

directory number <b>2021/</b>
date of pronouncement <b>17/06/2021</b>
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JUG-JGC

N° 167

**French-speaking Court of  
First Instance of Brussels,  
Civil Section**

**Judgement**

**4th chamber**

**civil cases**

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**Final judgement Contradictory  
Public authorities' responsibility - Environment**

4 Annexes : Annex A, Annex B, Annex C and Annex D

**IN CONNECTION WITH:**

**ASBL Klimaatzaak**, whose registered office is located at Rue de Fiennes 77, 1070 Brussels, registered with the ECB under number 0567.926.684;

And all the persons mentioned in Annex A (8,422 persons); all of whom have elected domicile in this case at the Equal-Partners office, Piace Flagey, 18, 1050 Brussels;

**Applicants ;**

Represented by Eric GILLET, Carole BILLIET, Luc DEPRÉ, Audrey BAEYENS and Linli Pan-Van de MEULEBROEKE, lawyers, whose office is located at Piace Flagey, 18, 1050 Brussels, and Roger H. J. COX, lawyer, whose office is located at Sint Pieterskade 26B, 6212 AD Maastricht, The Netherlands, E-mails: [eric.gillet@equal-partners.eu](mailto:eric.gillet@equal-partners.eu); [luc.depre@equal-partners.eu](mailto:luc.depre@equal-partners.eu); [audrey.baeyens@equal-partners.eu](mailto:audrey.baeyens@equal-partners.eu)

**AGAINST:**

1. **The BELGIAN STATE**, represented by its Government, under the authority of the Minister of Energy, Environment and Sustainable Development, whose offices are located at 1060 BRUSSELS, avenue de la Toison d'Or, 87, bte 1;

**First defendant ;**

With Nathalie VAN DAMME, Nicolas CELIS, Xheni ZENELI and Thomas MERGNY, lawyers, whose offices are located at 4020 LIEGE 2, Piace des Nations unies 7, to whose offices an address for service is given for the purposes of the present proceedings, and Guy BLOCK and Kris WAUTERS, lawyers, whose offices are located at 1050 Chaussée de La Hulpe 187;  
E-mails: [n.vandamme@elegis.be](mailto:n.vandamme@elegis.be); [b.decocqueau@elegis.be](mailto:b.decocqueau@elegis.be)

2. **The WALLONNE REGION**, represented by its Government, pursued by the Minister for Climate, Energy and Mobility, whose offices are located at 5000 NAMUR, rue d'Harscamp, 22;

**Second defendant ;**

Represented by Pierre MOERYNCK, Aurélie VANDENBERGHE, Julien LAURENT and Charlotte MATHIEU, lawyers, whose office is established in 1040 BRUSSELS, avenue de Tervueren, 34/27;  
E-mail: [pm@moerynck.be](mailto:pm@moerynck.be)

3. **The FLEMISH REGION**, represented by the Flemish Government in the person of the Flemish Minister for the Environment, Spatial Planning, Nature and Agriculture, whose offices are located at Boulevard du Roi Albert II, 20 bte 1, 1000 BRUSSELS;

**Third defendant ;**

Represented by Maltres Guillaume VYNCKE and Marie-Louise RICKER loco Me Steve RONSE, lawyers, whose office is established at 8500 COURTRAI, Beneluxpark, 27B,  
E-mail: [sronse@publius.be](mailto:sronse@publius.be); [iurgen.vanpraet@prator.be](mailto:iurgen.vanpraet@prator.be);

4. **The BRUSSELS-CAPITAL REGION**, represented by its Government, under the authority of the Minister of the Government of the Brussels-Capital Region, responsible for Climate Transition, Environment, Energy and Participatory Democracy, whose office is located at Boulevard Saint-Lazare, 10 (11th floor), 1210 BRUSSELS:

**Fourth defendant ;**

Represented by Maltres Ivan-Serge BROUHNS, Guillaume POSSOZ and Vladimir THUNIS, lawyers, whose office is established in 1170 BRUSSELS, Chaussée de la Hulpe, 185;  
E-mail: [ivanserge.brouhns@sphere.be](mailto:ivanserge.brouhns@sphere.be);

**IN THE PRESENCE OF :**

1. **BORDEAL AULN** and all **81 OTHER TREES** mentioned in the application for voluntary action (Annex C);

**First responders;**

With Hendrik SCHOUKENS and Gwijde VERMEIRE, lawyers, whose offices are respectively located at 1750 LENNIK, Dorp 12 b2 and 9000 GHENT, Voskenslaan 301; not appearing;  
E-mails: [hendrikschoukens@hotmail.com](mailto:hendrikschoukens@hotmail.com); [vermeire.gwiide@telenet.be](mailto:vermeire.gwiide@telenet.be);

2. **Mrs. Inge DE VRIENDT**, residing at 9300 AALST, Wijngaardstraat, 55, and all the persons mentioned in Annex B (50,164 persons); all of whom have elected domicile in this case at the Equal-Partners office, Piace Flagey, 18, 1050 Brussels;

**Second intervening parties;**

Represented by Carole BILLIET, Eric GILLET, Audrey BAEYEN and Luc DEPPE, Unii Pan-Van de MEULEBROEKE , lawyers, whose office is located at 1050 BRUSSELS, Place Flagey, 18, and Roger H.J.COX, lawyer, whose office is located at Sint Pieterskade 26B, 6212 AD MAASTRICHT, the NETHERLANDS;

E-mails [eric.gillet@equal-partners.eu](mailto:eric.gillet@equal-partners.eu); [luc.depre@equal-partners.eu](mailto:luc.depre@equal-partners.eu); [audrey.baeyens@equal-partners.eu](mailto:audrey.baeyens@equal-partners.eu);

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In this case, held under advisement on March 26, 2021, the Tribunal pronounces the following

judgment: Having regard to the documents in the proceedings and in particular :

the summons to institute proceedings served on 2 June 2015;

the judgment of the French-speaking Court of First Instance of Brussels of the 1<sup>st</sup> chamber of 25 September 2015;

the judgment of the French and Dutch-speaking district courts of Brussels, delivered on 8 February 2016;

the judgement C.16.0185.F of the Belgian Court of Cassation of 20 April 2018;

the joint application for the setting of procedural time limits and the setting of oral hearings based on Article 747 of the Judicial Code of 29 August 2018;

the order setting out the timetable for the preparation of the case for January 2019;

the application for voluntary intervention of Mr Hendrik SCHOUKENS and Mr Gwijde VERMEIRE of 3 May 2019 on behalf of the trees;

- the application for voluntary intervention of 3 July 2019 of Mrs. Inge DE VRIENDT et al;
- summary submissions for the plaintiffs filed at the registry on 16 December 2019;
- the summary conclusions for the Walloon Region filed at the Registry on 13 March 2020; the summary conclusions for the Brussels-Capital Region filed at the Registry on 16 March 2020; the summary conclusions for the Flemish Region filed at the Registry on 16 March 2020;
- the summary conclusions for the State beige filed at the registry on 16 March 2020;
- files of exhibits and notes filed before and during the hearings;

Heard counsel for the parties in their submissions at the public hearings on 16, 17, 18, 19, 22, 23, 24, 25 and 26 March 2021;

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I. **FACTUAL BACKGROUND OF THE DISPUTE SUBMITTED TO THE COURT**

On 6 December 1988, the United Nations General Assembly adopted Resolution 43/53 on the protection of global climate for present and future generations. In this resolution, for the first time, the United Nations recognised climate change as a global problem.

*This is a "common concern of mankind".*

At the same time, the World Meteorological Organisation (WMO) and the United Nations Environment Programme (hereinafter "UNEP") established the Intergovernmental Panel on Climate Change (IPCC), an intergovernmental and scientific body, to review and assess the latest scientific, technical and socio-economic information

published around the world that are relevant to the understanding of climate change, with a view to be made available to policy makers.

Since 1990, the IPCC has issued five assessment reports, often referred to by the following acronyms:

1. FAR (*First Assessment Report*) for the first report (1990)
2. SAR (*Second Assessment Report*) for the second report (1995)
3. TAR (*Third Assessment Report*) for the third report (2001)
4. AR4 (*4th Assessment Report*) for the fourth report (2007)
5. AR5 (*5th Assessment Report*) for the fifth report (2014)

In addition to these reports, the IPCC also published special reports in 2011, 2018 and 20191.

**1990-1992**

In 1990, the IPCC's first assessment report, without making any categorical statements, nevertheless stated that "*emissions from human activities are significantly increasing the concentration of the greenhouse gases carbon dioxide, methane, chlorofluorocarbons (CFCs) and nitrous oxide in the atmosphere*".

On 9 May 1992, the United Nations Framework Convention on Climate Change (hereafter, the 'UNFCCC') was adopted in New York. To date, it has been signed by 196 states and one regional organisation, the European Union. It entered into force on 21 March 1994. Belgium signed the UNFCCC on 4 June 1992 and ratified it on 16 January 1996. The European Union signed on 13 June 1992 and approved on 15 December 1993.

The objective of the Convention is to prevent dangerous human-induced climate change.

Article 2 of the UNFCCC states that:

*"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to stabilise, in accordance with the relevant provisions*

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<sup>1</sup> See below,

*Convention, / greenhouse gas concentrations in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system".*

Article 3 of the UNFCCC sets out the guiding principles for the measures to be taken by each Party to achieve the objective of the Convention, including

the principle of common but differentiated responsibilities, taking into account in particular the respective capacities of the Parties, and which requires developed countries, including Belgium, to

<sup>2</sup> *"the vanguard of the fight against climate change and its adverse effects";*

the precautionary principle, according to which lack of full scientific certainty shall not be used as a reason for postponing preventive measures<sup>3</sup>.

The UNFCCC also sets out the commitments of the Parties, distinguishing between the obligations of the States listed in Annexes I and II and those of the States not listed there.

Annex I to the Convention groups together the "*developed countries*", i.e. the industrialised countries that were members of the OECD in 1992, as well as countries whose economies are in transition towards a market economy, notably Russia and several Eastern European countries. 43 countries are included in this annex, including Belgium, out of the 196 States Parties to the UNFCCC.

Annex II includes only OECD members, including Belgium, i.e. 24 of the 43 so-called *This is a "developed country" approach.*

The principle of common but differentiated responsibilities is based on this distinction. Indeed, the obligations under the UNFCCC - and then under subsequent treaties - are more binding on these developed countries than on non-Annex countries.

Belgium's obligations under the UNFCCC can therefore be summarised as follows:

- a. The obligations common to all parties, namely :
  - establish, periodically update, publish and make available to the COP national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases (hereinafter "GHGs") (Art. 4.Ia);
  - establish, publish and regularly update national programmes and, where appropriate (Art. 4.Ic); encourage and support through cooperation the development, application and diffusion (...) of technologies, practices and processes (Art. 4.Ic);
  - encourage the sound management and conservation and, where appropriate, enhancement of sinks and reservoirs of all GHGs (Art. 4.Id);
  - prepare, in cooperation, for adaptation to the impact of climate change (art. 4.1);
  - take into account, as far as possible, climate change considerations in its social, economic and environmental policies and actions (Art. 4.If); encourage and support through its cooperation scientific, technological, technical, socio-economic and other research (...) (Art. 4.Ih);

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<sup>2</sup> Article 3.1 of the UNFCCC.

<sup>3</sup> Article 3.2 of the UNFCCC.

encourage and support through its cooperation the exchange of scientific, technological, technical, socio-economic and legal data (...) (art. 4.1h);  
encourage and support through its cooperation education, training and public awareness in the field of climate change (art. 4.li);

- b. Obligations specific to Annex I and II parties (developed countries), namely: to take the lead in combating climate change and its adverse effects, by adopting national policies and taking appropriate measures to mitigate climate change by limiting their anthropogenic GHG emissions and protecting and enhancing their GHG sinks and reservoirs (...) (Art. 4.2a) submit their policies and measures to the Conference of the Parties every six months This includes the assessment of the GHG emissions of companies and the resulting projections of their GHG emissions with a view to reducing these emissions to 1990 levels (Art. 4.2b); provide new and additional financial resources to cover the full agreed costs incurred by developing countries as a result of their reporting and communication obligations (Art. 4.3); to help developing countries cope with the cost of adapting to the effects of climate change climate change (Art. 4.4); take all practicable measures to encourage, facilitate and finance, as appropriate, the transfer of or access to environmentally sound technologies and know-how to other parties (Art. 4.5).

Finally, Article 7 of the UNFCCC establishes the Conference of the Parties hereafter the "COP" as the supreme body of the Convention. Its role is to monitor the implementation of the UNFCCC, to determine whether the measures taken are sufficient to achieve the ultimate objective of the Convention, namely the prevention of dangerous climate change, and, within its mandate, to take the necessary decisions to promote the effective implementation of the Convention. For decision-making within the COPs, the consensus rule is applied as a priority 4.

### **1995**

The first COP, COP-1, took place in Berlin in 1995. On that occasion, the majority of the States Parties considered that the commitments foreseen for developed countries were not sufficient to achieve the objectives of the UNFCCC. A negotiation process was therefore set up to redefine the commitments of these countries. This process led to the adoption of the Kyoto Protocol in 1997.

Furthermore, in its second report finalised in December 1995, the IPCC has already indicated that, applying the 'most likely value' of climate sensitivity, *'the models result in an increase in global average surface temperature of about 2 -e between 1990 and 2100,,s.*

### **1996**

In 1996, the European Union acknowledged the 2-c upper limit by stating: *"In view of the serious risks associated with a temperature increase of this magnitude and in particular the rapidity of*

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4 Article 15.3 of the UNFCCC.

5 IPCC, 2nd Assessment Report, Synthesis, p.5.

*The Council considers that global temperatures should not exceed 2 degrees above pre-industrial levels (...) the Council notes that, according to the [IPCC], significant reductions in greenhouse gas emissions are technically possible and economically feasible. It further notes that there is ample scope for "no-regrets" solutions and that the potential risk justifies going beyond the implementation of "no-regrets" solutions at the level of Annex I Parties* <sup>6</sup>.

### **1997**

On 11 December 1997, at the COP-3 meeting in Kyoto, a Protocol was signed and added to the UNFCCC: the Kyoto Protocol. In it, the Annex I countries, including Belgium, committed themselves to reducing their GHG emissions over a period of five years, from 2008 to 2012.

Article 3.1 of the Protocol thus provides that:

*"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their total emissions of such gases by at least 5% below 1990 levels in the commitment period 2008 to 2012.*

The Kyoto Protocol also provides for two so-called "flexibility" mechanisms. The first mechanism consists of the purchase and sale of "carbon credits" between developed countries, allowing those who do not use all their quotas to transfer "rights to pollute" to those who, on the contrary, plan to exceed their allocated quotas <sup>7</sup>. The second mechanism, known as "clean development", consists of The second mechanism, known as the "clean development" mechanism, consists of developed countries that have made commitments to reduce their emissions financing emission reduction activities in developing countries in order to obtain "certified emission reductions" in exchange for being able to fulfil part of their own reduction commitments<sup>8</sup>.

Belgium has been a party to the Kyoto Protocol since 29 April 1998, as has the European Union. However, the Kyoto Protocol only entered into force on 16 February 2005.

On the domestic front, the Kyoto Protocol has been the subject of a law of assent at both federal and regional level<sup>9</sup>.

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<sup>6</sup> **European Commission, Press Release 96/188, "EU Climate Change Strategy - Council Conclusions", pt.6, p.12, Applicants' Exhibit G.1.**

<sup>7</sup> Article 6 of the Protocol. s Article 12 of the Protocol.

<sup>9</sup> See the law of 26 September 2001 approving the Kyoto Protocol to the **United Nations Framework Convention on Climate Change, and Annexes A and B; the decree of the Brussels-Capital Region of 19 July 2001 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B; the decree of the Flemish Region of 22 February 2002 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B, and the decree of the Brussels-Capital Region of 22 February 2002 approving the Kyoto Protocol to the Convention. The decree of the Flemish Region of 22 February 2002 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B, and the decree of the Walloon Region of 21 March 2002 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B.**

Annex B of the Protocol set the beige target at -8% GHG emissions by 2012 compared to the 1990 base year. Annex B set the same target for the European Union at -8% below 1990 levels by 2012.

## 2002

The EU has made use of the possibility provided for in Article 4 of the Kyoto Protocol, which allows Parties to jointly meet their reduction targets.

It therefore adopted Decision 2002/358/EC<sup>10</sup>, which set an overall GHG reduction target of 8% below 1990 levels for 2012, while the beige target for the period 2008-2012 was reduced to 7.5% of its GHG emissions. This target replaces, for Belgium, the 8% target of the Kyoto Protocol, as stated in article 4.5. of the Protocol. In accordance with Article 4.6. of the Protocol, only if the joint EU target was not reached would Belgium become responsible for its emissions under the Protocol.

On 14 November 2002, a cooperation agreement was concluded between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region (hereinafter referred to as the "CBR") concerning the establishment, implementation and monitoring of a National Climate Plan, as well as the preparation of reports, within the framework of the UNFCCC and the Kyoto Protocol<sup>11</sup>.

This cooperation agreement lays the foundation for beige climate governance through :

- the creation of the National Climate Commission (art. 3) as well as the determination of its attribution, its role, its functioning (art. 6) and the frequency of its meetings (art. 8);
- the obligation to establish, implement and monitor a National Climate Plan (Art. 14).

On 13 October 2003, Directive 2003/87/EC<sup>12</sup> of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the European Union was adopted.

Unlike international mechanisms, the European system distinguishes the way GHG emissions are managed according to the sector of activity.

For example, in the sectors mainly targeting large industry, the European Union has created a mechanism for trading GHG emission allowances, known as the "Emission Trading System" or "ETS", by which companies are allocated emission rights (or allowances) that they can trade. The aim of the scheme is to reward the environmental efforts of these companies, which can sell their unused allowances.

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10 Council Decision 2002/358/EC of 25 April 2002 concerning the approval of the **Kyoto Protocol to the United Nations Framework Convention on Climate Change** and the joint fulfilment of commitments thereunder, *OJ L 130*, 15.5.2002, p. 1-3.

<sup>11</sup> MB 27 June 2003, entered into force 13 November 2003.

<sup>12</sup> *O.J. L.* 275, 25 October 2003,

In the sectors not included in this trading system, or "non-ETS" sectors (transport, buildings, agriculture and part of energy and industry), each Member State is given an emissions quota which it cannot exceed.

#### 2004

On 8 March 2004, on the internal piano beige, the Concertation Committee adopted an agreement on burden sharing between the Regions and the federal authorities in the framework of Belgium's obligations under the Kyoto Protocol.

This political agreement stipulated, among other things, that *"the Regions are responsible for depositing emission rights for a quantity equal to the greenhouse gas emissions on their territory during the period 2008-2012 and are granted emission rights up to five times the emissions of the reference year, reduced by 7.5% for the Walloon Region, reduced by 5.2% for the Flemish Region, and increased by 3.475% for the Brussels-Capital Region. In the mid-term decision, the Federal Authority commits to acquire additional emission rights up to 2.46 million emission rights per year for the first commitment period and to take a series of complementary measures whose emission reduction impact during the first commitment period will be at least 4.8 million tonnes CO<sub>2</sub>-eq"*

#### 2005

Following a meeting on 22-23 March 2005, the European Council adopted its conclusions and stated

*"The European Council recognises that climate change is likely to have major negative global environmental, economic and social impacts. It confirms that, in order to achieve the ultimate objective of the United Nations Framework Convention on Climate Change, the increase in global annual mean surface temperature must not exceed 2°C above pre-industrial levels.*

*(...)*

*The European Council underlines the EU's strong commitment to give new impetus to the international negotiations. To this end, it should:*

*(...) develop an EU medium and long-term strategy to combat climate change that is consistent with the 2°C objective. In view of the global emission reductions required, joint efforts will be needed by all countries in the coming decades in view of their common but differentiated responsibilities and respective co-ownership, with all economically more developed countries in particular being called upon to substantially increase their cumulative reduction efforts.*

*(...) the EU considers that, in this respect, reduction profiles in the order of 15-30% by 2020 compared to the Kyoto Protocol baseline and beyond, in the spirit of the Council conclusions, should be considered for the group of developed countries*

*{Environment } "4*

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<sup>13</sup> Commitment included in the preamble of the cooperation agreement of 19 February 2007, *Monit.b.*, 12 February 2008,

p. 9 I 79 et seq.

<sup>14</sup> Council of the EU, 7619/05, Chapter IV, pp. 15-16.

**2007**

On 19 February 2007, the federal state and the three regions adopted a new cooperation agreement <sup>15</sup> including :

- a system for sharing the burden of Belgium's commitments through the transfer and sale of Kyoto units in the event of GHG emissions being exceeded by any of the regions;
- a possibility to carry over Kyoto units to the next commitment period.

In its preamble, the cooperation agreement also recalled that Belgium, as a Contracting Party to the Kyoto Protocol, is committed to using the flexibility mechanisms only as a complement to domestic policies and measures to achieve its GHG emission reduction target.

Also at the beginning of 2007, the IPCC published its Fourth Assessment Report on climate change in which the experts noted, among other things, that :

*"The warming of the climate system is unequivocal "16;*

*"Most of the observed decrease in global average temperature since the mid-twentieth century is most likely due to the observed increase in concentrations of onthropic greenhouse gases;*

*"Continued greenhouse gas emissions at or above the current rate would cause further warming and lead to many changes in the global climate system over the course of the twentieth century that would most likely be greater than those observed during the twentieth century;*

Global warming can only reasonably be limited to between 2°C and 2.4°C if the concentration of GHGs in the atmosphere is stabilised at between 445 and 490 ppm CO<sub>2</sub>-eq<sup>19</sup> . which implies, for Annex I countries, a collective reduction in GHG emissions of 25% to 40% below 1990 levels by 2020 ;

*"Human-induced global warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if greenhouse gas concentrations were stabilised"*

In March 2007, the European Council made a political commitment to set clear and legally binding targets, including :

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<sup>15</sup> Cooperation Agreement between the Federal Authority, the Flemish Region, the Walloon Region and the **Brussels Capital Region on the implementation of certain provisions of the Kyoto Protocol, concluded in Brussels** on 19 February 2007, *Monit.b.*, 12 February 2008, p. 9179 et seq.

<sup>16</sup> IPCC, **Fourth Assessment Report, Summary for Policymakers, p.2, Exhibit B. 10 of the applicants.**

<sup>17</sup> *Ibid*, p.5, Claimants' Exhibit B.10. 18

*Ibid*, p.7, Claimants' Exhibit B.10.

<sup>19</sup> IPCC, **4th Report, Working Group III, p. 229, Claimant's Exhibit B. 8.** The unit <sup>11ppm</sup>s is used per million" (ppm) to indicate the concentration of greenhouse gases in the atmosphere. The designation <sup>11ppmCO<sub>2</sub></sup>-eq<sup>11</sup> is used to indicate the concentration of all greenhouse gases together, with the concentration of non-CO

<sup>20</sup> *Ibid*, p.776, Claimants' Exhibit B.8. 21

*Ibid*, p.16.

reduce GHG emissions by at least 20% by 2020 compared to 1990, it being understood that the contribution of each member country will be determined taking into account its characteristics;

to increase the share of renewable energy in the EU's energy consumption to 20% by 2020.

This political decision will be the starting point for the development of a set of European legislation called the "Energy and Climate Package", adopted in 2009.

Meanwhile, at the end of its 4th session in Vienna in August 2007, the "*Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol*" issued a report stating inter alia that

*"The Task Force noted the usefulness of the ranges mentioned in the fourth report assessment (IPCC). Recognising the findings of the Troika's contribution on impacts, vulnerability and adaptation, (...) /Annex I Parties should, by 2020, collectively reduce their emissions to between 25% and 40% below 1990 levels by*

*The Parties agree that the means that may be available to them to achieve these targets. (...) if Annex I Parties were to achieve these reduction targets, they would make a significant contribution to the global efforts required to achieve the ultimate objective of the Convention as set out in its Article 2"*

At COP-13 in December 2007 in Bali, the UNFCCC Parties adopted the Bali Action Plan, whose preamble explicitly recognises the need for deep cuts in GHG emissions to meet the ultimate objective of the UNFCCC and stresses the urgency with which this should be done, with reference to the findings of the IPCC's 4th Assessment Report "*that warming of the climate system is unquestionable and that any delay in reducing emissions is likely to lead to a significant increase in greenhouse gas emissions. emissions significantly reduces the possibilities of achieving the stabilisation of emissions at lower levels*". The Bali Action Plan also refers to the tables in the 4th IPCC report which, in order to maintain a GHG concentration of 450 ppm CO<sub>2</sub> eq. in the atmosphere, prescribes a collective emission reduction of 25-40% by 2020.

In 2008, the National Climate Commission (hereinafter the "NCC") adopted a first draft of the National Climate Plan for Belgium. In its opinion of 19 February 2009, however, the Minaraad<sup>24</sup> underlined the limited and unclear nature of the National Climate Plan and insisted on the need for a better coordinated and concerted strategy between the federal and federated entities<sup>25</sup>.

## 2009

In March 2009, the UN Human Rights Council recognised climate change as a threat to human rights, "*noting that /the effects of climate change have a range of implications, both direct and indirect, for the effective enjoyment of human rights*".

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<sup>22</sup> Report, p. 5, no. 19, Claimants' Exhibit H.6.

<sup>23</sup> Decision 1/CP.13, p.3, Claimants' Exhibit H.5.

<sup>24</sup> This is the Flemish Council for the Environment and Nature.

<sup>25</sup> Claimants' Exhibit F.11.

*human rights, including the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of health, the right to adequate housing, the right to self-determination and obligations in relation to human rights concerning access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence* <sup>26</sup>

On 23 April 2009, the European Union introduced a package of legislation commonly referred to as the 'Climate and Energy Package' with the objective of reducing GHG emissions by 20% compared to 1990 by 2020, or 14% compared to 2005. To this end, it has adopted :

Directive 2009/29/EC<sup>27</sup> , which sets the European Union's effort for the ETS sector at a 21% reduction of its GHG emissions by 2020 compared to 2005. In contrast to the Directive 2009/29/EC sets a single EU-wide cap on GHG emissions from the relevant sectors in order to increase the predictability and transparency of the system. There are therefore no longer any National Allocation Plans per Member State for the period 2013-2020 in the ETS sectors.

Decision <sup>406/2009/EC</sup><sup>28</sup> , which sets a GHG emissions reduction target for the non-ETS sector of 10% below 2005 levels by 2020 for the European Union as a whole. This European target is broken down into binding targets for each Member State. The national targets are differentiated according to Gross Domestic Product (GDP) per capita. Belgium's target is a 15% reduction in GHG emissions in the non-ETS sector by 2020 compared to 2005.

Directive 2009/28/EC<sup>29</sup> , commonly referred to as the "Renewable Energy Directive", which aims to increase the share of renewable energy in the EU's gross final energy consumption to 20% by 2020. To achieve this objective, binding targets are imposed on the Member States. For Belgium, the share of renewable energy in the national energy consumption must reach 13% in 2020.

Directive 2009/31/EC<sup>30</sup> , which provides a framework for the storage of <sup>CO2</sup> underground as a transitional technology that contributes to climate change mitigation.

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<sup>26</sup> Resolution 10/4 of 25 March 2009 "Human rights and climate change", Exhibit H.27 of the **applicants**.

<sup>27</sup> Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC **so as to improve and extend the greenhouse gas emission allowance trading system of the Community**.

Member States to reduce their greenhouse gas emissions in order to meet their EU commitments. **Community in reducing these emissions until 2020**.

<sup>29</sup> 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 repealing Directives 2001/77/EC and 2003/30/EC.

<sup>30</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on geological storage and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and 2008/1/EC and Regulation (EC) No 1013/2006 of the European Parliament and of the Council.

On the internal front, in its report of 20 May 2009 on federal climate policy, transmitted to In the House of Representatives in June 2009, the Court of Auditors pointed out that :

*The EU's Kyoto Protocol states that "Belgium can only emit an average of 134.8 million tonnes of CO2 equivalent per year during the Kyoto period.*

*The beige burden sharing agreement shares the Kyoto efforts between the regions and the federal state. The federal commitment in the agreement is twofold. The federal authorities want to reduce emissions by 24 million tonnes (on average 4.8 million tonnes per year). At the same time, they want to buy 12.2 Mtonnes of emission rights (on average 2.44 Mtonnes per year).*

*This audit examined the planning and evaluation of federal climate policy and assessed the extent to which the sixteen most important federal measures have been implemented and whether their effects are known. Various ministers and public administrations are involved in this audit. The conclusions and recommendations of the Court of Audit are as follows.*

*There is no federal environmental plan. There is no precise description of the measures and their costs. CO2 reduction targets are not justified or are missing. Reporting is insufficient and no evaluation of the federal climate policy has been carried out so far. Information about some measures is partial, but there is no summary of the costs, level of implementation and effects of the federal climate policy.*

*This makes it difficult {1} to judge whether the federal authorities are properly executing their part of the burden-sharing agreement; {2} to correct the policy if necessary; and {3} to inform Parliament in a transparent manner.*

*(...)*

*A review of policy shows that the government is not currently in a position to meet the reduction commitment made in the Beige burden sharing agreement. The Court of Auditors found the following shortcomings:*

*(...) (follows a list of 11 breaches)*

*The purchase of emission rights via the flexibility mechanisms is not optimal: there is no link between the investment in the flexibility mechanisms and the national reduction policy, nor is there any consistency between the investment in these mechanisms and the reduction in greenhouse gas emissions planned by the Federal Office of the Environment in May 2008.*

*The Court of Auditors therefore recommends critically evaluating the whole package of measures in terms of its internal coherence, including the role of flexibility mechanisms in the climate policy and, if necessary, correcting it <sup>131</sup>.*

In its Walloon regional policy declaration of 16 July 2009, the Walloon Parliament stated that:

*"In view of the pessimistic outlook of the scientific community, including the work of the Intergovernmental Panel on Climate Change (IPCC) and the most recent studies, the EU's targets for reducing greenhouse gas emissions by 20% by 2020 (or 30% if there is an international agreement) compared to 1990 levels are laudable but insufficient. Europe must do more, and so must Belgium and Finland! In case of an international agreement, the government will ask Belgium to defend the European objective of 40%. At least three quarters of this target should be achieved by measures taken within the EU. In this context, the Government commits itself to take an active part in the Copenhagen climate negotiations, in particular with regard to North-South financing and the fight against deforestation, in order to stay below the limit of a temperature increase of 2°C. The*

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<sup>31</sup> See extract from the report, Exhibit C.4 of the applicants.

*The Government will ensure that shipping and international aviation are involved in GHG reduction efforts.*

*the Dutch Government is committed to pursuing, within the dynamics initiated by the Plan Air-Climat and the Plan for sustainable energy management, a strategy that will enable us to reduce our emissions by 30% by 2020 and by 80 to 95% by 2050. This must be inserted, in a concerted manner, in a beige and European approach "<sup>32</sup>*

At the federal level, the House of Representatives passed a resolution on 3 December 2009 in the *run-up* to the COP in Copenhagen, in which it called on the federal government to support internationally and at the European level that, among other things

the targets to be adopted must take into account the recommendations of the 4th IPCC report, namely the collective reduction by industrialised countries of their GHGs by 25-40% by 2020 and 80% by 2050;

the European Union can take the decision to move from 20% to 30% if the efforts of other developed countries are comparable and the contributions of developing countries are adequate

On 9 December 2009, the Flemish Parliament adopted a resolution stating that "*the precautionary principle implies that for the group of developed countries reduction targets of 25-40% are needed in 2020 compared to 1990 and at least 80-95% in 2050 compared to 1990*"<sup>34</sup>.

This resolution was based, among other things, on a Mineraad opinion of 26 November 2009, which called for a reduction in GHG emissions to a level that would limit the temperature increase to 2°C, which implies an overall reduction of 40% compared to 1990 levels by 2020 and a reduction of 80% to 95% by 2050<sup>35</sup>.

In December 2009, at COP-15, the States Parties signed the Copenhagen Accord, which confirms that "*in order to achieve the ultimate objective of the Convention to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we intend, taking into account the scientific view that the global temperature increase should be limited to 2°C, to strengthen our long-term cooperative action to address climate change, on the basis of equity and sustainable development*"<sup>36</sup>.

This agreement refers to the recommendations of the 4th IPCC assessment report updated in 2009 specifically for the COP in Copenhagen. The update of this report states that "*recent observations show that societies and ecosystems are extremely vulnerable to even modest climate change {...}. temperatures above 2°C will be difficult to*

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<sup>32</sup> Pari. Wallon, extr. sess. 2009, 8/1, p.60, plaintiffs' exhibit F.7.

<sup>33</sup> *Parl. Doc.*, House, sess 2009-2010, No. 52- 2263/1, pp.4-5, plaintiffs' Exhibit F.8.

<sup>34</sup> Flemish *Parl.* Pari. 2009-10, 282/3, Resolution of 9 December 2009 of the Flemish Parliament on the **new Copenhagen climate convention, uncontested free translation, Exhibit F.9 of the applications.**

<sup>35</sup> **Advies van de Milieu- en Natuurraad van Vlaanderen over de Klimaattop in Kopenhagen, Doc.parl. Parliament Flemish, 2009-10, 61/1, Claimants' Exhibit C.5. 36**  
Decision I/CP.15, p. 5, Claimants' Exhibit H.7.

*This is a major challenge for contemporary societies and has the potential to cause major socio-environmental disruptions in the rest of the world in this century and beyond* <sup>37</sup>.

In light of the IPCC findings, Member States participating in COP-15 therefore suggested that *"the implementation of this agreement should be subject to further development by 2015, particularly in the light of the ultimate objective of the Convention. This would include consideration of strengthening the long-term objective taking into account various elements of scientific work, in particular with regard to a temperature increase of 1.5°C."* <sup>38</sup>

## **2010**

In 2010, at COP-16, the Member States adopted the Cancun Agreements <sup>39</sup> in which, referring to the scientific findings of the IPCC, the Bali Action Plan and the Copenhagen Accord, the Parties to the COP agreed to say

- that climate change has an impact on the effective enjoyment of human rights, particularly on the most vulnerable groups;
- that they recognise that deep GHG reductions are needed, as documented in the IPCC 4th Assessment Report, to keep warming below 2°C and that parties to the COP must take urgent action to achieve this long-term goal;
- that they recognise the need to consider strengthening the long-term global goal, including by considering a maximum warming of 1.5°C as the objective of Article 2 of the Convention.

By a law of 30 July 2010, the beige state inserted the following provision into the law of 5 May 1997 on the coordination of federal sustainable development policy:

*"Art. 2/1. The King shall determine, after parliamentary debate and with organised civil society, the strategic vision*

*The federal long-term vision for sustainable development, hereinafter referred to as "the long-term vision", by a decree adopted by the Council of Ministers.*

*(...) This long-term vision is aimed in particular at meeting Belgium's commitments at international and European level (...)"*.

## **2011**

In 2011, at COP-17 in Durban, UNFCCC member states agreed to:

recognise that climate change is *"an immediate and potentially irreversible threat to human societies and the planet"* and that all parties *"must therefore address it as a matter of urgency note with "deep concern" that there is a "significant gap between, on the one hand, /the reductions promised by each country for 2020 and, on the other hand, what is really needed at the global level in terms of emission reductions to maintain global warming*

*"This is the first time that a company has gone below 2°C or 1.5°C above pre-industrial levels<sup>40</sup> - and the second time that a company has gone below 2°C or 1.5°C above pre-industrial levels.*

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37 IPCC 2009, AR4 SYR, p. 6, Exhibit B. IO of the applicants, free translation not contested.

38 Decision I/CP.15, p. 7, Claimants' Exhibit H.7.

39 Decision I/CP.16, pp.2-3, Claimants' Exhibit H.9.

40 Decision I/CP.17, p. 2, Claimants' Exhibit H.12.

Also in 2011, the European Commission produced two discussion papers that sought to develop a perspective for climate policy up to 2050. The first was entitled "*Roadmap to a competitive low-carbon economy by 2050*"<sup>41</sup>, the other was entitled "*Energy Roadmap to 2050*"<sup>42</sup>. The first document set out the milestones for the reduction of emissions from the EU itself ('domestic emissions'): in 2050 a reduction of 80% compared to 1990 would be achieved through a reduction of 40% in 2030 and 60% in 2040.

In June 2011, the European Commission indicated in its 2011 report for Belgium that, despite the influence of the economic crisis, the recent trend in greenhouse gas emissions was not towards the national Europe 2020 target {15% reduction from 2005 levels) and that the National Reduction Plan did not provide a quantitative assessment of existing or proposed emission reduction measures to achieve the *2020 targets*<sup>43</sup>.

In December 2011, the institutional agreement on the 6th state reform was reached, in which three commitments were made regarding climate policy in Belgium:

- optimising the CNC's r61e;
- the establishment of a climate accountability mechanism;
- the introduction of a right of substitution for the federal state in the event of non-compliance by a region or a community with the international obligations arising from the UNCAC.

These commitments will be formalised in January 2014<sup>44</sup>.

## 2012

In a recommendation to Belgium of 30 May 2012, the Council of the European Union noted that:

*"Although emissions have decreased by 1% up to 2010 (compared to 2005), they are expected to increase again in the coming years.*

*increase by 0.3% by 2020 (again compared to 2005) according to the latest Belgian projections, which represents a negative deviation of 15.3 percentage points from the target.*

*(...) although Belgium is on track to meet the objective of increasing the share of renewable energy in its economy, the prospects for achieving the 15% greenhouse gas reduction target {GHG} in the sectors not covered by the ETS are*

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<sup>41</sup> **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Roadmap to a competitive low-carbon economy by 2050**, COM (2011) 112 final, Brussels, 8 March 2011, 15 p., applicants' exhibit G.12.

<sup>42</sup> **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy Road Map to 2050**, COM (2011) 885 final, Brussels, 15 December 2011, 24 p., applicants' Exhibit G.13.

<sup>43</sup> **Council Recommendation on the National Reform Programme of Belgium for 2011 and Opinion of the Council on the Stability Programme of Belgium, 2011-2014**, SEC(2011) 802 final, p. 17, available at [https://ec.europa.eu/info/sites/default/files/file\\_import/swp\\_belgium\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/file_import/swp_belgium_en_0.pdf)

<sup>44</sup> See below.

*practically non-existent. Belgium has not taken sufficient measures or policy initiatives in 2011 to remedy this situation* <sup>45</sup>.

The Council therefore invited Belgium to *"take measures to address the lack of progress in achieving the target of reducing greenhouse gas emissions from activities not covered by the EU ETS, in particular by ensuring a significant contribution from transport to the achievement of this target* <sup>46</sup>.

In December 2012, at COP-18 in Doha, an expert dialogue process was launched in preparation for the Paris Climate Summit (or 'COP-21') in 2015, called the Structured Expert Dialogue, or 'SED'.

The objective of the SED was, inter alia, to examine whether, in view of the ultimate objective of the Convention, i.e. the prevention of dangerous climate change, the goal of limiting global warming to less than 2°C was sufficient, especially in the light of the discussions on the need to limit global warming to 1.5°C that have already taken place in Copenhagen (2009) and Cancun (2010).

At the end of the COP in Doha on 8 December 2012, the Parties to the Kyoto Protocol adopted an amendment to the Protocol that sets a second commitment period from 2013 to 2020 to achieve a total reduction of GHG emissions from Annex I Parties of 18% below 1990 levels by 2020<sup>47</sup>.

This amendment also sets Belgium's target for 2020 to reduce its GHG emissions by 20% compared to 1990.

The federal state and the three regions gave their assent to the <sup>amendment</sup><sup>48</sup> and Belgium signed it on 14 November 2017. The European Union signed it on 21 December 2017<sup>49</sup>. However, the amendment did not enter into force until 30 December 2020, failing to reach the required number of ratifications earlier.

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<sup>45</sup> **Council Recommendation on Belgium's National Reform Programme for 2012 and** Council Opinion on Belgium's Stability Programme, 2012-2015, COM(2012) 314 final, pp.5 and 8, Applicants' Exhibit G.14.

<sup>46</sup> **Council Recommendation on the National Reform Programme of Belgium for 2012 and** Opinion of the Council on the Stability Programme of Belgium for the period 2012-2015, COM(2012) 314 final, p.7, Applicants' Exhibit G.14.

<sup>47</sup> Decision 1/CMP.8, Claimants' Exhibit H.16.

<sup>48</sup> Law of 13 June 2014 assenting to the amendment to the Kyoto Protocol, *Monit.b.*, 30 August 2018; Decree of assent of the Flemish Parliament of 14 March 2014, *Monil. b.*, 16 May 2014, Decree of the Walloon Region of 12 March 2015 *Mani/. b.*, 24 March 2015), Ordinance of the Brussels Capital Region of 23 April 2015 *Monil. b.*, 7 May 2015.

<sup>49</sup> Council Decision (EU) 2015/1339 of 13 July 2015 concerning the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol.

2013

Meanwhile, in May 2013, the European Commission again stated that: "*Belgium does not seem to be on track to meet its 2020 greenhouse gas emission reduction target. According to the projections, the country expects to miss this target by 11 percentage points (pp). There is currently a lack of coordination and sharing of efforts between the different authorities involved*

»<sup>50</sup> "*If we look at the forecast for greenhouse gas emissions in 2020, Belgium will lack*

*11 percentage points its target of a 15% reduction in such emissions. However, it remains unclear how the isolated initiatives taken by the various authorities will ensure that the collective target is met*

On 28 June 2013, the Flemish Region adopted the Flemish Climate Policy Plan 2013-2020, which consists of two separate parts: the GHG emission reduction plan (or Vlaams Mitigatieplan) and the climate change adaptation plan<sup>52</sup>.

! waiting for the conclusion of a distribution agreement with the other Regions and the Federal State.

On 18 July 2013, the Beige State adopted the Royal Decree establishing the federal strategic vision long-term sustainable development<sup>53</sup>.

This Royal Decree sets out the long-term objectives referred to in Article 2/1, second paragraph, of the Act of 5

May 1997 on the coordination of federal sustainable development policy<sup>54</sup>, including the

here:

*"A society that preserves its environment*

*By 2050, the goal of a healthy environment will have been achieved. Belgium will have made a fair transition to a low-carbon and resource-efficient society. It will have taken the necessary measures to prevent or, failing that, correct the environmental impacts of human activities: global warming will have been limited and will remain limited to 1.5 to 2°C in the long term, water and air pollution will be under control and will no longer have a significant impact on health, biodiversity and ecosystems. Ecosystem goods and services will be restored, valued and used in a careful and sustainable manner, thus contributing to the preservation of biodiversity. Biodiversity itself will thus be valued, conserved, protected and restored and will fully contribute to sustainable prosperity while promoting economic, territorial and social cohesion and safeguarding our cultural heritage.*

*Climate change*

*31. Greenhouse gas emissions will be reduced domestically by at least 80% at 95% in 2050 compared to its 1990 level.*

*32. Belgium will be adapted to the direct and indirect impact of the consequences of climate change.*

*(...).*

*Outdoor and indoor air*

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<sup>50</sup> Belgium Report 2013, European Commission Communication, 29 May 2013, SWD(2013) 351

**Final, p. 5, Claimants' Exhibit G.15.**

<sup>51</sup> *Ibid*, p. 33.

<sup>52</sup> Part I of the Flemish Region.

<sup>53</sup> *Monit.b.*, 8 October 2013.

<sup>54</sup> **Quoted above.**

*35. Emissions of pollutants such as nitrogen oxides, fine particles, persistent organic pollutants, heavy metals, nitrotes and phosphates will be significantly reduced and the pollution of air (indoor and outdoor), water and soils will no longer have a significant direct or indirect impact on health or the environment.*

The report to the King specifies in particular that *"This long-term vision aims to meet the commitments made by Belgium at international and European level. Moreover, it only fits within the competences of the federal state. By the same token, it is understood that the proposed objectives are in line with the European and international context.*

*Finally, the proposed objectives attempt to present the desired state of affairs by 2050 for the sustainable developing beige society. The 1/s have been conceived as a coherent whole requiring joint implementation. 1/s have been proposed if it has been established that the federal state has the means to contribute to their realisation. The proposed indicators already exist, but can be reviewed or refined at any time. 1/s are either directly related to the objective or a close value that partially captures the state of the desired situation.*

In November 2013, the Climate Change Department of the FPS Health, Food Safety and Environment published a report *"Scenarios for a low-carbon Belgium by 2050"*, in which it is stated that reducing GHGs by 80-95% compared to 1990 in 2050 is possible and represents a major challenge<sup>55</sup>.

## **2014**

In January 2014, the climate policy component of the 5<sup>th</sup> State Reform was formalised.

Thus, Article 39 of the special law of 6 January 2014 on the sixth reform of the state inserted a fourth paragraph into Article 16 of the special law of 8 August 1980 on institutional reforms, which allows the state to *'substitute itself for the community or region concerned for the adoption of the measures that are necessary to put an end to the non-compliance with the international obligations provided for by the Framework Convention'* in the area of climate change. Various conditions are provided for, including a finding of non-compliance by the body established by or under the UNFCCC or its protocols or a reasoned opinion by the European Commission in the context of a formal infringement procedure.

In addition, the Belgian State has inserted an article *65quater* in the special law of 16 January 1989, which sets a multi-annual trajectory of GHG emission reduction targets for buildings in the residential and tertiary sectors for each region. The annex to the special law sets the reduction target for 2030 at approximately 21% for the Flemish Region, 19% for the Walloon Region and 19% for the Brussels Region.

de Bruxe lles-Capitale<sup>56</sup>.

This article also provides for a financial compensation mechanism (or "bonus-malus principle") in the event of deviations between actual emissions and the targets set, using in particular the federal share of the revenue from the auctioning of emission allowances. This mechanism is implemented in

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<sup>55</sup> pp. 7-8, Claimants' Exhibit C.8.

<sup>56</sup> Special Act of 6 January 2014 reforming the financing of the Communities and Regions, extending the fiscal autonomy of the Regions and financing new competences, *Alonit.b.*, 31 January 2014.

the ordinary law of 6 January 2014 on the climate accountability mechanism and applies only to Regions and not to Communities.

On 20 February 2014, the Walloon regional parliament adopted a "Clima!"<sup>57</sup> providing for a GHG reduction target, all sectors combined, of 30% in 2020 compared to 1990 and 95% in 2050 compared to 1990, following a climate study finalised on 30 December 2011 which concluded that these targets were achievable<sup>58</sup>.

The decree also provides for the development of emission budgets, i.e. the quantities of GHGs that can be emitted during a given period. Emission budgets are therefore intermediate targets and are established for five-year periods.

The issue budgets are set by the Government, with the exception of the overall issue budgets with maturities of 2022 and 2052, which have been set directly in Article 9 of the Decree as follows:

For the budget period 2018-2022, the overall issue budget is set at 191 817 kilotonnes of CO<sub>2</sub>-equivalent

For the budget period 2048-2052, the overall issue budget is set at 13,701 to 54,805 kilotonnes of CO<sub>2</sub>-equivalent.

The decree still requires annual monitoring of compliance with annual emission budgets (Article 17). On the basis of the reports drawn up in the framework of this monitoring, a committee of experts issues an opinion in which it determines whether the overall emission budget has been respected (Article 21). Corrective measures may, if necessary, be proposed to the Walloon Parliament (Article 22).

In 2014, at the request of the Secretary of State for the Environment, Energy, Mobility and Institutional Reforms, eight advisory bodies belonging to both the federal state and one of the regions issued *an "opinion on Belgium's transition to a low-carbon society by 2050"*<sup>59</sup>.

The notice states, inter alia, that :

*"The Councils wish to begin by recalling the governance challenges that will need to be addressed in order to successfully transition to a low-carbon society in Belgium:*

*A long-term perspective with 2050 as the horizon is needed, as a framework for short-term policies;*

*It is necessary to achieve a strong interaction between the levels of power and between the different fields of action;*

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<sup>57</sup> *Monit.b.*, 10 March 2014.

<sup>58</sup> Elude carried out by Climact, part D.2 of the Walloon Region.

<sup>59</sup> Federal Council for Sustainable Development (approval of the opinion on 27/05/2014), Economic and Social Council of the Bmxelles-Capital Region (approval of the opinion on 15/05/2014), Environmental Council of the Bmxelles-Capital Region (approval of the opinion on 14/05/2014), and Council of the Bmxelles-Capital Region (approval of the opinion on 15/05/2014), Environment Council of the Bmxelles-Capital Region (approval of the opinion on 14/05/2014), Milieu- en Natuurraad van Vlaanderen (approval of the opinion on 22/05/2014), Sociaal-Economische Raad van Vlaanderen (approval of the opinion on 12/05/2014), Economic and Social Council of Wallonia (approval of the opinion on 12/05/2014), Conseil wallon de l'Environnement pour le Développement durable (approval of the opinion on 3/06/2014); the opinion is available at [www.frdo-cfdd.be](http://www.frdo-cfdd.be).

*A holistic approach focusing on all components of the energy system and integrating the three dimensions of sustainable development is needed (systemic approach, see § [3] below);*

*The policy must be based on sound foundations (including science) and a transparent dialogue with stakeholders;*

*a stable /ega/ framework is needed;*

*/government commitments at national level and international commitments must be respected <sup>60</sup>*

In terms of general recommendations, the Councils highlight :

*"that coordination between the various Belgian federal and regional authorities is essential to ensure greater coherence of the transition policy, to define together the actions to be taken and to build a coordinated and long-term vision for the "climate and energy" policies and for a low-carbon society";*

*that this coordination must be "permanent", based on "the application of the principle of mutuality, whereby each level of power seeks to act in such a way as to enhance the effectiveness of all other levels of power" and accompanied by "the development of better governance within each entity involved (horizontal policy coordination)";*

*"The need for Belgium to play an active role at the international level. In order to do so, our country must be coherent in its internal policy in order to establish its legitimacy at this level;*

*that this strategy must be accompanied by a "regular evaluation to measure (...)*

*the concrete results of the measures adopted, accompanied by corrective measures if necessary <sup>61</sup>.*

Also in 2014, the Federal Minister of Energy, Environment and Sustainable Development recognised the importance and scope of this opinion, stating that the fact that it *"was produced jointly by the FRDO-CFDD and the regional councils, (...) reinforces the scope of this opinion, and makes it all the more important to follow it up.*

In the autumn of 2014, the IPCC published its 5th, synthesis report in which it states, among other things, that:

The warming of the climate system is unequivocal and, since the 1950s, many of the observed changes are unprecedented in decades or even millennia. The atmosphere and ocean have warmed, snow and ice cover has decreased, sea levels have risen<sup>63</sup> :

Anthropogenic GHG emissions, which have increased since pre-industrial times largely due to economic and population growth, are currently higher than ever before, resulting in atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least 800,000 years. Their effects, together with those of other anthropogenic factors, have been detected throughout the

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<sup>60</sup> Opinion 2014, p.2.

<sup>61</sup> Opinion 2014, pp.2-3.

<sup>62</sup> Claimants' Exhibit F.16, p. 6.

<sup>63</sup> IPCC 2014, AR5 SYR, p.2, Claimants' Exhibit B.21.

It is extremely likely that they have been the main cause of the warming observed since the middle of the 20th century<sup>64</sup> ;

the human influence on the climate system is clear and today, human-induced GHG emissions are the highest ever recorded <sup>65</sup> ;

the causal link between human activities and climate change is unquestionable. For example, the influence of human activities on the climate system can be seen in the warming of the atmosphere and the ocean, changes in the global water cycle, the retreat of snow and ice, and the rise in global average sea level, and is extremely likely to be the main cause of the warming observed since the mid-twentieth century<sup>66</sup> ;

continued GHG emissions will lead to further warming and long-term changes in all components of the climate system, increasing the likelihood of severe, widespread and irreversible consequences for people and ecosystems. Limiting the extent of climate change would require deep and sustained reductions in GHG emissions, which, together with adaptation, can limit the risks associated with climate change<sup>67</sup> ;

Many aspects of climate change and its impacts will continue for centuries, even if anthropogenic GHG emissions are halted. The risks of abrupt or irreversible changes increase as warming increases <sup>68</sup> ;

without mitigation measures other than those in place today, and even if adaptation measures are taken, the risk of severe, widespread and irreversible global consequences will be high to very high by the end of the 20th century due to warming<sup>69</sup>.

Finally, on 24 October 2014, the Council of the European Union adopted a first '*2030 Climate and Energy Package*' setting four general targets for 2030:

a binding EU reduction target of at least 40% below 1990 levels for concerns GHG emissions within the EU;

a binding EU target of at least 27% for the share of renewables in final energy consumption by 2030; this target is to be achieved collectively and is not divided between Member States;

an indicative EU target of at least a 27% reduction in energy use by 2030 compared to the baseline, to be reviewed in 2030 with a view to a 30% reduction; this is not translated into binding targets at national level

a 15% interconnection target in the electricity sector.

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<sup>64</sup> IPCC 2014, AR5 SYR, p.4, Claimants' Exhibit B.21. <sup>65</sup>

IPPC 2014, AR5 SYR, p.40, Claimants' Exhibit B.21. <sup>66</sup>

IPPC 2014, AR5 SYR, p.47, Claimants' Exhibit B.21.

<sup>67</sup> IPCC 2014, AR5 SYR, p.8, Claimants' Exhibit B.21.

<sup>68</sup> IPCC 2014, AR5 SYR, p.16, Claimants' Exhibit B.21.

<sup>69</sup> IPCC 2014, AR5 SYR, p.17, Claimants' Exhibit B.21.

## 2015

In 2015, the SED submitted its final report based on the findings of the IPCC 5th report. This report states in particular:

*"Limiting global warming to less than 2°C requires a radical transition (a This is not just an adjustment of current trends" (p.15).*

*"The impacts of climate change are hitting our planet. Significant climate impacts are already occurring in terms of global warming and the increase in global average temperature will only increase the risk of severe, generalised and irreversible impacts. Therefore, the concept of a 'guardrail', which implies a warming limit that guarantees total protection against dangerous anthropogenic interference, no longer works" (p.18).*

*"The concept of a 'guardrail', i.e. 2°C of warming being considered safe, is inadequate and would be better seen as an upper limit, a defensive line that must be rigorously defended, although less warming would be preferred" (p.33).*

*"Limiting global warming to 1.5°C would provide a safer 'guardrail'. It would avoid or reduce risks, especially to food production or unique and threatened systems such as coral reefs or many parts of the cryosphere, including the risk of sea level rise [...] Parties could decide to take a more conservative approach by limiting global warming to below 2°C, reaffirming the notion of a defensive line or buffer zone keeping warming well below 2°C" (p.11)7.*

In March 2015, the European Commission noted in relation to Belgium's targets: *"Without additional measures or the use of flexibility mechanisms, Belgium would miss its greenhouse gas emission reduction target by 11 pp, according to its own projections. The remaining effort is therefore among the largest of all Member States"*<sup>70</sup>

Also in March 2015, the Federal Pian Bureau published a summary of the legal opinions on the climate accountability mechanism introduced by the aforementioned special law of 6 January 201472- The IBGE states that, in its opinion, the climate accountability mechanism, on the one hand, contains numerous technical inaccuracies that make its application difficult and subject to challenge, and on the other hand, unreasonably and unjustifiably encroaches on regional environmental competences and does not respect the constitutional principle of equality<sup>73</sup>- The FPS Environment states that *"there are many obstacles to implementation of the law, both because of its drafting and the errors it contains and because of the technical aspects it raises"*<sup>74</sup>.

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<sup>70</sup> Excerpts from UNFCCC 2015, Report on the Structured Expert Dialogue on the 2013-2015 review, available at <https://unfccc.int/sites/default/files/resource/docs/2015/sb/eng/infOL.pdf>.

<sup>71</sup> 2015 Report for Belgium, Communication from the European Commission, 18 March 2015, SWD(2015) 21 final/2, p. 79, Applicants' Exhibit G.20.

<sup>72</sup> Exhibit II.1.6 of the Beige State filed on 22 March 2021.

<sup>73</sup> *Ibid*, p.22.

<sup>74</sup> *Ibid*, p.30.

In June 2015, Klimaatzaak vzw and the persons mentioned in Annex A initiated the present procedure.

On 4 December 2015, the federal government and the Regions reached a political agreement on the intra-Belgian distribution of the climate effort (or *burden sharing*), and more specifically on the distribution of the GHG reduction obligations in the non-ETS sectors for the period 2013-2020.

On 12 December 2015, at COP-21 in Paris, the member states of the UNFCCC adopted the Paris Agreement, which amended the UNFCCC once again.

The federal State and the three Regions gave their assent to this Paris Agreement, which was signed by Belgium and the European Union on 22 April 2016. This agreement entered into force on 4 November 2016.

Article 2 of the Paris Agreement includes measures "*to strengthen the global response to the threat of climate change*", such as

*to contain "the increase in global average temperature to well below 2°C above pre-industrial levels and continuing efforts to limit the increase in temperature to 1.5°C above pre-industrial levels, while recognising that this would significantly reduce the risks and impacts of climate change";*

*strengthening "capacities to adapt to the adverse effects of climate change and promoting resilience to climate change and low greenhouse gas emission development, in a manner that does not threaten food production";*

*make "financial flows compatible with a low greenhouse gas emission and climate change resilient development pathway".*

Under Article 4 of the agreement, the Parties undertake, with a view to achieving the temperature objective in the long term, to :

to reach their global GHG emission targets "as soon as possible";

rapidly reduce GHG emissions in line with the scientific indications of the temperature target, with the ultimate goal of global carbon neutrality in the second half of this century;

formulate and communicate, by 2020 at the latest, long-term strategies for low-carbon development;

determine their nationally determined contributions (NDCs) on a voluntary basis.

The agreement does not establish a mandatory emission reduction quota and allows countries to define their own level of ambition in terms of GHG emission reductions. The agreement

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<sup>75</sup> Law of 25 December 2016 assenting to the Paris Agreement, *Monit.b.*, 26 April 2017; Decree of the Walloon Parliament of 24 November 2016 assenting to the Paris Agreement, *Monit.b.*, 5 December 2016; Decree of the **Flemish Parliament of 25 November 2016 assenting to the Paris Agreement**, *Alonit.b.*, **21 December 2016**; Order of the Brussels Parliament of 16 February 2017 assenting to the Paris Agreement, *Monit.b.*, 10 March 2017.

The report also repeatedly mentions that developed countries must take the lead and play an important role in addressing climate change<sup>76</sup>.

These contributions must be revised upwards every 5 years on the basis of periodic analysis (at the global level) of the deviation from a trajectory that will limit warming to 2°C or 1,5°C.

Belgium's national contribution will be notified by the European Union, which will submit a contribution for all its members, including the European objective for reducing all GHG emissions across all sectors and the national objective of each Member State for the non-ETS sector.

It is also expected that each party will regularly provide the following information:

- a national inventory report on anthropogenic emissions by sources and removals by sinks of greenhouse gases;
- the information necessary to monitor the progress of each party in implementing and achieving its nationally determined contribution.

Decision I/CP.21 annexed to the Paris agreement stated from the outset that the national contributions (NDCs) submitted by countries are not sufficient to achieve the ultimate objective of the agreement and the UNFCCC, i.e. the prevention of dangerous climate change and thus of global warming well below 2°C and preferably limited to 1°C.<sup>77</sup>

Thus, the Conference of the Parties :

*"notes with concern that the levels of global greenhouse gas emissions in 2025 and 2030 estimated on the basis of projected nationally determined contributions are not consistent with least-cost scenarios of a 2°C temperature increase, but result in a projected level of emissions of 55 gigatonnes in 2030, and also notes that much greater emission reduction efforts than those associated with the projected nationally determined contributions will be required to keep global temperature rise below 2°C above pre-industry levels by reducing emissions to 40 gigatonnes or below 1.5°C above pre-industry levels by reducing emissions to 40 gigatonnes.  
emissions at a level to be defined in the special report referred to in paragraph 21 above afterwards"*<sup>78</sup>

The decision also called on the IPCC to present a special report in 2018 on the consequences of global warming above 1.5°C above pre-industrial levels and the associated global GHG emission patterns.

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<sup>76</sup> See the last recital of the preamble and Articles 4.4, 9, 11.3 and 13.9 of the Paris Agreement.

<sup>77</sup> **Decision I/CP.21, Preamble:** *"Emphasizing with deep concern the urgent need to close the significant gap between the global effect of the mitigation commitments made by Parties in terms of annual global emissions of greenhouse gases up to 2020 and the global emissions pathways consistent with the prospect of containing global average temperature increase significantly.(e.g. greenhouse gas emissions up to 2020 and global emissions pathways consistent with the prospect of containing global average temperature increase to well below 2°C above pre-industrial levels and continuing efforts to limit temperature increase to 1.5°C above pre-industrial levels), Exhibit H.22 of the applicants.*

<sup>78</sup> Decision I/CP.21, p.4/40, §17.

After the Paris agreement, two COPs took place, in 2016 in Marrakech (COP-22) and in 2017 in Bonn (COP-23).

## 2016

In 2016, the European Commission again pointed out that: *"If it does not change its policies and use suspicious mechanisms, Belgium will not achieve its target of reducing greenhouse gas emissions by 6 percentage points in 2020 (compared to 2005)*

»<sup>79</sup>,

On 21 April 2016, the Walloon Government adopted its Plan Air-Climat Energie (or "PACE") 2016- 2022 containing, among other things, a hundred or so measures to reduce GHG emissions.

In July 2016, the Federal Council for Sustainable Development published a new opinion on beige climate governance. In it, it underlines its concern about the unclear interpretations and the many options open after the political agreement on the distribution of the climate effort reached in the Paris Agreement of December 2015. It notes that this agreement *"must be translated into a cooperation agreement"*<sup>80</sup>. The FRDO-CFDD also urges *the federal state and the regions to "intensify negotiations to set out these options and clarify these aspects of the cooperation agreement as soon as possible quickly, as the deadlines announced in the political agreement on burden sharing (February 2016, i.e. 2 months after the signing of the agreement) are largely outdated"*<sup>81</sup>

On 12 October 2016, the ad hoc "Burden sharing" working group, composed of representatives of the Federal State and the three Regions, adopted a draft cooperation agreement between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the distribution of Belgium's climate and energy objectives for the period 2013-2020.

## 2017

In January 2017, the Senate published an own-initiative *"Information report on the intra-Belgian decision-making process regarding the distribution of the climate effort with regard to the climate objectives"*<sup>82</sup>.

The Senate's initiative was explained in particular by the fact that *"the intra-Belgian decision-making process on this burden sharing has, in recent years, required a disproportionate investment of time and energy. In Belgium, there is no hierarchy of norms and the agreement between the federal authority and the Regions concerned was reached on the edge. This is why the plenary assembly of the Senate considered it desirable to devote an information report to this process and to examine whether it could formulate recommendations to improve it and to avoid in the future that discussions on future federal agreements also drag on for several years.*

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<sup>79</sup> Belgium Report 2016, European Commission Communication, 26 February 2016, SWD(2016) 71 final, p. 69, Applicants' Exhibit G.21.

<sup>80</sup> Opinion on Governance on Climate Policy, Brussels, FRDO-CFDD, 4 July 2016, p.3, Claimants' Exhibit F.18.

<sup>81</sup> *Ibid.*

<sup>82</sup> Belgian Senate, Information report on the intra-Belgian decision-making process on the distribution of the climate effort with regard to climate objectives, *Doc. Senate, 2016-2017, no. 6-253/4.*

<sup>83</sup> *Doc. Senate, 2016-2017, no. 6-253/2, p.4.*

After noting that 'it was *only on 4 December 2015, after six years of negotiations, that an intra-Belgian climate agreement was reached*<sup>84</sup>, the Senate drew up a timeline detailing the stages of the negotiations on climate effort sharing.

Finally, this information report made numerous recommendations on beige climate governance, including

general climate policy :

- the development of a climate strategy beyond 2030, i.e. with a longer time horizon, by the federal and regional authorities in consultation with their respective parliaments (Recommendation 1);
- the implementation of an ambitious climate policy to comply with the Paris Agreement, with the joint determination of actions to be undertaken by all federal and regional authorities in all relevant policy areas to achieve a low-carbon society with a coordinated vision (R. 2);

The establishment of maximum cooperation and coherence between the federal state and the regions, notably through the application of the principle of mutuality. This principle "means that they systematically check the possible impact of a measure on the climate policy of another entity and try to act in such a way as to strengthen the effectiveness of the measures of all the other levels of power" (R. No. 3);

strengthening the continuous dialogue between the federal State and the Regions through the National Climate Commission, including during periods of government formation and current affairs (R. No. 4);

- the strengthening of instruments and means, in particular the administrations of the different levels of power (R. no. 5).

future targets, accountability mechanism and contribution to the climate effort:

- an anticipation of the intra-Belgian distribution of the 2030 targets (R. n° 6);
- a contribution by each entity according to its specificities to the climate effort, in order to obtain the most favourable result in terms of climate for all entities (R. n° 8).

the methodology :

- improving the systematic monitoring of the intra-Belgian climate policy (R. no. 10);
- the establishment of a single coherent monitoring and reporting system across all levels of government to measure greenhouse gas emissions and to assess the impact of policy orientations and measures taken (R. No. 11).

strengthening the role of the Coordination Committee upstream and downstream of the National Climate Commission as a political oversight body and a meeting place for governments (R. No. 12).

the National Climate Commission :

- + ensure compliance with the cooperation agreement of 14 November (R. no. 13), and more specifically with art. 8 of the cooperation agreement, which obliges the holding of meetings of the National Climate Commission at least twice a year (R. no. 18) and art. 6, § 1 of the

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<sup>84</sup> *Ibid*, p.7.

the Cooperation Agreement of 14 November 2002, which requires an annual report on the activities of the National Climate Commission, including compliance with each government's annual GHG emission reduction trajectories and any climate targets (R. No. 19);

- the full execution of the tasks devolved to the National Climate Commission as defined by the cooperation agreement of 14 November 2002 (R. no. 14)
  - the adoption of a work programme by the chair of the National Climate Commission on the occasion of each new presidency (R. No. 15)
  - strengthening the role, effectiveness and functioning of the National Climate Commission (R. No. 16)
  - the accelerated development of a new, updated national climate plan, following on from the one covering the period before 2012, with a clear overview of the policy actions undertaken, envisaged and their expected effects, in line with the existing plans of the federated entities;
  - setting binding targets beyond the legislature in line with the binding EU targets and the Paris Accorci targets for 2030 and then 2050;
  - Increasing the transparency of the work of the National Climate Commission, with documents and reports of the meetings being made available online (R. No. 22).
- the creation of a parliamentary consultation body (R. No. 23).

In March 2017, the European Commission raised the point that: "*Belgium is expected to miss its greenhouse gas emission reduction target for 2020 by 5 percentage points compared to 2005 (...) It is of utmost importance to implement the internal climate agreement by 2020, to review the existing policies in the light of this agreement and to develop a long-term vision*"<sup>85</sup>.

In May 2017, the Office of the United Nations High Commissioner for Human Rights conducted an in-depth analytical study on the relationship between climate change and the full enjoyment of children's rights.

Its report states in particular:

*"The importance of children's rights in the context of climate change is explicitly recognised in the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC), where States are required to take action to protect all children from the real and foreseeable adverse effects of climate change. The importance of children's rights in the context of climate change is explicitly recognised in the Paris Agreement under the United Nations Framework Convention on Climate Change, where States are called upon, in taking action to address climate change, to respect, promote and take into account their respective obligations regarding, inter alia, children's rights and intergenerational equity.*

*"The human rights obligations and responsibilities contained in the Convention on the Rights of the Child, the Paris Agreement and other international human rights instruments require States, along with other actors to whom they are accountable, to*

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<sup>85</sup> Belgium Report 2017, Communication from the European Commission, 1 March 2017, SWD(2017) 67 final/2, p. 63.

*obligations, including corporate obligations, to act to protect the rights and best interests of the child against the harmful effects of climate change (...).*

*53. Human rights, climate change, development and risk mitigation*

*Climate change and disaster risk reduction, including through relevant international instruments and processes, are inextricably linked. Climate change mitigation and adaptation must be based on human rights, given the overlap between these different areas and human rights obligations. Therefore, States have a concrete obligation to respect, protect, promote and fulfil the human rights of all children, and to integrate these rights into all policies and measures adopted to mitigate climate change.*

*54. The child rights approach is based on the following key elements:*

*(a) Ambitious mitigation measures to reduce, to the greatest extent possible, the future adverse effects of climate change on children by limiting temperature increases to 1.5°C above pre-industrial levels, in accordance with the Paris Agreement;*

*b) Adaptation measures that focus on protecting children who are more vulnerable to climate change;*

*(c) Mitigation and adaptation measures resulting from participatory and evidence-based processes that take into account the views and best interests of children*

*<sup>86</sup> . "I am not going to say that I am not going to say that I am not going to say it.*

Also in 2017, the Walloon Air and Climate Agency issued its PACE monitoring report, in which it underlines: *"In 2015, the level of emissions reached almost 36 million tonnes of CO<sub>2</sub> equivalent, which is below the maximum global budget set for the years 2015 to 2022. As far as the sectoral budgets are concerned, they are almost all respected with the exception of non-ETS industry, transport and agriculture. In each of these sectors, the difference is less than one percent. These deviations can, for the time being, be considered as being within the uncertainty range of the sectoral emission estimation calculations. As stated in the section devoted to the analysis of the inventories, the emissions of the non-ETS industry and agriculture sectors are constantly decreasing, 55% and 15% respectively between 1990 and 2015. However, for transport, they increased by 32% between 1990 and 2015.*

*At this stage, corrective measures are not envisaged given the very small differences in the sectoral budgets, but it will be necessary to remain attentive to these differences in the future. It should also be noted that the overall budgets are largely respected and that a new plan for 2030 is currently being prepared*

On 28 September 2017, the Walloon Parliament adopted a resolution on the implementation of a Walloon climate policy<sup>88</sup>. This resolution asks the Walloon Government, among other things, to pursue an ambitious policy to meet the objective of reducing GHG emissions by 95% compared to 1990 by 2050.

Also in 2017, the Federal Plan Bureau stressed that: *"in the exploratory scenarios considered above, the quantitative targets from the SDGs and the VLT OD [Federal Strategic Long-Term Development Vision*

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<sup>86</sup> Claimants' Exhibit H.33.

<sup>87</sup> Exhibit D.6 of the Walloon Region.

<sup>88</sup> *Doc.parl.* Walloon Parliament, session 2016-2017, Doc. 11°886/9, room D.8 of the Walloon Region.

*In the EU2030+ scenario, the energy and GHG emission targets are not met in 2030 and 2050, except for the objective of reducing energy dependency. Current policies, as well as those planned to reach the European targets set for 2030 (EU2030 and EU2030+ scenarios), while going in the right direction, are not sufficient to reach the SDGs and the LTV SD targets*

The "Interfederal Beige Energy Pact, a common vision for the transition", initially planned for December 2015, was finalised by the four Energy Ministers in December 2017. This pact was approved in December 2017 by the Walloon and Brussels governments. The federal and Flemish governments will approve it some time later.

The pact confirms that nuclear power will be phased out by 2025, but a monitoring committee will be set up, including the industry, to check that the price of electricity remains affordable and that security of supply is guaranteed.

## **2018**

On 12 February 2018, a cooperation agreement was concluded between the federal state and the regions, which translates into legal terms the distribution of the climate effort over the period 2013-2020.

This cooperation agreement provides for:

- 1°) the determination of the contribution of each Contracting Party to achieving the greenhouse gas emission reduction target imposed on Belgium for the compliance period in accordance with Decision No 406/2009/EC, including the use of the margins of manoeuvre provided for in Articles 3 and 5 of that Decision;
- 2°) the determination of the contribution of each contracting party in order to achieve the objectives imposed on Belgium with regard to energy produced from renewable sources in accordance with Directive 2009/28/EC;
- 3°) the sharing, between the Contracting Parties, of revenues from the auctioning of emission allowances for the period 2013 to 2020 inclusive, under Directive 2003/87/EC;
- 4°) the determination of the mandatory contribution of each Contracting Party to international climate finance for the period 2016 to 2020 inclusive.

Article 3 of the cooperation agreement sets the Regions' GHG reduction targets in the non-ETS sectors as follows:

- for the Flemish Region: -15.7%; for
- the Walloon Region: -14.7%;
- for the Brussels-Capital Region: -8.8%.

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<sup>89</sup> December 2017 Federal Plan Office Report, "Achieving the Global Goals of Sustainable Development", available at [www.plan.be](http://www.plan.be), Applicants' Exhibit F.20.

<sup>90</sup> Cooperation agreement between the Federal State, the Flemish Region, the Walloon Region and the Brussels Capital Region on sharing the Belgian climate and energy objectives for the period 2013-2020, *Monit.b.*, 12 July 2018.

The cooperation agreement also distributes the beige target of 13% (or 4.224 Mtoe) of renewable energy production<sup>91</sup> between the three Regions and the Federal State as follows:

- 2.156 Mtoe for the Flemish Region;
- 1.277 Mtoe for the Walloon Region;
- 0.073 Mtoe for the Brussels-Capital Region;
- 0.718 Mtoe for the Federal State.

Finally, article 46 of the cooperation agreement specifies that it takes effect on 4 December 2015. On 22 July 2018, the agreement was approved by the four parliaments involved: the federal, Brussels, Flemish and Walloon parliaments. It entered into force on the same day.

In its 2018 report for Belgium, the European Commission found that :

*"Although Belgium's environmental and climate policies are working well in some areas, they are still not effective enough in tackling local air pollution and greenhouse gas emissions. Belgium is not sufficiently exploiting its potential to become a champion of low-carbon innovation:*

*"According to national projections for 2017 based on existing measures, the greenhouse gas emissions reduction target of 15% in 2020 compared to 2005 is not expected to be met, with non-ETS emissions only 11.5% lower in 2020 than in 2005.*

In its October 2018 report to the Parliament, the European Commission also noted that 8 Member States, including Belgium, could fail to meet their 2020 and 2030 targets "on the basis of existing measures"<sup>94</sup>. The report further states that Belgium would be the 5<sup>th</sup> Member State with the largest gap between the 2030 targets and projected emissions<sup>95</sup>.

In November 2018, a broad dialogue was organised at the initiative of the FPS Public Health and universities in the country, the final report of which states, among other things, that:

*"The central question is whether the federal structure in Belgium is adapted to meet this gigantic climate challenge, which requires a radical transformation of our society. The observation that the current governance framework is inadequate for the climate challenge persists in the scientific analyses. The governance framework is inadequate, given the climate emergency, the necessary decarbonisation of the economy, new European governance requirements and citizen pressure. Despite the existence of external drivers, which stem from European and international law in particular, an internal driver is missing in federal Belgium. [...]"*

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<sup>91</sup> Objective set by Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy produced from renewable sources.

<sup>92</sup> Belgium Report 2018, Communication from the European Commission, 7 March 2018, SWD(2018) 200 Final, p. 4, Claimants' Exhibit G.24.

<sup>93</sup> Belgium Report 2018, Communication from the European Commission, 7 March 2018, SWD(2018) 200 film! at 59, Claimants' Exhibit G.24.

<sup>94</sup> European Commission Report 2018: The EU and the Paris Agreement on Climate Change: Progress to date The EU and the Paris Agreement: taking stock of progress to the COP in Katowice, 26 October 2018, COM(2018) 716 final, p. 10, Applicants' Exhibit G.25.

<sup>95</sup> European Commission Report 2018: The EU and the Paris Agreement on Climate Change: Taking stock of progress at the Katowice COP, 26 October 2018, COM(2018) 716 final, p. 9, Applicants' Exhibit G.25.

*We need a common long-term vision that provides legal certainty for the different policies and levels of power and is sustainable. [...] In addition to the need for accountability, prioritisation and focus, there is also a need to depa/itise and objectify climate policy. Decision-making power must be at the highest level, where decisions can be made most effectively. In a context of constant political bungling that hinders the implementation of an effective climate policy, a discussion on the relevance of changing specific aspects of climate policy (e.g. mobility) in the allocation of competences is useful. However, given the urgency of climate change, other urgent and pragmatic solutions must be considered. Within the existing institutional structure our country has several legal (constitutional) solutions to strengthen the cooperation between the different levels of power and policy areas <sup>96</sup>.*

Also in October 2018, the IPCC tabled a new special report<sup>97</sup> which states, among other things, that:

A warming of more than 1.5°C will cause very significant damage and the difference between the effects of climate change at 1.5°C and 2°C is significant;

to limit global warming to 1.5°C, global emissions will have to be (far) below 35 Gt *co-eq* by 2030; the IPCC also points out that half of the models used show that, by 2030, global emissions must already be reduced to 25 Gt and 30 Gt *co-eq*;

On this basis, and still with the objective of limiting global warming to 1.5°C, it is necessary to reduce global *coi* emissions by 45% net in 2030 (between 40 and 60%) and in 2050 by 100% net (for the period 2045-2055);

from 2050 onwards (for the period 2045-2055), there should be no further emissions of *coi*;

if this emission reduction pathway is followed and zero emissions are reached in 2050, the probability of staying below 1.5°C is 50% or more and the probability of staying below 2°C is 85% (in other words, even with this strong emission reduction for 2030 and even if zero CO<sub>2</sub> emissions are reached in 2050, there is still a 50% chance that the 1.5°C threshold will be exceeded and a 15% chance that warming will exceed 2°C);

the commitments made in the national contributions of the Paris Agreement countries by 2030 will be far from sufficient to achieve the Paris objectives.

The IPCC Report's calculations show that even if states were to meet all of their commitments, the NDCs, global warming would reach 3°C this century and only increase thereafter: *"Scenarios that reflect the currently stated reduction ambitions for 2030 generally correspond with co0t-efficiency scenarios that lead to a*

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<sup>96</sup> **Dialogue on 'Climate Governance in Belgium', main conclusions, including concrete proposals** for improving climate governance in a federal Belgium, 27 November 2018, pp. 2 et seq., available online at [https://climat.be/doc/Main conclusions Climate Governance Dialogue.pdf](https://climat.be/doc/Main%20conclusions%20Climate%20Governance%20Dialogue.pdf), quoted by G. ROLLAND and C. ROMAINVILLE, "Journey to the heart of the notion of 'special law' - proposals for a special climate law", *A.P.T.*, 2020/2, p.289.

<sup>97</sup> Claimants' Exhibits B.23 and B.24.

*warming of about 3°C in 2100, with continued warming thereafter (mayenne canfiance) "*

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This report was presented at COP-24 in Katowice in December 2018 but was not adopted as such by the Conference of the Parties, which only "*invited /the Parties to use /the information in the report*".

Also in 2018, the European Union adopted the following legislative acts to implement the Clean Energy for All Europeans (2030) package:

Regulation (EU) 2018/84299 which concerns non-ETS sectors and imposes binding annual GHG emission reductions on Member States, in principle linear, which must result in a prescribed reduction amount by 2030. For Belgium, the reduction to be achieved in 2030 is -35% compared to the 2005 level (Annex I of the Regulation). This Effort Sharing Regulation (ESR) provides for various forms of flexibility for Member States to achieve their targets in the period 2021-2030 if they

have insufficient allowances themselves. In addition to maintaining some forms of flexibility (saving, borrowing and emissions trading) from the 2013-2020 period, some mechanisms have been removed (CDM and JI project purchase rights) and new mechanisms have been created (ETS flexibility and LULUCF). The use of different flexible instruments is quantitatively limited.

The distribution of access between the Regions

to these forms of flexibility is part of the intra-Belgian burden sharing exercise of the climate targets for 2030.

Directive (EU) 2018/2001100 which concerns the share of energy from renewable sources in the Union's gross final consumption of energy. From 1 January 2021, this share of energy in the gross final consumption of energy of each Member State may not be lower than its target for 2020, i.e. 13% for Belgium (Art. 3(4) at Annex I, part A of the Directive).

Governance Regulation 2018/ 1999101, in force since 24 December 2018, which requires each of the EU member states to have climate governance based on integrated national energy and climate plans (or "INECPs").

On 28 November 2018, the European Commission called for Europe's accession to the carbon neutrality by 2050102 .

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<sup>98</sup> **uncontested free translation**

<sup>99</sup> 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.

<sup>100</sup> Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion **the use of energy from renewable sources.**

<sup>101</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the governance of the Energy and Climate Action Union, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council

<sup>102</sup> Press release of 28 November 2018, Claimants' Exhibit G.37.

On 31 December 2018, Belgium notified its National Integrated Energy-Climate Plan 2021-2030 (NIPEC 2021-2030) to the European Commission, pursuant to Article 3 of the above-mentioned Governance Regulation 2018/1999.

## 2019

In its 2019 report for Belgium, the European Commission again found, among other things, that:

*"In the absence of additional measures, it is likely that Belgium will not achieve its objectives. emissions by 2020 and 2030. Emissions from the non-ETS sectors in 2020 are expected to be only 12% below 2005 levels, compared to the 15% reduction target. The gap is expected to widen further by 2030, with emissions projected to be only 14% below 2005 levels, compared to the 35% reduction target.*

*>)<sup>103</sup>;*

*"Some progress has been made in the development and implementation of climate and energy policies by different levels of government, but overall effectiveness is compromised by the complexity of the evolving division of powers. In the past, this has considerably delayed the definition of coordinated action, such as an internal distribution of efforts towards the achievement of the 2020 climate and energy targets, a long-term vision for energy transition, or the completion of important infrastructure projects such as the RER around Brussels "<sup>104</sup>.*

In the course of February 2019, two special climate bills were submitted for parliamentary discussion<sup>105</sup> - The main difference between the two bills concerned the thresholds for reducing GHG emissions: at least 95% compared to 1990 by 2050 for one, at least 65% compared to 1990 by 2050 for the other.

The Legislation Section of the Council of State issued an opinion in chambers in which the Council of State approved the use of a special law for the organisation of a coherent exercise of the climate competences of the federal state and the federated entities. However, it considered that the introduction of emission reduction targets for 2050 and 2038 and the inclusion of

The Council of State considered that the special legislator did not have a general power to establish the general principles and objectives in the matters he assigns. In this sense, the Council of State considered that the special legislator did not have a general power to establish general principles and objectives in the matters it assigned. The opinion therefore suggested

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<sup>103</sup> 2019 Report for Belgium, European Commission Communication, 27 February 2019, SWD(2018) 200 final, p. 66, Applicants' Exhibit G.32.

<sup>104</sup> 2019 Report for Belgium, European Commission Communication, 27 February 2019, SWD(2018) 200 final, p. 67, Applicants' Exhibit G.32.

<sup>105</sup> Proposal for a special law of 6 February 2019 coordinating the policy of the federal authority, the Communities **and the Regions on climate change and setting general long-term objectives**, *Doc. Chamber*, 2018-2019, no. 54-3517/001. See also Proposal for a special law of 6 February 2019 coordinating **the climate change policy of the federal authority, the Communities and the Regions and setting general long-term objectives**, *Doc. House*, 2018-2019, no. 54-3520/001, which repeats the same **proposal with other GHG emission reduction targets**.

six alternatives for setting the general principles and objectives of climate policy, including amending Article 7a of the Constitution <sup>106</sup>.

The amendment of Article 7bis of the Constitution<sup>107</sup>, which was initially the chosen option, was however rejected by the House of Representatives in the plenary session of 28 March 2019, due to the lack of a qualified majority needed for its adoption. The special law proposals have since lapsed.

On 18 June 2019, the European Commission published its assessment of the Belgian NECP 2021-2030<sup>108</sup>, together with the related recommendations <sup>109</sup> and a factsheet <sup>110</sup>.

In its assessment, the Commission stated, inter alia, that

*"Belgium's 2030 target for greenhouse gas (GHG) emissions from sectors not covered by the EU Emissions Trading Scheme (non-EU ETS) is a 35% reduction from 2005 levels, as set out in the Effort Sharing Regulation (ESR)<sup>2</sup>. The adopted policies would lead to reductions of 13% and the draft NECP aims to achieve a 35% reduction at national level. The final version of the NAP would therefore benefit from including additional information on the scope, timing and expected impacts of the necessary policies and measures, including in the building and transport sectors, as well as on the planned use of flexibility under the EU ETS. »<sup>111</sup>;*

*"The division of competences between the different federated entities in Belgium is a challenge to achieve an integrated NECP. When finalising the NECP, additional coordination efforts will be needed to present an integrated national vision on how to achieve the objectives of the energy union by 2030, while ensuring overall consistency and coherence with federal and regional plans"<sup>112</sup>;*

*"In general, there is often insufficient information on which policies and measures are included in the scenario with additional measures, their specific contribution to the GHG reduction target and their exact scope, status and timing. This creates doubts about the feasibility of the binding national targets and indicative sectoral GHG reduction targets included in the draft NECP on the basis of the defined policies and measures. It is important that the policies and measures are described in sufficient detail to understand their exact nature and expected impact, and it is appropriate to*

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<sup>106</sup> Proposal of 13 March 2019 to revise Article 7bis of the Constitution in order to anchor climate objectives and principles, Pari. House, 2018-2019, 54-3642-001.

<sup>107</sup> The **text of which read as follows**: *"i/s cooperate in particular on an effective climate policy, in accordance with the objectives, principles and modalities established by a law adopted by the majority provided for in Article 4, last paragraph.*

<sup>108</sup> Assessment of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, Claimants' Exhibit G.33.

<sup>109</sup> Commission Recommendations of 18 June 2019 on the draft integrated national energy plan and climate policy of Belgium covering the period 2021-2030, C(2019) 4401 final, applicants' exhibit G.34.

<sup>110</sup> Belgium factsheet- summary of the Commission assessment of the draft National Energy and Climate Plan 2021- 2030, available at [https://ec.europa.eu/energy/sites/ener/files/documents/inecp\\_factsheet\\_be\\_final.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/inecp_factsheet_be_final.pdf). <sup>111</sup> Assessment of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.2, Applicants' Exhibit G.33.

<sup>112</sup> Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.3, Applicants' Exhibit G.33.

*to specify for each of them whether it is simply a description of a potential lead or a measure actually proposed and confirmed* <sup>113</sup>;

*"The draft NECP refers to the Interfederal Energy Pact which sets out Belgium's ambition for 2030 and 2050. A common vision document agreed at ministerial level and endorsed by the respective governments can be seen as a logical starting point for achieving an integrated NECP in the Belgian context. However, the draft NECP is not fully consistent with the ambitions set out in the Pact. For example, the sectoral targets for renewable energy (...) have not been fully retained, which seems strange if*

*The scenario with additional measures is considered to exceed these targets* <sup>114</sup>;

*"In its current state, the draft NECP often presents a summary of the information contained in In addition, this approach leads to a lack of coherence between the proposed elements, for example on hydrogen.19 In addition, the report does not show how the different elements presented are combined in a common vision on how to ensure the transition to a low-carbon society in Belgium. Moreover, this approach leads to a lack of coherence between the proposed elements, for example on hydrogen19. It also results in unexploited possibilities for synergies (...). Substantial efforts and political will are therefore needed to achieve a more integrated national energy and climate plan, which in turn would be a useful tool to foster cooperation between the different authorities in achieving the climate and energy transition.*

The European Commission went on to state that the recommendations arising from its assessment *"Member States should also ensure that their integrated national energy and climate plans take into account the latest country-specific recommendations issued in the framework of the European Semester. Member States should also ensure that their integrated national energy and climate plans take into account the latest country-specific recommendations of the European Semester* <sup>116</sup>.

It also stated that *"(...) the final version of the National Energy and Climate Plan must contain all the elements required by the Regulation, including all the information needed to assess the proposed levels of ambition and the adequacy of the plan to achieve them, including a comprehensive overview of policies and measures and an accompanying impact assessment. Considerable effort and political will are needed to achieve a more integrated national energy and climate policy* <sup>117</sup>.

Therefore, with regard to Belgium's share of GHG emission reductions, it recommended to *"complete information on the policies and measures necessary to achieve the 2030 target of a 35% reduction in greenhouse gas emissions from 2005 levels for sectors not covered by the emissions trading scheme*

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<sup>113</sup> Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.7, Applicants' Exhibit G.33.

<sup>114</sup> Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.14, Applicants' Exhibit G.33

<sup>115</sup> Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.14, Applicants' Exhibit G.33.

<sup>116</sup> **Commission recommendations of 18 June 2019 on the draft integrated national energy plan** and climate plan for Belgium covering the period 2021-2030, C(2019) 4401 final p.3, Exhibit G.34 of the requests. <sup>117</sup> Commission Recommendations of 18 June 2019 on Belgium's draft integrated national energy and climate plan covering the period 2021-2030, C(2019) 4401 final p.3, Applicants' Exhibit G.34.

*the EU, including the building and transport sectors, where most of the reductions will have to be made, with details of their scope and timing, as well as the expected impacts (...)* <sup>118</sup>.

In the meantime, the European Parliament adopted a resolution on 14 March 2019 urging the Member States and the European Commission to increase the EU's 2030 reduction target from 40% to 55%<sup>119</sup> - Like the European Commission, the European Parliament also considered it necessary to change the EU's 2050 target from 80-95% to a new target of zero (net) emissions by 2050 at the latest<sup>120</sup> - The European Council will also endorse the EU's goal of carbon neutrality by 2050<sup>12</sup>

In its regional policy statement of September 2019, the Walloon Region declared that it wanted to achieve the objectives set by the European Union, i.e. a 55% reduction in greenhouse gases, by 2030. The Region is aiming for carbon neutrality by 2050 at the latest (including a 95% reduction in GHG emissions compared to 1990), based on a progressive GHG emissions reduction trajectory with an intermediate stage of 55% reduction in GHG emissions compared to 1990 by 2030. The intention is to contribute to the global effort to contain the increase in global average temperature to well below 2°C above pre-industrial levels and to continue efforts to limit warming to 1.5°C, in line with the Paris climate agreement.

In its July 2019 policy statement, the CBR stated that it would have a long-term strategy based on binding targets and an evaluation framework with a "The *Brussels Climate Ordinance*", so that the CBR commits itself to becoming a low-carbon region » . This will involve, according to the declaration, strengthening the interim commitments and measures currently included in the Brussels contribution to the National Energy and Climate Plan (NECP), in order to achieve, by 2030, at least a 40% reduction in GHG emissions compared to 2005 and to contribute as much as possible to raising the European Union's targets by that date.

In October 2019, the latest annual report *"Trends and projections in Europe 2019"*, published by the European Environment Agency, indicated that in 2017, Belgium was among the eighteen Member States that met their reduction targets in 2017 without making use of flexibility mechanisms. The report also indicated that, compared to initial estimates for 2018, Belgium was just 0.4% above its 2020 target, but was expected to retain a surplus of 14.6 million tonnes of allowances in 2018<sup>122</sup> . The report also indicated that Belgium has planned additional measures which, if implemented, should enable it to meet its 2020<sup>123</sup> targets.

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<sup>118</sup> Commission Recommendations of 18 June 2019 on Belgium's draft integrated national energy and climate change plan covering the period 2021-2030, C(2019) 440 I final p. 4, applicants' Exhibit G.34. <sup>119</sup> European Parliament resolution of 14 March 2019 on climate change, point 23, **Applicants'** Exhibit G.36.

<sup>120</sup> *Ibid*, point 5.

<sup>121</sup> Notes of the meetings of 12 December 2019, Claimant's Exhibit G.40.

<sup>122</sup> Report N°15/2019 of 31/10/2019, pages 19, 32, 33 and 34: <https://www.eea.europa.eu/publications/trends-and-projections-in-europe-l>.

<sup>123</sup> *Ibid*, p.35.

The report also stated that, for 2030, existing measures in Belgium can only lead to a 15% reduction in emissions in 2030 instead of the 35% expected. Additional measures (or 'MAPs') are therefore expected from Belgium to reach its 2030 targets<sup>124</sup>.

On 18 December 2019, the final PNIEC 2020-2030 was adopted by the Consultation Committee, taking into account the recommendations and criticisms of the European Commission. The following GHG emission reduction targets have been set:

Flemish Region: -35% of GHG emissions in the non-ETS sector in 2030 compared to 2005 (p.48), it being understood that to achieve this, the Flemish Region will have to take additional measures and make use of the flexibility mechanisms at its disposal;

Walloon Region: -37% of GHG emissions from non-ETS sectors in 2030 compared to 2005 (p.55);

Brussels-Capital Region: -40% of GHG emissions in 2030 compared to 2005 (p.56); The federal government commits to continue the internal policies and measures in force, to implement the measures recommended in the PNIEC and to take new measures that contribute to achieving the GHG reduction targets (p.48).

The PNIEC also includes a contribution of 17.4% of renewable energy to gross final energy consumption and a contribution to the European energy efficiency target of 15% in primary energy and 12% in final energy.

The NECP was communicated to the European Commission on 31 December 2019.

In December 2019, at COP 25 in Madrid, the COP recognised "*the role of the IPCC in providing scientific input to inform the strengthening of the global response to the threat of climate change*" but did not adopt the findings of its 2018 special report. Parties also reaffirmed: "*the urgent need to close the large gap between the global effect of Parties' mitigation efforts in terms of annual global greenhouse gas emissions by 2020 and aggregate emission pathways consistent with a increase in global average temperature to well below 2°C above the levels of the past and continue efforts to limit the temperature increase to 1.5°C above pre-industrial levels*"<sup>125</sup>.

Also in December 2019, the European Union recognised the objective of limiting the temperature increase to 1.5°C and translated it, in its '*European Green Deal*', into a target of reducing GHG emissions by 55% compared to 1990 by 2030 and becoming carbon neutral by 2050.

## **2020**

On 19 February 2020, the Consultation Committee adopted the "*Long-term strategy for Belgium*" in accordance with Article 15 of EU Regulation 2018/1999, which includes regional strategies for reducing GHG emissions for 2050. This Long-term Strategy

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<sup>124</sup> *Ibid*, pp. 36-37.

<sup>125</sup> Decision I/CP25, available at [https://unfccc.int/sites/default/files/resource/cp2019\\_13a01E.pdf](https://unfccc.int/sites/default/files/resource/cp2019_13a01E.pdf)

states, among other things, that *"Belgium could reduce its GHG emissions by about 95% compared to 1990 and offset the remaining gap with negative emissions, thus achieving climate neutrality"*<sup>126</sup>

In its 2020 report for Belgium, the European Commission again found that :

*"Belgium is not on track to meet its 2020 climate change target. In sectors not covered by the EU ETS, reductions have been limited to 10%. They are expected to decrease by a further 2-3 percentage points, but still fall short of the 2020 target of a 15% reduction compared to 2005 levels; According to the 2017 data, Belgium has reached a share of 9.1% of energy from renewable sources in gross consumption. The policies currently implemented and the initiatives already planned are insufficient to achieve the required volumes of renewable energy on a purely national level"*<sup>127</sup>

On 30 September 2020, the new federal government adopted its government agreement in which it *"sets itself the target of a 55% reduction in greenhouse gas emissions by 2030"* and supports the EU's ambitions of at least a 55% reduction in GHGs by 2030 and carbon neutrality by 2050<sup>128</sup>.

On 14 October 2020, the European Commission published its assessment of the final NECP of the Belgia<sup>129</sup> - This opinion can be summarised as follows:

Although the final plan is an improvement on the draft plan, the Commission considers that it is not yet an integrated and coherent plan based on a common vision. Belgium is therefore encouraged to ensure greater coordination and integration of regional plans in order to achieve synergies

between the different measures.

As regards the reduction of greenhouse gas emissions, the Commission notes that Belgium will barely reach its target of -35% in 2030 compared to 2005 in the non-ETS sectors, since a gap of 0.6% will remain despite the numerous additional measures announced in the NECP. The Commission also notes that the targets are different for each region and that Flandre has been allocated a target below 35% which it will have to close by using the flexibility mechanisms. The Commission draws Belgium's attention to the fact that there is no clear correspondence between the estimates (35%) and the measures described in the NIP, and that the reliability of the estimates also varies considerably from one entity to another. The Commission also notes that the PNIEC does not include any data on emissions in the LULUCF sectors, which means that no conclusions can be drawn on targets for 2030 in these sectors. The contribution of renewables in the final IP is lower than in the draft IP: the ambition level of 17.5% of renewables in the gross final energy consumption in 2030 is considered by the Commission as unambitious.

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<sup>126</sup> Exhibit III.B.8 of the Beige State.

<sup>127</sup> Belgium 2020 Report, Communication from the European Commission, 26 February 2020, SWD(2020) 500 final, Applicants' Exhibit G.41.

<sup>128</sup> **Supplementary Exhibit 11°3 of the Beige State.**

<sup>129</sup> Evaluation of the final national energy and climate plan in Belgium, 14 October 2020, SWD(2020) 900 forni, available at climate.be.

Commission. It also asks for clarification on how Belgium will reach its 13% target by 2020. The Commission therefore proposes to explore cooperation mechanisms with Member States and a European financing scheme to reach the target and accelerate the implementation of measures in the field of transport and heating and cooling of buildings.

In the field of energy efficiency, the Commission considers that Belgium's contribution to the EU target is too low. It advises Belgium to implement additional policies and to develop a clear framework to achieve the expected results and the required financing. The Commission highlights

the importance of building renovation as a lever for energy savings in the context of the post-COVID economic recovery.

On energy supply, the Commission highlights a lack of clear targets and indicators on the resilience of the system. Import dependency will increase from 71% in 2020 to 86% in 2030. The internal energy market lacks clear targets and measures to increase flexibility, especially with regard to the contribution of renewables, storage, demand management, aggregation and smart grids in the energy market. Interconnection capacity should be 33%.

In the area of research, innovation and competitiveness, the Commission also calls for clear monitoring indicators.

The Ypres would benefit from a more coherent, robust and systemic approach to national investment needs.

The aspects of a just and equitable transition are present, but gaps remain in job creation, training, reaching the poorest groups in society, and efforts to reduce energy poverty.

However, the country has been praised for its "good practice" approach to cross-border cooperation (including in the reform of the Pentilateral Energy Forum).

Finally, on 15 January 2021, Belgium communicated to the European Commission its preliminary national GHG emissions inventory 2021, (covering 1990-2019 emissions), in accordance with Regulation (EU) n°525/2013.

It. **PURPOSE OF THE APPLICATION**

The plaintiffs request the Tribunal to :

- 1°) **Finds** that the defendants have not, by 2020 at the latest, reduced the overall volume of annual greenhouse gas emissions from the beige territory by 40%, or at least by 25%, compared to the level in 1990;
- 2°) **Finds** that the defendants are in breach of Articles 1382 and 1383 of the Civil Code in that they are not behaving like good fathers in pursuing their climate policy and are thus damaging the interests of the plaintiffs;

- 3°) **Finds that** in pursuing their climate policy the defendants violate the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR and Articles 6 and 24 of the International Convention on the Rights of the Child;
- 4°) **Orders** the defendants to take the necessary measures to induce Belgium to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory so as to achieve :
- in 2025, a reduction of 48%, or at least 42%, compared to the 1990 level;
  - in 2030, a reduction of 65%, or at least 55%, compared to 1990 levels;
  - in 2050, a net zero emission;
- 5°) Continues the case in order to verify whether the defendants have achieved the objectives imposed for the deadlines of 2025 and 2030;
- To this end, let him :
- orders the defendants to provide it and the plaintiffs with the greenhouse gas emission reports for 2025 and 2030 submitted to the UNFCCC Secretariat on the same day that they are submitted to that body in 2026 and 2031 respectively;
  - already sets the case three months after each of these communications, with instructions to the parties to file their submissions in relation to the findings of the greenhouse gas emission report for the year concerned:
    - for requesting parties: 1 month from the receipt of the 2025 and 2030 greenhouse gas emission report submitted to the UNFCCC Secretariat;
    - for the defendants: 1 month from receipt of the claimants' submissions.
  - orders the defendants, jointly and severally or in default of each other, to pay a penalty of €10,000 per day of delay to the first plaintiff, Klimaatzaak vzw, if it fails to communicate the greenhouse gas emission report to Your Tribunal and to the plaintiffs within ten days of 15 April of the reporting year in question;
- 6°) **Orders** the defendants *jointly and severally*, or one in default of the other, to pay to the first plaintiff, Klimaatzaak vzw, with a penalty payment of EUR 1,000,000 per month of delay in reaching the target imposed for 2025 and the target imposed for 2030, starting on the first of January of the year following the deadlines;
- 7°) **Acknowledges** that Klimaatzaak vzw undertakes to fully allocate the accrued penalty payments in accordance with its corporate purpose.

Voluntary interveners associate themselves with the requests made by the plaintiffs.

All the defendants conclude that the claim is inadmissible and unfounded, as well as the voluntary interventions.

The three regions conclude that the court of first instance has no jurisdiction.

In the alternative, and as a preliminary point of law, the beige State asks the court to ask: to the Constitutional Court for a preliminary ruling on the following questions

- *"Does Article 1382 of the Civil Code, interpreted in the sense that a sentence in so/idum may be pronounced against debtors without regard to their power and competence, as defined by the Constitution and the laws in force, to enforce such a sentence, violate Articles 10 and 11 of the Constitution in that it treats debtors who are in incomparable situations in an identical manner?  
?));*
- *"Does Article 1382 of the Civil Code violate Article 23 of the Constitution if it gives the court the power to impose on a legislator a measure limiting his discretion? »;*

the following questions to the Benelux Court of Justice for a preliminary ruling:

- *"Can an astreinte be imposed when the purpose of the request is to ask Parliament for a legislative change in violation of the separation of powers?  
Can a penalty be imposed where the request is to ask Parliament for a legislative change in violation of the separation of powers?*
- *"Is the obligation to provide financial resources to the State by means of a budget included in the concept of an obligation to do something involving a sum of money and is therefore covered by the exception in Article 1385bis, paragraph 1, of the Judicial Code? ».*

In the alternative and before the law is applied, the Walloon Region asks the Court to refer the following questions to the Constitutional Court for a preliminary ruling:

*"Does Article 1382 of the Civil Code violate Articles 10 and 11 of the Constitution insofar as it is interpreted as precluding a legal person which has been created and acts in defence of a collective interest, such as the protection of the environment or certain elements thereof, from receiving, for the infringement of the collective interest for which it has been created, anything other than compensation by way of pecuniary equivalent, apart from compensation for the damage caused to the environment, to receive, for the infringement of the collective interest for which it was established, anything other than compensation by way of pecuniary equivalent, apart from compensation in kind for the actual ecological damage from which the said infringement of the collective interest arose? » ;*

*"Does Article 1382 of the Civil Code violate Articles 10 and 11 of the Constitution in the interpretation in which it allows the condemnation of certain persons responsible for the damage, to the exclusion of others, with the consequence that the damage will not be repaired in any way, not even in part, and that the victim will therefore not benefit from it? »*

In the alternative, the Flemish Region asks the Court to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

*Is the "Directive 2003/87/EC of the European Parliament and of the Council of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC" {EU ETS) and "Regulation (EU) 2018/842 of the European Parliament and of the Council of Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action in order to meet their commitments under the Paris Agreement and amending Regulation (EU) No 525/2013", violate Articles 2 (right to life), 7 {right to respect for private and family life} and 24 {rights of the child} of the Charter of Fundamental Rights.*

*What are the fundamental rights of the European Union because these texts contain insufficient greenhouse gas reduction targets? ».*

iii. **DISCUSSION**

**A, AS TO THE COURT'S JURISDICTION**

The Regions raise an objection based on the lack of jurisdiction of the court of first instance to hear the claim, in that it would lead the court to substitute itself for the legislative and executive powers of the defendants.

The Walloon Region argues in this respect that the requests for injunction, continuation and reporting, if granted by the tribuna! would infringe the principle of separation of powers.

In fact, the purpose of the application is to establish that the federal State and the three Regions have failed to implement their climate policy and to hear them condemned to prevent the harmful consequences that this policy will have for the plaintiffs.

It is a given that the judiciary is competent to prevent or remedy any wrongful infringement of a subjective right by a public authority in the exercise of its discretionary power.

It is also accepted that Article 1382 of the Civil Code recognises a subjective right to compensation for damage caused by the fault of others.

Thus, the court has the power of jurisdiction to assess whether or not the conditions for the civil liability of a public authority exist on the basis of Article 1382 of the Civil Code.

In so doing, the judicial judge exercises a control over the legality and not the appropriateness of the behaviour adopted by the public authority.

Therefore, the court of first instance has jurisdiction to hear an action to decide the dispute as to whether or not the State and the three Regions have engaged in wrongful conduct.

The question of the scope of the measures that the judge may impose on the public authority to repair or prevent the damage claimed by the plaintiffs is a matter for the examination of the merits of the case.

**B. THE ADMISSIBILITY OF THE MAIN APPLICATION AND THE APPLICATIONS FOR VOLUNTARY INTERVENTION**

Concerning access to justice in environmental protection matters, Belgium ratified the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters on 21 January 2003.

Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998<sup>130</sup>

Article 9 of the Convention, entitled "Access to Justice", provides in part that

« (...) 2. Each Party shall ensure, within the framework of its national legislation, that members of the public concerned :

a) having sufficient interest to act

**or, if not,**

b) infringing a right, where a Party's administrative procedural code sets a condition,

(a) The right to appeal to a court of law and/or another independent and impartial body established by it against the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where provided for under national law and without prejudice to paragraph 3 below, other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the provisions of national law and the objective of providing the public concerned with broad access to justice under this Convention. For this purpose, the interest of any non-governmental organisation meeting the requirements of article 2, paragraph 5, shall be deemed sufficient for the purposes of subparagraph (a) above. Such organizations shall also be deemed to have rights which could be impaired within the meaning of subparagraph (b) above. (...).

3. In addition, and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that members of the public who meet the criteria, if any, laid down in its national law have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment.

4. In addition, and without prejudice to paragraph 1, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief where appropriate, and shall be objective, fair and expeditious without being prohibitively expensive. Decisions under this article shall be made or recorded in writing. Decisions of the courts and, as far as possible, of other bodies shall be publicly available.

5. In order to further enhance the effectiveness of the provisions of this article, each Party shall ensure that the public is informed of the possibility of initiating administrative or judicial review procedures, and shall consider the establishment of appropriate assistance mechanisms aimed at removing or reducing financial or other barriers to access to justice.

the plaintiffs consider that the present action is covered by Article 9, paragraph 3 of the Aarhus Convention.

the reference to "*national environmental law*" does not have the limited scope given to it by the CBR, but rather refers to the whole range of norms relating to the environment, including international and European norms that have been received in the domestic order and which, by virtue of this reception, form part of the law applicable in Belgium.

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<sup>130</sup> The Aarhus Convention was incorporated into the domestic legal order by the Act of 17 December 2002 approving the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and Annexes I and II, done at Aarhus on 25 June 1998 (I.B., 24 April 2003, p. 22128).

In addition, Article 1382 of the Civil Code is one of the domestic law bases for the environmental liability of public authorities<sup>131</sup> and as such forms part of the "*national environmental law*" referred to in Article 9, paragraph 3 above.

In other words, insofar as the issue in this case is to assess the existence of a fault required by Articles 1382 and 1383 of the Civil Code with regard to the obligations of the public authorities in environmental matters, the present dispute does fall within the scope of Article 9, paragraph 3, cited above.

Furthermore, the "*possible criteria provided for by domestic law*" referred to in Article 9, paragraph 3, above, refer in particular to the conditions of admissibility provided for by domestic law.

The admissibility of the application lodged by Klimaatzaak vzw and almost 58,000 natural persons must therefore be examined in the light of Articles 17 and 18 of the Judicial Code.

In its version applicable at the time of the present action, Article 17 of the Judicial Code provided that "*the action cannot be admitted if the plaintiff does not have the right and interest to bring it*".<sup>132</sup> *The Court of Cassation also provided that "the claimant must be able to prove that he has the right and interest to bring the action.*

*Legal interest" consists of any material or moral advantage - actual but not theoretical - that the claimant can withdraw from the claim he is bringing at the time he brings it, even if the recognition of the right, the analysis or the seriousness of the damage are established only at the time of the pronouncement of the judgment* "<sup>133</sup>.

The interest must be personal and direct, i.e. the proceedings must provide a benefit to the plaintiff. Thus, Article 17 of the Judicial Code excludes an action brought in the general interest which does not benefit the plaintiff at all or only indirectly.

It is therefore up to the plaintiffs to establish that their interest in the action is distinct from the popular action.

Article 18 of the Judicial Code states that "*the interest must be born and actual. The action may be admitted when it is brought, even as a precautionary measure, to prevent the violation of a seriously threatened right*".

Finally, the interest to act is assessed at the time the application is made<sup>134</sup>.

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<sup>131</sup> See in this sense CARETTE A., "*Milicuaansprakelijkheid*", in *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, IV. Commentaar Verbintenissenrecht, Titel III, Hfdst. 13*, Afd. 4, 11°40 and the cited case law.

<sup>132</sup> Polli' memory, paragraph 2 of the aforementioned Article 17 will only be introduced by the law of 21 December 2018 (*Monit.b.*, 31 December 2018).

<sup>133</sup> Ch. Van Reepinghen, "Rapport sur la réforme judiciaire", t.1, Brussels, *Moniteur beige*, 1964, p. 39.

<sup>134</sup> Cass. 24 April 2003, *Pas.* 2003, p. 854.

1. On the direct and personal interest of the plaintiffs

1.1. On the personal interest to act of the natural persons

In accordance with the above principles, the action of natural persons is admissible only insofar as each of them demonstrates an individual interest in the action.

In this case, the plaintiffs refer in particular to the impacts of climate change on the global yawl described by the IPCC in its 2018 special report.

This special report identifies and analyses the following consequences of global warming: average and extreme regional land temperatures; temperature levels and circulation of seas and oceans; droughts and water shortages; increased average and extreme precipitation and storms; increased risk of flooding; melting ice ; sea level rise and its impact on coastal and low-lying areas; the chemical composition of the oceans and the reduction of their capacity to absorb CO<sup>2</sup>; the disruption of terrestrial and marine fauna and flora; degradation of human health; food insecurity; climate migration; poverty.

On the European level, the European Commission also presented a Green Paper in 2007 which examined, among other things, the effects of climate change already observed at that time and their impact on the economy<sup>135</sup> - the first time that the European Commission has ever presented a Green Paper on climate change.

In particular, the plaintiffs cite the following extract:

*"the effects of climate change in Europe (...) are already significant and measurable. (...)*

*In Europe, the climate has warmed by almost 1°C over the last century, faster than the global average. (...)*

*the most vulnerable areas in Europe are (...):*

*\* In the coastal areas, due to the rise in sea level, there is an increased risk of storms;*

*\* In densely populated alluvial areas, due to the increased risk of storms, heavy rainfall and flash floods causing severe damage to protected areas and the environment.*

*infrastructure;*

*\* (...)*

*Many economic sectors are highly dependent on climate change.*

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<sup>135</sup> **Green Paper from the Commission to the Council, the European Parliament, the European Economic and Social Committee** and the Committee of the Regions. Adapting to climate change in Europe: options for EU action, Brussels, 29 June 2007, COM(2007) 354 final, p.5, ('EC, Green Paper Clima! 2007'), attachment G.3 of applicants.

*climate change. These include agriculture, forestry, fisheries, beach tourism, winter sports and health. Water scarcity, wind damage, rising temperatures, increased bush fires and increased disease pressure will result in a deterioration of forest conditions. Increased frequency and intensity of extreme events such as storms, heavy precipitation, coastal floods and flash floods, droughts, forest fires and landslides will cause damage to buildings, transport and industrial infrastructure and indirectly affect the financial services and insurance sectors. (...)*

*Changing climatic conditions will affect the energy sector and energy consumption patterns in several ways:*

*\* In regions with reduced precipitation or more frequent dry summers, there will be less water to cool thermal and nuclear power plants and to generate hydroelectricity. The cooling capacity of water will be reduced due to its general warming: exceeding discharge thresholds cannot be excluded;*

*\* River flows will change as a result of altered precipitation patterns and, in mountainous areas, as a result of reduced ice and snow cover. Siltation of hydroelectric dams could accelerate due to increased erosion risks;*

*\* Heating demand will be reduced, but the risk of power cuts will increase with increased demand for air conditioning due to summer heat, which will increase the demand for electricity;*

*\* Increased risk of storms and flooding could jeopardise infrastructure energy.*

*Major transport infrastructures with a long life span, such as motorways, railways, inland waterways, airports, ports and railway stations, their proper functioning and the means of transport concerned are sensitive to weather conditions and climate effects, so that they are influenced by climate change. For example:*

*\* The protective effect of breakwaters and quay walls is reduced by the rise of the sea level;*

*\* The risks of damage and disruption from storms and floods and from Heat waves, fires and landslides are expected to increase in general.*

*It is clear that, even if there are some benefits from changing climatic conditions (e.g. agricultural production in some limited parts of Europe), the negative effects will largely outweigh the positive effects*

More recently, the 2017 European Environment Agency (or "EEA") study analyses the vulnerability of the European Union and its members to the impacts of global climate change, particularly in terms of :

- trade in agricultural and non-agricultural products;
- infrastructure and energy supply; geopolitical risk and security;
- of human migration;

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<sup>136</sup> European Commission, Climate Green Paper 2007, *op.cii.*, pp. 5-7, plaintiffs' exhibit G.3.

of the financial sector and insurance system<sup>137</sup>.

Belgium, including its inhabitants, is not immune to the predicted global and European consequences of climate change.

The plaintiffs also refer to several undisputed sources to describe the direct consequences of global warming already observed in Belgium<sup>138</sup>. It can be deduced from this that Belgium is already experiencing the direct impact of this climate change on the basis of the following findings:

- an increase in average annual and seasonal temperatures (constant increase of +0.4°C per decade since the 1980s);
- an increase in the number of extreme heat days and in the number, length and intensity of heat waves;
- an increase in average annual precipitation with an increase in seasonality and extremes, leading to flooding and flooding;
- an increase in periods of drought, leading to a drop in the water table and the scarcity of certain tree varieties;
- economic losses due mainly to damage caused by storms, tempests and floods (destruction of buildings, decimation of livestock, etc.).

Climate projections for Belgium by 2100 indicate an intensification of the consequences already observed and described above, as well as a concrete threat to the territorial integrity of the country, and more specifically of Flandre exposed to sea level rise, and to human and animal health<sup>139</sup>. Consequently, the diplomatic consensus based on the most authoritative climate science leaves no room for doubt that a real threat of dangerous climate change exists. This threat poses a serious risk to current and future generations living in Belgium and elsewhere that their daily lives will be profoundly disrupted.

In this case, the plaintiffs intend to hold the Belgian public authorities partly responsible for the present and future adverse consequences of climate change on their daily lives.

In so doing, each of them has a direct and personal interest in the liability action they have brought.

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<sup>137</sup> EUROPEAN ENVIRONMENTAL AGENCY, *Climate change, impacts and vulnerability in Europe 2016. An indicator-based report*, Copenhagen, 2017, pp. 289-293 ('EEA (2017)'), Claimants' Exhibit D.5.

<sup>138</sup> See all sources cited in footnotes 261-271, pp.93-97 of the summary conclusions

**of applicants.**

<sup>139</sup> See not. E. BRJTS et al, *Climate change and health. Set-up of monitoring of potential effects of climate change on human health and on the health of animals in Belgium*, Scientific Institute of Public Health, 2010, 54 p., plaintiffs' exhibit C.3; D. MINTEN, "Diagnose: klimaatzieke. Behandeling: urgent. Bijna 1.000 artsen vragen dat ons land zijn klimaatinspanningen dringend verhoogt. 'De klimaatverandering zal de gezondheidskosten doen toenemen'", *De Standaard*, 10 oktober 2019, p.4, exhibit K.13 of the applicants.

The fact that other Belgian citizens may also suffer their own damage, in whole or in part comparable to that of the plaintiffs as individuals, is not sufficient to reclassify the personal interest of each of them as a general interest.

Insofar as necessary, the teaching of the CJEU's *Carvalho et al*<sup>140</sup> judgment is not relevant in the present case, insofar as in that judgment the Court, and the European Union Court before it, ruled on the admissibility of an action for annulment of Directive 2018/410 and Regulations 2018/841 and 2018/842 brought by private persons on the basis of Article 263 TFEU.

Indeed, the conditions of admissibility of an action for extra-contractual liability under beige law may validly differ from the conditions of admissibility of an action brought within the framework of a system of remedies and procedures designed to ensure the review of the legality of the acts of the European institutions by the Union courts. This difference results from the autonomous interpretation of the conditions of admissibility by courts acting within their own spheres of competence<sup>141</sup>.

Finally, contrary to what the defendants maintain, the requirement of a personal interest to act is not the same as the proof of the existence of an own damage. The question of the reality and extent of the material, physical and/or moral damage suffered by each of the claimants is a matter for examination of the basis of the claim and not its admissibility.

### 1.2. On the direct personal interest of the osb/ Klimaatzaak

Traditionally, the proper interest of a legal person includes only that which concerns the existence of the legal person, its patrimonial assets and moral rights, especially its patrimony, honour and reputation<sup>142</sup>. The mere fact that a legal person pursues an aim, even if it is statutory, does not give rise to a proper interest in bringing legal proceedings.

However, environmental organisations are given a privileged status by the Aarhus Convention mentioned above.

Indeed, when questioned in 2005 about Belgium's compliance with the Convention, the Compliance Committee specified the situation of environmental associations by indicating that the aforementioned Article 9 paragraph 3 should be read in conjunction with Articles 1 to 3 of the Convention and the principle set out in its preamble according to which "*the public, including organisations, (have) access to effective judicial mechanisms to ensure that their legitimate interests are protected and the law is respected*".<sup>143</sup>

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<sup>140</sup> Court of Justice of the European Union, Judgment No. C-565/19 of 25 March 2021.

<sup>141</sup> The formula is taken from the Constitutional Court assessing the difference between the interpretation of Articles 17 and 18 of the Judicial Code and Article 2, 2° of the Special Act of 6 January 1989 on the Constitutional Court, in its judgment No. 133/2013 of 10 October 2013.

<sup>142</sup> see not. Cass. 19 September 1996, *R.C.J.B.*, 1997, p. 105.

<sup>143</sup> ACCC/C/2005/11 (Compliance Committee), "Conclusions and recommendations on communication ACCC/C/2005/11 concerning compliance by Belgium with the provisions of the Convention".

Thus, Article 3 of the Convention provides, inter alia, that:

*" 4. Each Party shall give due recognition and support to associations, organisations or groups which have as their objective the protection of the environment and shall ensure that its national legal system is compatible with this obligation.*

The Compliance Committee of the Aarhus Convention regularly recalls that *"while Parties have discretion to define criteria for the application of Article 9(3) of the Convention, this discretion does not entitle them to prevent all NGOs acting solely for the purpose of promoting environmental protection from seeking remedies"*<sup>144</sup>.

In other words, by referring to *"possible criteria under domestic law"*, Article 9, paragraph 3 of the Aarhus Convention leaves States with a broad power to define the associations benefiting from access to justice, without, however, allowing these criteria to prevent the majority of associations from bringing cases before the courts, since access to the courts is the principle, the presumption and not the exception<sup>145</sup>.

Before the CJEU, Advocate General Sharpston stated that this privileged status granted to these associations is *"a counterbalance to the decision not to introduce compulsory popular action on environmental matters"*<sup>146</sup>.

It is true that Article 9 of the Aarhus Convention has no direct effect<sup>147</sup>. According to the CJEU, *"it must be recalled that neither paragraph 3 nor paragraph 4 of Article 9 of the Aarhus Convention contains an unconditional and sufficiently precise obligation capable of directly governing the legal position of individuals"*<sup>148</sup>. The Court of Justice of the European Communities has held that the Aarhus Convention does not contain any such obligation.

However, the CJEU also stated that it was for the national court, *"in order to ensure effective judicial protection in the fields covered by Union environmental law, to give an interpretation of its national law which, as far as possible, is in conformity with the objectives set out in Article 9(3) of the Aarhus Convention"*<sup>149</sup>.

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obligations under the Aarhus Convention with regard to the right of environmental organisations to access to justice", 16 June 2006, pt 34.

<sup>144</sup>ACCC (Compliance Committee), "Conclusions and Recommendations to the

Regarding Communication ACCC/C/2008/32 (Part II) on EU Compliance", 17 March 2017, p.16, pt 73 *in fine*, Claimants' Exhibit 1-1.37.

<sup>145</sup> See in this sense ACCC/2005/11 (Compliance Committee), "Conclusions and recommendations concerning communication ACCC/C/2005/11 on Belgium's compliance with its obligations under the Aarhus Convention with regard to the right of environmental associations to access to justice", 16 June 2006, points 35 and 36, quoted by M. PÀQUES and S. CI-IARLIER,

**"Access to justice for environmental NGOs guaranteed by the Aarhus Convention and the interest to act in the Council d'Etat"**, in *l'Europe au présent !*, Brussels, Bruylant, 2018, p.584; see also V. KOESTER "The Compliance Committee of the Aarhus Convention: an overview of procedures and case law", *Revue Européenne de Droit de l'Environnement*, 2007/3, p.272.

<sup>146</sup> Conci. av. gen. E. SI-IARPTON, 16 December 2010, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, Case C-115/09, pt. 52.

<sup>147</sup> M. PRIEUR, *Droit de l'environnement*, SE edition, Paris, Dalloz, 2019, point 1373.

<sup>148</sup> CJEU, C-470/16 of 15 March 2018, judgment *North East Pylon Pressure Campaign*.

<sup>149</sup> CJEU, 8 March 2011, *Lesoochranské zoskupenie VLK judgment*, § 50.

Taking note of this injunction of the CJEU, the Court of Cassation deduced from Articles 2(4), 3(4) and 9(3) of the Aarhus Convention that *"Belgium has undertaken to guarantee associations whose objective is the protection of the environment access to justice in the event that they wish to challenge acts contrary to the provisions of national environmental law and negligence on the part of private persons and public authorities, provided that they satisfy the criteria laid down by national law. These criteria cannot be described or interpreted in such a way that in such a situation these associations would not have access to justice. The court may interpret the criteria established by national law in accordance with the objectives of Article 9.3 of the Aarhus Convention. (...)*

*If an action (brought by a civil party in a criminal case) is brought by a legal person which, by virtue of its articles of association, has as its objective the protection of the environment and seeks to challenge In the case of a legal person who has been found to have acted or failed to act in a manner contrary to the provisions of national environmental law, that legal person satisfies the condition of admissibility relating to the interest in bringing an action* <sup>150</sup>

In a judgment of 21 January 2016, the Constitutional Court also admitted the specific legal standing of an association whose object is the protection of the environment in an action based on Article 1382 of the Civil Code, distinguishing it from that of a natural person as follows:

*« B.8.1. Although every citizen has, as a legal person, the purpose of*

*In the case of an interest in the conservation of nature, in this case the conservation of the wild bird population, there is an essential difference between the citizen and an association when it comes to bringing a civil action for compensation for damage to elements of the environment which do not belong to anyone.*

*Since the elements of the environment do not belong to anyone, the ordinary citizen will in principle have no direct and personal interest in bringing an action for compensation for the injury of this interest. On the other hand, a legal person which has been established with the specific purpose of protecting the environment may, as indicated in B.4, actually suffer moral damage and bring an action* <sup>151</sup>.

Thus, *"it follows from articles 2.4, 3.4 and 9.3 of the Aarhus Convention that Belgium has undertaken to ensure access to the courts for environmental associations when they wish to challenge acts and omissions contrary to environmental law by public persons and bodies, provided that they meet the criteria laid down by national law. The personal interest of an environmental association must be understood as the moral advantage that is obtained when the judicial decision is in accordance with the realisation of the association's objectives* <sup>152</sup>.

Finally, on the occasion of the subsequent adoption of paragraph 2 of Article 17 of the Judicial Code, the 2018 legislator endorsed the position of the Court of Cassation on the scope of the Aarhus Convention by stating that:

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<sup>150</sup> Cass. 11 June 2013, R.G. n° P.12.1389.N, p.3.

<sup>151</sup> CC, judgment no. 07/2016 of 21 January 2016.

<sup>152</sup> Civ. Brussels, 31 January 2020, *T.M.R.*, 2020, book 3, 364; see also Antwerp, 12 October 20 I 6, *TBBR* 2018, afl. 8, 440.

*"In view of the developments in the case law of the Court of Cassation, it seems preferable not to make any explicit legal provision for environmental associations which, in accordance with the Aarhus Convention, should always be able to benefit from effective access. Indeed, according to the case law of the Court of Cassation, environmental associations that meet the requirements of the Aarhus Convention already have effective access to justice. Thus, in its judgment of 11 June 2013, the Court considered that it follows from Articles 3.4, 9.3 and 2.4 of the Convention that Belgium has undertaken to guarantee associations whose objective is the protection of the environment access to justice in the event that they wish to challenge actions contrary to the provisions of national environmental law and the negligence of private persons and public authorities, provided that they satisfy the criteria established by national law. These criteria cannot be described or interpreted in such a way that in such a case these associations would not have access to justice. "The judge may interpret the criteria established by national law in accordance with the objectives of Article 9.3 of the Aarhus Convention. For the rest, /environmental protection associations that do not meet the requirements of the Aarhus Convention may, if necessary, bring a collective interest action under ordinary law*

Consequently, an environmental protection association has the personal and direct interest required by Article 17 of the Judicial Code to file a claim for compensation on the basis of Article 1382 of the Civil Code, if it considers that damage has been caused to the environment whose defence it has set itself as its statutory object. The personal interest of such an association is to seek compensation for its own moral damage deduced from the damage to the collective interests for which it was founded and which it aims to protect<sup>154</sup>.

In this case, according to article 3 of its statutes, the object of Klimaatzaak vzw is the following:

*"The aim of the association is to protect current and future generations from man-made climate change and biodiversity loss. The association wants to achieve this goal by obtaining the support of the population and the authorities. The association can achieve this aim by means of the following (non-limiting) means, among others:*

- 1- Take legal action, both in Belgium and abroad, to combat climate change and/or mitigate its effects.*
- 2° Encourage policy or actions aimed at the full participation of citizens or environmental associations, as well as actions aimed at adequate access to justice for them, both in Belgium and abroad;*
- 3° Carry out other actions, judicial or otherwise, in connection with specific or general issues relating to climate, the environment, nature conservation or biodiversity* <sup>155</sup>

The action taken by Klimaatzaak vzw in this case falls within the framework of its social object aimed at combating climate change, so that it can justify a personal and direct interest in acting.

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<sup>153</sup> Doc.parl. House, sess. 2017-2018, 11° 54-3303/001, p.99.

<sup>154</sup> Antwerp, 12 October 2016, R.G.D.C., 2018/8, p.440.

<sup>155</sup> Claimants' Exhibit P.7.

For the rest, the lesson of the Constitutional Court's judgment no. 133/2013156 referred to by the defendants is not relevant in the present case insofar as, in that judgment, the Court examined the situation of legal persons who wished to take action corresponding to their statutory purpose and aimed at the protection of fundamental freedoms, but to which the Aarhus Convention is not applicable.

Finally, as the Walloon Region points out, this is not an action to prevent or repair ecological damage in the strict sense. Indeed, this damage caused directly to the environment independently of its repercussions on people and property is not, in beige law, the subject of jurisdictional protection, unlike, for example, French law <sup>157</sup> .

In this case, the moral damage claimed by the Klimaatzaak vzw because of the harm done to the collective interest for the defence of which it was set up does not coincide with the ecological damage understood as the harm done to nature and which affects society as a whole<sup>158</sup> .

In other words, Klimaatzaak vzw can claim an interest of its own in acting in accordance with its corporate purpose, which is specifically aimed at combating climate change and not at defending the general interest without further specification.

## 2. On the born and present interest and the action *ad futurum* of the plaintiffs

The beige State concludes that the action is inadmissible for lack of a real and present interest on the part of the plaintiffs.

Article 18 paragraph 1 of the Judicial Code effectively states that "*the interest must be born and granted*".

Derogating from the condition of topicality of the interest, Article 18 paragraph 2 of the Judicial Code authorises, in particular, an action "*brought, even as a declaratory action, to prevent the violation of a seriously threatened right*".

In the present case, the applicants seek an order that the public authorities take the necessary measures to prevent future damage, the risk of which is real and not hypothetical. In this respect, they rightly claim to have an interest in bringing proceedings within the meaning of Article 18, paragraph 2, above.

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<sup>156</sup> e.g. Judgment No. 133/2013 of 10 October 2013, see mainly submissions B.10 and B.11.

<sup>157</sup> **According to Article 1246 of the French Civil Code, "any person responsible for ecological damage is required to compensate for it". Article 1248 of the French Civil Code provides that "the action for compensation for ecological damage is open to any person having the capacity and right to act, such as (...) associations approved or created at least five years ago on the date of the institution of the proceedings, the object of which is the protection of nature and the defence of the environment.**

<sup>158</sup> See judgment e.g. No. 07/2016 of 21 January 2016, recital B.8.3.

Indeed, as soon as the action was brought, in June 2015, the plaintiffs were aware of this real risk of harm to their living conditions<sup>159</sup> as well as of the risk that Belgium would not fulfil its obligations to reduce GHG emissions in the non-ETS sectors<sup>160</sup>, which allows them to justify the interest required by the aforementioned Article 18, paragraph 2.

It follows from all the above considerations that the action of Klimaatzaak vzw and the natural persons who are the main claimants is admissible.

By the same reasoning as for the natural person plaintiffs, the voluntary intervention of the natural persons listed in Annex B will also be declared admissible.

For the sake of clarity, all of the above parties will be referred to as "the claimants" in the following.

### 3. On the standing of the trees listed in the deed filed on 3 May 2019

On 3 May 2019, a deed of voluntary intervention for 82 'life span' trees was filed with the registry.

In the state of positive beige law, trees are not "subjects of rights", i.e. beings capable of having and exercising rights and obligations.

With the exception of legal persons who are expressly granted legal personality by law, only the human being has this capacity, and only his interests are subject to the regulations established by law.

In the absence of legal personality, trees have no standing to bring a claim. Their voluntary intervention will therefore be declared inadmissible.

### C. RECOMMENDATIONS ON THE APPLICATION PROCESS

The plaintiffs base their claim on Article 1382 of the Civil Code and seek compensation for the damage caused by the wrongful conduct of the Federal State and the three Regions.

They complain that the defendants have failed to adopt appropriate measures, whether legislative or executive, to prevent dangerous global warming and its consequences for fundamental rights.

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<sup>159</sup> See in particular the documents cited above: the IPCC's <sup>51<sup>st</sup></sup> report of 2014, IPPC 2014, AR5 SYP, Claimants' Exhibit B.21; the European Commission's Climate Green Paper of 2007, Claimants' Exhibit G.3; the Scientific Institute of Public Health's study of 2010, Claimants' Exhibit C.3

<sup>160</sup> See noi. the European Commission's reports for Belgium for the years 2012, 2013 and 2015, Claimants' exhibits G.14, G.15 and G.20.

According to the plaintiffs, the behaviour adopted for several years by the federal State and the Regions has therefore :

on the one hand, constituted an error of conduct that a normally careful and prudent authority in the same circumstances would not have committed;  
violated Articles 2 and 8 of the European Convention on Human Rights (ECHR) and Articles 6 and 24 of the Convention on the Rights of the Child.

#### 1. Applicable principles

##### 1.1. On the responsibility of public authorities in beige law

Concerning the question of the responsibility of the State in its regulatory and executive function, the Court of Cassation recalled in its judgment of 25 October 2004 that *"the fault of the administrative authority, which may on the basis of Articles 1382 and 1383 of the Civil Code engage its responsibility, consists of a behaviour which, either is analysed as an error of conduct to be assessed according to the criterion of the administrative authority normally careful and prudent in the circumstances, or, subject to an invincible error or another cause of justification, violates a norm of national law or an international treaty having effects in the internal legal order, imposes a duty on the State to respect and protect the rights of the citizens.the same conditions, or, subject to an unintentional error or other cause of justification, violates a norm of national law or of an international treaty having effect in the internal legal order, requiring that authority to refrain from or to act in a certain manner"*<sup>161</sup>.

The principle of the liability of the legislative power has been established by the Court of Cassation since 2006.

In the Ferrara judgment, the high court set out the application of Article 1382 of the Civil Code to the legislator in these terms:

*"The principle of the separation of powers, which tends to achieve a balance between the different powers of the State, does not imply that the State is generally exempt from the obligation to compensate for damage caused to others by its own fault or that of its organs in the exercise of the legislative function.*

*Neither this principle nor Articles 33, 36 and 42 of the Constitution preclude a court of law from finding such a fault and ordering the State to compensate for its harmful consequences.*

*In assessing the wrongfulness of the legislature's harmful conduct, this tribune does not interfere with the legislative function and the political process of law-making, but complies with the judiciary's task of protecting civil rights.*

*In the case of a claim for compensation for damage caused by a wrongful infringement of a right enshrined in a higher norm imposing an obligation on the State, a court of law has the power to review whether the legislature has legislated adequately or sufficiently to enable the State to comply with that obligation, even though the norm which prescribes it leaves the legislature with a discretionary power as to the means of ensuring compliance"*<sup>162</sup>.

In his conclusions preceding the judgment of 28 September 2006, First Advocate General Leclercq stated

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<sup>161</sup> Cass. 25 October 2004, *JL.M.B.*, 2005, pp. 638.

<sup>162</sup> Cass. 28 September 2006, *JL.M.B.*, 2006, p. 1549.

*"It seems to me that it can be said that a legislator who fails to act when there is a risk is not acting as a good father. I am thinking in particular of failure to act when the country is threatened by risks to safety, public health, hygiene, the environment, etc. I would go further and say, in the same vein, that the legislator who fails to take the necessary measures to guarantee his subjects the constitutional rights and freedoms and the rights and freedoms of the European Convention on Human Rights (27) is not behaving in the way one would expect of a legislator acting as a good father*

A few years later, the Court of Cassation also stated that :

*"The State may, as a rule, be held responsible for a wrongful intervention or omission. It is for the judge to examine whether the State has acted as an ordinarily prudent and diligent legislator would do"<sup>164</sup>.*

For the rest, the aforementioned judgment of 10 September 2010 sets aside the idea of unity between the unconstitutionality of a law and extra-contractual fault by inviting the liability judge to assess *in concreto* the existence of fault in the event of prior censure of a law by the Constitutional Court.

Consequently, and contrary to what the Walloon and Brussels Regions maintain, the Court of Cassation does not limit the liability of the legislator to the sole hypothesis of a violation of a higher norm imposing a specific behaviour.

The defendants also wrongly argue that failure to comply with a norm of international law can give rise to civil liability on the part of the public authorities only where that norm has direct effect. In this respect, they give the judgment of the Court of Cassation of 9 February 2017<sup>165</sup> a scope that it does not have.

In this judgment, the Court of Cassation simply recalled that *"the fault of the administrative authority which may, on the basis of Articles 1382 and 1383 of the Civil Code, engage its liability consists of a behaviour which, either is analysed as an error of conduct to be assessed according to the criterion of the normally careful and prudent authority, placed in the same conditions, or, subject to an invincible error or other cause of justification, violates a norm of national law or of an international treaty having direct effects in the internal order which requires that authority to refrain from or to act in a certain manner"*<sup>166</sup>.

This judgment therefore does not exclude the hypothesis that the violation of an international norm without direct effect may infringe the general standard of care, but only establishes the principle of unity between the violation of an international norm with direct effect and the civil fault. Only in the latter case does the Court of Cassation remove any possibility of counteraction from the liability judge, who, in its view, can only establish fault in the case of a breach of an international norm with direct effect.

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<sup>163</sup> Conclusions of the First Advocate General J.-F. LECLERCQ preceding Cass. 28 September 2006, *J T.*, 2006, p.599.

<sup>164</sup> Cass. judgment F.09.0042.N of 10 September 2010, p. 2, available at [www.juridat.be](http://www.juridat.be)

<sup>165</sup> *J T.*, 2019, p.33 ff.

<sup>166</sup> Cass. 9 February 2017, *.J.T.*, 2019, p.35.

On the other hand, disregard of norms without direct effect will constitute a fault if the claimant demonstrates a breach of the general duty of care<sup>167</sup>.

Moreover, if the traditional criterion for assessing the direct effect of a rule, namely its degree of precision and completeness, were to be retained, the Court takes the view that the precision of a rule, and hence its "direct effect", is not a function of its wording or of the qualification of the obligation that derives from it, but rather of the margin of appreciation that it grants or does not grant to the judge responsible for applying it<sup>168</sup>. The direct effect of a rule is then defined "*as the capacity of this rule, in the context where its application is claimed, to provide the judge whose application is requested with the solution of his judgment*"<sup>169</sup>.

Insofar as necessary, the tribunal notes that international acts, such as the Kyoto agreements, the Doha amendment and the Paris agreements, have all been approved by the federal and state parliaments and are therefore received in the domestic order in which they are likely to produce effects, whether direct or indirect.

In any case, and in accordance with the principle of separation of powers, the judge of liability must exercise a necessarily marginal control, thus avoiding substituting his assessment for that of the legislator<sup>170</sup>.

The examination of the present action must therefore be carried out within the guidelines laid down by the case law of the Court of Cassation.

Finally, climate science is evolving, as demonstrated by successive IPCC reports. It is therefore in the light of the scientific knowledge available at a given moment that the degree of knowledge of the risks is assessed, and hence the behaviour of the public authorities with regard to these risks.

### 1.2. On the scope of Articles 2 and 8 of the ECHR

Article 2 of the ECHR reads as follows:

*« 1. The right of every person to life is protected by law. Death may not be inflicted on any person intentionally, except in execution of a sentence of death pronounced by a court of law if the offence is punishable by law.*

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<sup>167</sup> See for an analysis in this respect of the judgment of 9 February 2017: F. AUVRAY, "Is the violation of a treaty a fault? incidence de l'absence d'effet direct sur la responsabilité extracontractuelle de l'Etat", J.T., 2019, p.26.

<sup>168</sup> See in this sense, J. PIERET, "Pinfluence du juge belge sur l'effectivité de la Convention: retour doctrinal et jurisprudentiel sur -le concept d'effet direct", in *Entre ombres et lumières: cinquante ans de application de la European Convention on Human Rights in Belgium* Brussels, Bruylant, 2008, pp.83-143.

<sup>169</sup> O. DE SCHUTTER, *Function de juger et droits fondamentaux. Transformation of judicial control in the European and American legal orders*, Brussels, Bruylant, 1999, p.134, quoted by J. PIERET, *Ibid*.

<sup>170</sup> see not. S. VAN DROOGHENBROECK, "La responsabilité extracontractuelle du fait de légiférer, vue d'ensemble", in *La responsabilité des pouvoirs publics*, Brussels, Bruylant, 2016, p.380 and the doctrinal references cited.

2. *Death shall not be considered as inflicted in violation of this article in cases where it results from the use of force made absolutely necessary:*

*(a) to ensure the defence of all persons against unlawful violence;*

*b) to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) to suppress, in accordance with the law, a riot or insurrection.*

The right to life is about :

the positive obligation of the State to take all necessary measures to protect the lives of persons;

or the negative obligation of the State not to inflict death, except in cases of death resulting directly from the acts of State agents.

In terms of the positive obligation invoked by the plaintiffs, the State must take preventive measures in the event of dangerous activities or disasters

the right to life and of which the authorities were aware<sup>171</sup> The Court

In contrast, the European Court of Human Rights has made it clear that the choice of appropriate measures is within the broad discretion of the State.<sup>172</sup>

Article 8 of the ECHR provides as follows:

*"Everyone has the right to respect for his or her private and family life, home and correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

In its *Lopez Ostra* judgment, the European Court of Human Rights made the link between environmental damage and damage to private life protected by Article 8. Thus, it states that *"//it is self-evident that serious environmental damage may affect the well-being of a person and deprive him of the enjoyment of his home in such a way as to adversely affect his private and family life, without however seriously endangering his health"*<sup>173</sup>.

In *Tàtar v. Romania*, the Court stated that *"the existence of a serious and substantial risk to the applicants' health and well-being placed a positive obligation on the State to adopt reasonable and adequate measures capable of protecting the rights of the persons concerned to respect for their private life and home and, more generally, to the enjoyment of a healthy and protected environment"*.<sup>174</sup>

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<sup>171</sup> **European Court of Human Rights, judgment *Öner vs. Turkey*, 30 November 2004, § 90; European Court of Human Rights, judgment *Boudai'eva and others***

*c. Russia*, 20 March 2008, §130.

<sup>172</sup> See ECHR, *Guide on Article 2 of the European Convention on Human Rights -Right to life*, December 2020, p. 12 and the case references cited.

<sup>173</sup> European Court of Human Rights, judgment *Lopez Ostra v. Spain*, 9 December 1994, §51.

<sup>174</sup> European Court of Human Rights, judgment in *Tàtar v. Romania*, 27 January 2009, §107.

Furthermore, with regard to environmental protection, Articles 2 and 8 of the ECHR may overlap in certain circumstances. For this reason, the principles developed under Article 8 can also be applied to Article 2. The European Court of Human Rights has stated: "*It has been found that, in the field of dangerous activities, the scope of the positive obligations under Article 2 of the Convention broadly overlaps with that of the positive obligations imposed under Article 8 (Oneryıldız, cited above, §§ 90 and 160). Consequently, the principles developed by the Court in its case law on the environment or town and country planning may also be invoked for the protection of the right to life where privacy and the home are infringed*"<sup>175</sup>.

In order to determine whether a state is meeting its positive obligations under Articles 2 and 8 of the ECHR, the victim must be able to invoke a direct, clearly identifiable and locally specific interference.

Thus, in the *Cordella and others v. Italy* judgment, the European Court of Human Rights recalled that the ECHR does not contain a general right to environmental protection and that popular actions are prohibited. The Court recalls that "*the control mechanism of the Convention cannot admit acta popularis (Perez v. France [GC], no. 47287/99, § 70 ECHR 2004-1, and Di Sarno and Others v. Italy, no. 30765/08, § 80, 10 January 2012). However, neither Article 8 nor any other provision of the Convention specifically guarantees general protection of the environment as a human right (Kyratos v. Greece, no. 41666/98, § 52, ECHR 2003-V (extracts)). [101]. According to the Court's case-law, the crucial factor in determining whether, in the circumstances of a case, environmental damage has resulted in a violation of one of the rights guaranteed by Article 8(1) is the existence of an adverse effect on a person's private or family sphere, and not merely the general deterioration of the environment (Fadejeva v. Russia, no. 55723/00, § 88, ECHR 2005-IV)*"<sup>175</sup>.

In the current state of climate science, as briefly mentioned above, there can no longer be any doubt that there is a real threat of dangerous climate change with a direct negative effect on the daily lives of current and future generations of Belgium's inhabitants. The not purely hypothetical risks of rising North Sea levels or increasing health problems are examples of this.

The global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under Articles 2 and 8 of the ECHR. In this respect, the Court agrees with the *view of the* Dutch Supreme Court in the *Urge Nederland* case.

Therefore, in the present case, the applicants are right to argue that Articles 2 and 8 of the ECHR impose a positive obligation on public authorities to take the necessary measures to remedy and prevent the adverse consequences of dangerous global warming on their lives and their private and family lives.

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<sup>175</sup> ECtHR *Budayeva and Others v Russia*, 20 March 2008, § 133; ECtHR, *One Işildizli Irgilie*, 18 June 2002, §§ 90 and 160.

<sup>176</sup> ECtHR, judgment in *Cordella and others v. Italy*, 24 January 2019, § 100-101.

<sup>177</sup> Arrêt of 20 December 2019, pt 5.7.1. to 5.8, Claimants' Exhibit 0.12.

Appropriate measures can be of two kinds: either so-called mitigation measures that aim to prevent the hazard from materialising, or so-called adaptation measures that aim to cushion or mitigate its effects. Measures to reduce GHG emissions are mitigation measures, while measures to protect the territory against sea level rise are an example of adaptation measures.

Finally, the obligations arising from Articles 2 and 8 of the ECHR relate to the measures to be taken by the public authorities and not to the result to be achieved. Such so-called behavioural obligations are therefore subject to the marginal review of the judge of responsibility.

Moreover, the European Court of Human Rights has insisted, in various judgments relating to the problem of the environment in connection with Article 8 of the ECHR, on the margin of appreciation available to the Member States<sup>178</sup>.

### 1.3 On the scope of Articles 6 and 24 of the Convention on the Rights of the Child

Article 6 of the International Convention on the Rights of the Child, hereinafter the "CRC", states that :

- « 1. States Parties recognise that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 24 of the CRC states:

- « 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment and rehabilitation of illness. 1/ States Parties shall strive to ensure that no child is deprived of the right of access to such services.
2. States Parties shall strive for the full realization of the above right and, in particular, shall take appropriate steps to: (a) To reduce infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children, with particular emphasis on the development of primary health care; (c) To combat disease and malnutrition, including in the context of primary health care, through, inter alia, the use of readily available technology and the provision of nutritious foods and clean drinking water, taking into account the dangers and risks of environmental pollution; (d) to ensure appropriate prenatal and post-natal care for mothers (e) to ensure that all groups in society, in particular parents and children, are provided with information on child health and nutrition, the benefits of breastfeeding, environmental health and safety, and the prevention of accidents, and are assisted in making use of that information (f) develop preventive health care, parental guidance and education, and family planning services.
3. States Parties shall take all appropriate effective measures to abolish traditional practices that are harmful to children's health.

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<sup>178</sup> See in particular. European Court of Human Rights *Budayeva and Others v. Russia*, 20 March 2008, §§ 134-135; European Court of Human Rights, *Fadeyeva !Russia*, 9 June 2005, §96.

*4. States Parties undertake to promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular regard shall be paid to the needs of developing countries.*

As the applicant rightly points out, unlike Articles 2 and 8 of the ECHR, it is not possible to deduce from Articles 6 and 24 a positive obligation on the part of the signatory States, as the text of these provisions leaves them free to meet the objective they set out.

With regard to other provisions of the International Convention on the Rights of the Child, which are as broadly worded as Articles 6 and 24 above, both the Cour de <sup>cassation</sup><sup>179</sup> and the Conseil d'<sup>Etat</sup><sup>180</sup> have found that they create obligations only for States Parties and cannot be directly invoked by individuals before the domestic courts.

The same is true of Articles 6 and 24, which, while recognising the rights of the child, leave signatory States a great deal of freedom as to how they intend to give effect to these rights. This maximum margin of manoeuvre rules out the possibility of these provisions being invoked directly by the applicants in support of their application in this case.

## 2. Application in this case

### 2.1. Background

In this case, neither party disputes the existence and seriousness of the threat of dangerous global warming.

On the basis of successive IPCC reports, a diplomatic consensus has developed among the Parties to the UNFCCC on the notion of dangerous global warming and the thresholds of warming that should not be exceeded.

The main stages of this development on the international scene can be briefly recalled as follows:

In 2009, the IPCC 4th Assessment Report update refers to the 2°C threshold as the limit that should not be exceeded, with the understanding that to reach this threshold, the maximum concentration of GHGs in the atmosphere must be 450 ppm CO

In the same year, the Copenhagen Accord acknowledged the 2°C threshold and already envisaged a reduction to 1°C;

In 2010, the Cancún agreement confirms the need to stay below 2°C and to consider a new global warming target limited to 1°C;

In 2011, the Durban COP recognised that climate change is an immediate and potentially irreversible threat and noted the significant gap between the

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<sup>179</sup> Cass. 31 March 1999, *J.L.M.B.*, 1999/33, p. 1430.

iso *e.E.*, judgment no. 237.821 of 28 March 2017.

reductions promised by Member States for 2020 and the reductions needed to keep global warming below 2°C or 1.5°C;

In 2015, the SED report called 2°C the "ultimate threshold" and 1.5°C the "ultimate threshold". "The prudent course is to limit global warming to below 2°C;

In the same year, the Paris agreements confirmed the need to keep global warming below 2°C in order to reach 1.5°C;

In 2018, the IPCC special report concludes that global warming must be limited to 1.5°C, which implies a reduction in GHG emissions of 45% by 2030 and 100% by 2050. This report was presented at COP-24 in Ottawa;

Also in 2018, UNEP presents an assessment of ongoing national mitigation efforts and ambitions presented by countries in their Nationally Determined Contributions (or NDCs) which are the basis of the Paris Agreement. It states that

*"The current commitments expressed in the NDCs are insufficient to close the gap between /the need and the prospects for reducing emissions by 2030"*<sup>181</sup>.

The UNEP report of 2019<sup>182</sup> states that:

- The gap between emission reduction needs and prospects is large. By 2030, annual emissions will need to be 15 Gt CO<sub>2</sub>e below current unconditional NDCs to meet the 2°C target, and 32 Gt CO<sub>2</sub>e to meet the 1.5°C target;
- NDCs need to be significantly strengthened in 2020. Countries need to triple the level of ambition of their NDCs to reach the target of well below 2°C, and they need to more than quintuple that level to reach the 1.5°C target.

The scientific community agrees on the need to contain the concentration of GHGs to 450 ppm by 2100, whereas currently the concentration of GHGs is already above 400 ppm.

At the European level, as early as 1996, the Council of the European Union also adopted the threshold of 2°C to be reached to mitigate the serious consequences of global warming. In March 2005, the Council stressed the need to limit global warming to 2°C.

In 2019, in its *European Green Deal*, the European Union has included the objective of limiting the global temperature rise to 1.5°C, not 2°C.

Finally, it is a fact that the four defendants had knowledge of each other for several years:

- the danger of exceeding the 2°C or even 1.5°C warming threshold;
- of the real risk of exceeding this threshold before the end of the 20th century;
- the inadequacy of current NDCs to prevent dangerous global warming.

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<sup>181</sup> UNEP, Emissions Reduction Needs and Opportunities Gap Report, 2018, Executive Summary, Exhibit 11.B.1 of the Beige State.

<sup>182</sup> **UNEP, Emissions Reduction Needs and Opportunities Gap Report, 2018**, Executive Summary, Exhibit 11.B.2 of the Beige Statement.

Indeed, the Federal State and the three Regions have participated in the successive COPs, given their assent to the international acts, thus enabling them to be incorporated into domestic law, and marked their support for the IPCC's conclusions by expressly referring to them in their own legal or political acts.

## 2.2. Three findings

In the context described above, the Beige State and the three federated entities have, jointly and each in its own right, adopted acts of legislative, regulatory, political and technical value, with a view to adapting their GHG reduction efforts to the evolution of climate science.

The factual data submitted to the Tribunal! allows the following findings to be made.

### 2.2.1. Beige reports and summaries

At the outset, the court noted that the defendants had stated that they were not in a position to provide final GHG emission figures for 2019 and 2020 until the case was taken under advisement.

In their updates under discussion, the Federal State, the Walloon Region and the CBR have submitted provisional figures for 2019, while the Flemish Region has submitted provisional figures for 2019 and 2020.

It is therefore impossible for the court to make a definitive statement on the development of GHG emissions up to 2020 from the beige territory. The request for such a finding will therefore not be granted.

Nevertheless, the following can be deduced from the partial data provided.

#### **a) Period 2008-2012**

According to Article 2 and Annex II of Decision 2002/358/EC<sup>183</sup>, Belgium had to reduce its GHG emissions by 7.5% from the 1990 level by 2012.

It is neither disputed nor disputable that Belgium has met its GHG emission reduction commitments of 7.5% below 1990 levels in 2012<sup>184</sup>, including a specific GHG reduction of 14% in the non-ETS sector, both through net GHG emission reductions and through the purchase of additional emission rights.

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<sup>183</sup> Council Decision 2002/358/EC of 25 April 2002 on the approval, for the <sup>110111</sup> Community **from the Kyoto Protocol to the United Nations Framework Convention on Climate Change.**

<sup>184</sup> Report on the individual review of the report upon expiration of the additional period for fulfilling commitments for the first commitment period of the Kyoto Protocol from Belgium, UN, 24 March 2016, Exhibit IV.D. 1. of the State beige.

**b) Period 2013-2020**

*International obligations*

Article 3 of the Kyoto Protocol states that :

*« 1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic emissions ( ' ) do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex 8.*

The Doha amendment replaces Annex B and changes Belgium's assigned amount from 92% to 80% of GHG emissions, but does not change the scope of the obligation as defined in Article 3 of the original Protocol.

Belgium had therefore committed itself to reducing its GHG emissions by 20% compared to 1990 by 2020.

Insofar as necessary, the Court notes that the range of 25% to 40% of emission reductions mentioned by the plaintiffs was not imposed as such on Belgium.

It is true that since 2007 and the 4th IPCC report, there has been a broad scientific and diplomatic consensus on the need for all Annex I countries (or Annex I countries "*as a group*") to reduce GHG emissions by 25% to 40% below 1990 levels by 2020 in order to limit global warming to 2°C.

This scenario aimed to maintain the maximum concentration of GHGs in the atmosphere at 450 ppm by 2100.

It is also agreed that, as of 2015, the international community agrees that, to avoid dangerous global warming, the temperature increase should be less than 2°C and no more than 1.5°C.

However, despite political declarations on the need to reduce global GHG emissions by 25% to 40%, it is clear that the States Parties to the UNFCCC and the Kyoto Protocol have not been willing to make any binding commitments, either collectively or individually, in this regard.

On the contrary, the Doha Amendment to Annex B of the Kyoto Protocol requires the vast majority of Annex I countries, including Belgium, to reduce their GHG emissions by 20% by 2020, not 25% or 40%. The European Union is no exception as it has formally committed itself to a 20% reduction in GHG emissions by 2020, although it has expressed the need to reduce its emissions by 30% and has, according to the latest estimates, achieved a 26-27% reduction by 2020.

These binding individual targets, which fall short of the global targets proposed by the IPCC, were not challenged after the 5th IPCC report and the 2015 Paris agreements, even though at COP-21 the States Parties agreed that efforts should be made to limit global warming

climate at 1.5°C. This 1.5°C maximum implies a maximum concentration of GHGs in the atmosphere of 430 ppm by 2100.

Therefore, the only binding target for Belgium for 2020 is a 20% reduction in GHG emissions.

### Results

According to the national beige inventory of 15 April 2020 submitted by the federal government, in 2018 Belgium achieved a GHG emission reduction threshold of 17.97% (including the LULUCF185 sector). The provisional percentage for 2019 is 18.8% (including the LULUCF sector).

In their figures, the defendants exclude emissions from the LULUCF sector on the grounds that these would be fully offset by credits (or carbon storage) from certain categories of use within this sector, as Belgium is bound by the 'neutral or positive balance' rule.

Indeed, the target applicable to all Member States for the period 2021-2030 is the so-called 'no-debit rule'<sup>185</sup> this rule means that, in this sector, carbon stocks as a whole cannot decrease. To this end, it is possible, inter alia, to use credits (carbon storage) from a certain land use category to offset a debit (carbon emission) in another land use category.

However, there are no figures or other concrete elements to substantiate this claim of perfect compensation, while in its latest report of October 2020<sup>187</sup>, the European Commission itself indicates that the task of compiling an accurate inventory of LULUCF emissions is also part of Belgium's *reporting* obligations. The Commission also underlines the fact that no conclusions can therefore be drawn on Belgium's commitments in this particular sector.

In the absence of figures on the existence and extent of carbon offsetting, there is no reason to exclude the results set out in the LULUCF sector.

In any case, the tribuna! can only note that in 2019, the overall volume of annual GHG emissions from the beige territory had not decreased by 20% compared to the 1990 level.

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<sup>185</sup> **Land use, land-use change, and forestry (LULUCF) is a sector that covers the emission and storage (inunission, capture, sequestration) of GHGs from land use, land-use change and forestry activities.**

<sup>186</sup> Article 4 of Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of **greenhouse gas emissions and removals from land use, land-use change and forestry in the 2030 climate and energy policy framework**, and amending Regulation (EU) 110 525/2013 and Decision (EU) 110 529/2013

<sup>187</sup> **Evaluation of the final national energy and climate plan in Belgium, 14 October 2020**, SWD(2020) 900 forni, p.8, available on the climat.be website.

European bonds

Article 3 of Decision 406/2009/EC, entitled "Emission levels for the period 2013-2020" indicates in particular:

*"Each Member State shall, by 2020, limit its greenhouse gas emissions to at least the percentage specified for that Member State in Annex II to this Decision in relation to its 2005 emissions.*

*2. Subject to paragraphs 3, 4 and 5 of this Article and to Article 5, each Member State with a negative limit under Annex II shall ensure that its greenhouse gas emissions in 2013 do not exceed its average annual greenhouse gas emissions during the period*

*The Commission shall submit to the European Parliament and to the Council a report on the implementation of Directive 2003/87/EC and Decision No 280/2004/EC for the years 2008, 2009 and 2010, as declared and verified under Directive 2003/87/EC and Decision No 280/2004/EC, including the use of the margins of manoeuvre provided for in this Decision.*

*(...) each Member State with a positive limit under Annex II shall ensure that its greenhouse gas emissions in 2013 do not exceed a level defined on a linear trajectory, starting in 2009 with its average annual greenhouse gas emissions during 2008, 2009 and 2010, as reported and verified pursuant to Directive 2003/87/EC and Decision No 280/2004/EC, and ending in 2020 at the limit for that Member State set out in Annex II, including by using the flexibility margins provided for in this Decision.*

*Subject to paragraphs 3, 4 and 5 of this Article( ...), each Member State shall annually limit its greenhouse gas emissions in a linear manner to ensure that they do not exceed the limit for 2020, as specified in Annex II, including by using the implementation measures set out in this Decision. (...)*

*3. During the period 2013 to 2019, a Member State may carry forward from the following year up to 5 % of its annual emission allocation. If a Member State's greenhouse gas emissions are lower than its annual emission allocation after taking into account the use of the flexibility periods provided for in this paragraph and paragraphs 4 and 5, it may carry over the part of its annual emission allocation for a given year that exceeds its greenhouse gas emissions for that year to subsequent years until 2020.*

*A Member State may apply for a 5 % higher carry-over rate in 2013 and 2014 in the case of extreme weather conditions that led to a substantial increase in greenhouse gas emissions in those years compared to years with normal weather conditions. To this end, the Member State concerned shall submit a report to the Commission substantiating its request. Within three months, the Commission shall decide whether a further postponement can be granted.*

*4. A Member State may transfer up to 5 % of its annual emission quota for a given year to other Member States. The receiving Member State may use that quantity for the implementation of its obligation under this Article for that year or a subsequent year until 2020. A Member State may not transfer any part of its annual emission allocation if, at the time of the transfer, that Member State does not comply with the requirements of this Decision.*

Article 5 entitled "*Use of funds resulting from project activities*" provides, inter alia, that  
 « 1. Member States may use the following greenhouse gas emission reduction credits  
 In order to fulfil its obligations under Article 3, the Commission shall  
 (... )

4. The annual use of credits by each Member State in accordance with paragraphs 1, 2 and 3 shall not exceed a quantity equal to 3% of its 2005 greenhouse gas emissions plus any quantity transferred in accordance with paragraph 6.

Finally, Article 7 provides for a process of corrective action in the event that the annual emission allowances provided for in Article 3.2 are exceeded in a linear manner.

Furthermore, the cooperation agreement of 12 February 2018 states that "*the federal State and the Regions undertake to achieve the objectives assigned to Belgium in terms of reducing greenhouse gas emissions from sectors not covered by Directive 2003/87/EC (i.e. non-ETS sectors) and in terms of renewable energy sources*".

### Results

The table "*non-ETS greenhouse gas emission reduction balance 2013-2020*" submitted by the federal government, supplemented or corrected by the figures provided by the Flemish Region in the *Mitigatieplan*, by the Walloon Region and by the RBe, is as follows

		2013	2014	2015	2016	2017	2018	2019	2020
<b>Region Flemish</b>	O1ss	48,05	46,96	45,87	44,48	43,02	42,06	41,11	40,16
	E"g	45,99	43,27	45,12	46,07	43,58	45,71	45,1	41,9
	SA190	2,06	3,69	0,75	-1,29	-0,56	-3,65	-4	-1,7
	se191	2,06	5,75	6,50	5,21	4,65	1,00	-3	-4,7
<b>Region Walloon</b>	O	26,30	25,62	25,22	24,81	25,22	24,80	24,38	23,96
	E	24,28	23,21	23,89	24,15	23,56	24,88	24,33	
	SA	1,75	2,42	1,33	0,67	1,66	-0,08	0,05	
	go to	1,75	4,16	5,49	6,16	7,82	7,74	7,79	
<b>RBC</b>	O	4,30	4,27	4,23	4,20	4,25	4,21	4,17	4,13
	E	4,17	3,58	3,80	3,84	3,70	3,66	3,51	
	SA	0,13	0,69	0,43	0,36	0,55	0,55	0,51	
	go to	0,13	0,82	1,25	1,61	2,16	2,71	3,22	
<b>Belgium</b>	O	78,38	76,85	75,32	73,79	72,49	71,07	69,99	
	E	74,26	70,05	72,72	74,06	70,82	74,25	72,94/74,3	
	SA	4,12	6,80	2,60	-0,27	1,66	-3,18	- 3,28/-4,6	
	go to	4,12	10,91	13,51	13,24	14,91	11,73	8,45/7, <sup>1192</sup>	

<sup>188</sup> Targets expressed in millions of tonnes of CO<sub>2</sub> equivalent

<sup>189</sup> Actual emissions.

<sup>190</sup> Annual Salde.

<sup>191</sup> Cumulative Salde.

<sup>192</sup> The figures in italics are taken from the November 2020 report, *Kick-starting the journey towards a climate-neutral Europe by 2050-EU Climate Action Progress Report*, submitted by the Federal Government on 19 March 2021.

The non-ETS GHG emission reduction balance sheet therefore indicates that in 2018 and 2019 the annual target was not met:

emissions in 2018 were 74.25 Mt CO eq instead of 71.07 Mt CO eq;  
while the provisional figures provided for 2019 indicate that 72.94 MtCO<sub>2</sub>e or 74.3 MtCO<sub>2</sub>e were emitted instead of 69.66 MtCO<sub>2</sub>e.

In October 2019, the latest annual report "*Trends and projections in Europe 2019*", published by the European Environment Agency, indicated that in 2017, Belgium was among the eighteen Member States which, in 2017, met their reduction targets without making use of the flexibility mechanisms. The report also indicated that, based on initial estimates for 2018, Belgium is just 0.4% above its 2020 target but is expected to retain a surplus of 14.6 million tonnes of allowances in 2018<sup>193</sup>. The report also indicated that Belgium has planned additional measures which, if implemented, should enable it to meet its 2020 targets<sup>94</sup>.

However, the updated figures submitted by the defendants and set out in the above-mentioned table indicate that in 2019, the surplus available to Belgium was only 8.45 million tonnes of allowances, or 7.1 million tonnes<sup>195</sup>. At the hearing on 22 March 2021, the Beige State filed an updated table that confirms that the balance available to cover the possible deficit in 2020 is 7.1 Mt. Eq CO'.

The European Commission's 2020 report on Belgium also notes that "*Belgium is not on track to meet its 2020 climate change target. In*

*In sectors not covered by the EU ETS, reductions have been limited to 10%. They are expected to decrease by 2-3 percentage points, but will still fall short of the 2020 target of a 15% reduction compared to 2005 levels*"<sup>196</sup>.

The European Commission's report of 14 October 2020 on the final NECP indicates that, according to the latest data received, Belgium has only achieved an 11% reduction on its 15% target compared to 2005.

The above table also shows that the principle of linear emission reduction dictated by the above-mentioned Decision 406/2009/EC has not been respected for all non-ETS GHG emissions in the country, with the trend having been reversed since 2014.

Finally, the Federal Government states that in terms of renewable energy, offshore wind farms generated 0.293 Mtoe in 2018 and that according to projections and the commissioning of two new wind farms, the Federal Government will produce around 0.687 Mtoe out of a target of 0.718 Mtoe.

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<sup>193</sup> Report N°15/2019 of 31/10/2019, pages 19, 32, 33 and 34: <https://www.eea.europa.eu/publications/trends-and-projections-in-europe-l>.

<sup>194</sup> *Ibid*, p.35.

<sup>195</sup> **Subject to the November 2020 report, Kick-starting the journey towards a climate-neutral Europe by 2050-EU Climate Action Progress Report**, submitted by the Federal Government on 19 March 2021.

<sup>196</sup> *Op.cii.*, tract G.41 of the applicants.

However, the European Commission's 2020 report on Belgium states that "*Based on 2017 data, Belgium has achieved a 9.1% share of energy from renewable sources in gross consumption. Current policies and planned initiatives are insufficient to achieve the required volumes of renewable energy in purely national level*"<sup>197</sup>.

#### Internal obligations

In accordance with the cooperation agreement of 12 February 2018, with regard to the reduction of GHG emissions in the non-ETS sectors, the intra-Belgian allocation provides for:

- a reduction of 15.7% for Flanders; a
- reduction of 14.7% for Wallonia;
- a reduction of 8.8% for Brussels-Capital.

The quantified target for maximum GHG emissions in the non-ETS sectors for the period 2013-2020 is :

- for the Flemish Region: 352,000,905 tCO<sub>2</sub>eq (corresponding to -15.7%) for
- the Walloon Region: 200,049,040 tCO<sub>2</sub>eq (corresponding to -14.7%) for the
- RBC: 33,765,680 tCO<sub>2</sub>eq (corresponding to -8.8%).

The Federal State has committed itself to pursue existing domestic policies and measures that will allow a total reduction of GHG emissions, all sectors combined, of 15,250 ktonnes CO<sub>2</sub>e (Article 9§1 of the cooperation agreement) and to adopt and implement new policies and measures that will allow a complementary reduction of GHG emissions.

7,000 ktonnes CO<sub>2</sub>e for the period 2016-2020 (Article 9§2 of the cooperation agreement).

#### Results

The only assessable result for 2020 is that of the Flemish Region which, with a cumulative balance of - 4.7 MtCO<sub>2</sub>eq, would have exceeded its emissions quota by about 1.3%.

Noting that the 2020 targets will not be met, the Vlaams Mitigatieplan provides for the use of the only suitable flexibility mechanism, i.e. the use of credits from project activities<sup>198</sup>.

The table above gives an overview of past results for the other two regions, subject to (in)validation of provisional figures.

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<sup>197</sup> *Ibid.*

<sup>198</sup> This mechanism provides for the annual use of credits for a quantity limited to 3% of GHG emissions, increased by 1% under conditions (Article 5 of Decision (EC) 406/2009 of 23 April 2009); see also Policy Paper 2019-2024, *Doc. parl.*, Flemish Parliament, sess. 2019-2020, doc. no. 134/1, p. 9, Exhibit 15 of the Flemish Region, **free translation not contested.**

The federal government submits a report from the FPS Public Health indicating that, according to the last two studies on the impact of federal policies and measures,<sup>199</sup> the impact of the existing policies and measures listed in Annex 5 of the cooperation agreement for the period 2013-2020 would be between 32,541 and 35,742 kilotonnes of CO<sub>2</sub> eq. According to the same estimation methodology, the impact of the new policies and measures would be estimated at 14,878 kilotonnes of CO<sub>2</sub> eq.

**e) Period 2020-2030 and 2050**

Objectives

As mentioned above, Regulation (EU) 2018/842 requires Belgium to reduce GHG emissions in the non-ETS sectors by 35% compared to 2005 by 2030. The linear reduction principle is also applicable for the 2030 targets.

In order to fulfil Belgium's European commitments, the final PNIEC sets regional GHG emission reduction targets for the non-ETS sectors as follows:

for CBR: 40% by 2030 and carbon neutrality by 2050;

for the Flemish Region: 35% in 2030 and 85% in 2050;

for the Walloon Region: 37% compared to 2005 in 2030 and 80% to 95% in 2050 compared to 1990.

In the LULUCF sector, the PNIEC also states that the Walloon and Flemish Regions aim to comply with the no-flow rule in the period 2021-2030<sup>201</sup>.

In addition, the federal government has set itself the target of reducing Belgian GHG emissions, all sectors combined, by at least 80% to 95% compared to 1990 by 2050<sup>202</sup>.

Finally, in its September 2020 statement, the federal government indicated that it was setting a target of a 55% reduction in GHG emissions from all sectors by 2030.

Resume/State Projection

The PNIEC 2021-2030 includes an analytical part which makes projections to 2030 in two scenarios: a scenario with existing policies (WEM scenario) and a scenario with additional policies described in the Plan (WAM scenario).

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<sup>199</sup> VITO/Econotec, 2015 and ICEDO, 2017,

<sup>200</sup> Under the NECP, the 35% reduction target is based on upwardly calculated 2005 non-ETS emissions and in reality corresponds to an indicative reduction target of 32.6% by 2030 compared to actual 2005 non-ETS emissions.

<sup>201</sup> Belgium is committed at European level to enforce this no-flow rule in accordance with Article 4 of the Regulation (EU) 2018/841,

<sup>202</sup> See the Royal Decree of 18 July 2013 establishing the federal long-term strategic vision for sustainable development.

In the WEM scenario, while total GHG emissions decreased between 2005 and 2015, they are expected to increase between 2015 and 2030. This increase is mainly linked to the origin of the energy consumed and is considered as a consequence of the closure of nuclear power plants and the increased use of natural gas power plants<sup>203</sup>.

In the WAM scenario, total GHG emissions decrease between 2015 and 2030 from 145.3 Mt CO<sub>2</sub>e to 112 Mt CO<sub>2</sub>e - this is equivalent to a 23% reduction compared to 2005.

Emissions from the non-ETS sector would decrease from 78.9 Mt CO<sub>2</sub>e to 52.7 Mt CO<sub>2</sub>e, which is a reduction of GHG emissions in the non-ETS sector by 34.4%. This scenario results in a regional emission reduction of 32.6% for the Flemish Region, 36.8% for the Walloon Region and 39.4% for the RBC, compared to 2005<sup>204</sup>.

According to these projections, the European non-ETS emission reduction targets will not be met, even in a WAM scenario.

The PNIEC states that in this case Belgium will be able to use the flexibility mechanisms to fill the gap. In particular, the Flemish Region states that *"as a guarantee system to reach the imposed target, we rely on the flexibility available in accordance with Article 6 of the European effort sharing regulation. This is a specific form of flexibility, reserved for Member States facing a significant difference between their non-EU 2030 target and their CO<sub>2</sub>-reduction potential. This flexibility mechanism allows for an annual amount of additional emission allowances for the non-EU ETS sectors in the period 2021-2030, subject to a limited cancellation of EU ETS allowances that would otherwise be auctioned. It goes without saying that, in order to limit the use of this flexibility as much as possible, Fiandre will continue to focus on taking measures that will further reduce non-EU ETS emissions over the next 10 years."*

Furthermore, the scientific report published by the Expert Group on Climate and Sustainable Development indicates that the GHG emission reduction scenario for 2030 proposed in the PNIEC clearly does not make it possible to achieve the objective of carbon neutrality in 2050 on a linear basis and would require radical, even unrealistic, measures from 2030 onwards in order to achieve carbon neutrality in 2050<sup>206</sup>.

### 2.2.2. Climate governance and beige federalism

In Belgium, climate policy is not assigned as such and exclusively to the federal state or to one of the federated entities of the country. Each entity, federal or federated, is competent to carry out a climate policy within the framework of its own competences

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<sup>203</sup> PNEC, Section B, p.1-2, Exhibit III.B.3bis of the Beige State.

<sup>204</sup> PNEC, Section B, p.15, Exhibit III.B.3bis of the Beige State.

<sup>205</sup> Final Flemish Climate and Energy Plan 2021-2030, approved on 9 December 2019, part 12 of the Region **Flemish, uncontested free translation.**

<sup>206</sup> Panel on Climate and Sustainable Development, "Systemic Change is **Urgently** Needed to **Effectively** Address Climate Change and the Ecosystem Crisis", 14 May 2019, Plaintiffs' Exhibit C. I, p.120.

granted by the special law on institutional reforms of 8 August 1980 and the special law of 12 January 1989 on the Brussels institutions.

In the current state of constitutional law, the "*climate change policy*" is not a *matter of national law*. is therefore a shared competence<sup>207-</sup>.

It is true that the implementation of climate policy, which is necessarily transversal in nature, is a real challenge in a state structure such as Belgium, in which the distribution of competences functions according to a logic of enumeration of matters attributed to the federated entities or reserved to the federal authority, and not on the basis of a distribution of public policy objectives between the different entities <sup>208-</sup>.

However, the federal structure does not exempt the federal state or the federated entities from their obligations, be they internal, European or international.

Moreover, in order to function, this federal structure requires the implementation of cooperation mechanisms between the different entities. This necessary cooperation is mainly institutionalised by the special law on institutional reforms of 8 August 1980 and the special law on the financing of the Regions and Communities of 16 January 1989.

In certain areas of shared or overlapping competences between the national and European levels, the Legislation Section of the Council of State has deduced from this overlap an obligation to exercise competences in good cooperation, whether by the conclusion of a cooperation agreement, the adoption of a special law or the approval of a concertation committee <sup>209-</sup>.

In the cases concerning the regulation of GHGs emitted by aviation activities, the Constitutional Court also held that "*in this case, the competences of the federal State and the regions have become so intertwined as a result, on the one hand, of the need under European law to have only one responsible authority per aviation operator.the competences of the Federal State and the regions have become so intertwined, as a result, on the one hand, of the need under European law to have only one responsible authority per aircraft operator and, on the other hand, of the predominantly trans-regional nature of the emissions caused during their entire journey by aircraft landing in or taking off from a region, that they can only be exercised within the framework of cooperation*" <sup>210</sup>.

Climate policy is a shared responsibility par excellence and should therefore normally be exercised in the context of sound and loyal cooperation.

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<sup>207</sup> Opinion of the Legislation Section EC 11°65.404/AG and 11°65.405/AG of 4 March 2019 on the proposals for special laws on the coordination of the policy of the federal authority, the Communities and the Regions on climate change and setting its long-term objectives.

<sup>208</sup> See "Clima! constitution and distribution of competences", Report of the academic seminar of 22 April 2018<sup>1</sup>, available online SUR: at [https://climat.be/doc/KlimGov\\_SI\\_Rapport\\_EN.pdf](https://climat.be/doc/KlimGov_SI_Rapport_EN.pdf).

<sup>209</sup> See e.g. the opinion of the EC Legislation Section No. 50.003/4 of 4 September 2011 I, *Doc.parl.*, Ch., sess.2011-2012, doc. 53 2143/001, pp. 170-173, quoted by G. ROLLANO and C. ROMAINVILLE, "Voyage au cceur de la notion de "loi spéciale". Proposals for a special "clima! law", *A.P.T.*, 2020/2, p.295.

<sup>210</sup> C. const. 2 March 2011, 11° 33/2011, B.10.2. and C. const. 12 June 2012, 11° 76/2012, B. 9.1 and B.9.2, cited by G. ROLLANO and C. ROMAINVILLE, *op.cii*, p.296.

The context before the court, in particular the climate emergency and international and European commitments, gives this natural obligation<sup>211</sup> of cooperation between the different entities of the country a stronger normative scope in such a way that it can be integrated into the general duty of care imposed on each of the four defendants.

In this case, the federal state states that it has exercised its organisational competences to combat climate change in a number of ways:

the signing of five cooperation agreements to ensure coordination between the different entities in the country<sup>212</sup> ;

the creation of internal consultation structures, such as the International Environment Policy Coordination Committee (or "IPCC"), the National Climate Commission (or "NCC") or the State-Regions Energy Consultation Unit (or "ECEC"). (or "CNC") or the Cellule de Concertation sur l'Energie Etat-Régions (or (E.G., "CONCERE");

the preparation of the National Integrated Energy and Climate Plan (the "NICEP") required by Regulation (EU) 2018/1999 and the Interfederal Energy Pact beige 2030-2050;

the adoption of Long Term Strategies for Belgium;

the introduction, during the 6<sup>th</sup> State reform, of an incentive bonus/malus mechanism (known as "accountability") for the Regions for buildings in the residential and tertiary sectors and a mechanism for the substitution of the federal State for the Regions in the event of a finding of non-compliance by the body set up by or under the UNFCCC or its protocols or a reasoned opinion from the European Commission in the context of a formal infringement procedure.

The special law proposals of February 2019 were intended to define Belgium's overall climate policy objectives and to improve the way in which the federal authority and the federated entities coordinate their competences<sup>213</sup> - However, this attempt by the special legislator to improve beige climate governance was not successful.

For their part, the Regions set out their climate change policies in the following planning instruments:

For the Walloon Region :

the Walloon Kyoto Fund created in 2004;

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<sup>211</sup> This is generally opposed to the term "legal obligation".

<sup>212</sup> - cooperation agreement of 5 April 1995 between the Federal State, the Flemish Region, the Walloon Region and the Region

**of Brussels-Capital on international environmental policy;**

- Cooperation agreement of 14 November 2002 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region concerning the establishment, implementation and monitoring of a national climate plan, as well as the establishment of reports, within the framework of the United Nations Framework Convention on Climate Change and the Kyoto Protocol, concluded in Brussels;

- Cooperation agreement of 19 February 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the implementation of certain provisions of the Kyoto Protocol;

- Cooperation agreement of 17 July 2015 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the transfer of units allocated to the regions for the period 2008-2012;

- Cooperation agreement of 12 February 2018 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the sharing of the Belgian climate and energy objectives for the period 2013-2020.

<sup>213</sup> Article 3 of the proposed climate bill, House *Doc.* 2018-2019, No. 54-3571/001, p.14.

the Plan Air Climat Energie ("the PACE") 2016-2022, as provided for in the Climate Decree;  
the Walloon Energy and Climate Plan ("the PWEC") 2030 which constitutes the Walloon contribution to the PNIEC 2021-2030;  
PACE 2030, which is a popularisation of the PWEC and integrates the "quality of life" dimension into the **the air**;  
the Walloon Long Term Strategy 2050;

For CBR:

the PACE 2016-2025 as foreseen by CoBRACE;  
the Brussels Plan Energie Climat 2030 which is the Walloon contribution to the PNIEC 2021-2030; the plan Good Move ;  
the implementation of the ILL system;

For the Flemish Region :

the Vlaams Klimaatbeleidsplan (or 'VKP') 2013-2020, consisting of three parts: the general framework, the Flemish mitigation plan ('het Vlaams Mitigatieplan') and the Flemish adaptation plan ('het Vlaams Adaptatieplan');  
the Flemish Climate and Energy Plan 2021-2030, which is the Flemish contribution to the PNIEC 2021-2030.

This catalogue of measures taken by each of the four entities mentioned does not, however, respond to the failure of climate governance, which has been noted by the public authorities themselves for several years.

Indeed, at the end of 2008, the Federal Council for Sustainable Development (FCSD) already stated that, in its opinion, *"one of the difficulties encountered by Belgium in terms of its climate policy (...) lies in the problems of harmonisation, integration and coordination between the climate policies pursued by the various Belgian political bodies. Moreover, within the federal government, climate policy is not sufficiently integrated with the various areas of public authority. As a result, there is no integrated climate policy, but rather a juxtaposition of measures taken by the different levels of government and the different departments.*

The FRDO-CFDD is composed of representatives of each federal minister or secretary of state as well as representatives of each region and each community.

In 2009, the Minaraad, a consultative body of the Flemish Region whose members are appointed by the Flemish Government,<sup>216</sup> also insisted on the need for a better coordinated and concerted beige strategy between the federal State and the Regions<sup>217</sup>.

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<sup>214</sup> FRDO-CFDD, "Opinion on the document "Draft National Climate Plan 2009-2012 for Belgium - Inventory of measures and state of play as of 31 December 2008", [www.frdo-cfdd.be/sites/default/files/content/download/files/2009a03e.pdf](http://www.frdo-cfdd.be/sites/default/files/content/download/files/2009a03e.pdf), p. 3.

<sup>215</sup> Article 12 of the Act of 5 May 1997 on the coordination of federal sustainable development policy.

<sup>216</sup> Article 11.3.2 of the Decree of the Flemish Parliament containing general provisions concerning the **of 5 April 1995**.

<sup>217</sup> Claimants' Exhibit F. II.

Other state bodies were quick to point out the ineffectiveness and even uselessness of the NCC, as well as its lack of transparency and political accountability<sup>218</sup>.

Moreover, when the first climate plan for 2009-2012 was drawn up, its authors were criticised for not producing a real plan, i.e. the articulation of measures around clearly identified objectives, but a simple addition of three regional reports on measures already adopted in this <sup>area</sup><sup>219</sup>.

Also in 2009, the Court of Auditors noted the lack of a federal climate plan and evaluation of climate policy as well as the lack of internal coherence<sup>220</sup>.

In 2014, the opinion issued by advisory bodies of the federal state and the regions themselves on Belgium's transition to a low-carbon society by 2050 stressed the necessity and essential nature of permanent coordination between the various federal and regional bodies <sup>22</sup>.

In the same year, the Federal Minister of Energy, Environment and Sustainable Development acknowledged the shortcomings in the coordination of climate policies by stating "*I am aware of the existing shortcomings in the coherence and coordination of the policies carried out by the different levels of power, and of the need to improve cooperation via the different institutions in place, such as the National Climate Commission (NC)*"<sup>2</sup>

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<sup>218</sup> See in particular the 2013 report of the "Climate Change" Service of the FPS Public Health, "Analyse du raie **et du fonctionnement de la Conuission nationale climat**", April 2013, [www.klimaat.be/files/7113/8253/0696/130426\\_Evaluation\\_CNC\\_web.pdf](http://www.klimaat.be/files/7113/8253/0696/130426_Evaluation_CNC_web.pdf); Belgian Senate, Rapport d'infonnation sur le processus décisionnel intra-belge en matière de répartition de l'effort élimatique au regard des objectifs climatiques, *Doc. Senate*, 2016-2017, 11°6-253/4; Opinion SLCE 11° 42.387/VR, Senate, 2006-2007, 11°2411/1; M. DEKLEERMAKER, "Une histoire beige : La coopération en matière environnementale et climatique et la COP2 1", *Fédéralisme Régionalisme*, voi. 18, 2018, available online at: <https://popups.uliege.be/443/1374-3864/index.php?id I792> The author writes that "[...] it is more than troubling that all of the **consultation mechanisms presented above, which multiply the number of meeting places between officials and**

**The opacity of the work of all these commissions does not allow us to know whether they have also experienced political blockages within them, thus preventing the emergence of a consensus between the parties, or whether these consultation institutions have simply not met to discuss this issue [...]. The beige cooperative federalism in climate policy is characterised by a lack of inclusion of this policy in the system of distribution of competences and by a real injlation of the instruments of cooperation which unfortunately did not serve to prevent the political crisis related to COP21**".

<sup>219</sup> See the report of the Flemish Socio-Economic Council (or 'SERV') and the Minaraad, 'Advies Nationale Klimaatplan van België 2009-2012: stand van zaken', SERV/Minaraad, 18 February 2009, available at [www.serv.be/sites/default/files/documenten/pdfpublicaties/1468.pdf](http://www.serv.be/sites/default/files/documenten/pdfpublicaties/1468.pdf). 52; see also the hearing of Mr Peter Wittoeck, Head of the "Climate Change" department of the FPS Public Health, *Doc.parl.*, Senate, 2016-2017, 11° 6-253/3, pp. 13 and 15, both cited by M. EL BERHOUMI and C. NENNEN, *op.cii*, p.66.

<sup>220</sup> See Claimants' Exhibit C.4.

<sup>221</sup> Notice available at [www.frdo-cfdd.be](http://www.frdo-cfdd.be).

<sup>222</sup> Claimants' Exhibit F.16, p.6.

The measures adopted during the 6th State reform have also been criticised, whether it be the cumbersomeness and unsuitability to the political reality of the substitution mechanism <sup>223</sup> or the lack of ambition or real incentive effect of the bonus/malus mechanism known as "accountability" <sup>224</sup>.

In 2015, the FPS Environment and the IBGE were also critical from a technical and legal point of view of the climate accountability mechanism introduced by the special law of 6 January 2014.

In its 2017 report<sup>225</sup>, the Senate noted the disproportionately slow intra-Belgian decision-making process on climate effort allocation and made numerous recommendations to improve Belgian climate governance.

In 2018, the report of the "Dialogue on climate governance in Belgium" initiated by the FPS Public Health concluded lapidary that:

*"The central question is whether the federated structure in Belgium is adapted to meet the needs of the population.*

*This gigantic climate challenge requires a radical transformation of our society. The inadequacy of the current governance framework with the climate challenge persists in scientific analyses. The governance framework is inappropriate, given the climate emergency, the necessary decarbonisation of the economy, the new European governance requirements and citizen pressure. Despite the existence of external drivers, notably from European and international law, an internal driver is missing in federated Belgium. [...] We need a common long-term vision that guarantees legal security for the different policies and levels of power and is sustainable. [...] In addition to the need for accountability, prioritisation and centralisation, there is also a need to depoliticise and objectify climate policy. Decision-making power must be at the highest level, where decisions can be made most effectively*

The draft PNIEC submitted to the European Commission on 31 December 2018 was again subject to criticism at both national <sup>227</sup> and European <sup>228</sup> level, in particular on its

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<sup>223</sup> See M. EL BERHOUMI and C. NENNEN, "le changement climatique à l'épreuve du fédéralisme", *Amén*, 2018/4 and the doctrinal references cited, p.68.

<sup>224</sup> *Ibid*, pp.68-69.

<sup>225</sup> **Belgian Senate, Information report on the intra-Belgian decision-making process regarding the distribution of climate effort in the light of climate objectives**, *Doc. Senate*, 2016-2017, no. 6-253/4.

<sup>226</sup> **Dialogue on 'climate governance in Belgium', main conclusions, including concrete proposals** for improving climate governance in a federal Belgium, 27 November 2018, pp. 2 et seq. ROMAINVILLE, "Journey to the heart of the notion of "special law". Proposals for a special "climate" law", *A.P.T.*, 2020/2, p.289.

<sup>227</sup> See FRDO-CFDD, Avis sur le projet de Plan National Energie Clima! 2030 (PNEC), 10 May 2019, available at <https://www.frdo-cfdd.be/fr/publications/advice/avis-du-cfdd-sur-le-projet-de-plan-national-energie-climat-2030-pnec>; FRDO-CFDD, CCEI, CESE Wallonie - Pôle environnement- Pôle énergie, SERV, Minaraad, CESRBC, CERBC, Avis commun sur le projet de Plan National Energie Clima! 2030 (PNEC), 10 May 2019, available at <https://www.frdo-cfdd.be/sites/default/files/content/download/tiles/2019a03f.pdf>

<sup>228</sup> **European Commission, Recommendation on the draft integrated national energy and transport plan** clima! of Belgium covering the period 2021-2030, 18 June 2019, C(2019) 4401 forni; European Commission, Assessment of the draft National Energy and Climate Plan of Belgium, 18 June 2018, SWD(2019) 211 forni.

climate governance. The European Commission's opinion of 14 October 2020 on the final PNIEC also remains critical, particularly with regard to the lack of coordination and integration of regional plans and the projected results in relation to the objectives set.

In adopting Belgium's Long Term Strategy in February 2020, the Consensus Building Committee further recognised that "*as the scope of the different regional strategies varies (not all of them include the ETS), it is not possible to aggregate the regional ambition levels in order to obtain a global beige target for greenhouse gas emission reductions*".<sup>229</sup> The Committee's report on the implementation of the Long Term Strategy is based on the findings of the European Commission's Greenhouse Gas Action Plan.

In short, cooperation between the federal authority and the federated entities is, by the admission of various state bodies, deficient to date, which leads some authors to consider the climate governance framework to be fundamentally inadequate<sup>230</sup>.

### 2.2.3. European Union Monitoring

As mentioned in the factual statement above, every year since 2011 the European Union has highlighted Belgium's difficulties in achieving its climate targets and in defining coordinated action between all entities.

The systematic and almost repetitive nature of the remarks and warnings issued by the European authorities to Belgium for almost ten years is thus clear.

## 2.3. Conclusion

### 2.3.1. Finding of a breach of the duty of care

The combination of the three above-mentioned findings, i.e.: the mixed results in terms of figures ;  
the lack of good climate governance;  
repeated warnings from the European Union;

and this in a context where the Belgian public authorities were fully aware of the certain risk of dangerous climate change for the country's population in particular, makes it possible to establish that neither the federal State nor any of the three Regions acted with prudence and diligence within the meaning of Article 1382 of the Civil Code.

Insofar as necessary, these same findings make it possible to consider that the four defendants have not, at present, taken all the necessary measures to prevent the effects of climate change on the life and privacy of the plaintiffs, as they are obliged to do under Articles 2 and 8 of the ECHR.

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<sup>229</sup> Belgium's long-term strategy, p.4, Federal State Exhibit 111.B.8.

<sup>230</sup> See V. DAVIO, "la lai clima: une errance législative face à l'urgence? " *Amén*, 2021/1, p.8 and references cited by the author.

Contrary to what the defendants maintain, beige federalism is not an obstacle to a finding of concurrent fault by the four entities cited in this case.

On the contrary, it is precisely the cooperative federal structure of Belgium 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.

### 2.3.2. Separation of powers and limitation of the tribune's power of action

The plaintiffs ask the court to order the defendants to take the necessary measures to bring Belgium to reduce the overall volume of GHG emissions from the Belgian territory:

in 2025, by 48%, or at least 42%, of the 1990 level; in 2030, by 65%, or at least 55%, of the 1990 level; by 2050, to achieve zero net emissions.

However, this request for an injunction cannot be granted without infringing the principle of the separation of powers.

Indeed, the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power.

In other words, if the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it<sup>231</sup>. The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority<sup>232</sup>.

It is therefore necessary to check whether the injunction requested does not tend to lead the tribuna! to substitute itself for the legislative or administrative authority in the exercise of its discretionary competence.

In the present case, neither international nor European law directly requires Belgium to reduce its GHG emissions by the various percentages referred to by the plaintiffs in their application:

Thus, the parties to the UNFCCC failed to agree on successor commitments to the Kyoto Protocol for 2012. The Paris agreement does not provide for quantified and individualised emission reduction targets. It merely states that

*"Parties seek to achieve a global cap on greenhouse gas emissions*

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<sup>231</sup> See in particular Cass., 3 January 2008, RG No. C.06.0322.N; see also Cass., 24 September 2010, RG No. 08.0429.N.

<sup>232</sup> See not. Brussels, 12 September 2014, *A.P. T.*, 2016, p.433 and the note by M. JOASSART, "le Juge civil et la séparation des pouvoirs", *A.P. T.*, 2016, pp.435-447.

*...and to make early reductions thereafter in accordance with the best available science so as to achieve a balance between anthropogenic emissions by sources and anthropogenic removals by sinks of greenhouse gases during the second half of the century [...] "233", a formula whose normativity is clearly minimum" 234 .*

International law is therefore limited to setting a common objective, i.e. to keep the increase in average global temperature "well below" 2°C below pre-industrial levels and the commitment to "pursue efforts" to limit it to 1.5°C, while leaving it to the States concerned to determine the means of contributing to it, "which would appear to be non-binding, even soft-law" <sup>23-5</sup>

On the European level, the only legally binding commitments for Belgium are found in Regulation (EU) 2018/842, which requires it to reduce its GHG emissions in the non-ETS sectors by 35% compared to 2005 by 2030<sup>236</sup> and in Directive (EU) 2018/2001, which requires it to provide 13% of its gross final energy consumption to be renewable.

Furthermore, the fact that the European Union has committed itself to GHG emission reduction targets of 55% below 1990 levels by 2030 and carbon neutrality by 2050, on its territory including that of Belgium, does not allow the country to be legally committed to such targets.

Moreover, with regard to the Union itself, its "European Green deal" is a letter of intent rather than a unilateral commitment with binding force.

In Belgium, in their respective declarations, the federal and regional governments acknowledge the relevance of the European GHG emission reduction targets.

In addition to the regional objectives collated in the PNIEC, each region has also defined its long-term strategy as follows:

The Walloon long-term strategy aims to achieve carbon neutrality by 2050 through a 95% reduction in GHG emissions compared to 1990, complemented by measures relating to carbon capture and use and negative emissions;

The Flemish long-term strategy aims to reduce GHG emissions from non-ETS sectors by 85% by 2050 compared to 2005, with the ambition to move towards total climate neutrality. As far as the ETS sectors are concerned, the Flemish Region follows the EU context for these sectors with a decreasing emission quota;

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<sup>233</sup> Article 4, § I, of the Paris Agreement.

<sup>234</sup> P. THIEFFRY, *Traité de droit européen de l'environnement et du climat*, 17/09/2020, Brussels, Bruylant, pp. 204-205.

<sup>235</sup> P. THIEFFRY, *op.cit.*, p.205.

<sup>236</sup> For European criticism of Belgium's ability to achieve this goal, see above.

CBR's long-term strategy sets the objective of moving towards the EU target of carbon neutrality by 2050 by reducing its GHG emissions by 40% from 2005 levels by 2030. However, neither the governmental declarations nor the various plans or other strategic documents are in themselves a source of legally binding obligations for the Belgian public authorities.

In fact, the plaintiffs are essentially basing themselves on the report of the Expert Group on Climate and Sustainable Development<sup>237</sup> to determine the GHG emission reduction targets they are asking the Tribuna! to impose collectively on the Federal State and the Regions.

This report by the Belgian expert group, whose scientific merit is certainly not disputed, argues that the total volume of Belgian GHGs needs to be reduced by about 65% compared to 1990 by 2030 and to reach carbon neutrality by 2050, for Belgium to effectively contribute to the Paris agreement's objective of limiting warming to 1.5°C and preventing dangerous climate change. The report also suggests an intermediate range of 42% to 48% reduction for 2025 to ensure the 2030 target.

However, this scientific report does not constitute a legally binding source of obligation for the public authorities. It is an expert opinion that can assist the public authorities in implementing their climate policy, but it is not binding on the defendants or the court.

Therefore, and subject only to the commitments made as a result of Regulation (EU) 2018/842 and Directive (EU) 2018/2001 mentioned above, the way in which Belgium will participate in the global GHG emissions reduction target is currently a matter for its legislative and executive bodies to decide.

The extent and pace of Belgium's GHG emission reductions and the internal distribution of the efforts to be made in this direction are and will be the result of political arbitration in which the judiciary cannot interfere.

Thus, it is not for the judge to determine the quantified GHG emission reduction targets for all sectors that Belgium should meet in order to "do its part" in preventing dangerous global warming.

In other words, while it is within the remit of the tribuna! to note a failure on the part of the federal state and the three regions, this does not authorise it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions.

The plaintiffs' request for an injunction will therefore be declared unfounded.

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<sup>237</sup> **Exhibit C.1 of the claimants.**

### 3. Expenses

Under Article 1017 of the Judicial Code, any final judgment shall order the payment of costs against the unsuccessful party or parties or, where appropriate, the compensation of costs if the parties are unsuccessful on any ground.

In the present case, in view of the admissibility and partial merits of the claim, the costs should be set off, each party bearing its own costs and neither party owing any procedural damages to the other.

## **IV. DECISION**

Having regard to the law of 15 June 1935 on the use of languages in judicial matters;

In view of the reasons set out above, the Court, ruling in the presence of both parties, hereby

Takes note of the withdrawal of the proceedings of the persons listed in appendix (D) as well as the death of Mr. Jozef Castermans for whom no notice of withdrawal has been filed;

Declares the main claim admissible;

Declares the voluntary intervention of the persons listed in Annex (B) admissible;

Declares inadmissible the voluntary intervention formulated in the name and on behalf of the trees listed in the deed of 3 May 2019 (Annex C);

Holds that, in pursuing their climate policy, the defendants do not behave as normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 of the Civil Code;

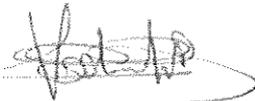
Holds that, in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy;

Dismisses the remainder of the plaintiffs' claim;

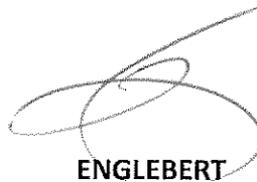
Orders full compensation of costs so that each party shall bear its own costs and neither party shall be liable to the other, or others, for any procedural damages;

So ruled by :

Ms Sabine MALENGREAU, Judge presiding over the  
Chamber Ms Valérie ENGLEBERT, Vice-President  
Mr. Luc Jean VAN DEN BROECK, Deputy Judge



**VAN DEN BROECK**



**ENGLEBERT**



**MALENGREAU**

And delivered at the extraordinary public hearing of the 4<sup>th</sup> chamber of the French-speaking court of first instance of Brussels on **17 June 2021**;

Where were present and seated :

Ms Sabine MALENGREAU, Presiding Judge, Ms Leila  
KHALED, Registrar,

**KHALED**



**MALENGREAU**