulation. Secondly, the applicant alleges two significant errors of assessment concerning the scientific evidence related to the combustion of forest biomass for energy in the decision, asserting that the Commission's evaluation of this evidence is manifestly flawed. Thirdly, they assert that the decision contains several manifest errors of assessment concerning the manufacture of Organic Chemical Compounds (OBCs), with the Commission's assessment of the manufacturing process being fundamentally flawed. Lastly, the applicant contends that the decision under challenge also reveals manifest errors in relation to the manufacturing of bioplastics, with the Commission's assessment of bioplastic manufacturing similarly flawed.

*Decision*

This case is still pending and there is thus no court decision yet.

---

[17] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TN0579

## 2.5 Ville de Paris and Others v. European Commission, Case C-117/19 P to C-179/19 P of 13 January 2022 [18].

We consider this case strategic litigation on the opposite sense as the others cases since the municipalities at stake try to reduce their climate and air quality obligations against the Commission decision.

*Facts*

In their appeals,Germany, Hungary, and the EuropeanCommission seek to overturn the General Court's judgment from December 2018, which annulled specific provisions in Commission Regulation (EU) 2016/646related to emissionsfrom vehicles (Euro 6) and ordered that the effects of the annulled provisions be maintained temporarily while new legislation is developed.

*EU Legislation*

The legal basis for the case are:

- Article 1, 4 Directive2007/46/EC,
- Article 1 Regulation No 715/2007,
- Article 1 Directive 2008/50/EC,
- Regulation 2016/427.

Standing is based on Article 263(2)TFEU.

*Arguments*

The Commission initially objected to the admissibility of the actions by the City of Paris, the City of Brussels, and the Municipality of Madrid, arguing that the regulation in question did not directly concern them as required by Article 263 TFEU. The General Court, however, rejected these objections and ruled that the applicants were directly affected by the regulation, allowing the case to proceed. In their grounds of appeal, the Federal Republic of Germany, supported by ACEA and the Slovak Republic, argue that the General Court failed to adequately explain why it considered the regulation in question directly concerned the respondent cities within Article 263 TFEU.

They argue that the restrictions on municipalities' freedom of action primarily arise from EU law requirements. They also challenge the distinction the General Court made between general traffic rules and emissions-based circulation restrictions imposed by public authorities. Hungary, supported by ACEA, disputes the General Court's interpretation of Directive 2007/46/EC. In response, the City of Brussels and the Municipality of Madrid assert that the Regulation (EU) 2016/646 directly affects their powers concerning air quality and traffic regulation. They suggest that infra-State entities should have a presumption of admissibility in such cases. Lastly, they argue that the possibility of bringing an action for failure to fulfil obligations against the Member State concerned confirms that the respondent cities are directly concerned by the Regulations, a view shared by the City of Paris.

*Decision*

The Court finds that the legal standing of local or regional entities to challenge EU law, emphasizing that such entities can only bring actions if they meet specific conditions outlined in Article 263 TFEU. The Court interpret Regulations and whether they directly concern these entities. It decides to reject pleas of inadmissibility.

[18] https://curia.europa.eu/juris/liste.jsf?num=C-177/19

## 2.6 Lipidos Santiga v. European Commission, Case C-402/20 P of 21 October 2021 [19].

*Facts*

The appellant, a company involved in importing and processing raw materials for biofuel production, brought an action for annulment of certain provisions of Delegated Regulation 2019/807. The General Court initially dismissed the action as inadmissible, stating that the appellant was not directly concerned by the provisions at issue. The appellant has raised multiple grounds of appeal, including arguing that the General Court erred in its application of the condition that a natural or legal person must be directly concerned by the provisions in question.

*EU Legislation*

The legal basis for the case is Articles3, 25, 26 Directive 2018/2001, and Articles 3, 4-6 Delegated Regulation 2019/207. Standing is based on Article 263(4) TFEU. The appellant, a Spanish company engaged in importing and processing raw materials for biofuel production, was found by the General Court to not be directly concerned by the contested provisions.

*Arguments*

The applicants presented three key arguments in their appeal: First, they contested the General Court's decision that they were not affected by the EU's exclusion of palm oil biofuel from its market. Second, they challenged the General Court's finding that Member States had discretion in implementing certain restrictions in Directive 2018/2001. Lastly, they argued that the General Court misapplied the "directly concerned" requirement and wrongly focused on the economic impact of the contested provisions rather than considering broader effects. In the second part of the third argument, the applicants contended that factual effects, even specific to their situation, should have granted them standing to bring legal proceedings, as previous EU Court decisions have recognized similar instances. The defendant, the Commission, contends that the grounds of appeal should be rejected.

*Decision*

The Court ruled that to establish standing for legal action under Article 263 TFEU, two conditions must be met: the contested measure must directly affect the legal situation of the party, and it must leave no discretion to its implementers, operating purely under EU rules without intermediary regulations. The Court affirmed the General Court's decision that the mere potential influence on an applicant's situation is insufficient for them to be directly concerned by the measure. The Court also clarified that previous case law cited by the appellant pertained to different contexts. The Court emphasized that the provisions at issue in this case were directed at Member States and pertained to the calculation of renewable energy shares, not the regulation of palm oil imports or biofuel marketing. Therefore, the appellant was not directly concerned by these provisions, and the appeal was rejected.

## 2.7 Armado Ferrão Carvalho and Others v. The European Parliament and the Council"The People's Climate Case", Case C-565/19P of 25 March 2021 [20]

*Facts*

The plaintiffs appealed to the European Court of Justice, contending that the EU General Court erred in its decision, specifically regarding the plaintiffs' standing under Article 263 and the requirement to establish standing for a non-contractual liability claim.

[19] https://curia.europa.eu/juris/document/document.jsf?text=&docid=247902&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3081817
[20] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-565/19%20P&jur=C

*EU Legislation*

The legal basis for the case is, Directive2003/87/EC, Regulation 2018/841,and the Paris Agreement.
Standing is based on Article 263 (4) TFEU.

*Arguments*

The appellants seek the Court to set aside the order under appeal and declare their actions at first instance admissible, particularly with regards to the claim for annulment and non-contractual liability of the Union. They argue that they are individually and distinctly concerned by the contested acts due to the unique impacts of climate change on each appellant, as well as the interference of these acts with their fundamental rights. The appellants emphasize fundamental differences between the two claims, pointing out that the alleged illegality varies, with the claim for annulment focusing on specific errors in the legislative package regarding greenhouse gas emissions, while the claim invoking non-contractual liability is based on a broader and continuous breach of higher-ranking rules of law dating back to 1992. The complainants further assert that the Court should adapt the criterion of "individual concern" to ensure effective judicial protection against serious infringements of fundamental rights, suggesting that the existing test derived from the judgment in Plaumann be modified to accommodate constitutional actions against legislative acts of the EU. The defendants, the Parliament and the Council, with support from the Commission, urge the Court to dismiss the appeal and order the appellants to pay the costs. They challenge the appellants' arguments regarding individual concern and the need to adapt the Plaumann test, contending that the existing criteria for admissibility should be maintained. Additionally, they dispute the claim for damages, asserting that it is intrinsically linked to the inadmissible action for annulment and accuse the appellants of seeking to circumvent the Court's jurisdiction by requesting an injunction through a compensation claim.

*Decision*

The Court of Justice upheld the General Court's decision, ruling that the plaintiffs' claims were inadmissible due to a lack of standing. The ECJ rejected the plaintiffs' arguments that they were individually impacted by climate policy and that their invocation of fundamental rights established standing, affirming that such reasoning could lead to broad standing for any applicant and would render standing limitations meaningless.

## 2.8 Peter Sabo and Others v. European Parliament and Council of the European Union, Case C-297/20 P of 14 January 2021 [21]

*Facts*

The appellants are arguing that argued that the General Court incorrectly interpreted the requirement of "individual concern" in EU law and that the directive at issue infringed their rights. They are requesting the Court of Justice to overturn the order in question, declare their appeal admissible, and refer the case back to the General Court, along with an order for the Parliament and the Council to cover the associated costs.

*EU Legislation*

The legal basis for the case is Article56 of the Statute of the Court of Justice of the EU, Article 9 Aarhus Convention, and Article 2 Directive (EU) 2018/2001. Standing is based on Article 263(4) TFEU.

*Arguments*

In their appeal, the appellants present three key arguments. Firstly, they request the Court of Justice to set aside the order under appeal.

[21] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-297/20%20P&jur=C

Secondly, they argue that the General Court made errors of law in interpreting and applying the fourth paragraph of Article 263 TFEU concerning the condition that applicants must be individually concerned by the measure they seek to annul. They assert that what is crucial for an applicant to be individually concerned is the impact of the legislative measure on their individual rights, as opposed to only situations involving the loss of specific acquired rights. In this case, they claim that the directive at issue infringes their rights, setting them apart from those not dependent on forests for their rights exercise. Thirdly, they allege an error of law in the General Court's refusal to interpret the condition of individual concern in a more open manner, particularly in the field of the environment and considering the Aarhus Convention, which they argue amounts to an error of law.

*Decision*

The Court held that the appellants failed to demonstrate that they were individually concerned by the Directive. The Court dismissed the appeal.

## 2.9 Lípidos Santiga v. European Commission, Case T-561/19 of 11 June 2020 [22]

*Facts*

Lípidos Santiga, SA, a Spanish company involved in importing and processing raw materials for biofuels, was impacted by various EU directives and regulations related to the promotion of renewable energy sources and the criteria for biofuels. This case involves a dispute regarding the classification of high indirect land-use change-risk biofuels and the associated certification criteria as outlined in Delegated Regulation 2019/807.

*EU Legislation*

The legal basis for the case is Articles 130(1)and (7) of the Rules of Procedure. Standing is based on Article 263 (4) TFEU.

*Arguments*

The applicants contend that the provisions, which classify palm oil as high ILUC-risk and limit its use in meeting renewable energy targets under the RED II directive, leave no discretion to national authorities. According to the applicant, this classification effectively results in a quantitative restriction and de facto prohibition on the use of palm oil in biofuel production, impacting its legal and factual situation. The applicant asserts that the contested provisions have harmful consequences on the sale of palm oil for biofuel production, affecting importation, processing, market placement, and contract conclusion, thereby directly and immediately affecting its legal and factual circumstances. The defendant, the Commission, asserts that the contested provisions do not have a direct impact on the legal situation of the applicant. They argue that the applicant is not directly concerned by these provisions, regardless of any implementing measures that may follow. According to the Commission, the consequences mentioned by the applicant are not caused by the contested provisions themselves but rather by the implementing measures that individual Member States may adopt. The contested provisions are viewed as solely defining criteria to identify high ILUC- risk feed stocks and are deemed not to directly affect the applicant as per the relevant legal precedent cited.

*Decision*

The Court determined that the contested provisions did not directly affect the applicant's legal situation but rather its factual situation, as the effects were indirect and subject to national implementation measures. Therefore, the court upheld the objection of inadmissibility raised by the Commission, dismissing the action as inadmissible.This decision has been appealed to the Court of Justice, who decided in Lípidos Santiga v. European Commission, Case C-402/20 P of 21 October 2021 (See above).

[22] https://curia.europa.eu/juris/liste.jsf?num=T-561/19&language=en

## 2.10 Peter Sabo v. European Parliament and Council of the European Union, Case T-141/19 of 6 May 2020 [23]

*Facts*

The applicants consist of individuals and environmental interest groups from various EU Member States and the United States. They challenge Directive (EU) 2018/2001, which establishes a framework for promoting renewable energy sources and sets a binding target for reducing greenhouse gas emissions by at least 40% by 2030, particularly focusing on the sustainability and greenhouse gas emissions criteria for biofuels, bioliquids, and biomass fuels.

*EU Legislation*

The legal basis for the case is Article191 TFEU, and Articles 130(1) and (7) of the Rules of Procedure.
Standing is based on Article 263 (4) TFEU.

*Arguments*

The applicants centred their arguments on seeking the partial annulment of a Directive that included forest biomass as a source of renewable energy.They claimed that this inclusion violated Article 191 TFEU and certain fundamental rights. They claim standing since the Directive would be impacting their legal situation, leaving no discretion to its addressees. The applicants argue individual concern as part of a limited category affected by deforestation and power plant operation resulting from the Directive, infringing on individual legal interests and fundamental rights. The defendants, which included the Parliament and the Council,focused on the inadmissibility of the applicants' case. They contended that the applicants lacked standing under the fourth paragraph of Article 263 TFEU because the directive did not directly and individually concern them.

*Decision*

The Court dismisses the case. It found that the Directive is not of individual concern to the applicants, as it applies to all persons,both natural and legal, with no identifiable limited category affected. The applicants' alleged infringement of fundamental rights does not establish individual concern, unless it distinguishes them individually. Additionally, the Court finds that environmental interest groups among the applicants also fail to demonstrate individual concern. Therefore, their claims lack standing. This decision has been appealed to the Court of Justice,who decided in Peter Sabo and Others v. European Parliament and Council of the European Union, Case C-297/20P of 14 January 2021 (See above).

## 2.11 Armando Ferrão Carvalho and Others v. The European Parliament and the Council "The People's Climate Case", Case T-330/18 of 8 May 2019 [24]

*Facts*

Ten families from various countries, including Portugal, Germany,and Kenya, have filed a lawsuit in the EU General Court seeking stronger greenhouse gas emissions reductions from the EU. They argue that the current EU emissions reduction target of 40% by 2030 is insufficient to protect their fundamental rights and demand that the EU set more stringent emissions reduction targets, potentially requiring a 50%-60% reduction by 2030.

*EU Legislation*

The legal basis for the case is Article340 TFEU, Directive 2003/87/EC, and the Paris Agreement. Standing is based on Article 263 (4) TFEU.

[23] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=T-141/19&jur=T
[24] https://curia.europa.eu/juris/liste.jsf?num=T-330/18

*Arguments*

The complainants assert that they are directly concerned by the greenhouse gas emission reduction targets established by the legislative package, contending that these targets infringe their fundamental rights as outlined in the Charter of Fundamental Rights of the European Union. They claim that the legislative package's inadequacy in addressing greenhouse gas emissions impacts their rights to life, personal integrity, rights of the child, work engagement, business freedom, property, and equal treatment. Additionally, they argue that they are individually concerned because the effects of climate change, attributed to the legislative package, vary uniquely for each individual, citing examples such as the differential impacts on farmers affected by drought or coastal flooding. The defendants, Council and Parliament, contest the complainants' assertions, maintaining that the legislative package does not directly affect the complainants' legal situation. They argue that the legislative package establishes minimal requirements for Member States to reduce emissions and combat climate change,without granting any individual the authorization to emit greenhouse gases. Furthermore, they dispute the admissibility of the complainants' claims, contending that they do not meet the eligibility criteria for legal proceedings and asserting that accepting the complainants' argument would render the condition of individual concern meaningless. Regarding the request for compensation, the Parliament asserts its inadmissibility as it is closely intertwined with the action for annulment, which it also argues is inadmissible, and claims that the complainants are attempting to circumvent the Court's jurisdiction by seeking an injunction through a compensation claim.

*Decision*

The European General Court dismissed the case, stating that the plaintiffs did not have standing to bring it because they were not directly and individually affected by the climate policies in question. The court rejected arguments related to the compatibility of the "individual concern" criterion with fundamental rights and other possible criteria for standing. This decision has been appealed to the Court of Justice, who decided in Armando Ferrão Carvalho and Others v. The European Parliament and the Council"The People's ClimateCase", Case C-565/19 P of 25 March 2021 (See above).

## 2.12 Ville de Paris and Others v. European Commission, Case T-339/16 of 13 December 2018 [25]

*Facts*

Directive 2007/46/EC establishes a framework for approving motor vehicles in the EU, emphasizing safety, environmental protection, and energy efficiency. It requires technical requirements to be specified in regulatory acts, including pollutant emissions. The directive prevents member states from restricting vehicle activities based on certain construction and functioning aspects. Commission Regulation (EU) 2016/646 introduced real driving emission (RDE) tests for vehicles, setting conformity factors for oxides of nitrogen (NOx)emissions during RDE tests to transition from 2.1 to 1.5 as a final value, aiming to reduce vehicle emissions and improve air quality. The city of Paris and others are seeking to annul this Regulation.

*EU Legislation*

The legal basis for the case is Articles 114, 294 TFEU, and Article4(3) of Directive 2007/46. Standing is based on Article 263(4) TFEU.

*Arguments*

The City of Paris, the City of Brussels, and the Municipality of Madrid initiated legal proceedings in the General Court aimed at annulling Regulation 2016/646.

[25] https://curia.europa.eu/juris/liste.jsf?num=T-339/16&language=en

These urban authorities contended that the regulation would hinder their ability to implement measures restricting the movement of passenger vehicles based on their emissions of air pollutants. The defendant, the Commission, objected, asserting that the disputed regulation did not directly pertain to the applicants as defined in the fourth paragraph of Article 263 TFEU.

*Decision*

The General Court has annulled certain parts of Commission Regulation (EU) 2016/646, specifically points 2.1.1 and 2.1.2of Annex IIIA, which set the values for conformity factors related to oxides of nitrogen emissions in the context of real driving emission (RDE) tests for vehicles. The court has ordered these provisions to be maintained for up to 12 months pending the adoption of new legislation to replace them. This decision has been appealed to the Court of Justice,who decided in Ville de Paris and Others v. European Commission, Case C-177/19P to C-179/19 P of 13 January2022 (See above).

## 2.13 Poland v. European Parliament and Council, C-5/16 of 21 June 2018 [26]

*Facts*

Poland filed a lawsuit against the EU's market stability reserve, claiming it should have been adopted under a special legislative procedure due to its significant impact on Poland's energy choices.

*EU Legislation*

The legal basis for the case is Article192(1), 192(2), Article1, 9(1), 29 Directive 2003/87,Directive 2009/29, and Article 1 Regulation (EU) No 176/2014.Standing is based on Article263 (2) TFEU. According to this article,a Member State has the right to institute proceedings against decisions, actions, or the failure to act by the European Commission, the Council and the European Parliament. It is easier for Member States than for individuals to have standing before the CJEU, since the latter have the additional requirement of the contested act being of direct and individual concern to them.

*Arguments*

The Republic of Poland raises several key arguments in its complaint. First, it alleges that the contested decision violates EU Treaty provisions by adopting an ordinary legislative procedure instead of a special legislative procedure, affecting Member States' energy source choices and energy supply structures. Second, it highlights the significant impact of the decision on Poland's reliance on fossil fuels and energy security. Third, it argues that the decision aims to correct the emissions allowance market imbalance, indirectly pushing Member States towards renewable energies, which should be considered in its legal basis. Finally, Poland contends that the decision's change in the Market Stability Reserve (MSR) start date infringes upon the European Council's powers and violates the principle of sincere cooperation by contradicting the Council's conclusions. The Council and the Parliament, with the backing of interveners, argue for the dismissal of the arguments.

*Decision*

The Court dismissed the action. The Court's findings revolve around the need for EU measures to have a clear and objective legal basis, considering factors like the aim and content of the measure. It rejects arguments that the contested decision directly impacts Member States' energy mix or that it infringes the principles of legal certainty or the protection of legitimate expectations. The Court emphasizes that interpreting exceptions to principles strictly, Article 192(2) point (c) TFEU can only be used as a legal basis if the primary aim of the measure significantly affects a Member State's choice of energy sources and supply structure. It also underscores that provisions like Article 192(2) TFEU should not be interpreted broadly, as this could undermine the special legislative procedure's intended exception.

[26] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-5/16

In conclusion, the Court finds the contested decision legally based on Article192(1) TFEU, rejects claims by Poland regarding the legal basis, European Council powers, and sincere cooperation, and determines that it does not infringe principles of legal certainty or the protection of legitimate expectations.

# 3. Analysis

*Legal basis used*

In climate change litigation within the EU, several recurrent legal bases can be observed. Article 263 TFEU stands out as a consistent foundation for the standing rules setting the legal basis for natural or legal persons to initiate proceedings before the CJEU. It is rooted in the notion of sufficient legal interest, granting individuals and organisations the right to challenge EU actions.

Private individuals, associations or companies, seeking to annul EU laws affecting their interests, can pursue legal proceedings. This can either be indirectly through national courts through Article 267 TFEU or directly before the General Court through Article 263(4). Standing under Article 263(4) TFEU requires natural and legal persons (individuals or NGOs) to have a direct and individual interest in the act, or that the action is related to a non-regulatory act directly impacting them without further implementation steps. The concepts of direct and individual concern based on the Plaumann jurisprudence[27] which, as shown in several of the cases identified, excludes the possibility for NGOs to challenge decisions on the grounds of a public interest such as the protection of the environment. The CJEU does not interpret that NGOs whose objectives are to ensure environmental protection as recognized in their bylaws, can be considered directly concerned. The definition of NGOs under Article 11 of the Aarhus Regulation does not extend to challenges to the Court beyond those linked to a prior request to review an administrative act under Article 10 of the Aarhus Regulation. Member States are exempt from the direct and individual concern requirement, making it comparatively easier to establish standing in EU Courts. Article 263(2)TFEU has a pivotal role in enabling legal challenges for alleged breaches of EU law.

There are certain trends regarding the legal basis for the merits of the requests. A number of regulations and directives on environmental and climate issues are to be used more often for such lawsuits. For example, Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the Taxonomy Regulation), Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading, and the Paris Agreement. The Aarhus Convention also plays a significant role, highlighting the importance of public participation and legal standing rules. Furthermore, the Rules of Procedure and the Statute of the CJEU establish the procedural guidelines for these cases.

*Arguments used*

The arguments used in these cases are a variety encompassing legal and factual aspects, and they provide insights into the complex and multifaceted nature of climate-related disputes.
The Republic of Poland, in one case, argues that a decision violates EU Treaty provisions, affects its energy source choices, and threatens energy security. It also contends that the decision pushes Member States toward renewable energies and interferes with the Market Stability Reserve start date,potentially infringing upon the European Council's powers. This is interesting as Article 194 TFEU on energy policy, attempts to strike a balance between the competence on energy policy attributed to the EU for the first time in 2009 with the Lisbon Treaty and the competence of EU Member States in their choice of energy mix. While this provision was not the legal basis it sets the context of the national considerations.

[27] Plaumann & Co v Commission, Case 25/62, 15 July 1963.

The case is considered strategic litigation because it questions this balance, with the CJEU emphasizing the need for clear legal basis, rejecting the claims by Poland, and affirming the decision's compliance with Article 192(1) TFEU on environmental policy, without infringing on legal certainty or legitimate expectations.

Urban authorities, such as the City of Paris, the City of Brussels, and the Municipality of Madrid, initiated legal proceedings related to the regulations on the implementation of measures to limit vehicle emissions. They argue that the regulations would establish standards that directly impacted their abilities to regulate air pollutants within their cities. While the legal basis used focus on air quality, they have a link with climate mitigation given the impact of the concerned pollutants. The strategic objective of this case is to challenge the validity of Regulation 2016/646 as this would impede their capacity to enforce measures restricting passenger vehicle movement, based on air pollutant emissions. Therefore, the cities claim they are impeded to fight air pollution at their own local level, which contributes to an unhealthy environment.

Some complainants assert that climate change legislation infringes on their fundamental rights, as outlined in the Charter of Fundamental Rights of the European Union, affecting life, personal integrity, child rights, work engagement, property, and more. They also claim individual concern due to the unique impacts of climate change on everyone. Other cases center on the inclusion or exclusion of certain energy sources, such as forest biomass or palm oil, in renewable energy targets. The applicants argue that these inclusions or exclusions impact their legal and factual situations, while the defendants dispute the direct impact on the applicants. Finally, multiple cases involve challenges to regulations and decisions related to climate targets, environmental impact assessments, procedural violations, and concerns about the criteria used for sustainability. These legal actions present various interpretations of EU law, contesting assessments and criteria used in climate policies.

As the Court still has to rule in 3 of the 12 mentioned cases, and found that there was no standing for the appellants in 5 of the other cases, there is limited material available to assess whether any trends can be identified on the merits. While it is clear that standing is not easy. In one of the cases where the Court did accept standing,Case C-402/20 P, the appeal was rejected in relation to Member States renewable energy shares. In Case C-177/19 P to C-179/19 P, the CJEU accepted standing but rejected the action, emphasizing the need for a clear legal basis for EU measures and dismissing claims of infringement on legal certainty or protection of legitimate expectations. The contested decision was deemed valid.

Lastly, the General Court annulled parts of the decision related to emissions in driving emission tests in case C-5/16. The CJEU upheld this decision but ordered for these provisions to be maintained for up to 12 months, awaiting of new legislation where the provisions would be changed.

*Impact*

The impact of the court decisions in the context of strategic climate change litigation in the EU shows clear trends. First, these decisions underscore the importance of establishing a clear and direct link between the contested measures and the legal situation of the applicants for standing to bring legal action. The courts consistently stress the need for a specific, immediate impact on the legal rights or interests of the plaintiffs. Additionally, the decisions highlight the courts' reluctance to broaden the scope of standing, as expanding the scope of standing would risk rendering it practically meaningless. As shown in many of the identified cases,the requirements for standing are considered as not met, and thus the CJEU has not ruled on the merits of many strategic climate litigation cases since the adoption of the Paris Agreement.

Furthermore, the cases reveal the significance of standing rules in environmental matters. Overall, these trends underline the legal specificity to challenge climate policies and regulations in the EU legal framework. The CJEU has ruled itself that both national courts and Member States of the EU, parties to the Aarhus Convention, must

interpret procedural rules related to initiating administrative or judicial proceedings in such a way that they align, to the maximum extent possible, with the goals outlined in Article 9(3) of the Aarhus Convention and the objective of ensuring effective judicial protection of rights granted by EU law. The aim is to empower environmental protection organisations to legally contest decisions made in response to administrative proceedings that may run counter to EU environmental law [28]. However, as the Court has hardly ruled on the content of the cases, the impact of the cases on the climate policy in the EU cannot be assessed.

# 4. Conclusion and Challenges

In the context of climate change litigation in the European Union, the standing rules under Article 263(2) and (4) TFEU and their compliance with Aarhus Convention underpin these cases.

The legal bases related to their merits include key provisions of EU law, regulations and directives that have a critical role in emission reductions linked to international agreements like the Paris Agreement. The arguments encompass from challenges to EU Treaty provisions and fundamental rights to concerns about energy source choices and renewable energy targets. The CJEU decisions emphasize the need for a direct link between the contested measures and the legal standing of the applicants. The CJEU interpretation of standing rules under Article 263(4) TFEU maintains the Plaumann jurisprudence [29] even after the adoption of the Lisbon Treaty, holding a rigorous stance to uphold its significance.

The trend shown in the cases identified, underscore the difficulties in developing effective climate litigation within the EU, given the restricted interpretation of TFEU standing rules. It would be useful to either reconsider the situation in light of the Lisbon Treaty or adopt legislation where the requirements under Article 11 of the Aarhus Regulation are applicable to any challenges to the Court. Navigating these legal complexities is essential for climate action in the EU.

[28] ECJ Case of Lesoochranárske zoskupenie VLK v.Ministerstvo životného prostredia Slovenskej republiky ("Slovakian Brown Bear I"), Judgement of the Court, 8 March 2011, C-240/09; FederalAdministrative Court of Germany, 7 C 28.18,ZUR 2020, 296.
[29] Plaumann & Co v Commission, Case 25/62, 15 July 1963.

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

## *COUNTRY REPORT: Belgium*

This study/report has been prepared by Milieu Consulting SRL under Horizon RED SPINEL Project N°101061621. The main authors of the study/report is Marthe Vandenbossche reviewed by Marta Ballesteros and Laura Vona.

The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.
**Milieu Consulting SRL**, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: marta.ballesteros@milieu.be; laura.vona@milieu.be; web address: www.milieu.be.

January 2024

# Table of contents

Abbreviations........................................................................ p.23

1.Introduction........................................................................ p.24

2. Overview of Strategic Climate Litigation cases in Belgium.....p.25

3. Analysis..............................................................................p.47

4. Conclusion and Challenges.................................................. p.51

Annex.................................................................................. p.52

# Abbreviations

| | |
|---|---|
| AQD | Air Quality Directive |
| CEU | Central European University |
| CoE | Council of Europe |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| NO2 | Nitrogen dioxide |
| LEZ | Low Emission Zone |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article49 of the TEU and the Preambles to the Treatyand to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law. The 2020 Rule of Law report by the European Commission confirms this meaning and states 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [3].

Within this context, dissenting actions broughy up by citizens against public institutions' decisions are at the heart of EU democracies and aim at ensuring necessary progress on issues of public concern. These cases are considered positive examples of dissensus because they are carried out in line with the rule of law and democratic principles and without breaching the law. As analysed in other reports within this project, there are also examples of dissenting actions by populists or nationalist movements seeking to subvert democratic principles, fundamental rights and the rule of law. For the purpose of this work, "dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors,including state and non-state actors,seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy" (Brack and Coman 2023).

This report provides an overview of relevant case law related to strategic litigation actions related to climate change, initiated by citizens and NGOs before national courts. The report will also analyse the arguments and impact of these cases in relation to EU and national strategic objectives. The timeframe for this research has been set in the period between the signature of the Paris Agreement in 2015 and today.

### Specific premise related to the Belgian Report

Before delving into the content of the Belgian Report, it is important to note that only in two cases, analyzed under Section 2.1 and 2.4, climate arguments were raised by the claimants (members of the public). In the other cases, climate arguments were raised by the defendants, namely the authorities (Sections 2.2, 2.3, 2.5, 2.6), or by the judge (Section2.7). These cases are included firstly because they represent a form of positive dissensus, and secondly because they illustrate how climate change initiatives can sometimes clash with other individual rights and economic interests. These decisions underscore the need for a balanced approach that addresses climate change and environmental protection while respecting individual rights.

[1] COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.

[2] Regulation (EU, Euratom)2020/2092 of the European Parliament and of the Council of 16 December2020 on a general regime of conditionality for the protection of the Union budget available at https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG

[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT, THE COUNCIL,THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEEOF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

# 2. Overview of Strategic Climate Litigation cases in Belgium

In Belgium 6 number of cases have been brought to national or regional courts between 2015 (date of the signature of the Paris Agreement) and today. They evidence the trend and critical importance that this type of strategic litigation action is having in Belgium where there is an increasing awareness of the need for action to combat climate change and the crucial role that the legal system plays in promoting responsibility. It highlights how climate advocacy is changing and how the courtroom is increasingly being used to advance environmental and climate protection initiatives.

The Belgian legal system operates within the civil law tradition, where in judges apply and interpret a set of codified rules [4.] The organization of the country's courts falls under federal jurisdiction. In the Belgian Constitution, alongside legislative and executive powers, the judicial power is established and exercised by law courts,making them an independent authority. These courts adjudicate cases, applying civil law in disputes between citizens and criminal law in cases of offenses [5]. Any court, court of appeal, or administrative tribunal has the power to refer a preliminary question to the Constitutional Court. This can be done either on its own initiative or at the request of one of the parties involved. This question relates to compliance of a legal norm with the provisions under the control of the Constitutional Court [6]. Furthermore, the Constitutional Court may be asked to annul a regulation if it violates rules imposed by or under the Constitution [7]. This request can be made by the Council of Ministers, by the Government of a community or Region, by any natural or legal person expressing an interest or by the presidents of the legislative assemblies at the request of two-thirds of their members [8].

The judicial system has a pyramid structure. At the base are the peace courts and tribunals, which pass 'judgments'. At the top are the courts of appeal, which deliver 'judgments'. Courts hear cases at first instance. If a party disagrees with a judgment, it can appeal to a court, through ordinary (opposition and appeal) or extraordinary (cassation appeal to the Court of Cassation) remedies. Cassation checks only the legality, not the facts of the case [9]. The Constitutional Courthas the power to verify the conformity of legislative norms with the rules in or under the Constitution.

Judicial competence in climate cases is not vested in a specific court; instead, it varies based on the type of act allegedly violating climate laws. The Constitutional Court has the right to annul a legislative norm that violates a constitutional provision, to the extent that this violation can be combined with the principle of equality and non-discrimination as guaranteed in Articles 10 and 11 of the Constitution. This means that when a situation arises where a legal provision appears to violate the non-discrimination principle, Articles 10 and 11 of the Constitution come into play.These articles act as a trigger, allowing the Constitutional Court to step in and review the case. If the challenged norm is found to be in violation of the constitutional principles, the Court can take action. The other judicial instances, such as civil and administrative courts, are also competent to rule on cases relating to climate change. Their jurisdiction depends on the nature of the adopted authorities' act and the consequent legal basis underpinning the case.

[4] Article 161 of the Constitution statethat administrative tribunals can only be established by lawand only for the settlement of conflicts related to political right. In Principle, only the federal government can establish them by law, but the regions and communities may also do so under strict conditions. The Highest administrative court in Belgiumis the Council of State, Department of Administrative Justice.

[5] European e-Justice, National justice systems – Belgium, 2022, https://e- justice.europa.eu/16/EN/national_justice_systems?BELGIUM&member=1#:~:text=The%20Belgian%20judicial%20system%20is,is% 20a%20solely%20federal%20responsibility.

[6] Article 26 of the Special Act on the Constitutional Courtof 6 January 1989.

[7] Grondwettelijk Hof, "Rechtspleging – Overzicht van de verschillende procedures voor het Hof", Grondwettelijk Hof, n.d., https://www.const-court.be/nl/court/presentation/procedure .

[8] Article 2 of the Special Act on the Constitutional Court of 6 January 1989.

[9] Hoven en Rechtbanken van België, "Het Belgisch rechtssysteem", rechtbanken-tribunaux.be, 2023, https://www.rechtbanken-tribunaux.be/nl/het-belgisch-rechtssysteem .

In Belgium, the political competences for climate change are divided between the federal government and three regions, namely the Flemish Region, the Brussels Capital Region, and the Walloon Region. Several ministries are involved, such as the Federal Public Service Public Health, the Agence wallonne de l'air et du climat, the Departement Omgeving Vlaamse Overheid and Leefmilieu Brussels. Local cities and municipalities often have their own energy and climate action plans, with support from various governments [10].

The National Climate Commission coordinates national efforts. In 2010, it approved the National Adaptation Strategy [11], highlighting three main objectives. Firstly, it aims to improve coherence between existing Belgian adaptation activities. Secondly, improved communication at national, European, and international level needs to be strived for. Lastly, the Strategy lays down the framework for the development of a National Adaptation Plan [12]. Following the Paris Agreement, the Consultation Committee of 19 February2020 agreed on Belgium's 2050 Climate Strategy, including targets for reducing greenhouse gas emissions and key measures to achieve them, based on regional plans [13]. The National Energy - and Climate plan 2021-2030 [14] promotes cooperation and contains measures at the national level. This plan is jointly reviewed by federal and regional authorities, with coordination by DG Environment [15]. The Flemish Region [16], the Brussels-Capital Region [17] and the Walloon Region [18] have specific adaptation plans, incorporating their competences.

Standing before civil and commercial courts is based on Article 17 and Article 18 of the Judicial Code [19]. Article 17 requires the plaintiff to have both the proper capacity and interest to bring a legal action. According to the Eikendael doctrine, legal persons only had the requisite interest where their claim sought to protect tangible property or moral rights of the legal entity, including its honour and reputation. Therefore, collective actions were inadmissible, even if the protection of that interest was the legal entity's social purpose [20]. In 2013, the Constitutional Court found that legal entities who did not have standing were discriminated against other legal entities who could have legal recourse due to specific legal provisions [21]. Therefore, this doctrine was abandoned. In the specific 2013 environmental case, the aim was to allow among others the enforcement of objectives of the Aarhus Convention.

As a consequence of this development, there is now an exception in the second paragraph of Article 17 of the Judicial Code, for legal persons seeking the protection of human rights and fundamental freedoms, under certain conditions. The social purpose of the legal entity needs to be of a special nature, and distinct from the public interest.The purpose of the legal entity must be pursued in a sustainable and effective manner.

[10] FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilieu, "De verdeling van de bevoegdheden", klimaat.be, 2019, https://klimaat.be/klimaatbeleid/belgisch/nationaal/bevoegdheden .

[11] FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilieu, "Nationale Adaptatiestrategie", 2010, https://klimaat.be/doc/Nationale_Adaptatie_Strategie.pdf .

[12] FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilieu, "Adaptatie: Een nationale adaptatiestrategie", klimaat.be, 2019, https://klimaat.be/klimaatbeleid/belgisch/nationaal/adaptatie .

[13] FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilieu, "De Belgische langetermijnstrategie", klimaat.be, 2020, https://klimaat.be/klimaatbeleid/belgisch/nationaal/langetermijnstrategie .

[14] X, "Belgisch geïntegreerd Nationaal Energie- en Klimaatplan 2021-2030", 18 December 2019, https://www.nationaalenergieklimaatplan.be/admin/storage/nekp/nekp-finaal-plan.pdf .

[15] X, "Klimaat", Federaal Milieurapport 2004-2008, 2008, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/19074960/NL%204.%20Deel%202%20h6.pdf .

[16] Vlaamse Overheid, "Vlaams Klimaatadaptatieplan 2030", omgeving.vlaanderen.be, 2022, https://omgeving.vlaanderen.be/sites/default/files/2022-10/Vlaams%20Klimaatadaptatieplan%202030_0.pdf .

[17] Leefmilieu Brussels, "Brusselse Plan Lucht-Klimaat-Energie", environment.brussels, 2023, https://document.environnement.brussels/opac_css/elecfile/PACE_NL.pdf .

[18] Gouvernement Wallon, « Plan Air Climat Énergie 2030 », energie.wallonie.be, 2023, https://energie.wallonie.be/servlet/Repository/pace-2030-adopte-gw-21-mars-2023.pdf?ID=73812 .

[19] Gerechtelijk Wetboek, 1967, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1967101001&table_name=wet .

[20] X., "Eikendael-doctrine niet langer houdbaar", Tijdschrift voor milieurecht, 2019, 357

[21] B. Allemeersch, E. Vandesande, "Een gemeenrechtelijk regimevan vorderingen ter verdediging van collectieve belangen", Rechtskundig Weekblad, 2019, 1242.

Thirdly, legal action must be within the corporate purpose of the entity, and with a view to defending an interest related to that purpose. Lastly, the legal action must pursue a purely collective interest. This has led to more opportunities for environmental associations and other organisations to protect collective interests [22]. These standing rules are valid for all procedures (administrative, civil and constitutional). Article 18 stresses that the interest in a legal action must already exist and be current. An action may be admitted even if it is brought to prevent a serious violation of a threatened right.

In addition to that, the special law on the Constitutional Court of 6 January 1989 states that for the action for annulment specifically, anyone can file this action if they show interest. The definition and interpretation of interest, including for NGOs, entails immediate, personal, and present interest. The criteria can be summarized as having a social purpose of a distinct nature, advocating for a collective interest, the challenged norm must have an impact on the NGOs social purpose and the social purpose must be genuinely pursued and not abandoned. This confirms the general rule of the Judicial Code.

It is worth noting that in judicial procedures, the concept of standing assumes a paramount role as it serves as the initial criterion assessed by the courts. Through the evaluation of standing, the courts determine the admissibility of a case, ensuring that only those with a legitimate interest or stake in the matter at hand can proceed. If standing is not recognized, signifying a lack of substantial interest, the case is deemed inadmissible, and the court will not proceed to deliberate on the merits of the case. This preliminary examination underscores the fundamental principle that legal proceedings are reserved for those directly affected or invested in the outcome.

## 2.1 Case Klimaatzaak ASBL v. Belgium

### 2.1.1 Francophone First Instance court of Brussels, 4th Chamber, Civil Section, no. 2015/4585/A, Judgment of 17 June 2021 [23]

*Facts*

In 2014, nonprofit organisation Klimaatzaak ASBL formally puts the four competent Belgian authorities, namely the federal state, the Flemish Region, the Brussels-Capital Region and the Walloon Region, in default. Klimaatzaak ASBL asks the governments to honour their commitments expressed in the United Nations Framework Convention on Climate Change [24] - to reduce Belgian greenhouse gas emissions by 40% by 2020 compared to 1990 levels [25]. Belgium was one of the countries taking the initiative to place the target at staying under 2°C on the long term. Therefore, the Klimaatzaak ASBL states that there is both scientific and political consensus on the necessary reduction target for Annex I countries [26], including Belgium.

[22] KU Leuven, "Naar de rechtre voor het klimaat", De grondwet voor iedereen, 2023, https://www.belgischegrondwet.be/dossier/klimaatzaken .
[23] Francophone First Instance Courtof Brussels, 4th Chamber, Civil Section,17 June 2021, Klimaatzaak ASBL v. The Belgian State,no. 2015/4585/A, https://www.stradalex.com/fr/sl_src_publ_jur_be/document/civ_2015_4585_A-FR .
[24] UNFCCC, Report of the Conference of the Partiesserving as the meeting of the Partiesto the Kyoto Protocol on its sixth session, held in Cancun from 29 November to 10 December 2010, 15 maart 2011, FCCC /KP/CMP/2010/12/Add.1, decision 1/CMP.6, p. 3, 6e preliminary consideration of the preamble, http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf; IPCC, 4th Assessment Report, Working Group 3, Climate Change 2007, Mitigation of Climate Change, 776.
[25] Klimaatzaak ASBL, "Het verloopvan de Klimaatzaak", klimaatzaak.eu, 2023, https://www.klimaatzaak.eu/nl/the-case .
[26] Annex I Parties encompass the industrialized nations that were part of the OECD in 1992, alongwith countries undergoing economic transitions, collectively referredto as the EIT Parties.These transitional countriesinclude the RussianFederation, the BalticStates, and several Central and Eastern European States.

*National and EU Legislation*

The legal basis for the case in national legislation are article 1382 Old Civil Code, Article 23 Constitution,articles 10 and 11 Constitution, articles 2 and 8 of the European Convention for Human Rights, and articles 6 and 24 of the International Convention on the Rights of the Child.

Article 1382 Old Civil Code determines civil liability containing the classic elements of fault, damage, and causation. To determine in Belgian law whether the fault is objectively to be attributed to someone, the principle of bonus pater familias is used. This involves judging whether the person who committed the offence behaved as a prudent and reasonable person placed in the same situation would react the likewise.

Article 8 of the ECHR protects the right to private life, home, and health. Belgium protects these aspects with separate articles of the Constitution: private life (Article 22), health (Article 23, 2°), and a healthy environment (Article 23, 4°). Article22 of the Constitution should be interpreted in line with Article 8 ECHR so that both fundamental rights have the same scope.Furthermore, under Article 13 ECHR, citizens have the right to an effective remedy.

Articles 10 and 11 of the Constitution lay down the principle of non-discrimination and need to be red together with another legal provision that is distinguishing similar situations. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

The Klimaatzaak ASBL argues it has standing since the abolishment of the Eikendael doctrine. Environmental protection associations have a right to access the justice system to challenge actions and negligence that violate national environmental law, as long as they meet the interest criteria established by national law [27]. On the one hand, the individual claimants claim standing based on Article 17 and 18 Judicial Code since they state that climate change leads to a violation of their subjective rights, as stated above. On the other hand, the non profit organisation claims interest since the social purpose of the organisation as laid down in its statutes is “protecting current and future generations, promoting policies or taking actions aimed at the full participation of citizens, and taking actions, judicial or otherwise, in response to specific or general climate, environment, nature conservation” [28].

The complainants demand the court to impose a decrease in greenhouse gas emissions on Belgian territory of at least 42 to 48% in 2025 and at least 55 to 65% in 2030, each time compared to the reference year 1990. By 2050, the complainants want to have moved further towards net zero emissions. They argue that science agrees that these reduction rates are necessary to avoid dangerous climate warming of +1.5°C. Given the importance and urgency of the demanded, the complainants request a penalty payment of 1 million euros per month of delay in implementing the judgement. The defence consists of the Belgian State, the Region of Wallonia, the Flemish Region, and The Brussels-Capital Region. All defendants conclude that the petition and voluntary interventions are inadmissible and unfounded [29].

[27] Francophone First Instance Court of Brussels,4th Chamber, CivilSection, 17 June 2021, Klimaatzaak ASBL v. The Belgian State, no. 2015/4585/A, https://www.stradalex.com/fr/sl_src_publ_jur_be/document/civ_2015_4585_A-FR p 51-55.
[28] Article 3 Social StatutesASBL Klilmaatzaak.
[29] Unfortunately, the judgement does not clearlystate all the reasons of the defendants, and the defendants have refused to disclose their conclusions.

The regions contest the jurisdiction of the court of First Instance to hear the case, saying this would overshadow the defendants' legislative and executive powers.The Walloon Region stresses that the request for suspension, continuation and reporting would violate the principle of separation of powers. The Belgian State claims that the appeal is inadmissible due to the lack of a current interest of the plaintiffs. The defendants argue that the Belgian federal system prevents joint debt settlement by the four named entities.

*Decision*

On standing, the court deems the action against the government of Klimaatzaak ASBL, as well as the natural persons,admissible in light of Articles17 and 18 of the Judicial Code. Article 17 requires the claimants to demonstrate a personal and direct interest, and in this case, Klimaatzaak ASBL can claim this interest because of their specific social objective aimed at fighting climate change. Article 18 requires that the interest be born and current, and the action is admitted because the plaintiffs are seeking to prevent future harm, which is considered a real risk, which provides them with a litigation interest. These considerations lead to the court's conclusion that the claim of Klimaatzaak ASBL and the natural persons acting as plaintiffs is admissible [30].

On the merits, the court finds that considering the combination of the mixed results in terms of numbers, the lack of proper climate governance, and repeated warnings from the European Union – and this in a context in which the Belgian authorities were fully aware of the certain risk of dangerous climate changes, in particular for the country's population – it can be concluded that neither the Federal State nor any of the three Regions acted as a prudent and diligent caretaker within the meaning of Article 1382 of the Civil Code (bonus pater familias). To the extent necessary, these same determinations allow it to be held that the four defendants have not currently taken all necessary measures to prevent the effects of climate change on the lives and privacy of the plaintiffs, as they are obliged to do under Articles 2 and 8 ECHR.

Contrary to defendants' assertions, Belgian federalism does not preclude a finding of concurrent fault by the four entities named in this case. On the contrary,it is precisely Belgium's cooperative federal structure that leads to the conclusion that both the federal state and each of the three regions are individually responsible for the lack of climate governance outlined above.

Finally, concerning the applicants' plea for the court to compel Belgium to decrease greenhouse gas emissions, the court concludes that such a directive would unavoidably infringe upon the principle of separation of powers.In its opinion, judges cannot impose government obligations or limit discretion. The international and European legal instruments do not impose specific emission reduction targets on Belgium. At the European level, the only binding obligations for Belgium are 35% emission reduction in non-ETS sectors by 2030 and 13% renewable energy by 2030. Therefore, the court states that it is not for the courts to set emission targets, given political issues and the separation of powers principle. This part of the applicants' request is unfounded.

In conclusion, the court declares the main action admissible, stating that the defendants do not act as bonus *pater familias* in pursuing their climate policy, within the meaning of Article 1382 of the Old Code Civil. The fundamental rights, more specifically Articles 2 and 8 ECHR, are violated by this climate policy, by failing to take all measures necessary to prevent the impact of climate change on the plaintiff's lives and privacy. Thus, they are essentially concurring with the plaintiffs on the substantive aspects of the case. However, by rejecting the request to oblige the entities to reduce emissions, the Court limits the result of the case to theoretical conviction without concrete consequences.

[30] On 3 May 2019, a deed was filed by the "Movement for Social-Ecological ChangeEarthworks", represented by councillors H. Schoukens and G. Vermeire, with the registry of the court for the voluntary intervention of 82 "lifelong" trees. In the state of positive Belgian law, trees are not "subjectsof rights", i.e. beings capableof having and exercising rightsand obligations. Except for legalentities to which the law expressly grants legal personality, only human beings possess this capacity and only their interests are subject to the regulations established by law. In the absence of recognition of legal personality, trees have no capacity to sue. Their voluntary intervention was therefore declared inadmissible by the judge.

### 2.1.2 Court of Appeal Brussels, 2nd Chamber, Civil Section,no. 2023/8411, Judgment of 30 November 2023 [31]

*Facts*

The applicants (not for profit organisation Klimaatzaak ASBL, representing 58.000 co-claimants) decided to file for appeal on 17 November 2021 against certain points of the judgement of the Francophone First Instance court of Brussels, of 17 June 2021. The Brussels court of appeal decided to give priority treatment to this case of Klimaatzaak ASBL. After a written round of conclusions that took 16 months, the Climate case was heard from 14 September to 6 October 2023 [32].

*National and EU Legislation*

The case relies on various legal bases, including Article 1382 of the Old Civil Code, Article 23 of the Constitution, Articles 10 and 11 of the Constitution, Articles 2 and 8 of the European Convention for Human Rights (ECHR), and Articles 6 and 24 of the International Convention on the Rights of the Child. Article 1382 of the Old Civil Code establishes civil liability based on fault, damage, and causation, assessed using the principle of bonus *pater familias* in Belgian law. Article 8 of the ECHR protects the right to private life, home, and health, aligned with corresponding articles in the Belgian Constitution. Articles 10 and 11 of the Constitution address non-discrimination and the need for equal treatment of similar situations. Additionally, Articles 17 and 18 of the Judicial Code require an immediate and legitimate interest for an admissible legal action, and an impairment of interest can only lead to compensation if the interest is legitimate.

*Arguments*

On standing, the admissibility of the appeal is contested. Both the Flemishand the Walloongovernment argue that the case should not be admissible, based on the legal standing of Articles17 and 18 of the Judicial Code.The Walloon region argues that the action is a popular action, which is prohibited, and that it concerns pure environmental damage.The Flemish region questions the current and natural interest, as well as the nature of the action as a popular action.

The Walloon Region applied to decline jurisdiction, emphasizing that the alleged violation of rights should pertain to a subjective right. More precisely, the Walloon Region argues that the claimants' action is insufficient as it only seeks to establish a fault without claiming damages. It contests the notion that the ECHR articles cannot independently form the basis for legal action in domestic law. The Region states that these provisions "contain nothing other than standards of behavior"; they do not provide for the sanction of their violation, and this sanction resides "in domestic law, from which the national judge draws his jurisdiction and finds at his disposal a variety of ways and means to implement, depending on the applicable national provisions". According to it, it follows that the appellants "invoke rights from which they expressly deprive the judge of the power to sanction them according to national law", so the court should "declare itself without jurisdiction" [33].

---

[31] Court of Appeal Brussels, 2nd Chamber, Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023; https://prismic- io.s3.amazonaws.com/affaireclimat/a2250051-e0b7-4488-8944-14c33a82d017_SP52019923113012320+fr.pdf .

[32] Klimaatzaak ASBL, "Het verloop van de Klimaatzaak", klimaatzaak.eu, 2023, https://www.klimaatzaak.eu/nl/the-case .

[33] See the Walloon Region conclusions., p. 105; https://affaireclimat.cdn.prismic.io/affaireclimat/4a065e57-964a-4050-96da-67fb2f3e6f7c_20220630_Wallonie%CC%88_Hoofdbesluiten%2BIncidenteel+beroep_PM0916078+PO+220630+CCLAPP01+%28D utch%29.pdf_anoniem.pdf .

Finally, it specifies, without explicitly indicating that it is an element that should lead the court to declare itself without jurisdiction, that individuals can only “invoke a violation of international provisions before the national judge if they can invoke a subjective right conferred by such provisions”, that the “source of this subjective right depends on the direct effect of the invoked international law provision”, and that no direct effect can be recognized for the positive obligations imposed on States [34].

On the merits, the applicants argue that the judgment wrongly decided that the plaintiffs should be dismissed “as to the remainder” mainly because of their refusal to impose mandatory greenhouse gas reduction targets. This is motivated, by the court of first instance, by the separation of powers argument. However, this effectively deprived applicants and interveners of the only means of addressing violations of their rights, namely reducing greenhouse gas emissions. As a result, the judgment violates Article13 of the ECHR and Article 9(4) of the Aarhus Convention for environmental matters.

In addition, the nationally required minimum amount of greenhouse gas emission reductions is set based on the globally recognised limit for dangerous warming, which is less than 2°C and aims for 1.5°C, as recognised and signed by Belgium under the UNFCCC. The judgment also wrongly assessed behavioural obligations based on international, European, and national climate law, whereas these standards should be assessed in light of the globally recognised limit for dangerous warming, as set out in the Paris Agreement in December 2015. This is widely recognised by the scientific and political community, irrespective of the binding nature of the texts [35].

*Decision*

On jurisdiction, the court rejected the defendants’ arguments, stating that it had jurisdiction to deal with the appellants’ action [36]. Firstly, it discusses that in law, the circumstance that a plaintiff would omit to invoke one of the conditions for the existence of a subjective right or that it would misunderstand what invoking such a right allows to obtain in court does not result in depriving the judiciary of its jurisdiction. Moreover, Article 18, paragraph 2, of the Judicial Code authorizes the action even on a declaratory basis, with a view to preventing the violation of a seriously threatened right. Since such a request, related to future damage,can be considered admissible, it must a fortiori be concluded that the judiciary has jurisdiction to hear such a request.

Furthermore, in fact,the request of the principal appellants is not limited to seeking the establishment of a fault without denouncing the existence of damage causally linked to that fault. Indeed, the principal appellants refer repeatedly to damages already occurred (for which they request compensation in kind) and justify their injunction requests by the desire to prevent the aggravation of these damages [37]. This question falls under substance and not admissibility.

[34] Court of Appeal Brussels, 2nd Chamber, Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, p. 60-63.
[35] Klimaatzaak ASBL, “Requêted’appel”, Equal Law for BetterLiving, 2021, https://affaireclimat.cdn.prismic.io/affaireclimat/989e74fe- 3d01-4cd0-9fff-d8642f974d8a_2021117_Reque%CC%82te+d%27appel_Def+DOCX_00832397+DOCX+-+PDF.pdf .
[36] Court of AppealBrussels, 2nd Chamber,Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, nr. 97-116.
[37] See especially, p. 156 of their conclusions: “It is not pecuniary compensation that interests the principal appellants, but the pronouncement of an injunction, which under the guise of compensation in kind, can relate to both the repair of damage that has already occurredand the prevention of furtherdamage”; see also p. 26, p. 146, pp. 154-156,and pp. 163-164, https://affaireclimat.cdn.prismic.io/affaireclimat/4a065e57-964a-4050-96da-67fb2f3e6f7c_20220630_Wallonie%CC%88_Hoofdbesluiten%2BIncidenteel+beroep_PM0916078+PO+220630+CCLAPP01+%28D
utch%29.pdf_anoniem.pdf .

The court reiterates that it is a constant jurisprudence that the competence of the judiciary (in reality, its jurisdiction) is determined by the real and direct object of the dispute [38], and that, when the object of the dispute concerns an act of the administration, it must be verified whether a subjective right is at stake [39].

On standing, the court highlights the specific nature of environmental litigation, in relation to the Aarhus Convention, which guarantees access to justice for environmental protection associations. It concludes that, despite the controversy, Klimaatzaak ASBL's action is admissible because it alleges not only pure ecological damage but also individual ecological damage, which demonstrates a present and well-founded interest. The Court found that the action had been brought to prevent dangerous global warming, thus justifying its preventive nature and the urgency of the situation [40].

On the merits, the court firstly addresses the violation of Article2 ECHR [41]. The court does not focus on whether the plaintiffs' lives are directly threatened by Belgian climate policy, but on assessing whether there is a real and immediate danger from global warming. The court examines whether the government is acting adequately to prevent this danger. It finds that insufficient efforts have been made, leading to the presumption that the government has not acted appropriately. For the period 2013-2020, the court finds that a 30% reduction in emissions compared to 1990 is needed to comply with Article 2 ECHR. Only the Walloon Region succeeds, while other defendants do not take sufficient adequate steps. For the period 2021-2030, the court concludes that a minimum reduction of 55% by 2030 is required. The Belgian State and the Regions do not demonstrate that they are taking adequate measures, resulting in a continuing violation of Article 2 ECHR. The appeal is upheld, except for the Walloon Region.

Secondly, the violation of Article 8 ECHR is considered [42]. The link between global warming and adverse effects on the applicants' residence has been established under Article 8 ECHR. The court emphasises that the fact that the government now appears to recognise that action is required, is not in itself sufficient to rule out causation. The court specifies that, both for the commitment period 2013-2020 and for the commitment period from 2021 until now, the respondent parties, apart from the Walloon Region, have also violated Article8 of the ECHR in relation to the individuals in question. The court concludes that, both for the commitment period 2013-2020 and for the commitment period from 2021 until now, the respondent parties, apart from the Walloon Region, have also violated Article 8 of the ECHR in relation to the individuals in question.

Lastly, the breach of Articles 1382 and 1383 Old Civil Code is discussed [43]. The court rules that the state is liable for improper conduct in the performance of its duties. After investigation, the court concludes that the climate policy of the Flemish Region,the Belgian State and the Brussels Capital Region violates articles 1382 and 1383 Old Civil Code. The appeal is well-founded, except for the Walloon Region. The court recognises an error for the 2021-2030 period, with the review of climate actions coming too late and the inability to achieve the required emissions reduction of at least 55% by 2030. On damages, the court finds that individual damages, as caused by climate change, are suffered by each party.

[40] Court of Appeal Brussels, 2nd Chamber, Civil Section, no. 2023/8411, Klimaatzaak ASBL v. Belgian State, Walloon Region, Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, nr. 120-129.

[41] Court of Appeal Brussels, 2nd Chamber, Civil Section, no. 2023/8411, Klimaatzaak ASBL v. Belgian State, Walloon Region, Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, p. 86-110.

[42] Court of AppealBrussels, 2nd Chamber,Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, p. 111.

[43] Court of AppealBrussels, 2nd Chamber,Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, p. 112-140.

On damages, the court finds that individual damages, as caused by climate change, are suffered by each party. There is a causal link between the faults found and damages suffered, with the court stressing that more effective climate policies could have reduced the damage.

After examining the legality of an injunction to remedy unlawful violations of individual rights, the court limits itself to an injunction aimed at reducing greenhouse gas emissions. The court does not rule on possible penalty payments, as it is not convinced that immediate imposition is necessary for the effect of the judgment. A ruling on this issue will be reserved until official greenhouse gas emission figures for Belgium, the Brussels Capital Region and the Flemish Region are available.

In summary, the federal state, together with the Flemish and Brussels regions, was convicted of violating human rights (Articles 2 and 8 of the ECHR) and duty of care (Article 1382 of the Old Civil Code) for inadequate climate policies. As a remedial measure for the established illegality, a court order was issued to achieve a minimum greenhouse gas emission reduction of 55% by 2030. The Walloon Region,which has met its targets in the past and has already enshrined the -55% reduction target for 2030 by decree, was not condemned.

The day after the ruling, Flemish environment minister Zuhal Demir announced that she will appeal in cassation against the ruling in the climate case. Demir calls the ruling a collective impoverishment and stresses that climate policy is a political choice. She argues that a French-speaking judge is imposing this on the Flemish community, exceeding European targets and imposing an incorrect 55% reduction. Demir fears possible industry closures and argues for a focus on climate adaptation. Prime Minister De Croo affirmed that he does not intend to appeal and stresses the need for a quick transition to green energy, regardless of specific figures or targets [44]. It is unknown whether an effective appeal to cassation has been filed.

## 2.2 Constitutional Court, Case 147/2022, Judgement of 10 November 2022 [45]

*Facts*

The petition concerns an action to annul the Flemish Region's decree of 22 October 2021, which deals with amendments to the Energy Decree of 8 May 2009 regarding a ban on the installation or replacement of fuel oil boilers. The non-profit organisation "Belgian Federation of Fuel Traders" together with some companies, including "Deconinck Fuels," "Bouts," "OCTA+ Energie," and "Comfort Energy," filed a petition with the Court on 17 December 2021.

*National and EU Legislation*

The contested rule is the Decree of the Flemish Region of 22 October 2021 “amending the Energy Decree of 8 May 2009, as regards a ban on the installation or replacement of a fuel oil boiler”. The national legal bases for the case are the following:

- Article 6, § 1, II, second paragraph, 1°, of the Special Law of 8 August 1980 on Institutional Reform, of the principle of federal loyalty, as guaranteed by Article 143, § 1, of the Constitution, and of the principle of proportionality

[44] VRTNWS, “Vlaamsminister Demir (N-VA)tekent cassatieberoep aan tegen uitspraak in klimaatzaak: “Vooralprincipiële kwestie””, 1 December 2023, https://www.vrt.be/vrtnws/nl/2023/12/01/zuhal-demir-cassatie-klimaatzaak/ .

[45] Constitutional Court, Case 147/2022, Vzw “Belgische Federatie der Brandstoffenhandelaars » and othersv. Flemish Government, 10 November 2022, ECLI:BE:GHCC:2022:ARR.147, https://www.const-court.be/public/n/2022/2022-147n.pdf .

- Articles 10 and 11 of the Constitution protecting the principle of non-discrimination, read together with Article 34 TFEU and the freedom of enterprise as guaranteed by Articles II.3 and II.4 of the Economic Code. Furthermore, Articles 10 and 11 of the Constitution are also relied upon in conjunction with Article 1 of the First Additional Protocol to the European Convention on Human Rights, that protects the right to property.

- Article 23, 3°, of the Constitution mandates competent legislators to ensure the right to health protection and the right to the protection of a healthy environment. This entails an obligation to the competent legislators, taking into account the corresponding duties, to guarantee the economic, social and cultural rights, the conditions for the exercise of which they determine.

- Article 36 of the Treaty on the Functioning of the European Union is being invoked as it clarifies that the prohibition to restrictions on free movement of goods can be justified on grounds of the protection of health and life of humans, animals or plants.

- Article 2 of the special law on the Constitutional Court of 6 January 1989 states that an appeal for annulment can be filed by any natural or legal person who proves they have interest in the annulment. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

On standing, the Flemish Government disputes the interest of the applicants, who describe themselves as organisations in the fuel and energy industry, in protecting consumer interests. It argues that only persons whose situation is directly and adversely affected by the challenged standard have the requisite interest. In this case, at least the second to fifth applicants in the case, as suppliers of fuel oil products, have a demonstrable interest in the annulment of certain provisions of the impugned decree because of the ban on fuel oil boilers. Consequently, the Court does not consider it necessary to examine the interest of the remaining applicants.

On the merits,the complainants object to the contested decree for three main reasons.Firstly, they argue that the decree almost completely bans the use of fuel oil boilers, which undermines federal authority on product standards as laid down by Article 6, §A, II, second paragraph, 1° of the Special Law of 8 August 1980, and closes off the market. According to them, the Decree does not provide sufficient exceptions to counter this market exclusion. Secondly, the decree is believed to discriminate between owners of fuel oil boilers and other heating methods on the basis of Articles 10 and 11 of the Constitution, read together with Article 34 TFEU. They as well claim discrimination between owners of buildings with different natural gas connection options, limiting the freedom of entrepreneurship in breach of articles II;3 and II.4 of the Economic Code.

Lastly, the decree would create unjustified differences in treatment between owners of fuel oil boilers based on the location of natural gas connections, which can lead to uncertainty and inhumane treatment, and limiting the right to property. In the second case that was joined by the Court, the applicant claims that the Decree creates an unreasonable difference in treatment between owners of homes heated with fuel oil boilers, depending on the location of the natural gas distribution network. They argue that the obligation to live in an unheated home when the natural gas connection is across the street is considered inhuman and degrading. For these reasons, the appellants request the Court to annul the Decree.

The defendants reject these reasons. Reacting to the first plea, the Flemish Government argues that the contest Decree falls within its competences and does not impose an absolute ban on fuel oil boilers. They consider the study to be objective and supported with climate-related arguments based on emission reduction and efficient alternative heating systems. Secondly, the defendants emphasise the discretion of the Decree-maker and state that the Decree pursues legitimate objectives of reducing soil pollution and greenhouse gas emissions. Thirdly, the Flemish Government refutes criticism of the difference in treatment between replacement of fuel oil boilers in existing dwellings and installation of fuel oil boilers in new builds or major renovations. They argue that the Decree provides reasonable justification for this distinction, aimed at cost reduction and emission reduction through reduced fuel oil use.

In the second case, the Flemish Government considers the first plea inadmissible because the petition does not clearly indicate how the decree violates the articles of law.
Interestingly, in this case, it is the defendants who raise climate arguments first. The Flemish government cites climate as an argument to strengthen its arguments and justify the underlying Decree.

*Decision*

The Court did not delve into the issue of standing but proceeded directly to consider the merits of the case. Indirectly, it recognised standing and considered the claim as admissible.

On the merits, the Court finds the applicant's arguments to be unfounded because the contested decree allows owners to replace fuel oil boilers if natural gas connection is not possible, without obliging them to switch to natural gas. The decree even encourages environmentally friendly heating systems, such as heat pumps and for building insulation to reduce energy demand for heating. Studies taken into consideration by the Court show that fuel oil boilers have a greater impact on emissions and air quality due to fuel oil combustion. For example, the $CO_2$ emission factor (ktonne $CO_2$/PJ) for fuel oil is about 32 per cent higher than that of natural gas, and 15 to 18 per cent higher than propane and butane gas. Also, the $NO_x$ emissions of a new fuel oil boiler are about 45 per cent higher than the emissions of a new natural gas boiler, for example.

Moreover, there are premiums and incentives to facilitate the transition to environmentally friendly systems, and sales of fuel oil boilers were already declining due to changes in market conditions. As a result,there is a reasonable balance between property rights and public interest, making the grounds of appeal raised unfounded.

## 2.3 Constitutional Court, Case 43/2021, Judgement of 11 March 2021 [46]

*Facts*

The Walloon decree of 17 January 2019 aims to reduce air pollution caused by vehicles and comply with European regulations. The decree gradually bans certain vehicles based on their Euronorm and engine type. It also allows the introduction of low-emission zones, where certain categories of vehicles can be temporarily or permanently banned from entering. An owner of a diesel vehicle with Euronorm 3 has objections to this decree and has filed an action for either partial or complete annulment in the Court on the 19th of August 2019, regarding division of powers, ownership, proportionality of penalties, equality, and privacy.

[46] Constitutional Court,Case no 43/2021of 11 March 2021, D. Ramaekers v. Flemish and Walloon Government, https://www.const-court.be/public/n/2021/2021-043n.pdf

*National and EU Legislation*

Articles 1 to 4, 7, 17 and 20 of the Decree of the Walloon Region of 17 January2019 “on combating air pollution linked to vehicle traffic” are the articles that are contested in this case.

Articles 35 and 39 of the Constitution, read in conjunction with the Special Law of 8 August 1980 on Institutional Reform, in particular Article6 § 4 3° thereof,stating the division of competences between the federal state and the regions,and the involvement of governments in the determination of general police rules and traffic and transport regulations.

Articles 10 and 11 highlighting the prohibition of the discrimination are also invoked in combination with Article 34 of the Constitution on the entrustment of certain powers by treaty or by law to institutions of international law, read in conjunction with the TFEU, in particular Title I thereof and, in particular, Articles 2, 4 and 91 thereof, governing the division of competences. Furthermore, the prohibition of discrimination is read together with Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 “on periodic road worthiness tests for motor vehicles and their trailers and repealing Directive 2009/40/EC”. Lastly, Articles 10 and 11 of the Constitution are also read together with Article 1 of the Twelfth Additional Protocol to the European Convention on Human Rights, which also entails a general prohibition on discrimination.

The right to privacy, safeguarded by Article 22 of the Constitution, read together with Article 8 of the ECHR and Artikel D.146 of the Environmental Law, is another ground this case relies upon.

Article 2 of the special law on the Constitutional Court of 6 January 1989 states that appeal for annulment can be filed by any natural or legal person who proves they have interest in the annulment. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

On standing, the applicant claims to have an interest in the appeal because of its ownership of a diesel vehicle affected by the provisions of the decree, including driving bans in low-emission zones. However, the Walloon Government disputes that the applicant is personally targeted by all the challenged provisions and argues that the appeal is only admissible for specific parts of the decree.

On the merits, the complainant raised several objections to reach a partial or complete annulment of the Decree relating to driving bans in the Walloon Region. In the first objection, the applicant contests the competence of the Walloon Region to impose a general driving ban. It also challenges the authority to introduce a permanent driving ban for certain types of vehicles, as this would violate federal competence, based on Articles 35 and 39 of the Constitution, read together with the Special Law on Institutional Reforms, that lays down the specific competences for each level of entity.

In the second objection, the applicant argues that the permanent driving ban on certain vehicles is not justified in the light of European directives and air quality objectives, and claims there is no necessity nor proportionality in this Decree. They argue that the intended aims have not been sufficiently demonstrated and that the introduction of the contested Decree is premature in the light of the implementation of Directive (EU) 2016/2284 of the European Parliament and of the Council on the reduction of national emissions of certain atmospheric pollutants. They also refer to the European Commission’s recommendation on the Draft Integrated National Energy and Climate Plan for Belgium, which requests additional data on policies and measures related to reducing greenhouse gas emissions.

The applicant submits that the contested Decree does not provide this data, and therefore fails to demonstrate the reasonable relationship between the means employed and the objective pursued. The applicant's third objection is based on discrimination, breaching Articles 10 and 11 of the Constitution. She claims that the decree is discriminatory because it applies only to certain categories of vehicles and not to others. The foreseen exceptions and alternatives do not cover a wide enough range. She suggests that the principles of the paying user and polluter could have been applied more fairly. The fourth objection focuses on privacy issues, in particular the power of staff to access and copy administrative data and documents of vehicles and drivers. The applicant argues that this amendment infringes too much on private and family life, linked to Article 22 of the Constitution.

The defendant does not agree with any of these claims. For the first plea, the Walloon Government argues that the Decree in question falls within its competence and is in line with EU law. It stresses that the Decree focuses on vehicle types in relation to their emissions, not on vehicle uses, and does not restrict who may use the public roads. In addition, the government argues that the measures in the decree are based on the environmental competence of the Walloon Region and are specifically aimed at protecting air quality in the region. This reflects the local situation regarding air pollution. The decree falls within Wallonia's competence with regard to traffic regulations and environmental protection, since there is no federal competence for road safety.

The second plea concerns the decree on driving bans in Wallonia. The Walloon Government challenges the admissibility of the plea on several grounds. It claims that the plea is inadmissible because the applicant has not shown how the alleged disproportionality is related to the standards in force. They argue that the measures in the decree are in line with the powers of the Walloon Region and EU legislation, and that the permanent driving ban is an opportune choice to improve air quality. The Flemish government stresses that the decree maker was not obliged to pay compensation and defends the use of the Euronorm as a relevant criterion for the permanent driving ban. They also dispute the claim that the sanctions in the decree are disproportionate and point to the separation of powers between different legislators. Furthermore, the Court has no power to review the divisionof powers betweenthe European Unionand the MemberStates, nor to review a provision in the light of the Constitution.

The third plea is held inadmissible because the applicant did not specify how Article 1 of the Twelfth Additional Protocol to the European Convention on Human Rights was violated.

The fourth plea is clarified by the Walloon Government. Article20, 2°, of the decree does not replace but supplements Article D.146 of the Environmental Code, which has improved control powers for staff members to inspect vehicles to verify their compliance with the provisions of the decree. The protection of personal data is ensured, despite the absence of an explicit reference. As a result, the Walloon Government concludes that the plea is not well-founded.

*Decision*

The Court granted the appeal in part for certain parts of the decree on air pollution. On standing, the Court found that the applicant, the owner of a categoryM1 diesel vehicle complying with Euronorm 3, was directly and adversely affected by certain provisions of the Decree of 17 January 2019 of the Walloon Region. These provisions concern the ban on the circulation of such vehicles in the Walloon Region from 1 January 2025, as well as the introduction of low-emission zones and administrative penalties.

On the merits, the Court found that the regions are competent to protect the environment from air pollution, and therefore they have the power to take measures to combat air pollution, such as regulating vehicles based on their emission levels. This power is enshrined in the Special Act of 8 August 1980.

The Court held that by banning the circulation of certain vehicles based on their Euronorm and engine type, the decree maker did not infringe on the powers of the federal government with regard to general policing, traffic rules, or technical regulations for vehicles. The decree focuses on combating air pollution from vehicles but does not establish technical requirements for vehicles or regulate technical vehicle inspections as regulated by Directive 2014/45/EU. Therefore, the Court rejected the applicant's arguments and concluded that the first plea was not well-founded. The second part of the first plea, which concerned the competence of the European Union and the Member States with regard to technical regulations on vehicles, was also rejected because it was based on an erroneous premise.

The second plea concerns the proportionality of the measures. The Court finds that the decree- maker struck a fair balance between the general interest of environmental protection and public health and the private interests of vehicle owners. The gradual introduction of these measures and exceptions for certain vehicles were considered reasonable and proportionate. The court concluded that the interference with property rights was not excessive and therefore rejected the second plea.

The third plea concerns the legislator's choice to affect certain categories of vehicles. The appellant states it discriminates against M1 category vehicles by excluding certain vehicles from driving bans and access to low-emission zones. The Court found that the legislation was based on reasonable considerations, in particular to give priority to private vehicles and encourage the use of more environmentally friendly vehicles and ruled that the third plea was unfounded. The Court finds that this choice is reasonable.

The fourth plea concerns the power of staff to consult administrative data and documents in the context of vehicle inspections. The Court finds that this power is not unlimited and is only used for checking the compliance of vehicles with the decree.Furthermore, this provision was in line with the law and human rights,as it pursued environmental protection and public health.The fourth plea was rejected.

The Court thus dismissed the request of the applicant to annul the contested Decree, letting the Decree pass the judicial force. This Decree is still fully in force.

## 2.4 Court of First Instance Brussels, Case 2918/1223/A, Judgement of 31 January 2020 [47]

*Facts*

In accordance with the 2008 Air Quality Directive (AQD), each Member State must define zones and agglomerations for the assessment and management of air quality. According to this Directive, the concentration of nitrogen dioxide($NO_2$) must not exceed the annual average limit value of 40 µg/m3 from 1 January 2010, with a possible postponement until 1 January 2015. The “agglomeration of Antwerp” was designated as an area where air quality assessment and management must take place.
Despite a postponement until 2015, the $NO_2$ limit was still exceeded in the “agglomeration of Antwerp” after this date. A remediation plan was therefore drawn up by the Flemish Environment Minister in December 2017, in accordance with Article 23 of the AQD.

On 26 March 2018, several environmental associations, namely vzw Straatego, vzw Ademloos and the citizens Oleyslaegers, Goordenand Van hees proceeded to summon the Flemish Region.They demand that the Flemish Region carries out effective measurements of $NO_2$ levels at 20 specific locations in the “agglomeration of Antwerp” within one month. Within three months, in consultation with the plaintiffs, they also ask the Flemish Region to draw up a remediation plan and take appropriate measures to restore the annual limit value for $NO_2$ no later than 1 September 2020.

At the same time, in response to an environmental monitoring claim by VZW Greenpeace in October 2018, the Flemish Region was ordered to draw up air quality plans for all zones and agglomerations within one year. This included the remediation plan for the "agglomeration of Antwerp", which, according to the president, did not meet the requirements of Article 23 of the AQD.

After an examination of the remediation plan by the European Commission in November 2018, it was found that the 2030 compliance deadline was too long, and more effective measures were needed. The Flemish Region sent a reasoned response to the European Commission in March2019, announcing a new 2030 Air Policy Plan.

*National and EU legislation*

Articles 4, 13, 22.1, 23.1 of the AQD form the legal basis of the case. These articles deal with the obligation to have an air quality plan for designated zones and agglomerations. Furthermore, Articles 4.3 regarding the principle of sincere cooperation and 19.1 on the competences of the CJEU of the TEU read in conjunction with Articles 267.2 on the prejudicial question and 288 on the legal scope of directives, of the TFEU are also invoked.

It follows from Articles 2.4, 3.4 and 9.3 of the Aarhus Convention concerning respectively the access to information, public participation in decision-making and access to justice, that Belgium has assumed the obligation to ensure environmental associations access to justice when they wish to challenge acts and omissions contrary to environmental law by persons and public authorities to the extent that they meet the criteria laid down in national law. However, these national criteria cannot be defined or interpreted in such a way as to make access to justice for environmental organisations de facto impossible. Articles17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case.

*Arguments*

On standing, the Flemish Region argues that the plaintiffs, including VZW Straatego and VZW Ademloos, do not have a personal and direct interest, but rather act in the public interest. The environmental associations, such as VZW Straatego and VZW Ademloos, argue that they do have a personal moral interest in improving air quality, as this is in line with their statutory objectives.

As for the individual claimants, the Flemish Region argues that an action brought by an individual in the mere interest of the community, the so called "popular claim" or "action popular is", is prohibited. The individuals claim they are personally affected and have interest, as they are more concerned than the average resident about this air quality, as evidenced by their engagement within certain organisations and the fact that they act as plaintiffs in these proceedings.

On the merits, the plaintiffs claim that the measurement results for NO2 in the "agglomeration of Antwerp" by the Flemish Region are unreliable because they allegedly underestimate actual concentrations. They demand that the Flemish Region be ordered to install sampling points according to the guidelines of the AQD, specifically 20 points in their designated locations. In particular, the sampling points would be insufficiently located in "street canyons",narrow streets with high-rise buildings and heavy traffic. They base their position on annual reports,measurements with passive samplers, a new air quality model and the study "Curious Noses".
Furthermore, the claimants argue that the remediation plan proposed by the Flemish Region and the Air Policy Plan 2030 do not contain appropriate measures that would reduce the period of exceedance of the annual limit values for NO2 as short as possible.

[47] Court of First Instance, 9th Chamber, Civil SectionBrussels, Vzw Straatego, vzw Ademloos, J. Olyslaegers, T. Goorden, W. Van Hees v. Flemish Region, nr. 2018/1223/A, 31 January 2023, https://www.justice-en-ligne.be/IMG/pdf/nds-ordonnance_juge_saisies_bxl-- 2020-07-08.pdf

*Decision*

On standing, he court finds that the environmental associations do demonstrate the requisite interest. Under Belgian law, the claimant's interest must traditionally be "personal", but since the abolishment of the Eikendael Doctrine in light of the Aarhus Convention, the personal interest of environmental associations needs to be understood as the moral benefit, which is achieved when judicial measures taken are consistent with the achievement of the association's objectives.

For the individuals, Misters Olyslaegers, Goordenand Van Hees, who are residents of Antwerp, the court finds that their air quality concerns do not benefit them more than the average resident.They therefore do not demonstrate a personal interest in having their claims granted.

However, in relation to an air quality plan and the installation of sampling points,the case law of the CJEU should be considered. Previous cases (such as ClientEarth v UK48 and Craeynest v Brussels Capital Region49) show that national rules that impede access to justice may not be invoked against persons directly affected by violations of limit values. So, regarding the individuals in this case, the court stressed that for natural persons it is sufficient to be a resident of an air quality zone or agglomeration to have the requisite interest in requiring measures such as drawing up an air quality plan or installing sampling points. This approach is based on the Treaty on European Union and the Treaty on the Functioning of the European Union. It thus concludes that Misters Olyslaegers, Goorden and Van Hees meet the requisite interest to require the requested measures, despite the lack of a distinctive personal advantage.

Finally, it is noted by the court that based on these cases of the CJEU, unlike the requirements for drawing up an air quality plan and installing sampling points, there is no need to grant access to the courts to obtain injunctions to enforce the implementation of measures of an air quality plan or to prohibit certain measures. This is not the subject of a preliminary reference to the Court of Justice of the European Union because the issue is not essential to the resolution of the dispute.

On the merits,the judge concludes that the Flemish Region makes a sufficiently plausible case that the sampling points are scientifically located. There is a detailed scientific evaluation of the sites, taking into account population exposure and practical possibilities. The measurement results with passive samplers are deemed to be an additional effort by the Flemish Region in order to conduct better measurements, and there is no evidence that the choice of location is incorrect. Therefore, there is no ground to require additional sampling points.

The court finds that the annual limit value for $NO_2$ has been exceeded in the "agglomeration of Antwerp". The court confirms that the jurisdiction exists to order an air quality plan from the Flemish Region this, according to the AQD. However, the judge concludes that the Air Policy Plan 2030, asserted by the Flemish Region as fulfilling its obligation to provide an air quality plan, contains measures designed to keep exceedances as short as possible, focusing on the de-dieselification of the vehicle fleet. The judge emphasises that monitoring of the effectiveness of proposed measures is marginal, but there is no evidence that the measures are manifestly inadequate. Therefore, the request of the claimants to order the Flemish Region to draw up a new or adapted air policy plan is rejected.

## 2.5 Constitutional Court, Case 11/2020, Judgement of 23 January 2929 [50]

*Facts*

By application sent to the Court by letter registered on 7 November2018 and received at the Registry on 20 November 2018, an action for annulment of the law of 30 March 2018 " concerning the introduction of a mobility allowance " (published in the Moniteur Belge of 7 May 2018) was brought by the non-profit association " Inter-Environnement Bruxelles" the asbl " Climaxi", the asbl " Climate Express ", the " General Belgian Trade Union Confederation ", Robert Vertenueil, the " General Christian Trade Union Confederation of Belgium "and Marc Leemans,assisted and represented by Mr. V. Letellier, lawyer at the Brussels Bar.

*National and EU Legislation*

The legal basis for this case is formed by Articles 10, 11, and 172 of the Constitution, which form the constitutional basis for the organization of the state and the distribution of legislative powers.Articles 7a and 23 of the Constitution, when read in conjunction with the non-discrimination and equality principle of the Constitution, are relevant to environmental protection and climate change matters. Additionally, Article2 of the United Nations Framework Convention on Climate Change outlines the treaty's goal of preventing dangerous interference with the climate system by stabilizing greenhouse gas concentrations. Article 172 of the Constitution forms a special application of the non- discrimination principle in tax matters.

Article 2 of the special law on the Constitutional Court of 6 January 1989 states that an appeal for annulment can be filed by any natural or legal person who proves they have interest in the annulment. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

On standing, the Council of Ministers disputes the interest of the applicants, including environmental organisations and trade unions. The requesting parties base their interest on their statutory goals and the protection of the environment and social justice, while the Council of Ministers claims that the law would not directly and adversely affect their goals. However, because the law aims to abandon commercial vehicles and promote sustainable mobility, it is argued by the applicants that they have the requisite interest because the law may affect their statutory goals and collective interests.

On the merits, the applicants are filing a request for annulment of the Law "on the introduction of a mobility allowance". They argue that the criterion for the mobility allowance, which leads to tax and social benefits, is not objectively justified because it is not linked to giving up a vehicle,but rather to wage negotiations with a new employer. Therefore, this law would be breaching the equality and non-discrimination principles of Articles 10 and 11 of the Constitution, read together with Article 172 of the Constitution. They also argue that the criterion is not relevant to reducing pressure from car traffic and related environmental objectives. They suggest that the benefit of the allowance subject to a favorable tax and social scheme does not depend on the guarantee that its beneficiary will no longer use a personal vehicle for commuting, thus does not lead to a reduced use of cars.

Finally, they claim that the measure perpetuates unjustified discrimination and violates the standstill principle of Article 23 of the Constitution because it reduces sources of funding for social security and other economic and social rights by exempting some workers from tax on part of their income.

[50] Constitutional Court,Case 11/2020, vzw « Inter-Environnement Bruxelles », de vzw « Climaxi », de vzw « ClimateExpress »,and others v. The Council of Ministers, 23 January 2020, https://www.const-court.be/public/n/2020/2020-011n.pdf .

The Council of Ministers defends the difference in treatment between ordinary pay and the mobility allowance based on the objective criterion of relinquishing a company car. They stress that the extension of the mobility allowance to employees without a company car was precisely to prevent employees from obtaining a company car only to later claim the mobility allowance. Secondly, they point out that the contested measure aims to correct the negative effects, on the environment and public health, of the massive use of tax-advantaged company cars without creating the original wage differentials between employees with and without company cars. Lastly,the Council argues the claim that the difference in treatment is not a result of the impugned law, but rather arises from the pay policies of employers who provide company cars to their employees. In other words, the difference in treatment between employees who receive a company car or not exists regardless of the mobility allowance and has its origin in the employer's policy, not in the law itself.

*Decision*

The Court did not delve into the issue of standing but proceeded directly to consider the merits of the case. Indirectly, it recognised standing and considered the claim as admissible.

On the merits, the Court concludes that the designed scheme and some aspects of its implementation are problematic considering the constitutional principles of equality and non- discrimination. The scheme introduces unjustified differences in treatment between employees and has shortcomings in achieving its intended objectives, with regard to reducing the number of vehicles on the road. Furthermore, the amount of the mobility allowance is determined with reference to the list price of the last company car returned, without in any way considering the distance actually covered between the place of residence and the place of work, and thus the impact on mobility and the environment. As a result, certain provisions of the law are quashed, and the effects of the quashed law are maintained until 31 December 2020 to allow the legislature to introduce new regulations if necessary.

## 2.6 Constitutional Court, Case 37/2019, Judgement of 28 February 2019 [51]

*Facts*

The Brussels Ordinance of 7 December 2017, which amended the Brussels Air, Climate and Energy Control Code and introduced a low-emission zone, aims to improve air quality, and implements Directives 2001/81/EC and 2008/50/EC.

The parliamentary preparation of the contested provisions shows that,by introducing a low-emission zone, the Brussels authorising officer aims to reduce polluting emissions from vehicles to improve air quality and thus protect public health and the environment in the Brussels Capital Region. According to the competent authority, this emission-reducing measure is part of the efforts needed to meet the air quality standards arising from Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants and Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [52].

In January 2018, a citizen filed an action for annulment of the Order of the Brussels-Capital Region of 7 December 2017 amending the Order of 2 May 2013 on the Brussels Air, Climate and Energy Code (published in the Moniteur Belge on 14 December 2017).

[51] Constitutional Court,Case no 37/2019, L. Goukensv. Brussels CapitalGovernment, 28 February2019, https://www.const-court.be/public/n/2019/2019-037n.pdf .
[52] Parl. St., BrusselsHoofdstedelijk Parlement, 2017-2018, nr. A-572/1, pp. 1-2.

*National and EU Legislation*

The legal bases for the case are the following: Article 6, § 1, II, first paragraph, 1°, of the Special Law of 8 August 1980 Reforming the Institutions, dealing with the distribution of powers and competencies between the federal government and the regions and communities. The Regions are competent for the protection of the environment, under which is to be understood the soil, subsoil, water and air against pollution and degradation, as well as the fight against noise pollution.

Article 4 of the special law of 12 January 1989 relating to Brussels institutions makes this competence applicable for the Brussels-Capital Region. Article 170 §2 Constitution handing over fiscal competence to the Regions, Article 16 Constitution offering the right to protection of property, as guaranteed by Article 1 First Protocol to the ECHR. Lastly, Article28, paragraph 1 and article30 TFEU on the free movement of people, goods and services is argued.

The contested legal provisions is Article 3.2.16 of the Brussels Code of Air, Climate and Energy Control.

Article 2 of the special law on the Constitutional Court of 6 January 1989 states that an appeal for annulment can be filed by any natural or legal person who proves they have interest in the annulment. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

On standing, the complainant claims they are personally affected by the Brussels ordinance of 7 December 2017, which introduces a low-emission zone in Brussels and denies her access to the city by car. She argues that these zones are problematic for people with limited financial means, as public transport offers no practical alternative. The applicant claims that she has a personal interest in cancelling an ordinance establishing a low-emission zone in Brussels because it would prevent her from driving her car into the city, and the proliferation of such zones causes mobility problems for people with limited financial resources. She argues that alternative transport options are insufficient. On the other hand, the Brussels Capital Government disputes her interest, as she does not provide evidence that she owns a 2005 vehicle and does not demonstrate why she cannot use alternative transport options to reach the Brussels Capital Region, such as public transport.

On the merits, the applicant makes four main arguments. First, that the ordinance violates federal traffic rules by selectively denying vehicles that meet national technical standards access to public roads, and so disrespecting the division of competences as laid down by the Special Law of 8 August 1980 Reforming the Institutions. Second, that the low-emission zone is an additional toll,resulting in double taxation, infringing Article 170 of the Constitution. Thirdly, they claim that the ordinance discriminates against financially vulnerable people and people with disabilities because the access conditions are vehicle related, breaching Articles 10 and 11 of the Constitution. Fourthly, it is argued that the measure constitutes expropriation without compensation in disrespect of Article 16 of the Constitution, read together with Article 1 First Protocol to the ECHR, by forcing owners of older vehicles to sell them at low prices, without scientific evidence that their emissions are significantly higher than those of new vehicles.

Finally, the applicant claims that the ordinance violates the EU treaties because it restricts the free movement of persons, goods and services as laid down in Articles 28 and 30 of the TFEU, and the social adjustment is unclear regarding its application to EU citizens outside the Brussels Capital Region. Based on these reasons, the applicant aims to have the new Order annulled.

*Decision*

On standing, the Court considers the case admissible, thus recognising standing to the applicant. On the merits, the Court dismisses the appeal for the following reasons.

The Brussels Capital Government has the power to apply the contested provisions, taking into account the division of powers between the federal government and the regions.The Brussels-Capital Region is competent for the protection of the living environment against air pollution. The Court finds that the mandate given by the Brussels ordinance maker to the Brussels Capital Region Government to define one or more low-emission zones and to limit the right of access of vehicles in one or more permanent low-emission zones on the territory of the Brussels Capital Region based on the emissions of air pollutants by those vehicles undeniably aims to improve air quality in the Brussels Capital Region. The first argument is unfounded.

The second argument concerns whether the authorizing authority has introduced new taxes, distinguishing between administrative fines and taxes. The system of temporary access to the low- emission zone(s) for a fee should allow the charge payer to temporarily enter the low-emission zone. This is also possible even if the vehicle does not meet the conditions regarding emissions of air pollutants. That charge is then justified by the special control and monitoring costs involved in introducing low-emission zones. Furthermore, this is also justified by the fact that the temporary entry system grants an individual benefit to the driver who wants to use his non-compliant vehicle. This charge is thus not a second taxation.[53] The second argument is also unfounded.
The fourth argument concerns the claim that establishing permanent low-emission zones violates the right to property protection. According to the Court, there is a reasonable balance between property rights and public interest of a healthy living environment and the air quality in the Brussels- Capital Region. Furthermore, Article 23 of the Constitution instructs the competent legislators to ensure the right to health protection and the right to the protection of a healthy environment. To protect human health and the environment, the Court states it is particularly important to avoid, prevent or reduce emissions of harmful air pollutants[54]. The fourth argument has no merit.

The third argument states that the introduction of the low-emission zone does not consider financially vulnerable people or people with disabilities and constitutes discrimination. However, it is claimed that the ordinance maker can take measures to alleviate the socioeconomic impact of the low- emission zone, to alleviate the impact with respect to individuals who do not have the financial capacity to immediately purchase a new vehicle that meets the emission standards set by the Government[55]. The lawmaker is pursuing a legitimate aim with the new rules, as the low-emission zones are there to reduce emissions of air pollutants from traffic in order to improve air quality[56]. The third argument has no merit.

The fifth argument claims that the challenged ordinance restricts the free movement of persons, goods and services within the European Union and introduces an impermissible toll. However, the Constitutional Court does not have jurisdiction to review legislative provisions directly against international treaties. The fifth argument is inadmissible.

[53] B.13.5 Case no 37/2019.
[54] B.17.2 Case no 37/2019.
[55] B.24.6 Case no 37/2019.
[56] B.23 Case no 37/2019.

## 2.7 Constitutional Court, Case 30/2017, Judgement of 23 February 2017 [57]

*Facts*

By application sent to the Court by letter registered on 10 February2016 and received at the Registry on 12 February 2016, the non-profit association " Sigma ", assisted and represented by Mr D. Blommaert, Mr J. Ghysels and Mr Y. Sacreas, lawyers at the Brussels Bar, brought an action for annulment of the Decree of the Flemish Region of 3 July 2015 introducing the kilometer levy and discontinuing the levying of the eurovignette and amending the Flemish Tax Code of 13 December 2013 in that regard (published in the Belgian Official Gazette of 10 August2015).

The contested decree introduces, with effect from 1 April 2016, a kilometer levy in the territory of the Flemish Region. The kilometer charge is a tax on the use a vehicle makes of certain roads. The tax is calculated on the number of kilometers travelled by the vehicle on those roads. The kilometers travelled are recorded electronically. The tax is payable by the holder of the vehicle.
The kilometer tax as introduced by the contested decree applies only to freight vehicles whose maximum permissible total weight exceeds 3.5 tons.

*National and EU Legislation*

The legal basis for this case consists of Articles 5, 39 and 134 of the Constitution, read in conjunction with Articles 2 and 19 § 3 of the Special Law of 8 August 1980 on Institutional Reform and Articles 2 § 1 and 7 of the special law of 12 January 1989 on the Brussels institutions, which all lay down the exclusive territorial competences of the different regions.

Furthermore, also Articles170 and 172 of the Constitution stating which governments can levy taxes, whether or not read in conjunction with Articles 10 and 11 of the Constitution on equal treatment and non-discrimination, and the principle of legal certainty, are used. Article 2 of the special law on the Constitutional Court of 6 January 1989 states that an appeal for annulment can be filed by any natural or legal person who proves they have interest in the annulment. Articles 17 and 18 of the Judicial Code state that an action is only admissible if the claimant has an obtained and immediate interest in bringing the case. An impairment of an interest can only lead to an action for compensation if the interest is a legitimate one.

*Arguments*

The applicant files an action for annulment and asks the Court to annul the Decree of the Flemish Region of 3 July 2015 introducing the kilometre charge and discontinuing the imposition of the Eurovignette and amending the Flemish Tax Code of 13 December 2013.

On standing, the applicant association, representing importers and general representatives of equipment used in various sectors, is challenging a decree related to the kilometre charge for their vehicles, and the association's interest in doing so is not contested. Similarly, the non-profit association "Algemene Belgische Schoonmaak Unie," which represents members in the industrial cleaning sector, also has a legitimate interest in the case.
On the merits, the applicant objected to the specific decree on three grounds. First, it claims that Article10 of the decree violates the territoriality principle, as it allows staff members of other regions to collect administrative fines within the Flemish Region, which is considered a violation of the territorial division of powers and autonomy of regions.

[57] Constitutional Court,Case 30/2017, vzw Sigma v. Flemish Government, 23 February 2017, https://www.const- court.be/public/n/2017/2017-030n.pdf .

Secondly, it also argues that Article 19 of the decree gives the Flemish Government the power to amend the road list, allowing the kilometres charge to be adjusted without the involvement of a democratically elected assembly, which would violate the principles of legality and legal certainty, and Articles 170 and 172 of the Constitution, read in conjunction with Articles 10 and 11 on equal treatment and non-discrimination. Finally, it argues that the decree does not distinguish between motor vehicles that actually transport goods and those intended to do so, which it says creates problems such as higher costs and a lack of clarity, which would violate the principle of legal certainty, this time read together with Articles 10, 11 and 172 of the Constitution, as general principles of EU law.

As the defendant, the Flemish Government asks the Court not to annul the Decree. It argues that the cooperation agreement does not violate the territorial division of powers and that the authorisation in Article 10 of the decree merely provides a non-binding possibility for staff members of other regions to collect administrative fines in the Flemish Region,without violating the territoriality or autonomy principles. As regards the amendment of the road list (Article 19 of the decree), the Flemish Government argues that this power relates only to the reordering of roads within the list, without changing the basis for levies, and that tariffs are based on criteria precisely defined by the decree-maker, which respects the principle of legal certainty. For the third plea, the Flemish Government argues that there is no substantial difference in treatment between vehicles carrying goods or implements, because the tax policy focuses on the costs that vehicles impose on the road surface, and that the term "vehicle" is clearly defined in the decree, which respects the principle of legal certainty. Other interested parties largely concur with this view.

*Decision*

The Court did not delve into the issue of standing but proceeded directly to consider the merits of the case. Indirectly, it recognised standing and considered the claim as admissible.
On the merits, the Court dismissed the appeal.

Before examining the contents of the case, the Court discusses some of the recitals of the new Decree. It repeatsthat “The costs of air and noise pollution caused by traffic,such as health-related costs, including healthcare costs, crop losses and other production losses,as well as welfare costs, are borne within the Member State where the transport takes place. Charging for external costs applies the polluter pays principle, which contributes to the reduction of external costs” (recital 10).

The first plea concerned authorisation for authorised staff to collect administrative fines from another region. The Court held that the provision in question did not impose an obligation, but only gave an authorisation, and that the collection of fines depended on assignments granted under cooperation agreements with relevant regions. The second plea, which concerned the power of the Flemish Government to adjust the road list with regard to name changes and categorisation of roads, was also rejected.The Court found that the adjustment only concerned roads already on the list and that the tax base could not be broadened or limited. The third plea, which concerned the treatment of heavy vehicles under the kilometre charge, was also rejected. The Court ruled that the decree maker did not have to distinguish between heavy vehicles based on the type of goods they transport, because the kilometre charge aims to absorb costs in terms of mobility, environment and road safety, regardless of the type of goods transported. The Court found that this did not impose a disproportionate administrative burden and was in line with the principle of legal certainty.

# 3. Analysis

*Legal based used*

The categories of legal articles that are often used as bases in climate litigation cases in Belgium are the following:

Constitutional Articles:

- Articles 10 and 11 of the Constitution: Frequently cited to discuss the principle of non- discrimination and equal treatment, invoked together with, inter alia, principles related to climate and environmental protection.
- Article 23 of the Constitution: it guarantees the right to a humane life and living conditions.
- Articles 35 and 39 of the Constitution: State the competences of the federal authorities in relation to the competences of the regions.
- Articles 5 and 134 of the Constitution: Invoked in cases related to constitutional principles as these articles lay down the main rules for the competences of the regions.

Articles 170 and 172 of the Constitution: Stating the competent authorities that can levy taxes and the conditions for this competence.

Special Laws:

- Special Law of 8 August 1980 on Institutional Reform: Frequently used to establish the division of powers between federal and regional authorities in environmental matters.
- Special Law of 12 January 1989 on Brussels institutions: Pertains to issues in the Brussels Region.

EU and International Law:

- Treaty on the Functioning of the European Union (TFEU): Invoked to address EU-level environmental regulations, the division of competences and the principle of sincere cooperation, stated in Article 4.3
- European Convention for Human Rights: Specifically, Articles2 and 8 related to human rights and environmental protection.
- United Nations Framework Convention on Climate Change (UNFCCC): Used to address climate change-related matters.
- Aarhus Convention on Access to Environmental Information: used to get access to courts, specifically through Articles 2.4, 3.4 and 9.3.

Specific Environmental Regulations:

- Directive 2014/45/EU of the European Parliament and Council: Applied in cases related to vehicle emissions and air pollution control.
- Brussels Code of Air, Climate, and Energy Control:Specific to the Brussels Region and used in air quality and climate cases.
- Directive 2008/50/EC of the European Parliament and Council on ambient air quality and cleaner air for Europe, specifically Articles 4, 13, 22.1 and 23.1.

Old Civil Code

- Article 1382 and 1383 of the Old Civil Code stating civil liability containing the classic elements of fault, damage, and causation.

*Arguments used*

The climate change arguments used can be grouped into categories based on their nature and the originating party in the procedure.

Complainants' arguments:

- Emission Reduction Targets: In the Klimaatzaak ASBL Case, the complainants argue for substantial and urgent reductions in greenhouse gas emissions, with specific targets for 2025, 2030,and achieving net-zero emissions by 2050.They assert that these targets are in line with scientific consensus, particularly the need to limit global warming to +1.5°C to avoid severe climate impacts.
- Penalty for Delay: In the Klimaatzaak ASBL Case, the complainants request a substantial financial penalty for any delay in implementing the emission reduction measures. This reflects the urgency they place on addressing climate change and the need for swift action.
- Driving Bans (Walloon Region): In Case 43/2021, the complainant (an individual) raises objections to driving bans in the Walloon Region, claiming that it exceeds regional competence, lacks proper justification based on air quality data, discriminates against certain vehicle categories, and raises privacy concerns regarding data access. As regards the 'climate' objection, the applicant argues that the permanent driving ban on certain vehicles is not justified in the light of European directives and air quality objectives. They argue that the contested Decree is premature and lacks sufficient demonstration of its intended aims, considering the implementation of EU Directive 2016/2284 to reduce national emissions. The applicant claims that the Decree does not provide the requested data on greenhouse gas reduction measures, failing to establish a reasonable link between its means and the objective it seeks to achieve.
- Mobility Allowance Criterion: In Case 11/2020, the applicants (several private associations) challenge the criteria for the mobility allowance, arguing that it is not objectively justified (since it does not lead to a reduced use of cars and thus emissions) and perpetuates discrimination while impacting social security funding.
- Reliability Air Quality Measurement: In Case 2018/1223/A, the applicants assert that the AQD was violated as they contend that the recorded level of $NO_2$ in the air exceeded the permissible limit. They argue that this breach occurred due to inaccurate measurements.

Defendants' arguments:

- Promotion of emission reduction: in Case 147/2022, The defendant (the Flemish Government) argues that the regulatory changes are intended to promote a significant reduction in emissions, particularly greenhouse gases. By phasing out certain practices, such as the use of fuel oil boilers, and by encouraging the adoption of cleaner and more efficient alternatives, it aims to lower overall emissions. This reduction aligns with broader climate objectives, including commitments to reduce carbon emissions and combat climate change.
- Enhancement of Air Quality: in Case 43/2021, the defendants emphasize that these regulatory changes also have a direct impact on local air quality. They argue that by controlling certain practices and vehicle types, they can improve the quality of the air in their regions. Better air quality is not only beneficial for public health but also contributes to mitigating climate change, as reduced air pollution can positively impact regional and global climates.
- Addressing Environmental and Public Health Impacts: in Case 11/2020, the defendant (the Council of Ministers) argues that certain measures are intended to address the negative environmental and public health impacts of specific practices, such as the widespread use of tax-advantaged company cars. It adds that these measures are necessary to rectify the consequences of policies that have encouraged excessive car use and contributed to environmental and health issues.

- Alignment with European Directives: In Case 43/2021, related to driving bans and low- emission zones, the defendant(the Walloon Government) stresses that the measures are in line with European directives. These measures are meant to improve air quality, and the defendant argues that its actions are consistent with broader European environmental and climate policies aimed at reducing emissions and protecting the environment.

*Impact*

In the climate cases discussed, the court decisions reveal several key trends and outcomes. Firstly, in the Klimaatzaak ASBL case, the court acknowledges the urgent need for climate action and recognize that neither the Federal State nor the three Regions in Belgium have acted as prudent caretakers in addressing climate change. However, the courts also assert that they cannot set specific emission reduction targets due to the separation of powers principle.

The most controversial aspect of the court of appeal's ruling is its imposition of concrete greenhouse gas reduction targets, raising debates on the judiciary's role in controlling state powers. While the first instance court held that it cannot go beyond finding the government's failure,the court of appeal asserts the authority to impose a result and condemn the governments to reach a reduction of emissions of 55% [58]. Nevertheless, the allocation of responsibilities for specific reduction targets among the governments is yet to be determined.
The ruling's significance goes beyond merely theoretical statements, as it mandates Belgian authorities to implement stricter measures, potentially influencing climate policies across various sectors. The Brussels Court of Appeal sets a precedent, extending its demand for a 55% emission reduction to the entire country, including the European carbon market, in contrast to Europe's requirement of a 47% reduction and exceptions for impactful sectors [59].

One last significant aspect with potential far-reaching consequences from the ruling,is the imposition of penalty payments, a decision the court is deferring until it receives updated information to assess its necessity for "one or the other party" [60] Legal scholars interpret this as the court hinting at the possibility of imposing individual periodic penalties on some, rather than all, of the entities found guilty. It remains uncertain whether the courts would base periodic penalty payments on the overall outcome or assign individual results to each penalty payment [61]. It should also be considered that this judgment may be appealed before Cassation, and thus its impact may change after this final decision. . It should also be considered that this judgment may be appealed before Cassation, and thus its impact may change after this final decision.

Regarding specific policies such as the fuel oil boiler ban and the air pollution decree, the courts generally strike a balance between property rights and the public interest, often finding the arguments raised by the complainants to be unfounded. They emphasize flexibility, incentives for environmentally friendly practices, and reasonable choices made in these policies. In the case of the mobility allowance scheme, the courts identify issues related to equality and non- discrimination, adding that the provisions do not take duly into account the impact on mobility and the environment, leading to the quashing of certain provisions while allowing for potential legislative revisions.

[58] E. De Clercq and S. Dethier,"Pleiten voor de planeet: uitspraakin de Belgische klimaatzaak (deel 1)", 22 December 2023, Leuven Blog for Public Law, https://www.leuvenpubliclaw.com/pleiten-voor-de-planeet-uitspraak-in-de-belgische-klimaatzaak-deel-1/ .
[59] K. Hectors and C. Bimbenet, "Brusselse Hof van Beroep veroordeelt België tot voeren van strenger klimaatbeleid", 1 December 2023, Schoups Omgevingsrecht, https://schoups.be/nl/news_items/brusselse-hof-van-beroep-veroordeelt-belgie-tot-voeren-van-strenger- klimaatbeleid .
[60] Court of AppealBrussels, 2nd Chamber,Civil Section, no. 2023/8411, Klimaatzaak ASBL v. BelgianState, Walloon Region,Flemish Region and Brussels Capital Region, Judgment of 30 November 2023, nr. 296; https://prismic- io.s3.amazonaws.com/affaireclimat/a2250051-e0b7-4488-8944-14c33a82d017_SP52019923113012320+fr.pdf .
[61] E. De Clercq and S. Dethier, "Pleitenvoor de planeet: uitspraak in de Belgischeklimaatzaak (deel 2)", 2 January2024, Leuven Blog for Public Law, https://www.leuvenpubliclaw.com/pleiten-voor-de-planeet-uitspraak-in-de-belgische-klimaatzaak-deel-2/ .

Regarding the impact of the court on standing admissibility, the doctrine allows environmental NGOs to bring a case to court, yet this is often challenged by the defendants, as seen in Case 2018/1223/A. The court considering and proving that in fact, the NGO does have standing, could have impact in the future for a more recognised standing for legal persons.

A remarkable trend in these Belgian climate cases is that only in one of the cases discussed, it was the claimant that raised the argument of climate change.In the remaining four cases, the defendant, which included the national or local government, and on one occasion, the Court itself, upheld the commitment to protecting the climate. This stems from the fact that climate change initiatives can sometimes come into conflict with other rights and economic interests. For example, in Case 147/2022, the Flemish Government vehemently opposes the claims that their contest Decree infringes on the rights of individuals to use fuel oil boilers, and they argue that their measures are justified by the paramount need to reduce greenhouse gas emissions and soil pollution. The government's position hinges on the contention that their climate-related goals must take precedence. Similarly, in Case 43/2021, the Walloon Government argues that climate protection necessitates measures that may appear to infringe upon individual liberties. In these cases,the Court is entrusted with the task of weighing the often-competing claims and simultaneously upholding the principles of justice, legality and fairness.

Overall, while the court cases highlight the urgency of addressing climate change, they also demonstrate the challenges in enforcing specific emission reduction targets through the legal system. The decisions emphasize the need for a balanced approach between addressing climate change and protecting the environment on one hand, and respecting individual rights while encouraging policy flexibility and incentives for sustainable practices on the other.

# 4. Conclusion and Challenges

The concept of the rule of law forms the bedrock of modern constitutional democracies in the EU, encompassing values like democracy, human rights, and environmental protection. In this context, strategic legal actions initiated by citizens and NGOs are crucial for upholding these values and making progress on issues of public concern.This report has shed light on important climate-related legal cases in Belgium, illustrating the growing significance of such actions in the country. However, it is vital to acknowledge the obstacles and complexities involved in seeking climate justice through the legal system.

Belgium's legal landscape is intricate, operating within the civil law tradition and a pyramid structure of courts. While these structures aim to provide a solid legal framework, they can be challenging for ordinary citizens and organizations to navigate, especially in cases related to complex issues like climate change.
Another significant challenge arises from the division of responsibilities for climate change between federal and regional authorities. Each entity has its own priorities, making it crucial to effectively coordinate efforts to comprehensively address climate concerns.

While the requests in the mentioned cases were deemed admissible (and thus standing was recognised), it is important to note that standing requirements in Belgian law can still pose challenges for legal entities seeking to initiate climate-related legal proceedings. There have been improvements in broadening opportunities in 2013 when the Constitutional Court opened up standing possibilities in all cases, also for environmental associations and organizations. However, the requirement for a current and existing interest could still form a barrier as this is an extra step to be fulfilled in order to start a case. The interest of a legal entity includes that which affects the existence of the legal entity, its assets, and its moral rights. Unless an exception is provided for by law, the interest of a legal person cannot rest solely on its corporate purpose, laid down in theirstatutes62. To prove the genuine interest for a legal person can thus be harder. Even with a legal purpose and a clear objective to challenge a measure, defendants often still challenge the standing of the legal person in hopes of declaring the claim inadmissible. Case 2018/1223/A is an example of this, where both the legal and the natural persons' standing was challenged by the defendants.

In summary, strategic climate litigation in Belgium is a vital tool for advancing climate action and safeguarding the environment. Nevertheless, it is essential to address the challenges posed by legal complexities, division of responsibilities, standing requirements, and the principle of the separation of powers to ensure effective climate justice through the legal system.

[62] Hof van Cassatie, 4 February 2008, RW 2010, 197.

# Annex

The case of neighbours against chemical company 3M in Antwerp concerns neighbourhood nuisance caused by PFAS (per- and polyfluoroalkyl substances) contamination [63]. While not strictly a climate litigation case, but rather an environmental one, the author chose to briefly include it in the Annex due to its potential future impact, especially within the context of climate litigation.

The plaintiffs claim that they suffer excessive nuisance due to the defendant's proximity to an industrial activity that produces PFAS. They claim damages under Article 3.101of the Civil Code for excessive neighbourhood nuisance. The defendant disputes the excessive nuisance, claiming that the nuisance is not sensory and that the plaintiffs deliberately moved near this activity.

The Peace court of Antwerp considers the criteria for excessive nuisance, including timing, frequency, intensity, and the public use of the property in question. It stresses that the nuisance need not necessarily be sensory. The court concludes that there is pollution as a result of the defendant's activities and that the plaintiffs are experiencing nuisance.
The case highlights the importance of assessing excessive neighbourhood nuisance and the responsibility of businesses in relation to pollution [64]. Compensation is currently set at 2.000 euros, but some note that this is a provisional amount. It might rise in the future when additional damage is found, such as physical damage or depreciation of the house. [65]

It is also noted by commenting lawyers that "this is the first PFAS pollution case in Belgium and even in the European Union. The ruling in this case may serve as an important precedent for other local residents who live close to the 3M factory also want to take legal action for damages caused by the chemical pollution" [66]. Lawyer Alexis Lenssens predicts that more residents will join a claim for damages and that group claims may arise to represent the interests of the affected community and prevent cases from being time-barred. The emphasis on liability in this case opens doors to hold specific companies or individuals accountable for damage to the environment and climate. As stated by Lawyer Lenssens, "The verdict has shown that even if you get an environmental licence, you remain responsible for the health of the people around you". This case has been mentioned because, even without being a climate litigation stricto sensu, may have an impact also in this kind of litigation in the future, opening the courts' doors.

[63] Vred. Antwerpen(5de kanton), 15 mei 2023, T.Vred./J.J.P. 7-8/2023.Please note that the judgmentis not publicly available but has been reviewed and considered by the law journal "Tijdschrift van de Vrederechters".
[64] Vred. Antwerpen(5de kanton), 15 mei 2023, T.Vred./J.J.P. 7-8/2023.
[65] J. Truyts,L. Dekock, "3M moet gezinuit Zwijdrecht schadevergoeding betalen voor PFAS-vervuiling: 'Belangrijk precedent'", vrt.be, 16 May 2023, https://www.vrt.be/vrtnws/nl/2023/05/15/chemiebedrijf-3m-moet-gezin-uit-zwijndrecht-schadevergoeding-bet/ .
[66] J. Truyts,L. Dekock, "3M moet gezinuit Zwijdrecht schadevergoeding betalen voor PFAS-vervuiling: 'Belangrijk precedent'", vrt.be, 16 May 2023, https://www.vrt.be/vrtnws/nl/2023/05/15/chemiebedrijf-3m-moet-gezin-uit-zwijndrecht-schadevergoeding-bet/ .

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

## *COUNTRY REPORT: France*

This study/report has been prepared by Milieu Consulting SRL under Horizon RED SPINEL Project N°101061621. The main authors of the study/report are Sophie Patras reviewed by Marta Ballesteros.

The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

**Milieu Consulting SRL**, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: marta.ballesteros@milieu.be; laura.vona@milieu.be; web address: www.milieu.be.

October 2023

# Table of contents

Abbreviations........................................................................ p.55

1.Introduction........................................................................ p.56

2. Overview of Strategic Climate Litigation cases in France..... p.57

3. Analysis.............................................................................p.10

4. Conclusion and Challenges..................................................p.12

# Abbreviations

| | |
|---|---|
| CEU | Central European University |
| CoE | Council of Europe |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| ECHR | European Convention of Human Rights |
| EU | European Union |
| GHG | Greenhouse Gas |
| HCC | High Council on Climate |
| IPCC | Intergovernmental Panel on Climate Change |
| LCNS | Low-Carbon National Strategy |
| NGO | Non-Governmental Organisation |
| NOEGW | National Observatory of the Effects of Global Warming |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UNFCCC | United Nations Framework Convention on Climate Change |

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article49 of the TEU and the Preambles to the Treatyand to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law. The 2020 Rule of Law report by the European Commission confirms this meaning and states 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [3].

Within this context, dissenting actions broughy up by citizens against public institutions' decisions are at the heart of EU democracies and aim at ensuring necessary progress on issues of public concern. These cases are considered positive examples of dissensus because they are carried out in line with the rule of law and democratic principles and without breaching the law. As analysed in other reports within this project, there are also examples of dissenting actions by populists or nationalist movements seeking to subvert democratic principles, fundamental rights and the rule of law. For the purpose of this work, "dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors,including state and non-state actors,seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy" (Brack and Coman 2023).

This report provides an overview of relevant case law related to strategic litigation actions related to climate change, initiated by citizens and NGOs before national courts. The report will also analyse the arguments and impact of these cases in relation to EU and national strategic objectives. The timeframe for this research has been set in the period between the signature of the Paris Agreement in 2015 and today.

[1] COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.
[2] Regulation (EU, Euratom)2020/2092 of the European Parliament and of the Council of 16 December2020 on a general regime of conditionality for the protection of the Union budget available at https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG
[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT, THE COUNCIL,THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEEOF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

# 2. Overview of Strategic Climate Litigation cases in France

In France, three climate litigation cases have been brought to national or regional courts between 2015 (date of the signature of the Paris Agreement) and today. They evidence the trend and critical importance that this type of strategic litigation action is having in France. It also reveals the rising awareness of judges for climate change issues. Through tort law and fundamental rights, the French judges acknowledged their role and ruled in favor of the environment, without going so far as to dictating public authorities the exact measures to adopt or acknowledging new legal principles without a proper legal basis, thus respecting their constitutional attributions and providing credibility to their judgements.

In France, the judicial system is based on a dual order. On the one hand, the administrative order is competent to review the legality of public authorities' acts and omissions, and to decide on the State liability. On certain occasions, administrative judges can also order redressing measures through injunctions to the authorities. On the other hand, the judicial order covers the civil and criminal jurisdiction. The jurisdictions belonging to the judicial order have competence to deal with civil, social, commercial, and criminal matters. It is designated as the ordinary courts. It can marginally be competent to rule on cases of manifest unlawful act from a public authority ('voie de fait'), when the act in question is so serious that the author can no longer be considered as acting as a public authority.

Overall, regardless of the competent judicial order, the legal standing is based on natural or legal person's interest and quality to act. Although the French legislator recently established a collective action in environmental matters granted to organisations representing a public interest (including environmental protection) [4], there is no room for actio popularis in the French legal system. Most climate-related actions are led by Non-Governmental Organisations (hereinafter 'NGOs') which purpose is to protect nature and environment [5].
Traditionally, climate-related litigations in France are brought before the jurisdictions of the administrative order. They usually consist of either tort or actions for annulment against public decisions (especially in urbanism matters) directly affecting one or several claimants.

Yet, in recent years, the legislator also introduced several new grounds for action allowing a deeper involvement of both the administrative and judicial (administrative or civil) courts in climate change litigations. It started in 2016, when the law on the recovery of biodiversity, nature,and landscapes [6] created a new ground for tort liability: the ecological prejudice ('prejudice écologique'), henceforth led down in articles 1246 to 1251 of the French Civil Code. In 2017, a new law [7] also established a due diligence duty upon big private companies, requiring them to publish challengeable vigilance (due diligence) plans (i.e. companies' corporate governance action plans monitoring their own impact on society and the environment), revealing the French legislator's intention to involve, not only public actors but also the private stakeholders in climate change matters.
The following report therefore exposes, in chronological order,three landmark cases instigated by NGOs and challenging the State to nourish positive public dissensus on climate change matters.

---

[4] Article L.142-3-1 of the French Environmental Code, introduced by article 89 of Law n° 2016-1547 of 18 November 2016 of modernisationof Justice of the XXIstCentury, (Loi n°20161547 du 18 novembre2016 de modernisation de la justicedu XXIe siècle), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/.
[5] Article L.142-1of the French Environmental Code,https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006832964/2002- 02-28#:~:text=141%2D1%20justifie%20d'un,elle%20b%C3%A9n%C3%A9ficie%20de%20l'agr%C3%A9ment.
[6] Article 4 of Law n°2016-1087 of 8 August 2016 onrestoration of biodiversity, nature,and landscapes (LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la natureet des payasages), LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages (1) - Légifrance (legifrance.gouv.fr).
[7] Law n° 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and contracting companies (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/.

## 2.1 The 'Triangle of Gonesse' case: a first partial victoryfor positive dissensus through strategic litigation in France

Four successive judgements have been issued in this case involving a significant town planning project of a constructible agricultural area named 'The Triangle of Gonesse'.

The first judgement was issued by the Administrative Tribunal of Cergy-Pontoise on 6 March 2018 [8] against an administrative decision adopted in 2016, and was overruled by the Administrative Court of Appeal of Versailles on 11 July 2019 [9]. The case was then reintroduced from another angle on 27 November 2017 before the Administrative Tribunal of Cergy-Pontoise, which ruled on the case on 12 March 2019 [10] before another lawsuit, related to the same issue, was lodged before the Administrative Tribunal of Montreuil. The latter issued a judgment on 15 November 2019 [11].

This report will focus on the three judgments ruled in the first instance. Indeed, the ruling of the Administrative Court of Appeal of Versailles does not provide a more detailed legal reasoning that would justify an in-depth analysis in the present report. It solely overruled the proportionality test carried out by the first judges and counterweighed the arguments in favor of the defendant. For that reason, these two decisions will be analysed together in section 2.1.1. below.

Although the applicants did not challenge the administrative authorities for their actions or inertia against climate change itself, the climate change argument successfully penetrated the legal debates to prevent a public work project affecting greenhouse gas emissions (hereinafter 'GHG emissions'), the value maximisation of agricultural land, nature,and the environment as a whole. This case also had great repercussions in the public sphere as the contested project caused several public protests and a 17 days-long strike in the so-called 'Concerted Development Zone' ('Zone d'Aménagement Concertée' - ZAC)of the Gonesse Triangle' [12]. A ZAC is an area in which a local authority or a public establishment decides to intervene to realise or have realised a town- planning or town-equipment project in view to sell it or grant it later to public or private users [13].

### 2.1.1 Administrative Tribunal of Cergy-Pontoise, judgment n° 1610910 and n°1702621, 6 March 2018, France Nature Environnement et al. (Triangle of Gonesse (I))

*Facts*

On 21 September 2016, the department prefect of Val d'Oise (the competent local authority) adopted an administrative authorisation allowing a large town planning project called 'The EuropaCity project'. The objective was to develop an important shopping and leisure center covering 80 of 300 hectares of agricultural land located in the municipality of Gonesse right between the French capital and two major airports (Bourget and Roissy-Charles de Gaulle).

---

[8] Administrative Tribunal of Cergy-Pontoise, n°1610910and n°1702621, 6 March 2018, France Nature Environnement et al. (Triangle of Gonesse (I)), https://cergy-pontoise.tribunal-administratif.fr/decisions-de-justice/dernieres-decisions/annulation-de-l-arrete-creant- la-zac-dite-du-triangle-de-gonesse.

[9] Administrative Court of Appeal of Versailles, n° 18VE01634 and 18VE01635, France Nature Environnement et al. (Triangle of Gonesse (II)), https://www.legifrance.gouv.fr/ceta/id/CETATEXT000039095917.

[10] Administrative Tribunalof Cergy-Pontoise, n°1711065, n°1801772 and n°1801788, 12 March 2019, France Nature Environnement et al. (Triangle of Gonesse (III)), https://cergy-pontoise.tribunal-administratif.fr/decisions-de-justice/dernieres-decisions/urbanisme- annulation-du-plan-local-d-urbanisme-de-gonesse.

[11] Administrative Tribunal of Montreuil, n° 1902037, 15 November 2019, France Nature Environnement et al. (Triangle of Gonesse (IV)), http://montreuil.tribunal-administratif.fr/Actualites/Actualites-Communiques/Les-travaux-de-la-ligne-17-Nord-du-reseau-de- transport-du-Grand-Paris-Express-sont-partiellement-suspendus-par-le-tribunal-administratif-de-Montreuil.

[12] Le Monde, 'Evacuation de la ZAD du Triangle de Gonesse, où doit être construite la future gare du Grand Paris Express', Agence France Presse, 23 February 2021, (lemonde.fr).

[13] Article 311-1of the French Town-planning Code

Considering that this project would have considerable adverse effects on nature and environment and would impair the value of agricultural lands, a consortium of eight NGOs (France Nature Environnement, Collectif pour le Trianglede Gonnesse, Val-d'Oise Environnement, France Nature Envrionnement Île-de-France, Vivre mieux ensembleà Aulnay-sous-bois, Association familiale de défense des consommateurs, de l'environnement et du logement (AFCEL 95), les Amis de la Confédération paysanne, Mouvement national de lutte pour l'environnement (MNLE93)) challenged the decision before the Administrative Tribunal of Cergy-Pontoise on 20 November 2016.

*National and EU Legislation*

This action was an action for annulment for misuse of powers ('recours en annulation pour excès de pouvoir'). Grounded on an old case-law [14] of the highest administrative jurisdiction (hereinafter 'the Council of State'), it allows any claimant to challenge the legality of any act or omission of the public administration, even without a textual legal basis, so long as the latter is directly affected by the challenged act. This action constitutes the ordinary legal remedy against public acts. It enables the administrative judge to examine the competence, the form, and the substantive legality of challengeable decision (act or omission) of the public administration.
Administrative procedural rules are provided primarily in the Code of Administrative Justice [15] and in the jurisprudence of the Council of State. The rules on standing are exclusively defined in the jurisprudence of the Council of State. Accordingly, a sufficient interest (intérêt à agir) is required, which means that the act must affect the applicant [16] in a sufficiently direct and certain way [17].

For NGOs to go to the French Administrative courts, the legal standing can be either provided by the law or based on a settled case-law allowing defence associations to protect a particular interest affected by a challenged administrative act [18]. Specific rules have been adopted in relation to associations for the protection of the environment. In environmental and climate change matters, the legislator provided NGOs with a specific legislative legal standing. French law grants wide access to justice for associations concerning the protection of environment, with Act No 95-101 of 2 February 1995 on strengthening environmental protection [19]. Based on this Act, Articles L.142-1 to L.142-3 of the French Environmental Code [20] provide the rules for standing of environmental non- governmental organisations (NGOs) (see sub-section 2.2).

Both standings lay down on the statutory purposes of the applicants. Accredited associations and "any association which statutory purpose is the protection of the environment' may bring proceedings to the administrative courts. As regards the merits, in this case, the applicants challenged the lawfulness of the procedure followed for the adoption of the challenged decision. They mainly considered that the mandatory environmental impact assessment that should have preceded the authorisation had not been carried out properly.

---

[14] French Council of State, decisionn° 86949, 17 February 1950, Ministerof Agriculture v. Dame Lamotte,https://www.conseil-etat.fr/fr/arianeweb/CE/decision/1950-02-17/86949.
[15] See https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933/
[16] It may be any natural or a legal person with a capacityto act under 2.2 below.
[17] See definition of interest to act providedby the Council of State in https://www.conseil-etat.fr/pages/glossaire#I
[18] French Council of State, decisionn°25521, 28 December1906, Trade union of managers-hair dressersof Limoges, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007635225/
[19] See https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000551804; E-Justice portal, Access to justice in environmental matters, France, https://e- justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?FRANCE&action=maximizeMS&clang=en&idSubpage=1&member=1#_ftn14
[20] See https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074220/LEGISCTA000006159218/#LEGISCTA000019280519

Indeed, article R. 122-5 of the French Environmental Code [21] applies to public works and space planning projects and requires the implementation of a prior impact assessment of the said project. This impact assessment shall contain,among several other elements, 'an analysis of the direct and indirect, temporary (including during the works phase) and permanent, short-, medium- and long- term negative and positive effects of the project on the environment, in particular on the elements listed in [pagragraph] 2'. The latter paragraph refers to an assessment of the 'initial state of the concerned area and its milieu', including in particular 'the climate factors at stake'. This article also commands that the content of the impact assessment is proportionate to the environmental sensitivity of the area affected by the project at stake. Once adopted, these impact assessments are made available to inform the general public of the impact and expected outcome of the project in question, thus allowing stakeholders to challenge it when necessary.

*Arguments*

In this first case, the claimants argued in essence, and among other arguments, that the prior environmental impact assessment of the authorised project was insufficient, therefore affecting the procedural lawfulness of the challenged decision. They also argued that the public participation to the concerted decision to authorise such consequent land planning project was insufficient. They consequently challenged the legality of the decision on procedural grounds, claiming that it was adopted in breach of article R. 122-5 of the French Environmental Code.

The defendant however challenged the legal standing of the applicants due to their lack of capacity to act and that the NGO's arguments were unfounded. The jurisdiction was therefore invited to appraise the soundness and completeness of the prior impact assessment allowing the EuropaCity project.

*Decision*

By its decision, the Administrative Tribunal of First instance dismissed six of the eight applicants and cancelled the challenged decision on the sole ground of article R.122-5 of the Environmental Code, considering that the latter was unlawfully adopted due to the flaws of the environmental impact assessment.
Firstly, regarding the legal standing of the applicants, the Tribunal considered that only two of the eight associations were admissible (paragraphs 3 and 4).

It has to be noted that the judgment does not refer to article L.142-1 of the French Environmental Code, nor does it mention any case-law related to personal admissibility. However, in paragraphs 3 and 4 of the judgment, the Tribunal analysed the statutory purposes of each of the applicants.
Regarding the six inadmissible NGOs, the French considered that the statutory purpose these associations did not protect specifically nature and the environment. According to the judgment, the six dismissed associations were indeed considered to have a 'too wide and extensive' statutory purpose (paragraph 3). Although not referring expressly to article L. 142-1 of the French Environmental Code, the reasoning applied by the judge makes it tempting to assume that this provision was applied. The same cannot be inferred for the two remaining NGOs (AFCEL 95 and MNLE 93). Indeed, the national judge considered that these two associations had a limited geographical scope (two departments) which was affected by the challenged decision. It then concluded that it was enough to justify their personal interest to act, notwithstanding the fact that the latter does not expressly allow the association to take part to court proceedings (paragraph 4) . This reasoning, although not referring to any legal ground whatsoever, seems to refer to the criteria applied to defense associations acknowledged by case-law.

[21] Which transposes Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21, https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex%3A32011L0092.

The jurisdiction then examined the appropriateness of the environmental impact assessment.

In principle, according to a settled case-law [22], the administrative judge established that a decision is unlawful for a breach of procedure or forms solely if it consequently had a substantial influence on the outcome of the decision or deprived the applicant concerned from a guarantee. In this case, the jurisdiction transposed this principle to the appraisal of the impact assessment considering that 'any of its inaccuracies, omissions or insufficiencies would affect the legality of the challenged decision solely if they would detrimentally affect the population's information or if they would influence the administrative authority's decision' (paragraph 6).

The Tribunal then considered, among other elements, that the impact assessment failed to take properly into account the adverse effects of the project on GHG emissions and air quality. In support to its reasoning the jurisdiction observed that the Environmental Authority [23], which had been consulted before the launching of the project, had also pointed out its adverse effects on climate change and GHG emissions. Based on the Autority's opinion, it observed that the impact assessment failed to take properly into account the important increase of GHG emissions that would come out of the flows of tourists coming from Paris and the two airports (paragraph 7). The judgment also considered that the impact assessment failed to take into account the cumulative environmental impacts of the EuropaCity project with the other projects ongoing in the same area. Indeed, together with the leisure center project, the competent authorities were planning to build a new subway line (the line 17) connecting the City of Paris ('le Grand Paris') to Bourget airport.The latter was also subjectto an environmental impact assessment, which had not been taken into account by the local competent authority in the final challenged decision. In its judgement, the jurisdiction considered that the two projects were intertwined, because the construction of this subway line included the building of a station in the EuropaCity area to allow passengers to stop in the Triangle of Gonesse area (paragraph 8).

Consequently, the jurisdiction considered that the several shortcomings of the impact assessment were both failing to adequately inform the public and influencing the essence of the challenged decision. It also considered that the complements to the impact assessment that followed the opinion of the Environmental Authority [24] were insufficient to compensate the gaps of the impact assessment. The Tribunal therefore annulled the decision. Significantly, it shall be observed that the Tribunal solely considered the applicants' arguments related to the appropriateness of the impact assessment, which were, according to the administrative judge, sufficient to void the decision. It shall be noted however, that this judgment was overruled in appeal by the Administrative Court of Appeal of Versailles on 11 July 2011 [25]. The Court considered, on the contrary, that the impact assessment of the EuropaCity project was sufficient and proportionate.

[22] Council of State, Plenary Assembly, decision n° 335033, 23 December 2011, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000025041089/
[23] The Environmental Authority is a body of the for General Inspection for Environment and Sustainable Development (Inspection Générale pour l'Environnement et le Développement Durable), which is itselfpart of the French Ministryof Environment. The Authority is particularly taskedwith consultative missions, including to issueopinions, availed to the generalpublic, on the impact assessments of major projects and programmes on the environment. It also proposemanagement measures to avoid, mitigateor compensate such impacts, https://www.igedd.developpement-durable.gouv.fr/l-autorite-environnementale-de-l-inspection-a376.html.
[24] Environmental Authority, Deliberated opinion on the creation of the ZAC of the Triangle of Gonesse (93-95), n°2015-103, 2 March 2016, https://www.igedd.developpement-durable.gouv.fr/les-avis-rendus-en-2016-a2353.html#H_Seance-du-2-mars-2016.
[25] Op. cit.

### 2.1.2 Administrative Tribunalof Cergy-Pontoise, judgmentn°1711065, n°1801772 and n°1801788, 12 March 2019, France Nature Environnement et al. (Triangle of Gonesse (II))

In this case,on 27 November 2017, ten associations (Francenature environnement, Collectif pour le triangle de Gonesse, Val d'Oise environnement, France nature environnement Île de France, Les amis de la terre Val d'Oise,Des terres, pas d'hypers!, Les Amis de la Confédération paysanne, Mouvement national de lutte pour l'environnement 93, Environnement 93 et les Amis de la terre France) challenged the reviewed local town planning scheme adopted on 25 September 2017 allowing the development of the EuropaCity project.

*National and EU Legislation*

The claim of a manifest error of appreciation leads the administrative judge to operate a proportionality test on the substance of the decision.

In this case, the jurisdiction was asked to consider the existence of such a manifest error through a compatibility appraisal of the decision with articles L. 101-1 and 101-2 of the French Code of Urbanism. Article L. 101-1 states that 'the French territory is a common heritage of the nation', whereas article 101-2 sets out different objectives that the public authorities must meet and implement throughout their action to achieve the sustainable development goals. They include among others: the protection of natural environments and landscapes, the preservation of air, water, soil and subsoil quality, natural resources, biodiversity, ecosystems and green spaces (paragraph 6); the combat of the artificialization26 of land (change of land use), with the aim of eventually achieving zero net artificialisation (paragraph 6a); and the combat and adaptation to climate change, reducing greenhouse gas emissions, saving fossil fuels, controlling energy consumption and producing energy from renewable sources (paragraph 7).

As in the previous case, the legal standing allowing NGOs to act before an administrative court is grounded on article L. 142-1 of the French Environmental Code or on a settled case-law according to which their action is admissible if their statutory purpose protects specifically the interests affected by the challenged decision. However, in this case, the judgment remained silent on this issue, however, as the NGOs acted before the Court, it is assumed that the standing rules were applied.

*Arguments*

In this case, the applicants mainly challenged the decision of the competent local authority to launch a public work project leading to the artificialization of 248 hectares of agricultural land. In support of their application, the associations challenged, among other aspects, the adverse effects of the project on nature, air quality and climate change. Although the arguments related to climate change were discreet and put forward together with several other environment-related claims, it remained one of the grounds leading the jurisdiction to cancel the challenged decision.

In this case, they argued that the decision's adverse effects on nature and climate change were disproportionate and hence affected the substantial legality of the decision itself. The decision was therefore challenged from a new perspective: the internal legality of the decision rather than the procedural steps preceding the decision [27].

---

[26] Under French law, the artificialisation of lands refers to the conversion (or use) of a natural,agricultural or forest lands into an artificial area serving man-made purposes.

[27] For a detailed analysis, see: Fleury, M., 'Affaires du Triangle de Gonesse (2019)', Les Grandes Affaires Climatiques, (Dir. Cournil, C.), Confluence du Droit, DICE Edition, Aix-en-Provence, 2020, pp. 379 – 390, https://books.openedition.org/dice/11238?lang=en.

The defendant on the contrary put forward the balance and proportionality of the challenged decision between the foreseen economic,social and town developments advantages of the project with its environmental impact. With respect to the climate change argument, the jurisdiction was therefore asked to assess the material legality to determine whether the competent authority had committed a manifest error of appreciation.

As for the applicants' legal standing, the judgment remained silent. One conclusion can therefore be inferred: the legal standing rules are presumed to be complied with on grounds that NGOs' their statutory purpose specifically covered the protection of the interests at stake in the main proceedings. It should be observed in this respect that, the applicants being almost the same as in the first case, it is rather odd that the defendant did not challenge the applicants' standing based on the previous judgment findings.

*Decision*

In this judgment, the Tribunal considered that the challenged decision was unlawful for three reasons: The environmental impact assessment was insufficient and failed to consider alternative measures to prevent the artificialisation (land use change)of agricultural lands; it was incompatible with the noise exposure plans related to the two neighbouring airports (Roissy-Charles de Gaulle and the Bourget): and the authority committed a manifest error by considering the artificialisation (change of land use) of more than 200 hectares of land appropriate.

Although the decision presented several interesting aspects, climate change arguments were only put forward in the final part of the decision (paragraphs 9 and 10).

In one single paragraph (paragraph 10), the administrative judge concluded that the administrative authority failed to balance its decision adequately and proportionately. Although the project could have had positive impacts on the local economic growth and employment, such projected benefits would not compensate the adverse environmental effects induced by the decision. The Administrative Tribunal indeed considered, firstly, that the lands in question were particularly valuable and fertile. It then explained that the decision was likely to disrupt the balance between urban development and the sparingly use of natural spaces. It finally recalled that several opinions of competent bodies and valuable expertise had put forward the adverse impact of the project on the protection of natural environments and landscapes, the preservation of air quality, natural resources, biodiversity and ecosystems, and was likely to increase greenhouse gas emissions. The challenged decision was therefore disproportionate due to a manifest error of appreciation.

It should be noted that in the aftermath of this case, and after the third meeting of the Environmental Defence Council on 7 November 2019 [28] the Government abandoned the EuropaCity project [29].

---

[28] The Environmental Defence Council is a restricted Council of the Ministers meeting reuniting the President of the FrenchRepublic and several Ministers (Environment, Budget, Economy, Agriculture, Health, Housing, Local authorities, Overseas territories, and Foreign Affairs) to discuss environmental matters in a transversal way, https://www.elysee.fr/emmanuel-macron/conseil-de-defense- ecologique.

[29] Allix, G., 'EuropaCity : le projet de mégacomplexe définitivement abandonné', Le Monde, 7 Novemeber 2019, https://www.lemonde.fr/economie/article/2019/11/07/emmanuel-macron-annonce-l-abandon-du-megacomplexe-europacity-au-nord- de-paris_6018357_3234.html.

### 2.1.3 Administrative Tribunal of Montreuil, judgment n° 19020387, 19 November 2019, France Nature Environnement et al. (Triangle of Gonesse (III))

*Facts*

This last decision was also related to the important town planning project of the Triangle of Gonesse. This time,through an application introduced on 22 February 2019, the applicants (France Nature Environnement Île-de-France, Collectif pour le Triangle de Gonnesse, les Amis de la Confédération paysanne, les Amis de la Terre du Val d'Oise, le Mouvement national lute pour l'environnement, Val d'Oise environnement, « des Terres pas d'hypers ! », Environnement 93, le Réseau associations pour le maintien d'une agriculture paysanne en Île-de-France and Vivre mieux ensemble à Aulnay-sous-bois) challenged the other side of the project: the construction of a subway line connecting Paris to the train and airport station Bourget (hereinafter, the line 17).
As already mentioned, this debated project included both the construction of a shopping and leisure center, and the construction of a subway line connecting this center to Paris and the Bourget airport and RER (train) station.
Still fighting against the project as a whole, the applicants challenged the administrative authorisation to launch the public work building the station.

*National and EU Legislation*

This case was also an action for annulment of an administrative act for misuse of power.
The applicants' legal standing is mainly grounded on article L. 142-1, second indent of the French Environmental Code which allows associations accredited by administrative decisions to act before administrative courts against any decision having a direct link with their statutory purpose or activities (1) and having damaging effects on the environment (2).

With respect to the climate change aspects of this case,the legal grounds invoked by the applicants were the same as the first judgment issued by the Administrative Tribunal of Cergy-Pontoise issued on March 2018: Article R.122-5 of the French Code of Urbanism, transposing Directive 2011/92/EU, which requires public work to be subject to a prior environmental impact assessment. According to Directive 2011/92/EU, as amended by Directive 2014/52/EU, the impact assessment needs to consider the effects of the project on climate change.

*Arguments*

First, the defendant challenged the applicants' interest to act. No other element of the defendant's argument is provided by the judgment regarding the legal standing at stake. However, it can reasonably be inferred from the case that the key issue at stake was the existence of a direct link between the alleged climate change and environmental consequences of the challenged decision with the statutory purposes of each NGOs.

On the contrary, the applicants challenged the administrative decision authorising the project aimed at building the subway line 17. The main legal arguments were focused on nature legislation and protected species and the devaluation of agricultural land due to their projected change of use, which is not covered by the present report. Yet, the applicants also argued that the prior impact assessment of this project was incomplete and failed to analyse properly climate change impacts as well as the cumulative effects of this project with those stemming from the EuropaCity project within the Concerted Development Zone of Gonesse.The strategic axis of this claim was hence to mirror the reasoning of the Tribunalof Cergy-Pontoise to challenge the legality of the second authorization in the light of the alleged gaps of the prior environmental impact assessment.

With respect to the climate change aspects of this case,the jurisdiction was asked to analyse the proportionality and completeness of the environmental impact assessment carried out for the second space planning project.

In particular, the judge was asked to consider the correct application of the existing legal framework which requires the impact assessment to cover several elements, including the effects on climate change.

*Decision*

In paragraph 2 of the decision, the Administrative Tribunal appreciated the applicants' legal standing. It paid a particular attention the existence of an accredited association authorized by article L.142-1, second indent of the French Environmental Code to act against the challenged decision. According to the French judge, the association France Nature Environnement Île-de- France was an accredited association which purpose was "to monitor the safeguard and value maximization of the environment and of the quality of life in all its aspects" and the challenged decision was likely to affect directly the environment in three department within the territorial scope of the association (paragraph 2). The broad wording of the association's statutory purpose tends to put in perspective the findings of the previous judgment ruled in March 2018,which was probably compensated by the limited and relevant territorial scope targeted by the NGO. More interestingly, the Tribunal considered that the admissibility of this single NGO was sufficient to analyse the merits of the case and found unnecessary to look into the admissibility of the other applicants. The latter also means that the following reasoning of the judge was taken in contemplation of the sole submissions of this NGO.
Without quoting the previous judgment of March 2018, the jurisdiction concluded that the challenged impact assessment was indeed insufficient and failed to correctly appraise the cumulative effects of the two simultaneous projects on the environment, including on GHG emissions.

In paragraph 11 of the judgment, the Tribunal considered that the Concerted Development Zone (ZAC) of Gonesse project was subject to an impact assessment identifying potential cumulative effects of the two projects on the environment due to their connections and concomitance. The jurisdiction listed such effects, hereby mentioning the increased GHG emissions, dusts and pollutants stemming from the combination of the two simultaneous public works. It also observed that the impact assessment of the ZAC lacked any quantitative or qualitative analysis of such list of effects, and further noted that the impact assessment of the subway station did not add the impacts of the ZAC in the listed measures considered to mitigate the environmental impact of the subway line.

The jurisdiction then considered that the impact assessment presented was insufficient and that the gaps prevented the correction information of the population and influenced the public decision, making it unlawful.
The Tribunal however considered that the gaps could,this time, be regularised. It therefore did not annul the decision but left a two-months period to the competent authorities to take the necessary measures to correct the discrepancies and adapt their decision.

For completeness, it shall be noted that this case still goes on. On 22 March 2022, the Administrative Tribunal of Cergy-Pontoise dismissed the action of several NGOs challenging the administrative authorization to start the construction of the planned train station in Gonesse following the same strategy as described above. Contrary to the findings of the Tribunal in November 2019, the administrative judge considered that the project related to the train station constituted a separate project from the construction of line 17 and that the proportionality of the impact assessment should hence be appraised separately [30]

[30] Administrative Tribunal of Cergy-Pontoise, decision n° 1811963, 22 March 2022, https://cergy-pontoise.tribunal- administratif.fr/decisions-de-justice/dernieres-decisions/triangle-de-gonesse-le-tribunal-rejette-le-recours-exerce-par-plusieurs- associations-de-defense-de-l-environnement-contre-le-permis-de-construire.

## 2.2 The Grande-Synthe case: an acknowledgment of judicial review of public actions in climate change matters vis-à-vis the binding effects of the reduction objectives of GHG emissions

This case is constituted of three administrative decisions and an application before the European Court of Human Rights (hereinafter 'The ECtHR'), which is still pending at the time of the report.

### 2.2.1 State Council , interlocutory decision n° 427301, 19 November 2020, Municipalityof Grande-Synthe (I)

*Facts*

In this case [31], the municipality of Grande-Synthe, together with its mayor, acting both in his own name and as the decentralised authority, challenged the State authorities for failure to take the necessary measures to reduce climate change.

In three letters addressed respectively to the President of the French Republic, the Prime Minister and the Minister for ecological transition (hereinafter 'the highest competent authorities'), the complainants exhorted the French State to take positive measures to comply with France commitments under the Paris Agreement. The letters also invited them to undertake legislative and regulatory initiatives to create a legally binding obligation of "climate priority" likely to make any act liable to increase greenhouse gas emissions (hereinafter 'GHG emissions') unlawful.

After sending these letters, tantamount to an administrative review ('recours gracieux'), the absence of an answer within a two-months period constituted an implicit administrative decision, challengeable before the administrative jurisdictions.
The same complainants therefore initiated a judicial challenge before the Council of State. In the course of that administrative judicial action, two other municipalities (Paris and Grenoble)and four associations (Oxfam France, Greenpeace France, Notre Affaire à tous, and Fondation pour la Nature et l'Homme) intervened to support the claim.

*National and EU Legislation*

This administrative judicialaction was, again,an action for annulment of an administrative decision. Articles L.911-1 and L.911-2 of the Administrative Justice Code ('Code de justice administrative') also allow the judge, upon application or ex-officio, to issue injunctions against a given public authority.
In this case the applicant challenged the compatibility of the implicit decision not to take further actions to reduce emissions causing climate change with several international, EU and national legal acts:
First, the applicants invoked the Paris Agreement and the United Nations Framework Convention on Climate Change (hereinafter 'the UNFCCC').

At the national level, the claimants mainly referred to the legislative and regulatory provisions implementing the Paris Agreement. Under French Law, Article L. 100-4 of the French Energy Code implements the Paris Agreement and Annex I of the EU Regulation n°2018/842 setting binding annual GHG emission reductions by Member States [32], and a reduction of GHG emissions objective to 40% in the 1999-2030 period.

[31] Council of State, interlocutory decision n° 427301, 19 November 2020, Municipality of Grande-Synthe (I), https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042543665.
[32] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, pp. 26-42, https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex%3A32018R0842.

The French Environmental Code leaves up to the Executive power, by means of decrees, the duty to design a national strategy, called the Low-Carbone National Strategy (hereinafter 'the LCNS') [33], to meet this objective. It also requires the regulatory authorities to establish mid-term reduction objectives called 'carbon budgets' ('budgets carbones').

Based on these articles, the Government had adopted a first decree in 2015 [34], establishing carbon budgets for the following periods: 2015-2018; 2019-2023; 2024-2028 and 2029-2033. These budgets were then revised by a second decree on 21 April 2021 [35], which increased the GHG emissions ceiling for the 2019-2023 (i.e. the second carbon budget).

The claimants also referred to EU legislations. They subsidiarily asked for preliminary references in interpretation to the Court of Justice of the European Union (hereinafter 'the CJEU'). They indeed invited the French judge to ask the Court whether the Paris Agreement had a direct effect to be invoked in court, and to request an interpretation of three EU acts implementing the Paris Agreement at the EU level.

- Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [36];
- Directive 2012/27/EU of the European Parliament and of the Council of 25October 2012 on energy efficiency [37];
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [38].

*Arguments*

Through their action, the claimants indirectly challenged the adequacy of the French measures already in force (especially the 2015-2018 carbon budget) with the French commitments laid down in the Paris Agreement. They argued in substance that the measures in force at the time of their action were not sufficient to meet the Paris Agreement objectives, making the challenged implicit decision not to act further unlawful.
They concluded that bolder measures had to be taken to meet the Paris Agreement objectives and requested the administrative judge to order the highest competent authority to act accordingly.

The defendants contested the legal standing of the parties to challenge this kind of decision and argued that the adopted measure (i.e. the decree of 21 April 2020) was appropriate.

[33] The LCNS, ('Stratégie Nationale Bas-Carbone' or 'SNBC') was created by Law n°2015-992 of 17 August 2015 on the energy transition for Green Growth (Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte), https://www.ecologie.gouv.fr/strategie-nationale-bas-carbone-snbc.
[34] Decree n° 2015-1491of 18 November 2015 on national carbon budgets and the low-carbon national strategy (Décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031493783.
[35] Decree n° 2020-457 of 21 April 2020 on carbon budgetsand the low-carbon national strategy (Décret n° 2020-457 du 21 avril 2020 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041814459.
[36] Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, pp. 136-148, https://eur-lex.europa.eu/eli/dec/2009/406/oj.
[37] Directive 2012/27/EU of the EuropeanParliament and of the Councilof 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text with EEA relevance, OJ L 315, 14.11.2012,
pp. 1-56, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0027.
[38] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, pp. 16- 62, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0028, no longer in force.

The main questions that were asked to the jurisdiction were the following:

1. Do the applicants have a legal standing to challenge the opportunity for public authorities to undertake more ambition action and demand additional legislative and regulatory initiatives on climate change reduction?
2. Does the Paris Agreement have a direct effect allowing the applicants to invoke its content to challenge a national decision not to take further actions against climate change?
3. Can the national administrative judge review the legality of such decision in the light of programmatic national provisions implementing the Paris Agreement objectives.

*Decision*

On the first question: Legal Standing

Firstly, the Council of State admitted the application of the three municipalities. Quoting the conclusions of the National Observatory of global warming effects (Observatoire National sur les Effets du Réchauffement Climatique – ONERC [39]), it noted, based on scientific evidence, that these municipalities were exposed to high risks of floods and intense droughts likely to have practical, direct and certain consequences on their situation and interests. The Court concluded that these municipalities were bound to be adversely affected by climate change in the absence of effective and quickly adopted measures, therefore acknowledging their legal standing to challenge the public authorities' decision not to take further measures (paragraph 3 and 5).
The Court also admitted the action in intervention of the four NGOs on the grounds that the object of the action was in close connection with their organisational purposes, thus establishing a sufficient legal interest to support the claim (paragraph 6).

However, without further explanations, the Court straightly dismissed the individual application of the mayor considering that he merely argued that he was a citizen of the applicant municipality, and his residence was located in a submersible area (paragraph 4). An a contrario reading of the decision could lead to the conclusion that the jurisdiction expected a substantial reasoning on the adverse effects of climate change in the absence of further action rather than a hypothetic or risk of damage.
The Council of State dismissed the application to the extent that it asked for further legislative actions. Indeed, according to an established case-law and the French concept of division of powers, the relationships between the Government (embodiment of the executive power) and the Parliament (embodiment of the legislative power) are of a constitutional nature and fall outside of the administrative judges' competence (paragraph 2).
On the second question:Direct effect of the Paris Agreement
After carrying out a detailed interpretation of the relevant provisions at the international, EU, and national levels (paragraphs 9 to 11), the Council of State concluded that the Paris Agreement and the UNFCCC as such needed implementing measures and were therefore deprived of direct effect (paragraphs 12 and 18). However, it quickly balanced its finding by considering that the provisions of these two international instruments 'should nevertheless be taken into consideration when interpreting the provisions of national law, especially those quoted in paragraph 11 of the decision which, by referring to the objective they set, were precisely aiming at implementing them' (paragraph 12). By doing so, the French administrative judge gave the Paris Agreement an indirect effect,similar to the subsidiary principle of interpretation principle admitted by the CJEU in the Von Colson and Kamann case [40].

[39] The ONERC is a public body created by the law of 19 February 2001, in charge of collecting and broadcasting information on the risks of climate change. It is also entrusted with the mission to issue recommendations to limit the impact of climate change and to liaise with the Intergovernmental Panelon Climate Change – the IPCC, https://www.ecologie.gouv.fr/observatoire-national-sur-effets- du-rechauffement-climatique-onerc.
[40] CJEU, 10 April 1984, von Colsonand Kamann v. Land Nordrhein-Westfalen, C-14/83,ECLI:EU:C:1984:153, paragraph 26, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0027.

On the third question: Legality of the decision

In the last part of the decision, the Council of State attempted to review the compatibility of the challenged decision not to act further with the reduction objectives of GHG emissions laid down in the law and the revised LCNS and carbon budgets adopted on 21 April 2020. By doing so, the Council of State seems to implicitly review in concreto the feasibility and realism of the French LCNS with the GHG emissions reductions objectives (paragraphs 14 and 15).

The jurisdiction observed, first, that several reports had already underlined the shortfalls of the French policy (paragraph 14). It also noted that scientific data, including the reports of the Intergovernmental Panel on Climate Change (hereinafter 'the IPCC'), foresee an aggravation of climate risks, which lead the European Commission to propose an augmentation of the reduction of GHG emissions objectives up to 55% (paragraph 15). It then found that the decree of 21 April 2020 revised downwards the reduction objective of GHG emissions of the second carbon budget (2019-2023), creating a discrepancy in the reduction trajectory of GHG emissions and leading to postpone most of the efforts after 2020, 'according to a trajectory that has never been reached so far' (paragraph 15). On the other hand, the Council of State found that the decree maintained the objectives set out in the third and fourth carbon budgets, making it still likely to meet the reduction objectives laid down in the law. The jurisdiction however concludes that, due to these contradictory findings, it did not possess sufficient elements, at this stage of the proceedings, to evaluate such compatibility and ordered further investigations before issuing its final decision.

### 2.2.2 Council of State, decision n°427301, 1 July 2021, Municipality of Grande- Synthe (II)

*Facts*

This case [41] follows-up the first Grande-Synthe case. After the Council of State had ordered further investigations, the national authorities had to prove that the measures already in force were sufficient to match the reduction objectives of GHG emissions laid down in national, EU and international legal standards.

*National and EU Legislation*

As a continuation of the proceedings described above, the legal grounds invoked were the same.
The key legal provisions invoked were hence the Paris Agreement, the decree of 21 April 2020 revising the French LCNS and carbon budgets, and Article L 100-4 of the French Energy Code implementing the 40% reduction target of GHG emissions by 2030 laid down in the Paris Agreement and the EU regulation 2018/842.

*Arguments*

The complainants reiterated their claim according to which the decision not to take further positive actions to reduce GHG emissions was unlawful. It stems from paragraph 3 of the decision that they also tried to incidentally challenge the decree of 21 April 2020 itself through a plea of illegality ('recours en exception d'illégalité') to deprive the challenged decision of its alleged legal basis.

It can be inferred from the decision that the defendant, on the other hand, argued that the revised carbon budgets were sufficient to meet the general objective laid down in the Paris Agreement and that the objective of each carbon budgets were likely to be met without further action.

[41] Council of State, decision n°427301, 1 July 2021, Municipality of Grande-Synthe (II), https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042543665.

The main question asked to the jurisdiction was therefore whether the measures in force at the time of the Court's decision were sufficient to meet the French reduction objectives of GHG emissions.

*Decision*

On the admissibility of the plea of illegality

Arguably, the Council of State did not admit the plea of illegality, considering that the challenged implicit decision was neither grounded on the decree of 21 April 2020, nor taken for its implementation (paragraph 3). Although there was a link between the two, the Council of State rejected this approach to better examine the compatibility of the measures in force with the programmatic provisions of this decree and the general reduction objective of GHG emissions laid down in the law.

On the legality of the challenged decision

After an appreciation in concreto, the highest administrative jurisdiction ruled that the authorities' implicit decision not to take further action to curb the GHG emissions was unlawful. To come to this conclusion, the Council of State had to determine whether the French actions already in force were sufficient to uphold the trajectory that the Government had assigned itself to meet the reduction objective of GHG emissions.

First, it examined the implementation of each of the first two carbon budgets (for 2015-2018 and 2019-2023). It also evaluated their contribution to the general objective of 40% laid down in Article L.100-4 of the French Energy Code. In this respect,the judge noted that although France could be considered as a sober country with regard GHG emissions, the overall reductions of GHG emissions between2018 and 2019 (0.9%) were actually lower than the yearly objectives set out in the first (1.9%) and third (3%) carbon budgets. Although it acknowledged the defendant's argument according to which, in 2019, the carbon budget was respected, the jurisdiction considered that it was only circumstantial, due to the extraordinary situation stemming from the covid crisis. The jurisdiction concluded that this argument was therefore not relevant to appreciate the real impact of the Government's measures taken to implement its strategy (paragraph 4).

Second, the Council of State then established the existence of a serious doubt regarding the ability of the measures to be adopted under the current strategy to achieve their assigned goal. Quoting several reports and scientific conclusions, it confirmed the claimants' argument considering that, 'based on the sole measures already in force, the reduction objectives of GHG emissions allocated for 2030 would not be met' (paragraph 5). The authorities' current measures to curb the French GHG emissions and reach the objective laid down in national law and the Paris Agreement for 2030 were therefore not sufficient.

For those reasons, the challenged decision was found unlawful, and the Council of State ordered the Prime Minister to take 'any useful measure allowing to curb the GHG emissions produced on the national territory in order to ensure its compatibility with the reduction objectives of GHG emissions laid down in article L.100-4 of the Energy Code and in Annex I of the Regulation (EU) 2018/842 of 30 May 2018 before 31 March 2022' (Paragraph 7 and Article 2 of the decision).

The following remarks are worth noting:

First, it must be noted that, abiding by the principle of division of power; the judge did not go so far as to indicate which measures had to be taken, leaving a broader margin of discretion to national authorities.
Second, the administrative judge acknowledged the biding effect of programmatic provisions that the Government imposed itself while implementing the 40% objective laid down in the law. For that reason, this case-law can be regarded as classic decision upholding the rule of law as well as a good example of positive dissensus on climate change.

As soon as the State committed itself to meet a given objective, it was bound to achieve it and programmatic provisions have been considered as binding as the objectives themselves by the judge. The latter gave the legal action a useful effect, making sure that this type of action increasing the State's accountability in the field of climate change would be given sufficient effect, within the limits of the judge's competence.

It appears from this decision that the judge accepted its role in this public dissensus. Whereas the traditional conception of the division of powers prevents the judge to extend its legal review too far where a margin of discretion is left to the administrative authorities, the Council of State adopted an in-depth examination of the measures in force in this case. It conducted a thorough, and yet pragmatic, examination of the credibility and usefulness of the measures at stake. It also took into consideration the broader context of climate change and reduction objectives of GHG emissions. Indeed, several exogen factors were taken into account in this decision, such as the EU decision to increase the reduction objective of GHG emissions from 40% to 55% or the fact that the objective set out by the second carbon budget was met due to the covid situation rather than an efficient planning on the part of the Government. The legal review conducted in this case was not a mere appreciation of a manifest error, but a thorough examination of the legality of the decision.

Thirdly, the highest administrative jurisdiction relied heavily on scientific data and institutional opinions specialised in climate change matters to support its reasoning, hereby establishing their authority. The Council of State indeed quoted the High Council on Climate (hereinafter, 'the HCC') [42], the opinion of the Economic Social and Environmental Committee [43] and the General Council on Environment and Sustainable Development [44] which are all consultative French bodies having expertise in climate change matters.

### 2.2.3 Council of State, decision n° 467982, 10 May 2023, Commune de Grande- Synthe (III)

*Facts*

This case follows up on the decision of 1 July 2021 that acknowledged the State authorities' failure to act in accordance with their own commitments regarding climate change and ordered them to take any further measures necessary to curb the GHG emissions by the 31 March 2022.

The applicants of the first case (except the municipality of Grenoble, and the ONG 'Fondation pour la Nature et l'Homme' which withdrew its application) monitored the measures adopted by the Prime Minister to execute the Council of State's order. Considering that the competent authorities did not take the appropriate measures in due time, the applicants challenged the State again and lodged an action for enforcement of the 2021 decision.

---

[42] The High Council on Climate ('Haut Conseil pour le Climat') is an administrative independent body established by decree and entrusted with two main tasks : to evaluate the Government's policy on climate change and its coherence with the French EU and international commitments, and to issue policy advice and recommendations on climate change https://www.hautconseilclimat.fr/en/about/.

[43] The EconomicSocial and Environmental Committee (Conseil Economic Social et Environnemental) is a constitutional consultative body providing adviceand recommendations to the legislative and executive powerson various aspectsof French laws and policies. It particularly represents the interests of the French civil society, https://www.lecese.fr/en.

[44] The General Council for Environment and Sustainable Development (Conseil Général pour l'Environnement et le Développement Durable) is a body of the French Ministry of Environment tasked to evaluate the conception and implementation of public policies related to environment, climate, sustainable development, ecological transition, urbanism, town planning, landscapes, transports, natural and technologic risks and seas. In 2022 this body became a General Inspection (Inspection Générale), which was additionally tasked with the duty to provide opinions and impact assessments on public work projects (cf. supra, the Environmental Authority), https://www.igedd.developpement-durable.gouv.fr/presentation-de-l-igedd-a433.html.

*National and EU Legislation*

This action was lodged on grounds of articles L.911-5 and R.931-2 of the Administrative Justice Code which enable the administrative judge to order any necessary measures for the execution of a previous decision and to order, when necessary and even ex officio, periodic penalty payments ('astreinte').

The provisions invoked in support of the action were the same as in the two previous decisions.
However, several new measures were put forward by the State authorities concerned (the defendant) to establish its compliance with the 2021 order. It put forward various measures aimed at curbing the GHG emissions (paragraphs 11 to 20). These measures included sectorial measures in key areas such as transport, construction, agriculture, industry, energy and waste (paragraphs 11 to18). It also mentioned public investments to finance these measures (paragraph 19) as well as institutional reform aimed at ensuring a better governance of climate change (paragraph 20).

*Arguments*

The complainants argued that, at the end of the delay left by the Council of State in its decision of 2021, the measures adopted by the Government were still insufficient to meet the reduction objective of GHG emissions provided by the Paris Agreement, the EU regulation 2018/842 and article L.100-4 of the French Energy Code.
The Court was hence asked to evaluate the adequacy of the new measures adopted by public authorities to implement the decision of 1July 2021 with the French reduction trajectory of GHG emissions set out in the Low-Carbon National Strategy.

*Decision*

After a pedagogic and methodical reasoning, the Council of State concluded that the competent authorities failed to comply with the 2021 order. As a first step, the Council of State pedagogically detailed its competence under the administrative execution procedure, explaining the burden of proof lying on the Government and the method it would apply to examine the execution of its previous decision (paragraph 8).

First it set out the burden of proof. According to the Council of State, the defendant had to demonstrate 'that the measures taken, as well as the measures that can still reasonably be adopted to produce sufficient short-term effects' were able to meet the objectives set for 2030 'before the adoption of the 'Fit for 55' package'.

The judge then expressly explained the method and relevant elements it was to consider. Its reasoning would proceed in three steps: Firstly, it would appreciate in concreto the achievement of the mid-term objectives (set out in the carbon budgets). Like in its previous decision, the administrative judge took all its precautions stating that it would conduct its examinations with 'a sufficient safety margin', taking into account possible exogen events as well as the prevision and execution contingencies that may have occurred. Secondly, the Council of State would analyse the measures adopted by the Government, both those reducing the GHG emissions and those increasing them. Thirdly, the jurisdiction would evaluate the effects and efficiency of these measures vis-à-vis the French reduction trajectory of GHG emission, based on the existing scientific tools and methods of evaluation and relying specifically on the expertise of the institutional bodies tasked with this mission. To carry out this analysis dynamically, the jurisdiction announced that it would also assess if, overall, the above-mentioned findings were reasonably likely to fulfil the objectives set for 2030 and appraise the opportunity to order further measures if necessary.

As a second step, the jurisdiction applied its method.It first assessed the levels of GHG emissions at the date of its decision (in May 2023), and concluded that subject to confirmation, the levels granted by the carbon budget for 2021 and 2022 were respected of likely to be so (paragraphs 9 and 10).

Then the jurisdiction listed the measures adopted and announced by the Government, overall ad sector by sector, taking into account the budgetary and organic measures adopted as well. It especially considered that, in addition to each regulatory measure, the competent authorities had consented an important part of the budget to implement them (paragraph 19) and had established an institutional body called the 'Secretariat General for ecological planning' ('Secrétariat Général à la planification écologique') tasked to coordinate the actions of the different State administrations and plan a coherent reduction strategy of GHG emissions (paragraph 20).

Finally, the Council of State appraised the compatibility between the Government measures and the national reduction trajectory of GHG emissions (paragraphs 21 to 25). Carrying out its analysis, the administrative judge remained extremely measured and cautious. It firstly observed that its findings had to be dampen due to the occurrence of two successive crises (covid and the energy crisis that followed the beginning of the war in Ukraine). It also observed that the carbon budgets as revised by the decree of 21 April 2020 had perceptibly postponed most of the reduction efforts after 2021 without taking into account the upcoming upward adjustment of the objective set forth by the EU (paragraph 21). The jurisdiction then discussed the relevance of the scientific data and reports submitted by the parties to appraise the effects of the measures (paragraphs 22 to 24). It concluded that the method of evaluation of the report submitted by the Government presented a high degree of uncertainty, on the contrary to the studies submitted by the applicants and the High Council on Climate. The Council of State paid a significant attention to the findings of the HCC, based on a 'detailed qualitative assessment' highlighting the risks and weaknesses of the French measures (paragraph 24).
In its conclusion, the Council of State therefore acknowledged that the public authorities had taken several measures and invested massively to curb the GHG emissions, thereby revealing the State's will to comply with the 2021 decision and its international commitments (paragraph 25). It found however that the results of these measure were still too weak to be compliant and ordered further measures (again without stating exactly what they should be) to be taken by 30 June 2024 (paragraph 26 and Article 2 of the decision).

It shall be noted however, that the highest administrative judge remained extremely proportionate in its decision and ordered these measures without any periodic penalty ('astreinte') although it had a legal basis to do so and was asked to do it by the claimants. However, it planned a monitoring process, asking the competent authority to provide evidence of the adoption of these measures and elements allowing an assessment of their impact on the reduction objectives of GHG emissions by 31 December 2023, and by 30 June 2024, at the latest (paragraph 26 and Article 2 of the decision).

This decision reveals how strategic litigation can work as a bottom-up way of upholding the rule of law in climate change matters.The applicant monitored, with the help of the national judge, that the State comply with its obligations and commitments, be it solely programmatic to make sure that any announced measure would be applied and effective. From this case, it could reasonably be foreseen that another follow-up litigation could be initiated at the end of the delay.

### 2.2.4 European Court of Human Rights, n° 7189/21, Carême v. France

*Facts*

This action constitutes a follow-up of the Grande-Synthe case of 2020, challenging the French State's failure to act enough to reduce climate change and its adverse effects.

The applicant, Damien Carême, was the mayor of Grande-Synthe who acted both personally and as the local competent authority, and was dismissed for lack of legal standing. After being dismissed for lack of legal standing, he had exhausted all the French internal legal remedies. On 28 January 2021, he lodged an application to the European Court of Human Rights (ECt.HR).

*National and EU Legislation*

As in the 2020 case, the applicant challenged the French State failure to take appropriate measures to reduce climate change and meet the objectives it had committed to under the Paris Agreement.
His action was brought to the ECtHR on grounds of Article 2 (which protects the right to life) and Article 8 (which protects the right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).

*Arguments*

The complainant claimed that the State authorities' implicit decision not to take further actions to reduce climate change affected its right to life and his right to enjoy his domicile.
He argued in essence that the lack of positive measures taken to curb GHG emissions affected his domicile, exposed with certainty to future damages. He particularly argued that the weakness of the current measures in force affect the conditions of occupation his domicile, preventing him from projecting himself in it due to the risks of exposure to climate change adverse effects.

He also argued that State authorities failed to protect his life from environmental hazards that might cause him harm and that, due to this omission to act appropriately, climate change side effects caused him asthma.
On the other hand, the French State challenged the applicant's legal standing. It claimed that the link between the alleged damages and climate change was too thin and uncertain. It also claimed that the alleged asthma was not presented belated for it was not presented during the internal proceedings.

The Court was therefore invited to rule, first on the admissibility of the application under article 34 and 35 of the ECHR. Second, the Court is invited to determine whether under article 2 and 8 of the Convention, the Parties to the ECHR have a positive obligation to fight against climate change and mitigate its adverse effect to protect the life, family and private life of the individuals subject to their jurisdiction.

*Decision*

At the time of the report,this case is still pending, and awaits the Court's judgement. On 31 May 2022, the chamber designated by the Court to rule the case relinquished it to the Grand Chamber [45], revealing that the question was new or may imply a change in the Court's case-law. This relinquishment reveals the attention of the ECtHR for climate change litigation. The hearing was hold on 29 June 2023 and is available online [46].

Four NGOs were admitted in intervention in this case: the European Network of National Human Rights Institution (ENNHRI), Our Children's Trust (OCT), Oxfam France (which was an intervening party in the French original proceedings) and Oxfam International.

---

[45] ECtHR, Relinquishment in favor of the GrandChamber, Press release,7 June 2022, https://hudoc.echr.coe.int/fre- press#{%22fulltext%22:[%227189/21%22],%22sort%22:[%22kpdate%20Descending%22]}.
[46] ECtHR, Grand Chamber hearing, 29 March 2023, https://www.echr.coe.int/fr/w/car%C3%AAme-v.-france-no.-7189/21-1.

## 2.3 The Case of the Century: a landmark decision on the State's liability for ecological prejudice

### 2.3.1 Administrative Tribunal of Paris, interlocutory judgment n° 1904967, 1904972, 1904976/4-1, 3 February 2021, Oxfam Association et al. (Case of the Century (I))

*Facts*

This case constitutes the most significant strategic litigation aimed at nourishing the public debate around climate change in France.

It was led by four associations active in the field of climate change and environmental protection: Notre Affaire à Tous; Oxfam France; Greenpeace France and Fondation pour la Nature et l'Homme. This case was initiated in its administrative phase by a letter [47] sent, in December 2018, to the Prime Minister and several other ministers, compelling the State highest competent authorities to redress the moral and ecological damage caused by the French State's failure to act against climate change. It also compelled public authorities to take any necessary measure to stabilise and prevent global warming, to adapt the town planning to the risks induced by climate change,to improve the energy efficiency and the use of renewable energies, to stop any direct or indirect contributions of the French State to climate change, and to meet the reduction objectives of GHG emissions.
This letter constituted an administrative informal appeal which received a negative answer from the Government on 15 February 2019, allowing the applicant to challenge it.

*National and EU Legislation*

This case was an action for damages. For the first time since their adoption,articles 1246 and seq. of the French Civil Code were invoked in court to claim the State liability for ecological prejudice.
These articles were introduced in 2016 by the law on the recovery of biodiversity, nature, and landscapes [48]. They establish an obligation to repair, by priority in kind (article 1249), any 'damage to a component or the functions of ecosystems or to the collective benefits to mankind derived from the environment' (article1247). Article 1248 specifically defines the legal standing required for such an action to be admissible. Indeed,the legislator opened this course of action to any person having a quality and an interest to act, including associations whose purpose is to protect nature and the environment.

Although it was not invoked by the applicants, the Tribunal grounded its reasoning regarding the admissibility of the claim on article L. 142-1, first indent, of the French Environmental Code as well. As already mentioned in this report, this specific article enables any association which purpose is to protect nature and the environment to challenge the State on these matters before the administrative jurisdictions.

To establish the State authorities' fault, the applicants also invoked article 2 (right to life) and 8 (right to privacy and family life)of the ECHR. They also invoked the French Environmental Charter which, since 2005 [49], has the same binding effect as the Constitution itself [50], to make the judge acknowledge the existence of a general obligation for the State to act proactively against climate change.

[47] This letter, as well as the applicant submissions were publishedonline. See the informal appeal('Demande préalable'), 17 December 2018, https://laffairedusiecle.net/laffaire/affaire-du-siecle-au-tribunal/.
[48] Article 4 of Law n° 2016-1087 of 8 August2016 on recoveryof biodiversity, nature,and landscape, Op cit.
[49] Since the constitutional revision of 1 March 2005, the Preambleof the French Constitution refersto the Environmental Charter. See Constitutional law n° 2005-205 of 1 March 2005 on the Environmental Charter (Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'Environnement), https://www.conseil-constitutionnel.fr/les-revisions-constitutionnelles/revisions- constitutionnelles-de-mars-2005.
[50] Constitutional Council, decision n° 2008-564 DC of 19 June 2008, paragraph 18, https://www.conseil-constitutionnel.fr/decision/2008/2008564DC.htm.

*Arguments*

The complainants applied for a compensation for damages. But the purpose of this action was rather to make the administrative jurisdictions acknowledge, in principle, the State liability for ecological damage. Indeed, the amount of financial damage asked by the applicants amounted to 1 symbolic euro for each ground of damage (ecological and moral).

Through their action,they argued in essence that the current measures in force to combat climate change were not sufficient but rather aggravated it, or at least made it impossible to solve, hence causing a damage to the atmosphere, the environment and public health resulting in an ecological damage under the meaning of article 1247 of the French Civil Code.

In support to their claim,the applicant invoked several faults:

- A breach of the State's general obligation to act against climate change;
- A breach of article 2 and 8 of the ECHR due to the adverse effects of climate change on public health and the right to enjoy peacefully one's domicile;
- A failure to comply with the reduction objectives of GHG emissions that the Government had committed to through both general and sectorial policies;
- A lack of positive actions to comply with the EU legislations related to energy efficiency and renewable energies;
- A lack of positive actions to adapt to climate change, especially regarding town planning and urbanism measures.

Interestingly, the applicants tried to induce the establishment of two new legal principles which could have a significant impact in the legal debates regarding climate change: First the acknowledgement of a general obligation upon the State to act against climate change, stemming from article 1 of the Environmental Charter. Second the finding of a new general principle of the law consisting in the right for everyone to live in a sustainable climate system.

The defendant however challenged the applicability of article 1246 of the French Civil Code to public authorities in administrative matters. It also argued that in the absence of a priority preliminary reference on the issue of constitutionality [51] ('question prioritaire de constitutionnalité') the French Environmental Charter was not applicable to the case and that the alleged general principle of the law invoked by the applicants had never been found in public law before. The defendant additionally argued that the alleged breach of the carbon budgets was not, in itself, a violation of the Environmental Code. For that reason, this case had connexions with the Grande- Synthe case without being linked to it as such.

The administrative Tribunal was therefore asked to determine whether the State was liable for an ecological prejudice due to an insufficiently wilful policy to fight climate change. Implicitly, it was also asked to arm strategic litigation actors with legal grounds and efficient remedies to successfully challenge inertia and enforce concrete actions against climate change. The use of the action for damages and the new ecological prejudice provisions were also symbolic and used by the applicant to communicate massively all along the proceedings [52].

[51] See article 61-1, French Constitution of 4 October 1958, https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958.

[52] Bétaille, J., 'Les stratégies contentieuses des associations en matière de protection du climat : de l'application du droit à l'activisme judiciaire', Changements climatiques globaux et outils juridiques locaux : le citoyen en première ligne, (Dir. Kada, N.), Dalloz, 2022, pp. 109-123, p. 4, https://publications.ut-capitole.fr/45290/1/Les%20strat%C3%A9gies%20contentieuses%20des%20associations%20en%20mati%C3%A8re%20de%20protection%20du%20climat%20-%20J.%20B%C3%A9taille.pdf.

*Decision*

On the admissibility of the claim

In its decision the Tribunal of First Instance confirmed the applicability of article 1246 to administrative matters and the applicants' admissibility (paragraphs 10 to 15). The Tribunal did not pay much attention to the defendant's argument and merely checked, after quoting article L. 142-1 of the French Environmental Code, that the applicant associations had as statutory purpose to protect nature and environment.
The Tribunal then appraised the merits of the case. Following a very methodical approach, it examined the existence of a prejudice, the causal link and the alleged faults giving rise to the damage before examining the ways of redress.

In essence, the Tribunal acknowledged the State's liability for moral and ecological damage. It however rejected the compensation in money and ordered further investigation to determine the appropriate measures to order before issuing a final decision, making this first judgement interlocutory.

On the prejudice

Quoting scientific evidence, and the IPCC studies in particular, it noted that global warming was a consequence of GHG emissions having various adverse effects on the environment and causing increasing risks for food safety,water resources, public health and economic growth. It also noted that the French territory was highly affected by climate change and that a large percentage of its population was exposed to extreme climate phenomena such as floods, droughts, air pollution or expansion of insects carrying out infectious diseases.It thus concluded that an ecological prejudice was established (paragraph 16).

On the faulty acts and omissions

In this regard, the Tribunal divided the applicants' arguments in two categories. It first examined the alleged breach of a general obligation to combat climate change, before examining different aspects of the fulfilment of the reduction objectives of GHG emissions.

Following the applicants' arguments, the Tribunal expressly acknowledged the existence of a general obligation for the State to act against climate change (paragraphs 18 to 21). The jurisdiction considered that the French international and EU commitments as well as article 3 of the Environmental Charter revealed that the French State 'has acknowledged the existence of an 'urgency' to combat the current climate imbalance, and acknowledged its ability to act effectively on this phenomenon to limit its causes and mitigate its adverse consequences' (paragraph 21).

It then examined the State's liability in climate change. It assessed the compliance of the existing measures to mitigate climate change (paragraphs 22 to 34). Like the Council of State in the Grande- Synthe II and III decisions, the Tribunal referred to the studies of the HCC and concluded that the State failed to comply with its first carbon budget and did not meet the objectives that it had itself committed to (paragraphs 29 and 30). However, by contrast with the Grande-Synthe case, it observed that the possibility for the State to meet the overall objective set for 2030 would not exonerate the authorities from their liability, for the ecological prejudice would already be consolidated (GHG remaining in the atmosphere for around a hundred years)(paragraph 31). From that perspective, it can be inferred from the judgment that the jurisdiction recognised that ecological prejudice resulting from climate change and GHG emissions had so long effects that it was close to irriversible.

As for the other arguments put forward by the applicants, the Tribunal considered that most of them did not present a sufficiently direct causal link with the prejudice to be admissible. It also observed that the State failure to meet particular reduction objectives of GHG emission in sectorial policies, such as energy, could not be appraised alone to evaluate their direct contribution to the prejudice at stake (paragraph 25). Overall, the jurisdiction concluded that the State had breached its general obligation to combat climate change. Yet, it later moderated its finding by considering that the French State was only partially liable for the ecological prejudice, to the extent that it failed to comply with its first carbon budget (setting out a ceiling of GHG emissions for the 2015-2018 period) (paragraph 39).

On the assessment of the appropriate compensation measures

The Tribunal firstly considered both the economic and in kind redresses asked by the applicants to compensate the ecological prejudice. It first considered that article 1249 of the French Civil Code commands to order compensation in kind prior to any financial damages.Indeed, contrary to the traditional prejudices, the judge recalled the ecological one is not personal and should therefore be addressed by specific measures instead of financial damages.It is only if these measures are impossible or not sufficient to fully compensate the damage, that financial compensation should be ordered. The jurisdiction added that, if any financial damages would be awarded, it shall be affected to the restoration of the environment (paragraph 36). The latter is not specifically provided by the law and implies, in line with the tort law principle of integral compensation [53], that any action for damages on this legal ground should be selfless and in favor of the general interest of the environment.
The Tribunal then examined the appropriate measures to order the State to redress the ecological prejudice. Yet, as in the Grand-Synthe case (that was not over at the time of the proceedings), the jurisdiction considered that further investigations were necessary to determine the exact measures to order to redress or prevent an aggravation of GHG emissions and provided the party with a two- months period to elaborate on this aspect (paragraph 39). As for the moral damages, the Tribunal awarded the applicants one symbolic euro each on grounds of their moral damage suffered through their statutory purpose (paragraphs 40 to 45).

The following remarks on the case's outcome are worth noting:

On the one hand, it contributed to challenging the weaknesses of the State's policy to combat climate change by acknowledging, in principle, the State's liability for ecological prejudice. It also constituted a landmark decision applying the new provisions on the ecological prejudice in public law and provided NGOs and stakeholders with a legal ground to challenge the State's inertia in this regard. On the other hand, the judgment remained silent on the claimants' attempt to create a new general principle of the law regarding the right to a sustainable climate system. Without closing all doors to such gateway, it did not acknowledge it either, nor did it analyse its possible definition or scope.

On the other hand, the practical consequences of the judgment were limited. To balance its decision, the judge considered that the State's liability for the occurrence of the ecological prejudice was only partial. The fact that the judge did not find the full liability of the French State for climate change adverse effects on the environment and order integral reparation could easily be found sound. Not only does it preserve the liability of other actors that could have a significant impact on climate change, but it also prevents the regulatory authority to be tempted to neutralise this new legal ground before it has deployed its full effects.

[53] French tort law is based on the principle of integral compensation. This ordinary law principle impliesthat a damage shall be wholly compensated but limited to the damage itself. French tort law indeed focuses on restoring a balance that has been breached and excludes punitive damages. See for instance: French Court of Cassation, 2nd civil chamber, 28 October 1954, J.C.P. 1955, II, 8765: 'the purpose of civil liability is to restoreas exactly as possible the balance destroyed by the damage, and to put the victim back in the situation he would have been in had the harmful act not occurred'.

### 2.3.2 Administrative Tribunal of Paris, judgment n° 1904967, 1904968, 1904972, 1904976/4-1, 14 October2021, Oxfam Association et al. (Case of the Century (II))

*Facts*

This judgement constitutes the follow-up of the first interlocutory judgment.
In the latter, the Administrative Tribunal of Paris had found the French State liable for a moral and ecological prejudice but ordered further investigations in order to determine the appropriate
The parties were therefore asked to express their opinion on the following question: Considering that the State was only found liable to the extent that it failed to comply with its first carbon budget at the time of the Tribunal's decision,what would be the appropriate redress measures to prescribe in order to meet the French reduction objectives of GHG emission and prevent any aggravation of the constituted ecological prejudice (first recital of the decision).
Oddly, it has to be noted at this stage, that the question was limited to the redress measures considered for the future and not for the past events. Betweenthe first and the second judgments, little attention was paid to the restoration of the already existing prejudice and the Tribunal rather focused on the remaining prejudice and its risks of aggravation at the date of its decision.

*National and EU Legislation*

The legal basis for the case remained article 1246 and seq. of the French Civil Code, and particularly article 1252 which allows the judge to order, in addition to compensation measures, further measures to prevent or stop an aggravation of the damage.

It has to be noted that, at the time of this final decision, the highest administrative jurisdiction (the Council of State) had ruled the Grande-Synthe case in favour of the applicants and ordered public authorities to take further measures to curb GHG emissions in line with the Government's own regulatory reduction trajectory.
Due to the Tribunal findings limiting the scope of the State's liability to its reduction policy of GHG emissions, it appears that the subject matter of the action at stake had slightly moved towards the legal questions and aftermaths of the Grande-Synthe case. This case-law,together with the decree of 20 April 2021 and article 100-4of the Environmental Code were quoted and debated by both the parties and the Tribunal during the second part of the proceedings.

*Arguments*

The complainants argued in essence that the current measures in force to tackle the GHG emissions were not only insufficient to meet the 40% reduction objective set for 2030 but also ineffective to restore, or at least limit, the aggravation of the ecological prejudice stemming from GHG. The defendant however argued that the Government had already taken measures to correct its reduction objectives of GHG emissions and claimed that those measures were likely to meet the 40% objective by 2023 as well as limiting the aggravation of the ecological prejudice.

The Court was asked to determine whether ordering further measures for the reduction of GHG emission would adequately compensate the current and future ecological prejudice at stake,within the limits of its own liability identified in the previous interlocutory judgement. It was therefore called upon to identify the exact quantum of prejudice compensable and to assess the appropriate measures to redress past harm and prevent further harms.

*Decision*

In its final decision the Tribunal ruled that an order was necessary to redress the damage (paragraph 10). It also found that the measures ordered should intervene in a sufficiently short- term period to prevent the 'continuous and cumulative effects' of the prejudice resulting from excessive GHG emissions (paragraph 11).

However, the appraisal of the exact quantum of compensation measures necessary to balance the State's liability proves itself difficult. On the contrary to the Council of State in the Grande-Synthe case, the Tribunal refused to assess the overall efficiency of the French reduction trajectory to meet the objective set out for 2030, considering that such assessment of the future fell outside of its competence for it was only asked to rule on the damage at the date of its decision (paragraph 6). It nonetheless considered mathematically, based on the scientific data provided by the HCC, that the missed targets of the first carbon budget (2015-2019), which lead to the harm that the French State was liable for, had not been reflected in the second(2019-2023) nor the third carbon budget (2024-2028). It also accepted, through an objective approach of the damage, to take into account the positive effects of the covid measures on the French GHG emissions to reduce the quantum of prejudice that the State had to compensate. It finally found that the quantum of compensation required at the date of the decision was as follows:

62 Mt CO2eq. [54] (equivalent to the faulty overage of the first carbon budget) – 47 Mt CO2eq (the average amount of emissions reduction due to the combination of the covid measures and the strengthening of the French policies to tackle climate change) = 15 Mt CO2eq (the remaining prejudice that had to be compensated at the date of the decision) (paragraph 7).

The Tribunal therefore ordered the Government to adopt any sectorial useful measures likely to repair the observed damage. It added that these measures shall be effective by 31 December 2022, which does not align with the deadline given by the Council of State in the Grande-Synthe decision of 2021.

It shall be noted that this judgment really complements the Grande-Synthe case and constitutes its extension through tort law. From that perspective, the French administrative legal system provides an almost comprehensive set of legal remedies to monitor, through strategic litigation, that the public administration complies with its own commitments and undertake concrete and effective measures to tackle climate change beyond mere symbolic statements.

As in the Grande-Synthe case, it shall also be noted that the case is still not over yet and allows a constant bottom-up compliance monitoring. Indeed, the applicant associations continuously monitored the implementation of the decision by the State authorities. On 14 June 2023, the latter lodged a new application before the Administrative Tribunal of Paris, asking the jurisdiction to review the execution of its judgment and a periodic penalty payment of 1.1 billion euros to force the State authorities to comply [55].

[54] Million tons of CarbonDioxide equivalent
[55] Notre Affaire à Tous, 'L'Affaire du Siècle demande une astreinte d'un milliard d'euros pour obliger l'Etat à agir', Press Release, 14 June 2023, https://notreaffaireatous.org/laffaire-du-siecle-demande-une-astreinte-dun-milliard-deuros-pour-obliger-letat-a-agir/.

# 3. Analysis

In addition to what has already been stated throughout the report, it appears that the French provisions transposing and implementing EU and international legal instruments became the cornerstone of the most recent strategic litigation related to climate change.

The new provisions introduced by the legislator have still to bear their fruits, especially in relation to standing through the collective action in environmental matters. Article L.142-3-1 of the French Environmental Code,introduced by article89 of Law n° 2016-1547, indeed establishes a collective action in environmental matters granted to organisations representing the public interest of environmental protection as per their by-laws. Further, the law on the restoration of biodiversity, nature, and landscapes[56] created a new ground for tort liability: the ecological prejudice('prejudice écologique'), which led to the introduction of articles 1246 to 1251 of the French Civil Code.

The general obligation found by the judge in the Environmental Charter through the Case of the Century also bears an interesting potential from this perspective, although, again, it can only be invoked in vertical litigations for the time being. The Court considered that with the adoption of the Charter and its article 3 in particular, the French State 'has acknowledged the existence of an 'urgency' to combat the current climate imbalance, and acknowledged its ability to act effectively on this phenomenon to limit its causes and mitigate its adverse consequences'.
Most of these provisions are only enforceable in vertical litigations (directed against the State authorities and bodies). The invocation of legal instruments in horizontal litigations (against private parties, and big companies in the first place) has still to be imagined since the State and its organs and bodies are not the only ones to contribute to climate change. The new Law n° 2016-1087 has established a duty of care upon big private companies, requiring them to publish challengeable monitoring plans, providing the possibility to involve private stakeholders in climate change matters.

*Arguments used*

The cases presented in this report, evidence that the standing rules for environmental NGOs are well established and the attempts to challenge them have been dismissed by the relevant courts. The trend in France is therefore positive towards access to justice for environmental NGOs.
It appears for the presented cases that the core argument mobilised by the applicants throughout the different cases described in this report was focused on the State insufficient actions rather than a total inertia. This has two positive consequences: First, although too weak or too safe, there is an existing climate policy supported by public authorities in France that can be developed. Second, from a legal perspective, the existence of such policy creates challengeable acts that active NGOs can bring to court to challenge the French State. Such acts also hold enough content for national judges to appreciate their legality. In the absence of these acts, NGOs would have still been able to spark off a silent challengeable decision like in the Grande-Synthe case.

It shall also be noted from the Triangle of Gonesse case that one working argument can be reused several times in subsequent cases or to challenge other acts related to a same project adversely affecting climate change. This is particularly relevant for impact assessment and legal review actions as the elements taken into consideration, as well as their relevance, their appropriateness and the overall proportionality of the conclusions can always be debated in court, leaving leeway for NGOs to intervene. Interesting as well to note that arguments on the need for the Impact Assessment legislation can be successfully used in relation to climate change. Lastly, the NGOs' attempt to create new obligations upon the State through general principles of the law and the French Environmental Charter was close to successful.

[56] Article 4 of Law n° 2016-1087 of 8 August 2016 on recovery of biodiversity, nature, and landscapes (LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la natureet des payasages), LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages (1) - Légifrance (legifrance.gouv.fr).

It certainly was for the arguments grounded on the Charter,which has in the French legal system,an authority equivalent to the Constitution itself. As for the general principle of the law according to which a right to a sustainable climate would exist in France,it shall be recalled that the judge did not answer the call. If it is a pity that the jurisdiction did not provide a detailed reasoning on this innovation of the claimants, it did not reject it either. That means that further developments could be brought to court to establish the principle that could be, then, opposed as a fundamental right to the regulatory authorities when adopting climate change policies.

*Impact*

Overall, the impact of these cases can be approached from different perspectives.
First, as mentioned above, the cases have established solid grounds regarding the implementation of standing rules granting the right of NGOs to access to justice on environmental and climate change matters. The same cannot be said for individuals who are still failing to establish a direct and certain risk of damage stemming from climate change to be admissible in court proceedings. The channeling of climate litigation through NGOs wanted by the legislator clearly empowered NGOs but not private individuals.

Second, the mediatic and raising awareness impact of these cases was significant. All of them were supported by a massive communication strategy, strikes, demonstrations, etc. This is particularly relevant for the Case of the Century whose claimants (i.e. environmental NGOs) organized their communication around the case itself. In the Grande-Synthe Case as well, the mayor acted as a mere individual but, also as a local authority representative and a Member of the European Parliament, and might also have the intention to raise awareness on the issue.

Thirdly, on the legal side, the actions also bore a symbolic impact. Indeed, most of the cases had never been challenged before. The Case of the Century was, for instance,the first case to discuss the ecological prejudice since its introduction in the Civil Code in 2017. It shall also be noted that all these cases lead to a conviction of the State, which in turn, has a certain significance in public opinion. And this is probably where the French judges were the widest. All the cases lead to a conviction, but, apart from the Triangle of Gonesse decisions, the practical outcomes of the decisions were relatively as proportionate as they were symbolic. The judges did not impose any tough or scandalous sanctions, often without any periodic penalty payment either to enforce the orders issued. French judges also remained cautious regarding the types of measures ordered, leaving leeway to the Government, hence upholding the rule of law and the principle of subsidiarity. Thus, if the French State was convicted in principle, it still had the time, authority and legitimacy of the State authorities to take the decisions with regards climate change policy.

Fourthly, on the strictly legal side, the impact of these court cases seems mitigated. As already explained, the Court ordered the Government to act further and to take its commitments more seriously but without any follow-up or periodic payment,the enforcement of these judgments. This implies that, should any monitoring intervene, it would fall (and fell) on the litigants, the NGOs active in this field. This outcome may come costly with respect to jurisdictions' workload but also contributes to strengthening the moral authority of these NGOs. The challenge would then be, for these NGOs to gather and manage sufficient resources to keep these actions going, and to keep the public awareness up, for in the long run, it is bound to lessen.

Lastly, it shall be observed that all of these judgements valued and enhanced the authority of the relevant institutions with expertise in this area.Several bodies', panels',authorities' and institutions' studies were quoted by the judges to support their reasoning. This not only means that their scientific authority and objectivity was acknowledged but also that their conclusions could successfully be invoked by litigants and contribute to their litigation strategies.

# 4. Conclusion and Challenges

Several challenges and open questions remain following the presented case-law.

**Standing**

As most European legal system, there is no actio popularis in the French judicial system. The French judicial system still requires claimants to establish their quality and sufficient legal interest to act against a given decision or a given legal or natural person. Yet, since the environment is a matter of general interest and concerns everyone, all at once, it can be difficult to establish a personal interest to act (see for instance the dismissal of Damien Carême in the Grande-Synthe case). To even the issue, the French legislator has recognised NGOs standing when meeting certain requirements including the purpose of defending the protection of the environment in their by-laws or be registered within the competent public authorities. The legislator therefore decided to channel strategic litigations through approved and registered NGOs whose purpose is to protect nature and environment. To some extent, as it appears difficult for individuals to launch such actions by themselves, it may appear that the legislator, as a compromise, is aiming to concentrate litigations, avoid a dispersal of the most important legal challenges as well a wise costs and time management. On the other hand,the absence of a legislative legal standing for private individuals tends to limit their access to justice in climate matter. Due to the latent, diffused and broad effect of climate change on societies and individuals, it appears more difficult for natural persons to establish the existence of a direct and certain effect between a given challenged decision and climate change. The case of Damien Carême is a good example of this trend and the pending ruling of the ECtHR may not solve all the legal issues stemming from it.

**Limits of the traditional concepts of tort law and the challenges of measuring harm to the environment**

The Case of the Century revealed how the concept of ecological prejudice can be raised as an issue in practice.In a damage based on broad and diffused pollution stemming from and resulting in climate change, the classic concepts of attribution of liability to an identified author appear difficult to apply. The exact calculation of the contribution of a said author to the damage will be difficult. The redress measures in kind and, subsidiarily, the calculation of financial compensation was difficult in the Case of the century. It seems that no exact methodology has been proposed yet. Moreover, climate change and global warming are indeed global. If it can reasonably be imagined that all State contributed to GHG emissions, it seems difficult to quantitatively calculate the respective part of contribution of each State. The same can be said for private parties. Since the existing legal concepts of tort law do not seem to properly address these issues, conceptual work will probably be needed to give the judge adapted tools to apply the provisions on ecological prejudice and give them a useful and dynamic effect.

**Strategic climate litigation v strategic environmental litigation**

The cases described evidence a trend towards the use of strategic litigation for climate change in a similar way as it has been used for other environmental objectives over the years. Environmental NGOs have been able to challenge authorities on environmental court cases related to nature protection or the lack of impact assessment related to projects affecting protected areas. The key driver seems to be the recognition in law of authorities' positive obligations and specific emission reduction targets or objectives as legally binding obligations. However, this trend in climate change matters seems to remain limited to targeted GHG emissions, which have become mandatory.

**EU law as a leverage to foster climate litigation at the national level**

One other key aspect of the above-mentioned trend is the increasing use of European Union law as a pivotal leverage to foster State liability and obligation in climate change matters.

In all the cases analysed in this report, EU secondary law has been a useful tool for the litigant NGOs as well as an authoritative reference for French judges. Indeed, through the principle of primacy and direct effect of EU law in the internal legal order, the EU acts implementing the Paris Agreement provide consistency, authority and useful effect to the international standard itself. This is even more obvious in the Grand-Synthe case were, although the Council of State did not refer to the Court of Justice as the claimant asked, it eventually took a systemic approach considering the future EU policy implementing the Paris Agreement to support its findings. The French national judges took into account the EU strategy and movementof compliance to the Paris Agreement as an argument justifying the unlawfulness of a decision not to act. The French transposition law on environmental impact assessment was also the cornerstone of the claimants' success in the Triangle of Gonesse case.

**Safeguarding the rule of law in the face of positive strategic litigation**

Climate change strategic litigation cases also had an impact on the rule of law. In several cases presented throughout this report, they often lead to positive dissensus, rather than negative. But attention should be paid to the cases in between. As it has been exposed throughout this report, NGOs challenged both State authorities and private companies to confront them to their own commitments and legal obligations, which clearly contributed to positive dissensus. In the Case of the Century and the Grande-Synthe cases, the purpose of the NGOs' actions was to confront the State to its own obligations and give a useful effect to the national and international provisions, hence substantiating the content of the law. To this extent, these cases undoubtfully uphold the rule of law. They not only strengthened the content of positive law through the judges' enforcement powers, but they also increased the State's accountability before their citizens and subjects.
The legal grounds and execution measures left by the legislator and enforced by the judge seem to have opened a well-functioning system of legal remedies to monitor the State's compliance with its obligations.

On the other hand, it seems important to recall that even while contributing to positive dissensus, strategic litigations may have an adverse effect on the rule of law, calling for the judges' self- discipline. Indeed,while judges may be tempted or asked to engage in a judicial policy and overstep its own competence [57].This would not be acceptable under the French conception of the divisionof powers. Indeed, according to Montesquieu's doctrine, and subject to certain limits, French judges are merely 'the mouth of the law'. In principle, they do not possess authority to make the law. Should strategic litigation lead to too bold case-law, even with good intentions, the rule of law would be breached, and the legitimacy of the national judges would be impaired. This is probably the reason why the French judges were always moderate in their sanctions against the State and did not went so far as to proclaim a new general principle of the law in addition to its other findings in the Case of the Century decision. In such important and matters, the judges' wisdom is therefore key to protect the balance of the rule of law.

**Future commitments and principle of legality**

As explained in the previous section, French judges are limited to a strict principle of legality. They do not have the power to order public authorities to act without a solid legal basis. As a result of a voluntarist judicial policy extending the judges competence or stretching the legal principles set out by the law could result in an opposite policy of the Executive authorities. Indeed, the latter could be tempted to reduce their commitments. This reason could also be an explanation of the judges limited solutions when ruling the presented cases. Indeed, if the State authorities adopted less committed policies or refrain from agreeing to bold statements in climate change matters, NGOs and judges may have a more difficult time finding legal grounds and argument to support climate change action. Overall, progresses in climate change matters would be impaired.

[57] Bétaille, J., Op cit.

### Public involvement against climate change

Both the Grande-Synthe and the Affaire du Siècle cases entailed a constant follow-up that can last. It has yet to be assessed what the costs of such follow-up would amount to in the long run considering that the compensation for the costs of procedure are often lower than the exact amount spent for the proceedings and clearly do not cover the mediatic costs spent in margin of the proceedings to raise awareness on the matter itself through a strategic litigation initiative. The soundness of the decision resides in the fact that the decision can be reapplied every time public authorities do not comply with the legal obligations. Without saying it, it allowed citizens and NGOs to act as watchdogs of public authorities and private companies which became accountable. These decisions empowered the public to act when the State does not (or not sufficiently) and reinforced the authorities' accountability though legal remedies, which can be seen as the cornerstone of democracy. In this regard, the cautiousness and limitations of power of French judges contributes to the efficiency of the constitutional checks and balances theory, allowing activism and a proper accountability of climate change stakeholders on the one hand, and a reasonable application of the principle of legality and division of powers on the other.

### Rasing awareness

The role of strategic litigation to raise awareness on environmental matters succeeded in France. It generated pressure on decision makers to act further and enhance a bolder climate change policy, not only to comply, but to be proactive in this matter. Altogether, these cases showed how climate change could have a spillover effect on all areas of public policies, from public town planning to energy, economic, housing and resources policies. They also gave a hint of how a climate change-oriented mindset could contribute to the GHG emission reduction targets from the outset. Indeed, from the preliminary impact assessment of a project to the design of a public policy, its implementation in the long-term and the appraisal of its effects, climate change could be and should be considered. These cases revealed that the tools already exist and that the expertise at the national and international level is also able to provide useful advice to help public authorities. Eventually, these cases also highlighted that even at the stage of implementing public policies, the public, through NGOs, would also monitor and safeguard the delivery of the Paris Agreement commitments, making the democratic institutions more accountable for their promises.

---

[57] Bétaille, J., Op cit.

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

## *COUNTRY REPORT: Germany*

This study/report has been prepared by Milieu Consulting SRL under Horizon RED SPINEL Project N°101061621. The main authors of the study/report is Laura Sznajder reviewed by Marta Ballesteros and Laura Vona.
The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

**Milieu Consulting SRL**, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: marta.ballesteros@milieu.be; laura.vona@milieu.be; web address: www.milieu.be.

October 2023

# Table of contents

Abbreviations.......................................................................... p.88

1.Introduction.......................................................................... p.89

2.Overview of Strategic Climate Litigation cases in Germany.... p.90

3. Analysis................................................................................p.97

4. Conclusion and Challenges.................................................. p.99

# Abbreviations

| | |
|---|---|
| BGB | Bürgerliches Gesetzbuch (Civil Code) |
| CEU | Central European University |
| CoE | Council of Europe |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| GG | Grundgesetz (Basic Law) |
| IEKK | Integrierter Energie- und Klimaschutzkonzept (Integrated energy and climate protection concept) |
| KSG BW | Klimaschutz- und Klimawandelanpassungsgesetz Baden-Württemberg<br><br>(Climate Protection and Climate Change Adaptation Act Baden-Württemberg) |
| UmwRG | Gesetz über ergänzende Vorschriften zu Rechtsbehelfenin Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG<br><br>(Act on Supplementary Provisions on Legal Remedies in Environmental Matters under EC Directive 2003/35/EC) |
| UvWG | Umweltverwaltungsgesetz Baden-Württemberg<br><br>(Environmental Administration Act Baden- Württemberg) |
| SEA | Strategic Environmental Assessment |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article49 of the TEU and the Preambles to the Treatyand to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law.
The 2020 Rule of Law report by the European Commission confirms this meaning and states 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [3].

Within this context, dissenting actions broughy up by citizens against public institutions' decisions are at the heart of EU democracies and aim at ensuring necessary progress on issues of public concern. These cases are considered positive examples of dissensus because they are carried out in line with the rule of law and democratic principles and without breaching the law. As analysed in other reports within this project, there are also examples of dissenting actions by populists or nationalist movements seeking to subvert democratic principles, fundamental rights and the rule of law. For the purpose of this work, "dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors,including state and non-state actors,seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy" (Brack and Coman 2023).

This report provides an overview of relevant case law related to strategic litigation actions related to climate change, initiated by citizens and NGOs before national courts. The report will also analyse the arguments and impact of these cases in relation to EU and national strategic objectives. The timeframe for this research has been set in the period between the signature of the Paris Agreement in 2015 and today.

[1] COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.
[2] Regulation (EU, Euratom)2020/2092 of the European Parliament and of the Council of 16 December2020 on a general regime of conditionality for the protection of the Union budget available at https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG
[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT, THE COUNCIL,THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEEOF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

# 2. Overview of Strategic Climate Litigation cases in Germany

In connection with the growing trend and awareness in society of the issue of climate change,there has been an increase in the number of lawsuits in Germany which involved climate change related arguments. Such cases are of particular importance, as they affect the existing understanding of climate change matters and encourage the jurisdiction to revise the current interpretation of the law. In this report, several court cases will be presented, where citizens or NGOs have gone to court claiming violations of environmental rights connected to climate change. These proceedings are instrumental in shaping a new understanding of environmental law, using private but also public law to protect interests threatened by climate change. In terms of broader implications for future climate change litigation, it is worth noting a significant case affecting the understanding of violations of fundamental human rights as delineated in the German Constitution (hereafter: the "GG") [4] in connection with climate-damaging emissions, which will be discussed further.

Under the division of competences in the GG, the enforcement of laws related to environmental protection and climate change is, with a few exceptions, the exclusive responsibility of the Länder. At the national level, the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection is responsible for climate matters, and under it the German Environment Agency, which is the central environmental authority of the Federal Republic of Germany. The agency's main tasks are to provide expert scientific support to the federal government, to enforce the environmental acts (although it can itself enforce laws only in a few exceptional cases and is not an agency superior to the Länder authorities), and to inform the public about environmental protection on the basis of impartial studies. In each Land there is also an environmental department. The federal state ministries belong to the state governments of the respective federal states.

Germany has taken a number of measures to secure climate protection targets nationwide. In October 2019, the German government adopted the Climate Protection Program 2030 [5], for which it has designated funding of around 54 billion euros for climate protection-related measures for the period 2020 to 2023. The Climate Protection Program 2030 is a wide-ranging package of measures to achieve the climate targets. There is also the Climate Protection Plan 2050 [6], which is an overall concept for energy and climate policy up to the year 2050. It sets out the measures required to achieve Germany's long-term climate targets. The German national courts are divided into different branches for reasons of specialization. Art. 95 of the GG lists labor courts, fiscal courts, ordinary courts, social courts and administrative courts. There are four levels of ordinary jurisdiction: Amtsgericht (Local Court), Landgericht (Regional Court), Oberlandesgericht (Higher Regional Court) and Bundesgerichtshof (Federal Court of Justice). The Landgericht (Regional Court) has first-instance jurisdiction in civil cases with a higher value in dispute, with compulsory representation by a lawyer.The constitutional courts of the Länder and the Federal Constitutional Court (Bundesverfassungsgericht) form the constitutional jurisdiction. The courts are structured upwards, i.e. the federal courts are the highest appellate instance in relation to the regional courts. Using legal remedies of appeal and revision, one can challenge a court decision and demand its review by a higher court.

Climate-related litigation is not necessarily more common at one level of German jurisdiction, as environmental and climate protection cases are often situation-specific and depend on the objective to be achieved by the court's decision, for example damages or revision of an administrative decision. It is worth noting, however, that climate issues are beginning to appear at the level of the Constitutional Court and are gainingin importance, as environmental protection is becoming one of the objectives of the State in connection also with the protection of the rights of its citizens.

[4] The official legal name of the German Constitution Act is the Basic Law (Grundgesetz), abbreviated as "GG".

[5] Klimaschutzprogramm 2030, available at: https://www.bmel.de/SharedDocs/Downloads/DE/_Landwirtschaft/Klimaschutz/Klimaschutzprogramm2030.html

[6] Klimaschutzplan 2050, available at: https://www.bmwk.de/Redaktion/DE/Artikel/Industrie/klimaschutz-klimaschutzplan-2050.html

In Germany, standing refers to the legal ability of a person or entity to initiate a legal action or to be a party to legal proceedings. Standing is a fundamental principle in the German legal system and is intended to ensure that only those with a direct interest in a case can file a lawsuit or be parties to a legal process. In order to have standing before a German court (including the Constitutional one),a person or entity must demonstrate a direct, personal and legally recognised interest in the subject matter of the case. This means that the outcome of the case must have a direct impact on their rights or legal position. These requirements apply to all courts mentioned in this report, i.e. civil courts, administrative courts or the Constitutional Court. The constitutional complaint can only be lodged with the assertion that a fundamental right or another relevant right contained in the German Constitution has been violated by a public authority. If the constitutional complaint against a decision is upheld, the Federal Constitutional Court shall declare the decision null and void, if it is upheld against a law, the law shall be declared null and void. Legal entities such as companies, associations and other organisations have standing if they pursue an interest related to their legal interest or statutory purpose. Individuals or organisations may also have standing in certain cases if they can demonstrate a significant public interest in the case.

The requirement of standing is strongly connected to the guarantee of legal protection of Article 19(4) of the GG and leads to the substantive legal position of the claimant in the admissibility examination. Whether the asserted violation of the claimant's own rights actually exists, however, is not the subject of the admissibility examination, but is to be dealt with in the merits of the action.
The concept of litigation against the violation of one's own interests has as its reason the protection of individual rights and the prevention of popular lawsuits,in which the individual ("quivis ex populo") acts as an advocate for the enforcement of a right. With regard to standing in environmental cases, depending on the situation, proving direct infringement of one's own rights can be problematic, as such cases are often of public interest.

## 2.1 Case 5 U 15/17, Saúl Luciano Lliuyav. RWE AG, OLG Hamm

*Facts*

On 24 November2015, Saúl Luciano Lliuya, a mountain guide and farmer from Peru, filed a lawsuit against the energy company RWE, based in Germany, in the Essen District Court.His house, located in Peru, is threatened by a flood wave from the rising glacier lake Palcacocha. The water levels of the lake are rising as a result of factors linked to climate change and RWE, as an operator of coal and gas-fired power plants, is one of the world's largest emitters of $CO_2$ and is thus partly responsible for climate change, which is leading to the melting of the glacier. The lawsuit marks the first time a person affected by climate change has demanded that one of Europe's largest greenhouse gas emitters contribute to urgently needed protective measures. Luciano demanded compensation from RWE for his own expenses for protecting his house from potential flood damage and an additional 17,000 euros. Furthermore, damages related to the costs of installing flood defences for the municipalities association at his place of residence, the lowering of the high water level leading to the flood risk or damages adequate to the amount of the company's contribution to the flood risk were also mentioned as alternative claims.

On 15 December2016, the Regional Court dismissed the claim because there was "no linear causal chain between the source of the greenhouse gases and the damage" – therefore, causality was lacking [7]. However, a subsequent appeal to the Hamm Higher Regional Court was successful. On 30 November 2017, the Court found that it considered a civil claim based on the "neighbourhood paragraph" Art. 1004 of the German Civil Code (BGB) against the energy company RWE to be possible and decided to enter into the taking of evidence. The Court did not yet decide on the question of evidence, but only on the general possibility of further litigation with the prospect of a decision in the plaintiff's favour if the evidence would convince the Court.

[7] LG Essen, 15.12.2016 - 2 O 285/15,https://www.justiz.nrw.de/nrwe/lgs/essen/lg_essen/j2016/2_O_285_15_Urteil_20161215.html

*National and EU Legislation*

The basis for the claim is Art. 1004 BGB, the general provision of German civil law for protection against interference in property, often called "Nachbarschaftsparagraph" ("neighbourhood paragraph"). According to Para. 1, if the property is impaired in a way other than by deprivation or withholding of possession, the owner may demand that the interferer remove the impairment. If further interference is to be feared, the owner may sue for injunctive relief.In the following paragraph, it is stated that the claim is excluded if the owner is obliged to tolerate the interference. In the presented case, the Higher Regional Court of Hamm determined that climate change with its cross- border effects has brought about a kind of global neighbourhood relationship, so that Art. 1004 also applies here [8]. The Court reasoned that climate change with its cross-border effects has led to the creation of said global neighbourhood relationship and that it must be presumed that the norm can also regulate a legal relationship over greater distances. This is of great importance because there are about 10,000 kilometres between RWE's headquarters in Essen, Germany, and the claimant's Peruvian home in the Andes.
However, it has to be noted that the crucial point of the legal dispute is causality. Liability under Art. 1004 BGB can only be assumed if the co-causality of the energy company's emissions for the risk of flooding claimed by Lliuya can be proven.

The applicability of German law results from Art. 7 of the Rome II Regulation, which grants the damaged party a right to choose between the law of the place of performance and the law of the place of effect in the case of non-contractual obligations resulting from environmental damage.The concept of environmental damage is to be understood broadly and, according to Recital 24 of the Rome II Regulation, means any adverse change to a natural resource [9]. Given that the place where the damaging act took place – i.e. the effects of climate change, which the energy company has contributed to –is in Peru, that the injured party is Peruvian and that the case has been brought before a court in Germany, where the company in question is based, this scenario opens up the possibility for effective legal action against companies in similar cases.

*Arguments*

On standing, RWE did not contest it in its submissions at any point.

On the merits, the energy company says that legally it is not possible for individual emitters to be held liable for a problem like climate change caused by multiple sources. RWE refers to a judgement from the 1990s on forest damage as a result of sulphur dioxide emissions. At that time, the highest courts denied liability for individual emitters [10]. The Essen Regional Court held that it was impossible to link CO2 emitters to specific climate change impacts according to the legal requirements of causality. Causality is assessed according to the principle that asks whether the legal impairment would not have occurred if the conduct in question had not taken place [11]. However, the court of second instance said that even if RWE's emissions are not responsible for the entire flood risk due to glacial melt, it is sufficient that they are partly responsible for the current and given flood risk. RWE's share of emissions is to be considered relevant for a responsibility according to Article 104 BGB [12].

*Decision*

The case is still pending.

[8] The ClimateCase Saul v. RWE, https://rwe.climatecase.org/de/rechtliches (Accessed: 26. September 2023)
[9] Kling, A. (2018). Die Klimaklage gegen RWE: – Die Geltendmachung von Klimafolgeschäden auf dem Privatrechtsweg. Kritische Justiz, 51(2), 213–224.
[10] BGH, 10.12.1987 - III ZR 220/86, https://research.wolterskluwer-online.de/document/c5c3112e-60c0-4d04-980e-15b53ad405e5#.
[11] LG Essen, 15.12.2016 - 2 O 285/15,https://www.justiz.nrw.de/nrwe/lgs/essen/lg_essen/j2016/2_O_285_15_Urteil_20161215.html
[12] Indicative and evidence orderof 30.11.2017 of the HigherRegional Court Hamm,I-5 U 15/17, https://dejure.org/ext/9e152b74bfa56f596718ab57ee6082e8

## 2.2 Case 1 BvR 288/20, Neubaueret al. v. Germany

*Facts*

A group of young Germans challenged the Federal Climate Protection Act (Bundesklimaschutzgesetz) [13] before the Federal Constitutional Court in February 2020. Based on their argument that the Acts target of reducing greenhouse gas emissions by 55% by 2030 compared to 1990 levels was insufficient, the complainants argued that the Act violated their fundamental rights as protected by the German Constitution.
The Constitutional Court decided jointly on three other complaints targeting the government's climate protection measures – filed by BUND (Friends of the Earth Germany) and the Association of Solar Supporters and others in November 2018, Yi Yi Prue and others from Bangladesh and Nepal in January 2020 and Steinmetz and others in January 2020. All complaints were aimed at contesting the Federal Climate Protection Act and largely used the same argumentation - emphasising that the measures contained in this act are not able to achieve the climate objectives for Germany and therefore violate the right to life and physical integrity as well as the property rights of citizens (see below "Arguments").

*National and EU Legislation*

The complainants have alleged violations of the fundamental right to human dignity, life and physical integrity (Art. 1, Art. 2 para. 2 sentence 1 of the GG] in each case in conjunction with Art. 20a GG), freedom of occupation as well as the guaranteeof property (Art. 12 para. 1 and 14 para. 1 sentence 1 GG respectively) and the violation of these fundamental rights in conjunction with Art. 20 para. 3 GG with regard to Art. 2 and 8 of the ECHR have taken place.

The EU has set itself the target of reducing greenhouse gas emissions by 20% by 2020 on the basis of Article 191 TFEU and has implemented this in a number of legal acts. On the basis of the EU Charter of Fundamental Rights and EU primary law, in particular Article 191 TFEU,the EU is obliged to maintain a "high level of protection, prevention and precaution" when implementing its environmental and climate policy. This means that it must avoid the damage caused by climate change and the associated violations of fundamental human rights. An increasing amount of responsibility for climate protection has been assumed by the EU. According to Art. 47 TEU, it has legal personality, and has adopted, among other things, the Paris Agreement on the basis of Art. 216 TFEU. While this falls within the realm of mixed competence involving both the Member States and the EU, the latter has far-reaching powers (Art. 3 f. TFEU). Finally, the EU has created a comprehensive internal EU budget of maximum permissible greenhouse gas emissions, which are tradable under certain conditions. The regulations allow for national stricter requirements in this regard. Thus, this is a minimum harmonisation and Member States can be more stringent.

*Arguments*

The claimants argued that the emission target to which the German federal government has committed itself through the Federal Climate Protection Act does not take into account the new findings of the scientific community, which have since been made public,nor does it take into account the international legal obligation bindingon Germany and the EU under the Paris Agreement to limit the global temperature increase to "considerably below 2°C", and if possible to 1.5°C compared to pre-industrial levels.

[13] Bundes-Klimaschutzgesetz vom 12. Dezember2019 (BGBl. I S. 2513), https://www.gesetze-im-internet.de/ksg/BJNR251310019.html

The law simply adopts the goal of the target set at EU level so far. The Act also did not contain a reduction path beyond 2030, nor did it contain any information on the still permissible greenhouse quotas nationally [14].
Moreover, the complainants argued that the principle of human dignity enshrined in Art. 1 GG, in conjunction with Art. 20a GG, imposes an obligation on the State to enable people to live in accordance with their dignity in the long term by protecting the natural resources. Given the existential significance of the climate crisis, the German Federal Climate Protection Act falls short of meeting the obligation of guaranteeing the human dignity with the emission reduction targets first established. In their submission, the complainants claimed that Germany had to reduce its greenhouse gas emissions by 70 % by 2030 compared to 1990 levels in order to contribute to achieving the goals of the Paris Agreement. Given this, the contested provisions fail to provide the required protection because they are evidently unsuitable, do not achieve an adequate protective level and thus infringe the prohibition of inadequacy [15].

The Court acknowledged that it is possible that fundamental rights protection obligations under Article 2 (2) sentence 1 and Article14 (1) of the GG are violated due to the excessively high emission levels permitted in the Climate Protection Act until 2030 and that the complainants living in Germany are threatened with very high reduction burdens after 2030, which could pose an unconstitutional threat to their fundamental rights and comprehensively protected liberty - as a result,they are directly and personally affected.

*Decision*

The Federal Constitutional Court has unanimously ruled that the protection of life and physical integrity under Art. 2 para. 2 sentence 1 of the German Basic Law includes protection against infringements of fundamental rights from environmental threats,regardless of by whom and through what circumstances they are threatened. The State's duty to protect against violations of the right to life, which follows from Art. 2 para. 2 sentence 1 GG, also includes the obligation to protect life and health from the dangers of climate change. It can also establish an obligation to protect objectively under the law with regard to future generations. Furthermore, Art. 20a GG obliges the State to protect the climate. This also aims at achieving climate neutrality; the State's duty to protect natural resources does not enjoy unconditional priority over other concerns but must be balanced with other constitutional rights and constitutional principles in case of conflict. In this context,the relative weight of the climate protection requirement in the balancing process increases as climate change progresses. Compatibility with Article 20a GG is a prerequisite for the constitutional justification of State interventions in fundamental rights.The legislator must adopt the necessary regulations on the size of the total amount of emissions permitted for certain periods of time.

However, the Court also ruled that the right to file a constitutional complaint cannot be based directly on Article 20a of the GG (obligation of the state to protect the environment). It is true that the protection duty of Article 20a GG covers the protection of the climate quite broadly, and the norm is also enforceable. However,Art. 20a GG does not contain any subjective rights that can be exercised.

With the ruling, the Court ordered the German legislator to provide clear targets for emissions reductions from 2031 onwards by the end of 2022. Following the ruling, the federal legislature passed an amended Climate Protection Act16 that requires a reduction of greenhouse gas emissions by at least 65 % by 2030 compared to 1990 levels. It has been in force since 31 August 2021.

[14] „Verfassungsbeschwerden gegen das Klimaschutzgesetz teilweise erfolgreich", Neue Juristische Wochenschrift 2021, Issue 24, p. 1723, beck-online
[15] Ibidem.

## 2.3 Case 10 S 3542/21, DeutscheUmwelthilfe v. Land Baden- Württemberg

*Facts*

The Land Government of Baden-Württemberg was required to adopt an integrated energy and climate protection concept (IEKK) for 2020 and every five years. It is to be established after consulting with environmental associations and organisations to define the main goals, strategies and measures for achieving the Land's climate protection targets. According to Art. 6 para. 3 of the Climate Protection Act of Baden-Württemberg (KSG BW [17]), the IEKK forms the basis for the Land government's decision-making regarding the realisation of the climate protection goals.

However, the IEKK has not yet been concluded by the Land government for the year 2020 or subsequently. Only an IEKK passed back in 2014 in accordance with the statutory provisions was available at the time.
The complainant was a German nationwide environmental organisation, Deutsche Umwelthilfe (German Environment Help). In September 2021, it demanded that the Land adopt an IEKK that met the climate protection targets. Subsequently, in November 2021, the complainant filed the lawsuit seeking compliance with the legal obligation under Art. 6 para. 1 sentence 1 of the KSG BW.

*National and EU Legislation*

According to Art. 6 para. 1 sentence 1 KSG BW in the wording in force as of the 24th of October 2020, the Land government decides to issue monitoring reports pursuant to Art. 9 para. 2 sentence 1 nos. 1 and 2 KSG BW, after the associations and organisations have been consulted, and adopt an integrated energy and climate protection concept that sets out the objectives of the KSG BW for achieving the climate protection targets.
Since the complainant is an environmental organisation, the legal standing required under Art. 42 para. 2 of the German Administrative Code (VwGO)for bringing an action for performance arises for it from Art. 2 para. 1 Environmental Rights Act (UmwRG)in conjunction with Art. 1 para. 1 sentence 1 no. 4. lit. b) UmwRG.
Under Art. 1 para. 1 sentence 1 no. 4 UmwRG, the Act applies to legal actions against decisions on the adoption of plans and programmes within the meaning of Art. 2 para. 7 of the Environmental Impact Assessment Act (UVPG) and within the meaning of the corresponding provisions of Land law, for which there may be an obligation to carry out a Strategic Environmental Assessment under Land law.

Pursuant to Art. 2 para. 1 sentence1 UmwRG, a domestic or foreign organisation recognised under Art. 3 UmwRG may, without having to assert an infringement of its own rights, file an appeal under the VwGO against a decision under Art. 1 para. 1 sentence 1 UmwRG or its omission, if the organisation:

1. asserts that a decision under Art. 1 para. 1 sentence 1 UmwRG or its omissionis contrary to legal provisions which may be relevant to the decision,
2. claims to be affected by the decision under Art. 1 para. 1 sentence 1 UmwRG or its omission in its statutory scope of promoting the objectives of environmental protection, and
3. in the case of proceedings under Art. 1 para. 1 sentence 1 nos. 1 to 2 b UmwRG it was entitled to participate or in the case of proceedings underArt. 1 para. 1 sentence1 no. 4 UmwRG it was entitled to participate and in doing so it expressed its views on the matter in accordance with the applicable legal provisions or, contrary to the applicable legal provisions, it was not given the opportunity to express its views.

[16] Bundes-Klimaschutzgesetz vom 12. Dezember2019 (BGBl. I S. 2513), das durchArtikel 1 des Gesetzes vom 18. August 2021 (BGBl. I S. 3905) geändertworden ist, https://www.gesetze-im-internet.de/ksg/BJNR251310019.html
[17] Klimaschutz- und Klimawandelanpassungsgesetz Baden-Württemberg vom 7. Februar2023, https://www.landesrecht- bw.de/jportal/?quelle=jlink&query=KlimaSchG+BW&psml=bsbawueprod.psml&max=true&aiz=true

Under Art. 2 para. 1 sentence 2 UmwRG, when appealing againsta decision pursuant to Art. 1 para. 1 sentence 1 nos. 2 a to 6 UmwRG or against its omission, the organization must also assert the violation of environmental law.

*Arguments*

The complainant argues that the IEKK is a plan or programme that has or is intended to have significant environmental impacts within the meaning of Art. 17 para. 2 and 4 UVwG, because the term"significant environmental impacts", which itself is derived from the SEA Directive, is generally understood to include both negative and positive environmental impacts. According to its claim and as defined in Art. 6 para. 3 KSG BW, the IEKK is to be the foundation of the Land government's decision-making process for achieving the highly ambitious climate protection goals of the Land as defined in Art. 4 KSG BW, and thus aims to achieve positive environmental impacts to a very large extent.

The Land argued in turn that the action was inadmissible because the claimant had neither standing nor the necessary need for legal protection. According to the Land of Baden-Württemberg, the update of the IEKK requested in the complaint is not a decision on the adoption of plans and programmes within the meaning of Article 1(1) sentence 1 no. 4b UmwRG in conjunction with Article 2(7) UVPG, for which thereis an obligation to carryout a Strategic Environmental Assessment (SEA) under Land law pursuant to Article 17 (2) sentence1 UVwG. As a result,the NGO cannot have any standing in a process that requires the actualisation of the IEKK. The complaint also lacked the necessary need for legal protection, as the defendant Land's actions had not givenrise to the present claim at the time the action was filed. On the contrary,the complainant NGO had been assured in a letter that the Land was working at high pressure on the further development of the climateprotection policy framework in Baden-Württemberg. Furthermore, there had been significant changes to the European and German legal framework conditions for climate protection in Baden-Württemberg, making it impossible for the Land government to adopt an update of the IEKK that met the requirements of the KSG BW until the NGO filed the lawsuit.

*Decision*

The Administrative Court (Verwaltungsgerichthof) has ordered the Land of Baden-Württemberg, the defendant, to adopt the "integrated energy and climate protection concept" (IEKK) provided for in Art. 6 of the Climate Protection Act of Baden-Württemberg (KSG BW).

The Higher Administrative Court in Mannheimheld that the action was admissible becausethe IEKK was a programme subject to legal protection under the Environmental Rights Act (Umwelt- Rechtsbehelfsgesetz). This resulted from the fact that a strategic environmental assessment could be necessary for the IEKK, because it could set a framework for subsequent decisions on approval. In this context, it was not important whether a framework was actually set by means of certain measures in the concept, but whether this was possible in principle - particularly in the case that an IEKK had not been issued to begin with. Contrary to the wording of Art. 2 para. 4 of the Environmental Rights Act, the merits of the action did not depend on whether there had been an obligation to carry out a strategic environmental assessment in the specific case. That could not be determined in deciding whether a concept had been adopted and, moreover, the provision did not cover SEA obligations under Land law in the first place.

---

[16] Bundes-Klimaschutzgesetz vom 12. Dezember2019 (BGBl. I S. 2513), das durchArtikel 1 des Gesetzes vom 18. August 2021 (BGBl. I S. 3905) geändertworden ist, https://www.gesetze-im-internet.de/ksg/BJNR251310019.html

[17] Klimaschutz- und Klimawandelanpassungsgesetz Baden-Württemberg vom 7. Februar2023, https://www.landesrecht- bw.de/jportal/?quelle=jlink&query=KlimaSchG+BW&psml=bsbawueprod.psml&max=true&aiz=true

# 3. Analysis

*Legal basis used*

In the legal proceedings given,we are dealing with either private law or public law.
In the first proceeding against the energy company RWE, the affected party invokes the German Civil Code and Article 1004 of the BGB relating to interference with the use of property and the resulting material damage,claiming injunction relief.Although the plaintiff as well as the effect of the harmful act are located in Peru, the application of German law follows from Article 7 of the Rome II Regulation, where the plaintiff is allowed to choose the jurisdiction of the place where the harmful act was initiated with non-contractual legal obligations related to environmental damage.

In Neubauer et al. v. Germany, both constitutional and European Union law are at stake. A group of individuals brought a case before the Court to establish that the German Climate Protection Act, as issued, is unconstitutional and violates the fundamental rights contained therein. In their position they invoked violations of the fundamental right to human dignity, life and physical integrity in conjunction with the obligation to protect the environment (Art. 1, Art. 2 para. 2 sentence 1 GG and Art.20a GG), freedom of occupation and the guarantee of property (Art. 12 para. 1 and 14 para. 1 sentence 1 GG) and the violation of these fundamental rights in conjunction with Art. 20 para. 3 GG, ordering the legislation to act within the framework of constitutional law, with regard to Art. 2 and 8 of the European Convention on Human Rights - namely the right to life and right to privacy.

The last case involves law at the regional level, or Land law, with an administrative dimension. Baden-Württemberg has issued its own Climate Protection Act (KSG BW). In it, it obliges itself in Art. 6 par. 1 sentence 1 KSG BW to establish an integrated energy and climate protection concept (IEKK) every few years. This concept sets the objectives of the Act for achieving the climate protection goals for the Land. Referring to Art. 1 par. 1 sentence 1 no. 4 of the UmwRG, the UmwRG act is applicable to legal actions contesting decisions as to the adoption of plans and programmes in Art. 2 para. 7 of the Environmental Impact Assessment Act (UVPG) and in terms of the relevant Land law – this encompasses also omission of issuing them.

*Arguments used*

- The first case refers to a crucial principle in the German legal tradition – causality. For the environmental impact to be linked with actions conducted by the energy company, there must be a direct tie with the outcome in form of a flooding risk in the presented case.The court of second instance held that even though the company's emissions are not solely responsible for the flood risk, partial responsibility would be sufficient.

- In the second case, not setting clear emission targets corresponding to EU goals and relevant agreements in international law is against ensuring effective protection in relation to climate change. Fundamental rights from the German Basic Law are being violated when not taking action to actively prevent environmental harm, as it affects many aspects of lives of citizens.

- The Land in question in the last presented case was obliged to be consistent in issuing an energy and climate protection concept, as it is essential for achieving the climate protection goals set out in the Land-specific Climate Protection Act.

*Impact*

The collected case law indicates a trend in the jurisprudence to set obligations for the federal government and the Länder to actively pursue climate protection goals and take measures to prevent environmental damage. Legally binding targets are being considered essential and necessary for guaranteeing an effective combat against climate change. Environmental objectives are also being linked to the state protection of fundamental rights, as the currently dynamically changing situation of global climate may and in numerous ways will influence the enjoyment of human rights, such as the broadly understood right to life and the right to property.

In the first presented case, the transnational character of the legal dispute is of great importance, as it would establish the possibility for corporations responsible for environmental damage to be held accountable for their impact in foreign countries, which are often overlooked when assessing the influence on climate, even when there is no direct causality. Legal action in similar cases is thus intended to seek compensation for climate-related damage or reimbursement of expenses for adaptation measures. While the immediate point of reference is past actions, these proceedings are also expected to influence future practices of many companies, since they will restrict greenhouse gas-intensive activities in order to minimise liability risks.

However, it must also be pointed out, as was rightly indicated in the doctrine, that the legal problems of such lawsuits come to the foreground. The civil courts are supposed to diverge from traditional legal approaches and eventually settle distributional questions that fall within the scope of political decision-making. Consequently, we can expect situations in which the courts will have to decide, as in the first case presented, to what extent a particular company is responsible for the effect of climate change and how it can be held liable, thus taking on the role of establishing the responsibility of businesses in environmental matters. Moreover, there is a risk of distortions of competition, as the selection of responsible defendants - which is legitimate from a procedural point of view - is ultimately arbitrary [18].

It should be noted that the standing was not particularly strongly contested in any of the above- mentioned proceedings, and although it was challenged as regards some of the complainants, the court ultimately decided to allow the case to go to trial. The fact that the effect of the German company's actions took place in Peru and violated the property rights of one of the complainants there, was not an obstacle in the civil proceedings, nor was the fact that in the administrative proceedings it was the NGO which brought the challenging action to court - rather, the Land's argument was that there was insufficient legal basis for bringing the case and requiring the creation of anew IEKK. The constitutional complaint case also left little room for doubt regarding the standing of the complainants and also recognised that they were affected by the possible consequences of global warming on their constitutional freedoms.

Taking this into account, however, it cannot be clearly stated that standing in climate matters has been simplified and access to the court is easier. However, it can be noted that environmental and climate change cases are increasingly on the agenda of German courts and, in general,standing is not a problem as long as the previously mentioned criteria are fulfilled.

[18] Fellenberg, Frank,„Rechtsschutz als Instrument des Klimaschutzes – ein Zwischenstand“, Neue Zeitschrift für Verwaltungsrecht 2022, Issue 13, p. 913, beck-online

# 4. Conclusion and Challenges

There are not many cases yet brought by citizens and NGOs with the objective to decisions having an impact on the environment. The lawsuits at hand however are of great importance and are a stepping stone for strategic climate litigation in Germany. It is remarkable that environmental cases can be found on the regional (Länder) level, as well as on the federal level. This notion creates room for effective litigation in climate impact cases and indicates that the citizens may be moved to act more often also regarding environmental affairs on the regional level. It is also noticeable that environmental matters are gaining importance on par with fundamental rights, which suggests that in the future the two fields may become brought in relation to each other more often in legal disputes.

However, there are still some challenges present. Most notably, to file a court case, citizens and NGOs have to prove that their own private interest – directly and presently – is being affected by a certain decision. This may prove difficult when combating environmental impact, as it was always generally understood as a matter of public interest. It should be noted, however, that in the court cases provided, standing and its more detailed analysis were not the main issue to be considered by the Court. It was mostly acknowledged that the complaining actors were entitled to start litigation, nor did the defendants focus on contesting this aspect. In view of the above-mentioned prerequisites for standing before court, we can observe that, despite the obstacles, effective climate litigation is possible both for citizens and non-governmental organisations at different levels of jurisdiction and types of courts or contested legal measures.

In conclusion, legal disputes with an environmental dimension are gaining significance in the German jurisprudence. With citizens and NGOs using strategic climate litigation as a tool to combat harmful decisions or practices, the so gained decisions are re-shaping the prominence of environmental matters in the legal landscape. The more present engagement of individuals and specialized organizations on federal and regional level is to be viewed as a willingness to enforce climate change prevention objectives, which are now more than ever closely linked to private interest as well. Given this, there are specific hurdles to be met when it comes to the possibility of standing before German courts, nevertheless the presented cases indicate that effective measures to held public authorities and privately owned companies can be successfully executed in litigation.

---

[18] Fellenberg, Frank,„Rechtsschutz als Instrument des Klimaschutzes – ein Zwischenstand", Neue Zeitschrift für Verwaltungsrecht 2022, Issue 13, p. 913, beck-online

# CLIMATE CHANGE STRATEGIC LITIGATION: AN EXAMPLE OF POSITIVE DISSENSUS

*COUNTRY REPORT: Spain*

This study/report has been prepared by Milieu Consulting SRL under Horizon RED SPINEL Project N°101061621. The main author of the study/report is Fernando Beamud Carrillo reviewed by Marta Ballesteros and Laura Vona.
The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

**Milieu Consulting SRL**, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: marta.ballesteros@milieu.be; laura.vona@milieu.be; web address: www.milieu.be.

October 2023

# Table of contents

Abbreviations.....................................................................p.102

1.Introduction.....................................................................p.103

2. Overview of Strategic Climate Litigation cases in Spain.........p.104

3. Analysis.............................................................................p.110

4. Conclusion and Challenges...............................................p.112

# Abbreviations

| | |
|---|---|
| CoE | Council of Europe |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| MITECO | Ministry for the Ecological Transition and the Demographic Challenge |
| NGOs | Non-Governmental Organisation |
| NPACC | National Plan fro Climate Change and Adaptation |
| PNIEC | National Plan for Climate Change Adaptation |
| SEA | Strategic Environmental Assessment |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article49 of the TEU and the Preambles to the Treatyand to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law.
The 2020 Rule of Law report by the European Commission confirms this meaning and states 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [3].

Within this context, dissenting actions broughy up by citizens against public institutions' decisions are at the heart of EU democracies and aim at ensuring necessary progress on issues of public concern. These cases are considered positive examples of dissensus because they are carried out in line with the rule of law and democratic principles and without breaching the law. As analysed in other reports within this project, there are also examples of dissenting actions by populists or nationalist movements seeking to subvert democratic principles, fundamental rights and the rule of law. For the purpose of this work, "dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors,including state and non-state actors,seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy" (Brack and Coman 2023).

This report provides an overview of relevant case law related to strategic litigation actions related to climate change, initiated by citizens and NGOs before national courts. The report will also analyse the arguments and impact of these cases in relation to EU and national strategic objectives. The timeframe for this research has been set in the period between the signature of the Paris Agreement in 2015 and today.

[1] COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.
[2] Regulation (EU, Euratom)2020/2092 of the European Parliament and of the Council of 16 December2020 on a general regime of conditionality for the protection of the Union budget available at https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG
[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT, THE COUNCIL,THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEEOF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

# 2. Overview of Strategic Climate Litigation cases in Spain

In Spain a total of two cases have been brought to national courts between 2015 (date of the signature of the Paris Agreement) and today. They evidence the start of what might be a trend and critical importance that this type of strategic litigation action may have in Spain following a series of legislative developments initiated by the EU, in particular following the EU's ratification of the Paris Agreement and the adoption of Regulation 2018/1999 on the Governance of the Energy Union and Climate Action.

The Spanish legal system is part of the civil law family based on Roman law principles. Similar to its neighbouring countries, its legal system is mainly codified,comprising a system of legal codes, including the Spanish Civil Code (Código Civil) and the Spanish Penal Code (Código Penal) among others [4]. Moreover, according to the Civil Code, the primary sources of the Spanish legal system are laws, custom and the general principles of law, while jurisprudence is considered as a secondary source of the Spanish legal system, complementary to the others4. In this particular regard, the Spanish Constitution of 1978 holds a supreme position in the Spanish legal system, establishing the principle of separation of powers divided between the legislative, executive and judicial. Further, since 1986 Spain is a Member State of the EU, so that both EU law and the decisions of the CJEU have a direct impact on the Spanish legal system.

The Spanish judicial system and competence has a hierarchical structure, with various levels, including local and regional courts, provincial courts, regional high courts, and the Spanish Supreme Court (Tribunal Supremo). Likewise, there are specialised courts for more specific matters, such as administrative, family, labour, and the Constitutional Court (Tribunal Constitucional) that deals with constitutional issues.

Furthermore, the only two cases of climate litigation in Spain have taken place under the jurisdiction of the Supreme Court whose structure, divided into 5 chambers, reflects the legal fields of competence (civil, criminal, administrative, social and military). In order to access the third chamber (administrative proceedings) of the Supreme Court, it is necessary to exhaust the previous ordinary jurisdictional steps. However, it is possible to have access the third chamber of the Supreme Court in a single instance when the case meets the requirements listed by Article 58 of the Organic Law 6/1985 on the Judiciary (Ley Orgánica 6/1985). This provision states that the administrative Chamber of the Supreme Court shall hear "contentious-administrative appeals against actions and administrative provisions adopted by the Council of Ministers, of the Government Delegated Commissions and the General Council of the Judiciary and against the actions and administrative provisions adopted by the Congress and the Senate, of the Constitutional Court, the Auditors Court and the Ombudsman in the terms and matters established under Law and those resources which are exceptionally attributed to it under law" [5].

The present study is focused on climate litigation, which falls within environmental legal framework. Climate litigation refers to the judicial cases that citizens or NGOs initiate against an act or omission from the authorities or private (natural or legal) person on the basis of climate change targets or legislation. As we will discuss further on, the examples of climate litigation identified in Spain have been initiated from NGOs against acts or omissions from the central government. No case has been identified where a group of citizens initiated the legal action related to climate change.Similarly no case has been identified where the court targeted actions or omissions of a legal person of the private sector regarding its obligations on emissions reduction.
Standing is based on a non-exhaustive set of criteria/requirements that may vary depending on the nature of the case, but which in general follow a rights-based or interest-based approach.

[4] https://e-justice.europa.eu/6/EN/national_legislation?SPAIN&member=1
[5] Organic Law 6/1985, of 1 July, on the Judiciary. Ley Orgánica6/1985, de 1 de julio, del Poder Judicial. 'BOE'núm. 157, de 02/07/1985, https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666

Under Spanish administrative Law 39/2015 of the common administrative procedure of public administrations [6], natural and legal persons, including NGOs that are holders of legitimate rights or interests are considered an interested party in the administrative review procedure (Article 4). Further Article 19 of Law 29/1998 on the Administrative judicial procedure (Law 29/1998) [7] grants standing before the administrative jurisdictional order to the following: a) natural or legal persons who have a legitimate right or interest; b) corporations, associations, trade unions and groups and entities (including NGOs) that are affected or are legally authorised to defend collective rights and legitimate interests.

In other words,the Spanish administrative legal framework grants standing to those associations and organisations that are holders of legitimate interests recognized by law or legally authorized to defend collective interests such as environmental protection (e.g. by way of their statutes) and may challenge relevant decisions (incl. for breaching environmental law or affecting environmental protection interests) through administrative procedure and administrative judicial procedure.

Both cases of climate litigation identified in Spain have been initiated by environmental NGOs, In Spain most environmental acts or decisions fall within the administrative legal system and the procedural channel through which climate litigation has been settled is the administrative jurisdiction. In this respect, Article 19 of the Administrative Jurisdiction Law (Ley 29/1998) deals with the standing of individuals and organisations who are directly affected or have a legitimate interest by an administrative act or decision. Further, standing rules for environmental NGOs are broadened by Law 27/2006regulating the rights of access to information, public participation and access to justice in environmental matters [8] that incorporates Directives 2003/4 and 2003/35. Article 22 introduces a quasi actio popularis for NGOs in environmental matters where actions and omissions of public authorities in breach of environmental provisions may be challenged through the administrative procedures. This actio popularis grants standing only to not-for-profit legal persons meeting a set of requirements listed in Article 23 which involve: a) having among its objectives stated in its by-laws the protection of the environment in general or of one of its elements; b) having been legally established at least two years before the initiation of the legal challenge and having been active during that period to accomplish the objectives provided in their by-laws; c) according to their by-laws,develop their activity within the territorial scope affected by the administrative act or omission' [9].

In Spain the legal framework for climate change policies and regulations derives mainly from the decisions adopted by the central government clearly influenced by the path set by the international commitments and EU legislation [10]. Due to the Spanish quasi-federal context, climate policies and regulations are also derived from the seventeen Autonomous Communities (CCAAs) that compose the Spanish State and by the different local authorities.

The Spanish Ministry for the Ecological Transition and the Demographic Challenge (MITECO) is the Ministry in charge of environmental and climate change matters. The Spanish Strategy for Climate Change and Clean Energy (horizon 2007-2012-2020) and the National Plan for Climate Change Adaptation (NPACC) are the main planning tools of the Spanish climate change policy that has been developed in Spain since 2006. They have been regularly updated with the most recent versions being approved in 2021 and will be applied until 2030.

[6] Law 39/2015of 1 October on the common administrative procedure of publicadministrations, Ley 39/2015,de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas, 'BOE' núm. 236, de 02/10/2015, https://www.boe.es/eli/es/l/2015/10/01/39/con

[7] Law 29/1998of 13 July 1998, regulating the administrative judicialprocedure, Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, 'BOE' núm. 167, de 14/07/1998, https://www.boe.es/eli/es/l/1998/07/13/29/con

[8] Law 27/2006 of 18 July regulating the rights of access to information, public participation and access to justice in environmental matters. Ley 27/2006, de 18 de julio, por la que se regulanlos derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente, 'BOE' núm. 171, de 19/07/2006, https://www.boe.es/eli/es/l/2006/07/18/27/con

[9] Translation taken from the E-Justice factsheets.

[10] Rodrigo, S., Alda-Fernandez, M., & Kölling,M. (2023). Climate Governance and Federalism in Spain. In A. Fenna,S. Jodoin, & J. Setzer (Eds.), Climate Governance and Federalism: A Forum of Federations Comparative Policy Analysis (pp. 263-284). Cambridge: Cambridge University Press. p. 280.

Moreover, due to recent advances promoted by the EU regulatory framework, the National Integrated Energy and Climate Plan (PNIEC) was adopted, a national strategic plan that includes climate change mitigation and adaptation measures, and the Climate Change and Energy Transition Law (Law 7/2021), whose approval is justified by the compliance with the Spanish commitments under the Paris Agreement [11] Following Article 3 and 4 of the SEA Directive 2001/42/EC the environmental assessment has to be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure. This procedure requires the public to be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure (Article 6 of SEA Directive 2001/42/EC). Further, although adopted after the PNIEC, under Article 40 of Law 7/2021, these plans should be subject to Strategic Environmental Assessment.

## 2.1 Case 2/265/2020 (Greenpeace et al. v. Spain I)

*Facts*

Preliminary administrative phase

The complainants (Greenpeace España,Ecologistas en Acción-Coda and Oxfam Intermón) three environmental and human rights NGOs lodged, in early 2020, a formal complaint for climate inactivity of the Spanish government's Council of Ministers (Consejo de Ministros y Ministras) and the Ministry for the Ecological Transition and the Demographic Challenge according to article 22 of the Law 27/2006 regulating rights of access to information, public participation and access to justice in environmental matters, Article 22 grants NGOs the right to challenge public authorities' decisions (or omissions) that breach environmental law following the administrative procedure regulated under Law 39/2015 on the Common Administrative Procedure of Public Administrations and Law 29/1998 on Administrative Jurisdiction. In this respect, article 29(1) of Law 29/1998 foresees that if within 3 months of the complaint being uploaded, the administration has not complied with the request or has not reached an agreement with the interested parties, the latter may file a contentious-administrative appeal for administrative inaction [12].

The claim was based on the failure of the Spanish government to approve the National Integrated Energy and Climate Plan (hereinafter PNIEC) in accordance with the requirements set out in Regulation 2018/1999 on the Governance of the Energy Union and Climate Action whose article 3(1) incorporates the obligation for Member States to present by 31 December 2019 an integrated national energy and climate plan [13].

Additionally, the appellants claimed that the PNIEC had to reach a high level of climate ambition in order to preserve human rights and the right to an adequate environment for present and future generations, in conformity with the environmental law principles of intra/intergenerational equity.

[11] Law 7/2021 of 20 May 2021, on climate change and energy transition, Ley 7/2021, de 20 de mayo de 2021, de cambio climático y transición energética, 'BOE, núm 121, de 21/05/2021, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021- 8447

[12] Law 29/1998of 13 July 1998, regulating the administrative judicialprocedure, Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, 'BOE' núm. 167, de 14/07/1998, https://www.boe.es/eli/es/l/1998/07/13/29/con

[13] Regulation (EU) 2018/1999 of the EuropeanParliament and of the Councilof 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L328/1. https://eur-lex.europa.eu/legal- content/EN/TXT/?toc=OJ%3AL%3A2018%3A328%3ATOC&uri=uriserv%3AOJ.L_.2018.328.01.0001.01.ENG

*Judicial procedure*

Further, due to administrative silence in the administrative phase and following article 29(1) of Law 29/1998, the NGOs requested judicial remedy by filing an appeal before the Spanish Supreme Court on 15 December 2020 [14], on the basis of article 12(1)(a) of Law 29/1998 which allows direct access in a single instance to the Administrative Chamber of the Supreme Court in the case of acts and provisions of the Council of Ministers.
It is worth noting that during the time when the trial was taking place, the Spanish government approved the PNIEC (March 2021) as part of the decarbonisation strategy for 2050 (Estrategia de Descarbonización a Largo Plazo 2050) a fact which,as we shall see below,was used as one of the main arguments of the defendants.

*National and EU Legislation*

The legal basis for the case focuses on the obligation under Regulation 2018/1999 on the Governance of the Energy Union and Climate Action with regard to the approval of the PNIEC. Furthermore, with regard to the legal basis for standing, the claimants relied on articles22 and 23 of Law 27/2006 granting NGOs meeting the requirements with access to justice in environmental matters. Under this provision, NGOs should have accredited in their statutes that they pursue the objectives of protection of the environment in general or that of any of its elements in particular. They also should carry out their activity in a territorial area that is affected by the action, or omission. In the case, they alleged to have a legitimate interest in the omission on the basis of article 19(1)(a) of Law 29/1998 claiming the need for the Spanish Government to adopt measures to reduce greenhouse gas (GHG) emissions. Additionally, from a human rights point of view,a reference was made that implied that the failure to achieve ambitious climate targets in the PNIEC would jeopardise the enjoyment by Spanish citizens of certain fundamental rights, particularly the right to life and the right to respect for private and family life in articles 2 and 8 (respectively) of the European Convention on Human Rights [15] Moreover, one of the main legal basis is the Paris Agreement, ratified by Spain in 2017, whose articles 3 and 4 establish the duty of the parties to present nationally determined contributions (NDCs), in order to achieve the temperature goal of 2°C and to pursue efforts to limit the temperature increase to 1.5°C as established in article 2 [16].

*Arguments*

The complainants claimed the climate inactivity of the Spanish government due to its failure to approve the PNIEC that would establish GHG reduction targets in line with Spain's international commitments under the Paris Agreement and the scientific evidence presented by the Intergovernmental Panel on Climate Change (hereafter IPCC) of not exceeding 1.5°C degree of global temperature and the goal of carbon neutrality by 2050.17
Furthermore, even though the PNIEC was not approved at the time the lawsuit was filed, there was a draft plan which indicated a GHG reduction target of 23% compared to 1990,which the claimants considered to be far short of the targets set out in the Paris Agreement.
The defendant (the Spanish Government) argued that regarding the PNIEC Spain had complied with the obligations established in the Regulation 2018/1999 since Spain sent the draft plan to the European Commission on 22 February 2019 and the European Commission published an evaluation of the draft plan on 18 June 2019, so that after the final approval of the PNIEC on 31 March 2020 it was no longer necessary to submit it again to the European Commission [18].

[14] Lawsuit 2/ 265/ 2020 brought by the claimants in Greenpeace et al. v. Spain I. Available: https://www.ecologistasenaccion.org/158818/presentada-ante-el-tribunal-supremo-la-demanda-contra-el-gobierno-por-falta- de-accion-climatica/
[15] European Convention for the Protection of Human Rightsand Fundamental Freedoms.
[16] Paris Agreementto the United Nations FrameworkConvention on ClimateChange,
[17] Order by the SpanishSupreme Court in Greenpeace et al. v. Spain I. Available : https://climatecasechart.com/wp- content/uploads/non-us-case-documents/2020/20200930_12221_order.pdf
[18] Spanish Government's response to the complaint in Greenpeace et al. v. Spain I. Available: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302_12221_reply.pdf

Moreover, with regard to the commitments acquired by Spain in the framework of the Paris Agreement, the defendants pointed out that the Agreement itself does not impose emission reduction targets at the national level but rather an obligation to implement domestic measures through the NDCs [19]. Additionally, the defendants also claimed that at the time the PNIEC was approved, the appeal raised by the appellants was no longer relevant, so that the interest in a judgment condemning the approval of an activity that has already taken place with the approval of the PNIEC was extinguished [20]. In this particular regard, it should be noted that judicial processes in Spain are often delayed due to the overload of cases that the courts have to deal with. Therefore, in cases such as the present one, in which the inactivity of the public administration in relation to the approval of a legal instrument is claimed, it might be common that said instrument is approved before the Court issues a judgment, opening the possibility for the public administration to be able to present new arguments that are favourable to it in the outcome of the dispute. The Supreme Court made no mention of the claimants' standing, which leads to the presumption that their standing was assumed based on the legal framework related to environmental matters. However, the Court did rule on the Government's arguments concerning the lack of subject matter following the approval of the PNIEC. It stated that in accordance with all the arguments set out by the appellants in the complaint, there were still some which rendered the decision subject to judicial review. In this particular regard, there was the appellants' claim that the lack of ambition in the mitigation target set out in the PNIEC would make it difficult to meet the temperature target of the Paris Agreement [21].

*Decision*

After the approval of the PNIEC, the claimants decided to bring a new case against the Spanish government, this time concerning the content of the PNIEC itself. Therefore, as there were two appeals of a very similar nature and there was a clear connection between them, the Supreme Court agreed on a joint decision for both appeals.Hence, for logical reasons, the Court's decision was taken jointly with the new case, which is assessed below.

## 2.1 Case 2/162/2021 (Greenpeace et al. v. Spain II)

*Facts*

As just anticipated, on 18 May 2021, the claimants (Greenpeace España, Ecologistas en Acción- Coda, Oxfam Intermón and Coordinadora de ONG para el Desarrollo) filed a second lawsuit against the Spanish government22. In this case against the content of the PNIEC, the NGOs argued that the GHG reduction target of 23% compared to 1990 levels by 2030 established in the plan was not ambitious enough to comply with the commitments acquired by Spain in the Paris Agreement and the objective of 1.5°C. It should be added that at the same time as the PNIEC was approved, the Spanish Government passed the Climate Change and Energy Transition Law 7/2021, which establishes concrete obligations and targets regarding to climate change reduction efforts.

*National and EU Legislation*

The legal basis for the present case are similar to the previous case with certain differences as the previous case was more procedural regarding the adoption of the PNIEC. In this case, the focus more on the merits and legality of the PNIEC upon approval.

[19] Ibid.
[20] Spanish Government's motion to dismiss for lack of subject in Greenpeace et al. v. Spain I. Available: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210331_12221_na.pdf
[21] Supreme Court decision rejecting the motion to dismissfor lack of subject in Greenpeace et al. v. Spain I. Available: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210614_12221_decision.pdf
[22] Lawsuit 002 / 0000162/ 2021 brought by the claimants in Greenpeace et al. v. Spain II. Available: http://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/

With regard to NGOs' standing, the request does not refer to the legal basis for standing, which are assumed on the basis of the clear legal framework as mentioned in relation to the previous case. The case is also based on the Law on Environmental Assessment (Ley 21/2013 de evaluación ambiental) which seeks the integration of environmental aspects into decision-making in projects, plans and programmes through a systematic process of environmental impact assessment that incorporates a public information and consultation process for interested stakeholders who may be affected.

*Arguments*

The complainants argue that the Spanish government, in addition to approving the PNIEC fourteen months later to the date set by Regulation 2018/1999, also skipped a series of procedures prior to its approval. Essentially, one of the main irregularities alleged by the complainants is that the strategic evaluation assessment (SEA) of the PNIEC was carried out with irregularities mainly related to the lack of stakeholder involvement and public consultation, as stated in Articles 19 to 23 of Law 21/2013 [23]. According to the Law on Environmental Assessment a consultation process with interested civil society actors on the draft plan is required (Art. 19 Ley 21/2013), together with the preparation and submission for public information and consultation of the strategic environmental study (Arts. 20 to 22 Ley 21/2013) and the formulation of the Strategic Environmental Declaration (Arts. 24 to 26 Ley 21/2013). In this respect, while the consultation was carried out, the complainants claimed that the submitted allegations to the SEA were not taken into consideration by the Spanish authorities when approving the PNIEC (Art. 23 Ley 21/2013). Article 23 of Law 21/2013 establishes that the promoter of the plan or program must take into consideration the allegations formulated in the public information and consultation procedures and modify the strategic environmental study in accordance with them [24].

Furthermore, with respect to the content of the PNIEC, the claimants argue that both emission reduction targets and targets for improving energy efficiency and the use of renewable energy are far from what is needed to meet the targets of the Paris Agreement and the recommendations issued by the IPCC. The Supreme Court stated that while the environmental assessment related to the PNIEC had deficiencies in its processing, mainly in relation to the way stakeholder allegations were taken into account, as stated in Law 21/2013, it cannot be concluded that this had any effect on its legality, since it does not necessarily lead to an evident conclusion that affects the adoption of the plan itself.

Secondly, with regard to the arguments concerning the PNIEC and the lack of ambition in its targets to meet the Paris Agreement, the Supreme Court stated that safeguarding the division of powers, the Court does have jurisdiction to compel the Public Administration to increase the level of ambition in its climate policies. However, with respect to Spain's obligations under the Paris Agreement, the Court indicated that the Agreement only sets general criteria without any specific deadlines, highlighting that the Agreement long-term targets are not legally binding in Spain.

Furthermore, the Supreme Court stated that Spain has complied with its Paris Agreement obligations within the context of the EU by meeting its GHG reduction commitments as both the EU and Spain have the same commitments. Further, while the Court recognises the need for increased action on climate change if the Paris Agreement targets are to be met, it also points out that in the global picture the EU is playing an ambitious role in comparison with the international community as a whole, and with Spain as well.

Lastly, the Court recognises that efforts are being made to increase ambition on EU targets and that unilateral action by Spain could jeopardise its main economic sectors.

[23] Appellants complaintIn Greenpeace et al. v. Spain II. Available : https://climatecasechart.com/wp-content/uploads/non-us- case-documents/2021/20210528_14167_complaint.pdf

[24] Law 21/2013,of 9 December 2013, on environmental assessment. Ley 21/2013, de 9 de diciembre de 2020, de evaluación ambiental. 'BOE' núm. 296, 11 December 2013. https://www.boe.es/buscar/act.php?id=BOE-A-2013-12913

*Decision*

The Spanish Supreme Court in its Decision (STS 3556/2023) of 24 July 2023 dismissed both appeals (2/265/2020 &2/162/2021) filed by the claimants against the adoption of the PNIEC and concludes that it duly complies with the legal system.

# 3. Analysis

On the basis of the two cases that have been analysed in this case study, we present hereby a legal analysis of their main legal arguments and impacts on national climate policies as well as main conclusions.

*Legal basis used*

With respect to the legal basis used in the cases described here, since both cases have the same parties and the same background, we can conclude that in both cases essentially the same legal strategy is used, while different legal arguments were raised since one case was more procedural while the merits were analysed in the case of "Greenpeace et al. v. Spain II".
In relation to standing, the NGOs in the first case put forward the Law 27/2006 as the legal basis to justify their standing. It was contested by the defendant in relation to the standing of the plaintiffs with regard to the fundamental rights arguments used by the complainants and which linked them to the lack of ambition of the PNIEC. On the other hand, the Court did not question the legal standing of the environmental NGOs by admitting the case and making no reference to it in the judgment. This leads us to conclude that there is a presumption of legal standing of environmental NGOs in cases related to decisions that could potentially breach environmental legislation.

Standing rules were not put forward to justify the initiation of the second case before the Supreme Court. The Spanish legal system is clear and not questioned. There is a presumption of legal standing of environmental NGOs in cases related to decisions that could breach environmental legislation. In relation to the merits of the case, both cases essentially revolve around the Paris Agreement and EU climate change and energy policies, and the impact of these on Spanish legislation.

The Paris Agreement, ratified by the Spanish Government, is a legally binding international commitment which entails a series of responsibilities for its parties.This international commitment seeks to reduce global GHG emissions in order to limit the increase in global temperature to no more than 2°C above pre-industrial levels. However, the claimants referred to the 1.5°C target which is not legally binding for the parties to the Agreement. While the 2 °C target set by the Paris Agreement is binding for its parties, the claimants decided to focus their strategy on the 1.5 °C target which is more ambitious in line with the IPCC scientific advice.Spain has the obligation to submit its NDC every 5 years and, as an EU Member State has an obligation to keep the reduction levels within those established for Spain at EU level to meet the 2°C target. While the claimants opted to build the arguments around the more ambitious target of 1.5 °C, the strategy might have had more possibilities to succeed, had they used the 2°C legally binding target. In any case, the impact of measures towards such long-term target is difficult to measure.

With regard to EU law, the legal argument focused on the implementation of Regulation 1999/2018 through the adoption of the PNIEC approved by the Spanish government. In this regard, despite the potential errors claimed by the NGOs, in relation to the allegations raised within the SEA consultation process in conformity with Law 21/2013,the fact that the Commission did not declare it void cannot be ignored.

It should be noted that while the issue of fundamental rights is raised by the NGOs in the second case, the legal argument is not the Spanish legal framework. The claimants argued the impact of the inaction of the Spanish Government in fundamental rights,considering that it could jeopardise the exercise of the right to life and the right to respect for private and family life in articles2 and 8 (respectively) of the European Convention on Human Rights. However, they could have referred to the fundamental rights enshrined in the Spanish Constitution which incorporates in its Article 45 a right to an adequate environment, in which obligations are established for the competent authorities to ensure its conservation and restoration [25]. While this right is outside the chapter dedicated to fundamental rights in the Spanish Constitution of 1978, Article45 underlies the right of citizens to enjoy a quality of life that is consistent with the dignity of the person recognised in Article 10, the right to life in Article 15 and the right to respect for private and family life in Article 18, which all of them, are within the chapter of fundamental rights of the Constitution. Those provisions can be asserted before the Constitutional Court through the amparo remedy (recurso de amparo).

*Arguments used*

Firstly, with regard to "Greenpeace et al. v. Spain I", the arguments used focused on the procedural obligation of the Spanish government to develop and submit the PNIEC on time and in accordance with the provisions of Regulation 1999/2018. Secondly, with regard to "Greenpeace et al. v. Spain II", once the Spanish government had already approved the PNIEC, the arguments focused on the content of the PNIEC itself and its lack of ambition in relation to the Paris Agreement commitments. Further, the complainants argued certain errors in its adoption process, especially in relation to the lack of consideration of their allegations to the plan and its environmental assessment.

Furthermore, in both cases the claimants highlighted the effects of climate change in Spain, considered one of the most vulnerable countries in continental Europe. In this respect, the increase of climate litigation, at a worldwide level, is also due to the improvement of scientific evidence. This argument can be connected to the emergence of climate litigation cases in Spain. With regard to the arguments used by the Court in its decision, we can clearly observe how it positions itself in line with the Spanish government's position on climate change, going so far as to praise the role of Spain and the EU as models because of the 'high' level of ambition in their policies compared to the rest of the international community. Moreover, while acknowledging that with the current climate targets it is unlikely that the Paris Agreement targets can be met, the Court anticipates future developments by indicating that these targets will be updated and become progressively more ambitious. In this respect, the Court should not decide on the basis of future events that have not yet been decided.

Further, regarding the formal defects in the approval of the SEA by the Spanish government, it is relevant to note that the Court did not consider sufficiently relevant for the final approval of the PNIEC or to invalidate it, the fact that the Spanish government did not take into consideration the arguments of the claimants during the public participation phase in the process of adoption of the SEA as provided for in Article 23 of Law 21/2013.

*Impact*

As the Supreme Court's joint ruling dates from 24 July 2023, it is still premature for us to determine what the real impacts have been. However, it may be discouraging for future climate litigation or, on the contrary, NGOs might want to try to change this precedent. Since the Supreme Court dismissed the appeals in both cases there is not a clear impact as a result of the ruling that could oblige the Spanish government to increase the level of ambition in its climate change measures. Moreover, although there is no certainty that these lawsuits led to a change in the Spanish Government's position and forced them to approve regulations and strategies in the field of climate change, we cannot overlook the fact that after the first lawsuit "Greenpeace et al v. Spain I" the

[25] Spanish Constitution of 1978, Constitución Española de 1978,'BOE' núm 311 of 29/12/1978, https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229

Spanish Government finally approved the PNIEC (despite not being ambitious enough),the Spanish National Plan for Adaptation and the Climate Change and Energy Transition Law. Further, a possible negative impact that could be drawn from the judgment would be regarding the Court's acceptance that the public administration can approve the SEA without taking into consideration the allegations made by the interested parties. This could create a dangerous precedent that would go against the provisions of Law 21/2013 and therefore also against Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

Moreover, although there is no certainty that this lawsuit led to a change in the Spanish Government's position and forced them to approve regulations and strategies in the field of climate change, we cannot overlook the fact that after this first lawsuit the Spanish Government finally approved the PNIEC (despite not being ambitious enough), the Spanish National Plan for Adaptation and the Climate Change and Energy Transition Law. Likewise, as a result of the Climate Law, the Spanish government is strengthening the mechanisms for public participation in the decision-making process on climate change through the establishment of a Citizen Assembly for Climate Change at the national level, which allows citizens to be better informed and thus participate in the transformations that are necessary to achieve climate neutrality by 2050 [26].

# 4. Conclusion and Challenges

Although it is true that there is a long tradition of environmental litigation in Spain, until relatively recently no climate litigation has been brought in Spain, unlike in other European countries. However, the two recent cases that have reached the jurisdiction of the Supreme Court may be an indicator that this type of citizen and NGO-led action in climate change cases may become a possibility to influence more ambitious measures by the public administration. However, it raises the question of why there is such a gap in the number of climate disputes compared to other countries.

The identified two cases of climate litigation in Spain show a clear example of what positive dissenting actions promoted by NGOs before national courts entail, demanding national governments to take more ambitious climate action like in Urgenda or in the People's Climate cases.
Although it is true that the outcome of both cases was not positive with respect to the actions demanded by the NGOs, this may be due, as we have seen, to a series of factors that may justify the response from the courts. Among these factors which may hinder, to some extent, future climate litigation cases in Spain are: the absence of a fundamental right to the environment recognised in the Constitution; and the absence,at the time of the court case,of a law setting out clear legally binding obligations and targets for the Spanish Government to comply with its emission reduction and climate policies.

However, the adoption of the Climate law, which incorporate clear obligations and commitments for the Spanish government, may open the possibility of new litigation occurring in the future if the objectives set out in these instruments are not achieved. In this respect, the Climate law sets binding minimum targets for 2030 in relation to the reduction of GHG emissions, the use of renewable energy and the promotion of energy efficiency and includes a target for 2050 to achieve climate neutrality, stipulating that this should be pursued in the shortest possible time.27 To this end, the Council of Ministers is authorised to review these targets upwards,with a view to making them more ambitious in order to comply with the objectives of the Paris Agreement and EU regulations. Further, it also incorporates both the content of the PNIEC and the Decarbonisation Strategy for 2050 into the Spanish legal system.

[26] Citizen Assembly for Climate Change. Asamblea Ciudadana para el Clima. https://asambleaciudadanadelcambioclimatico.es/la-asamblea-por-el-clima/
[27] Law 7/2021 of 20 May 2021, on Climate Change and Energy Transition. Ley 7/2021, de 21 de mayo de 2021, de cambio climático y transición energética. 'BOE' núm. 121, de 21/05/2021. https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021- 8447