Constitutional Court

Decision No. 147/2022
of November 10, 2022
Business directory nos. 7707 and 7726

In the matter of: Actions for annulment of the Decree of the Flemish Region of October 22, 2021 " amending the Energy Decree of May 8, 2009, concerning the prohibition to install or replace an oil-fired boiler ", raised by the VoG " Belgische Federatie der Brandstoffenhandelaars " and others and by Luc Lamine.

The Constitutional Court,

composed of Presidents L. Lavrysen and P. Nihoul, Judges T. Giet, J. Moerman, M. Pâques, Y. Kherbache, T. Detienne, D. Pieters, S. de Bethune, E. Bribosia, and W. Verrijdt, and Judge Emeritus J.-P. Moerman, pursuant to Article *60bis of* the Special Act of 6 January 1989 on the Constitutional Court, assisted by Registrar P.-Y. Dutilleux, under the presidency of President L. Lavrysen,

issues the following decision after deliberation:

I. *Subject of the actions and proceedings*

a. By application sent to the Court by registered letter posted on 17 December 2021 and received at the Registry on 21 December 2021, brought an action for annulment of the Decree of the Flemish Region of 22 October 2021 " amending the Energy Decree of 8 May 2009, concerning the prohibition to install or replace an oil-fired boiler " (published in the *Moniteur belge* of 19 November 2021): the VoG " Belgische Federatie der Brandstoffenhandelaars ", the " Deconinck Brandstoffen " GmbH, the " Bouts " AG, the " OCTA+ Energie " AG and " Comfort Energy " AG, supported and represented by RA F. Judo, admitted in Brussels.

b. By application sent to the Court by registered mail posted on January 7, 2022, and received at the Registry on January 11, 2022, Luc Lamine brought an action for annulment of the same decree.

These cases, entered in the Court's docket under Nos. 7707 and 7726, were joined.

The Flemish Government, supported and represented by F. Vandendriessche, lawyer, and L. François, lawyer, admitted to the Brussels Bar, filed pleadings, the applicant parties in Case No. 7707 filed a reply brief, and the Flemish Government also filed a rejoinder brief in Case No. 7707.

By order of July 13, 2022, the Court, after hearing the oral argument of Judges W. Verrijdt and J.-P. Moerman, sitting by designation, for the Judge prevented by law from sitting, ordered
T. Detienne, resolved that the cases are ready for hearing, that no hearing will be held unless a party has filed a request for hearing within seven days of receipt of notification of this order, and that, subject to such request, the hearing will be closed on August 1, 2022, and the cases will be set for deliberation.

Since no meeting was requested, the cases were set for consideration on August 1, 2022.

The provisions of the Special Act of 6 January 1989 on the Constitutional Court, relating to the procedure and use of languages, were applied.

II. *Legal appraisal*

(...)

With regard to the contested decree and its context.

B.1.1. The plaintiff parties in case no. 7707 and in case no. 7726 seek the annulment of the Decree of the Flemish Region of 22 October 2021 " amending the Energy Decree of 8 May 2009, as regards the prohibition to install or replace an oil boiler ".

B.1.2. Article 3 of the contested Decree inserts into the Decree of May 8, 2009 " establishing general provisions regarding energy policy " (hereinafter: Energy Decree), under Title XI (" Energy Efficiency of Buildings "), an Article 11.1/1.3 which, on the one hand, allows the installation of an oil boiler in both residential and non-residential buildings for which the environmental permit is requested for urban planning acts related to new construction or major energy renovation as of January 1, 2022, and, on the other hand, the replacement of an oil boiler with an oil boiler,

of a boiler body by a boiler body or of a heating technology other than an oil-fired boiler by an oil-fired boiler in existing buildings from the same date, unless there is no natural gas network in the street concerned.

Article 1.1.3 no. 114/1 of the Energy Decree, inserted by Article 2 no. 3 of the contested Decree, defines the term " oil-fired boiler " as " the unit consisting of the boiler body and the burner designed to transfer the calorific value resulting from the combustion of fuel oil to the water in order to ensure the heating of rooms or sanitary hot water ". Article 1.1.3 no. 74/0 of the Energy Decree, inserted by article 2 no. 2 of the contested decree, defines the term " boiler body " as " the totality of the parts of an oil-fired boiler that are not intended to burn the fuel, but to transfer the calorific value to the water ". This refers to " the most robust part " of the oil boiler ((*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/7, p. 6). Therefore, the contested ban does not refer to the replacement of the burner (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/5, p. 2).

The extension of the prohibition to the replacement of a " boiler body " with another " boiler body " was inserted as a result of an amendment, which was justified as follows:

"On a chaudière à mazout, it is in fact generally the brûleur that needs to be replaced after a few years. Le corps de chaudière, beaucoup plus grand, a quant à lui une durée de vie de 30 à 50 ans. If the body were to be replaced again, this would again create a *lock-in* effect for a long period of time. Moreover, in many cases, this chaudière body made of concrete or acrylic must be removed to be eliminated, even if it is the ideal moment to reconsider the choice of the chauffage system. C'est pourquoi il est aussi proposé, en ce qui concerne les bâtiments existants, d'interdire également le remplacement du corps de chaudière " (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/5, p. 3).

B.1.3. Article 4 of the contested decree, which adds an Article 11.1/1.4 to the Energy Decree, imposes on installers of oil boilers the obligation to submit to the Vlaams Energie- en Klimaatagentschap (Flemish Energy and Climate Agency, hereinafter: VEKA) each quarter a list of addresses of the residential and non-residential buildings in which they have installed or replaced one or more oil boilers or boiler bodies during the previous quarter.

B.1.4. Articles 5 and 6 of the contested decree provide for a database of energy use and production to be maintained by VEKA, regulate its objectives, as well as access to and the retention period for such data.

B.1.5. Finally, Articles 7 and 8 of the contested Decree provide for an administrative sanction if VEKA determines that an oil boiler or boiler body has been installed or replaced in a residential or non-residential building in violation of the prohibition regulated in Article 11.1/1.3 of the Energy Decree. The sanction consists of an administrative fine of EUR 3,000 plus EUR 2,000 per building unit in the building and is imposed on the declarant if it concerns a new building or a major energy renovation, and on the owner or the holder of a right in rem if it concerns an existing building.

B.2.1. In the explanatory memorandum, the prohibition regulated in Article 3 of the contested decree is explained as follows:

"Le Gouvernement flamand peut, dans le cadre de sa politique en matière d'utilisation rationnelle de l'énergie et de promotion de la performance énergétique des bâtiments, interdirect l'utilisation de certaines installations de chauffage, installations techniques et systèmes techniques de bâtiment, ou soumettre le utilisation à des conditions. Cette disposition figure à l'article 11.1/1.1 du décret sur l'énergie du 8 mai 2009, lequel a récemment été inséré par le décret du 30 octobre 2020.

The present proposal for a decree allows to fix by means of a written procedure the strict conditions for the chaudières à mazout, and therefore to strictly regulate their use. Cette *lex specialis* implique qu'en application de l'article 11.1/1.1 précité, le Gouvernement flamand ne peut pas instaurer de dispositions dérogatoires dans cette matière, qui a déjà été réglementée par le législateur décrétale. La Région flamande œuvre ainsi à rendre les bâtiments plus durables. It will consequently be forbidden to install or replace a wastewater treatment plant in residential and non-residential buildings where the environmental permit for urban development activities related to a new construction or a substantial energy renovation is required from 1 January 2022. Même dans les bâtiments existants, il ne sera plus possible à partir de cette datum - même lors de la réalisation de travaux non soumis à permis - de remplacer une chaudière à mazout par une autre chaudière à mazout, sauf si aucun réseau de gaz naturel n'est disponible dans la rue.

L'article 11.1/1.3 en projet met ainsi en œuvre l'accord de gouvernement flamand 2019-2024 pour, d'un part, les nouvelles constructions et les rénovations énergétiques substantielles et, d'autre part, les bâtiments existants. L'accord de gouvernement prévoit en effet les dispositions suivantes en ce qui concerne les chaudières à mazout :

- À partir de 2021, une chaudière à mazout existante ne pourra plus être remplacée si la rue abrite un réseau de gaz naturel. Les propriétaires seront informés de toutes les autres solutions possibles. '

- ' Pour cette raison, à partir de 2021, plus aucune chaudière à mazout ne pourra être installée dans le cas d'une nouvelle construction et de rénovations énergétiques substantielles, et un raccordement au gaz naturel ne sera plus possible, pour les nouveaux grands lotissements et grands immeubles à appartements, qu'à fins de chauffage collectif par cogénération ou en combinaison avec un système d'énergie renouvelable comme chauffage principal. '

[...]

The Plan flamand sur l'énergie et le climat mentionne cependant : ' À partir de 2021, nous introduisons une interdiction des chaudières à mazout dans les constructions nouvelles et en cas de rénovation énergétique substantielle. Les chaudières à mazout existantes ne peuvent plus être remplacées par d'autres chaudières à mazout s'il existe une possibilité de raccordement à un réseau de gaz naturel dans la rue, sauf s'il peut être démontré que les chaudières à mazout ont une performance équivalente à celle des chaudières à condensation au gaz naturel les plus récentes. Cette problématique sera abordée plus en détail ci-après.

Le fait que cette technologie de chauffage s'avère moins efficace énergétiquement et moins écologique pour les nouvelles constructions et les rénovations énergétiques substantielles, tout en étant dépassée, est également attesté par les données statistiques ci-dessous, tirées des déclarations EPB (EPB : ' energieprestatie en binnenklimaat ' (prestation énergétique et climat intérieur)) qui ont été introduites.

[...]

À partir de 2022, l'installation ou le remplacement d'une chaudière à mazout par une autre chaudière à mazout ne sera plus autorisé non plus dans les bâtiments existants. La seule exception possible est le cas de figure où aucun réseau de gaz naturel n'est disponible dans la rue. Par le remplacement d'une chaudière à mazout, l'on entend par ailleurs uniquement le remplacement de l'intégralité de l'installation, et non le remplacement de composants individuels d'une installation de chauffage existante, comme le brûleur.

[...]

C.2.b. La mesure telle qu'elle est formulée dans le Plan flamand sur l'énergie et le climat

The measure as it is formulated in the Plan flamand sur l'énergie et le climat se révèle nevertheless problématique au view de l'article 6 de la directive-cadre relative à l'écoconception et du règlement (UE) n° 813/2013. Selon cette formulation, le remplacement d'une chaudière à mazout existante par une autre, tandis qu'il existe une possibilité de raccordement à un réseau de gaz naturel dans la rue, serait malgré autorisé ' s'il peut être démontré que les chaudières à mazout ont une performance équivalente à celle des chaudières à condensation au gaz naturel les plus récentes '. Dans ce scénario, l'autorisation d'installer une chaudière à mazout pour en remplacer une autre dépend donc d'une évaluation des performances.

Cette évaluation des performances portera (au moins) sur l'efficacité énergétique. Or, l'Annexe II au règlement (UE) n° 813/2013 fixe déjà des exigences applicables à l'efficacité

énergétique saisonnière et à l'efficacité énergétique pour le chauffage de l'eau. Si la Région flamande subordonne l'admissibilité du remplacement d'une chaudière à mazout par une autre chaudière à mazout à une évaluation complémentaire de l'efficacité énergétique, cela sera qualifié comme une exigence en matière d'écoconception qui a trait à des paramètres qui sont déjà couverts par le règlement (UE) n° 813/2013 et qui est contraire à l'article 6, paragraphe 1, de la directive-cadre relative à l'écoconception, à moins qu'il s'agisse d'une ' exigence en matière de performance énergétique ' de bâtiments ou d'unités de bâtiment ou d'une ' exigence relative aux systèmes techniques ' conformément à l'article 4, paragraphe 1, ou à l'article 8 de la directive PEB. However, this latter hypothesis does not apply in practice: in fact, the condition according to which a gas condensation unit must be as efficient as the most recent gas condensation units does not constitute a requirement relative to the technical systems, but rather a requirement in terms of energy consumption.

La mesure telle qu'elle est formulée dans le Plan flamand sur l'énergie et le climat est, pour cette raison, contraire à l'article 6 de la directive-cadre relative à l'écoconception, ainsi qu'au règlement (UE) n° 813/2013.

Pour ces raisons, la mesure ne peut se concrétiser que sous la forme établie dans l'accord de gouvernement flamand " (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/1, pp. 2, 5-6 and 10-11).

The aforementioned motivations also appear in the justification of the competence of the Flemish Region for the adoption of the contested decree:

"With regard to the interdiction of waste incinerators, this proposal for a decree fits perfectly into the framework of the region's competency in terms of energy efficiency and environmental protection. De telles installations de chauffage au mazout ne sont effectivement pas suffisamment efficaces sur le plan énergétique, ni suffisamment écologiques, pour continuer à jouer un rôle dans la transition énergétique actuelle. En raison de la combustion du mazout, les chaudières à mazout ont une plus grande incidence sur les émissions et la qualité de l'air. À titre d'exemple, le facteur d'émission de CO_2 (Ktonne $CO_{2/PJ}$) du mazout est supérieur d'environ 32 % à celui du gaz naturel, et supérieur de 15 à 18 % à celui du propane et du butane. Les émissions de NOx d'une nouvelle chaudière à mazout sont par exemple également supérieures d'environ 45 % aux émissions d'une nouvelle chaudière au gaz naturel.

In 2019, gas emissions represented 35% of the gas emissions from the building sector (all residential and non-residential buildings) and 10% of the total gas emissions from the SEQE (system of exchange of emission quotas) in Flanders. Une suppression progressive des chaudières à mazout peut donc contribuer significativement à l'objectif de réduction des émissions hors SEQE à courte (2030) et à long terme (2050) de la Flandre. En cas de passage au gaz naturel, on peut déjà s'attendre à une réduction de 32 % grâce au seul facteur d'émission de CO_2 plus faible. En cas de passage à des installations de chauffage fonctionnant sans énergie fossile, la réduction des émissions de CO_2 sera de 100 %.

La mesure exercera également une influence positive sur la qualité des sols, puisque l'utilisation des installations au mazout constitue un risque accruement de pollution des sols, en

raison, notamment, d'écoulements de mazout lors de la livraison ou de fuites dans les cuves à mazout. The fact that the measurement, in addition to influencing the energy efficiency and the gas emissions, also improves the quality of the sols, is an objective that is being pursued. The measurement therefore produces effects that are not applicable to other types of chauffage installations: in fact, the measures relating to these other types of installations do not exert this specific environmental pressure, so that the situation is not comparable.

L'utilisation de telles nouvelles installations au mazout s'intègre dès lors moins bien dans la transition énergétique vers une société pauvre en carbone. Une étude commandée par le secteur du mazout (Informazout) lui-même qui offre un autre son de cloche ne peut pas être considérée comme scientifiquement correcte. À la demande de la ministre Zuhal Demir, une tierce partie (Energyville et le panel climat) a soumis cette étude à une évaluation par les pairs. Cette évaluation conclut que le rapport d'Informazout analyse en détail, sur base d'une méthode fondée sur l'analyse du cycle de vie, une tendance vraiment hypothétique, à savoir la transition totale du chauffage au mazout classique vers le chauffage au gaz, and ce à relativement brève échéance (d'ici 2030), les chercheurs s'efforçant, par diverses hypothèses partiales en défaveur du gaz naturel, de démontrer que le mazout peut, à terme, exercer une pression plus limitée sur le climat. Toutefois, vu les problèmes méthodologiques et les choix subjectifs effectués, l'évaluation par les pairs conclut que l'on ne saurait affirmer que ce soit le cas. L'hypothèse de travail du secteur, selquelle le gaz naturel serait plus nocif que le mazout, n'est dès lès ni démontrée ni crédible, mais présente un problème méthodologique, de sorte qu'elle semble n'être que le reflet d'un réflexe plutôt tendancieux et protectionniste " (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/1, pp. 3-4).

B.2.2. It follows from the above explanation that the contested decree fits into the " short-term (2030) and long-term (2050) Flemish non-ETS reduction target " inserts. It concerns the target imposed by the European Union on the Member States for the so-called non-ETS sectors, these are the sectors that are not covered by the European Emissions Trading Scheme. It is mainly about the sectors of buildings, transport, agriculture and waste management. This short-term target, set out in Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018
"establishing binding national annual greenhouse gas emission reduction targets for the period 2021 to 2030 as a contribution to climate action to meet the commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013" and adopted by the Flemish Region in its Flemish Energy and Climate Plan (FEKP), implies that Belgium must reduce its greenhouse gas emissions by 35% by 2030 compared to 2005 levels. The long-term goal is to reduce greenhouse gas emissions by 80 to 95% in 2050 compared to 1990 levels.

The so-called " European Climate Act " (Regulation (EU) 2021/1119 of the European Parliament and of the Council of June 30, 2021 " establishing a framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ") provides for increased targets for the European Union to achieve a reduction of net greenhouse gas emissions (emissions net of removals) of at least 55% in 2030 compared to 1990 levels and full climate neutrality in 2050 in the European Union. In light of these amended targets, the European Commission published its " Fit for 55 " package on July 14, 2021, proposing to increase Belgium's national target to 47% by 2030 compared to 2005 levels.

B.2.3. With respect to the Flemish Region, the contested decree follows the other decrees adopted recently, which, in order to achieve the Flemish non-ETS reduction target by 2030 and 2050, aim to also reduce greenhouse gas emissions resulting from the use of natural gas.

A first step in this regard was made by Article 12 of the Decree of October 30, 2020 " amending the Energy Decree of May 8, 2013 ". As a result of this amendment, Article 4.1.16/1 of the Energy Decree provides that for new large parcellations, large group housing projects or large apartment buildings for which the environmental permit for the parcellation of land or for urban planning acts has been requested as of January 1, 2021, a connection to the natural gas supply network may only be provided in the case of collective heating through cogeneration or in combination with a renewable energy system as a preferential heating system.

Article 6 of the Decree of 18 March 2022 " amending the Energy Decree of
May 8, 2009 " represents the second phase. This article inserts an article 4.1.16/2 in the Energy Decree, which stipulates that operators of the natural gas supply network may no longer provide connection to the natural gas supply network for residential and non-residential buildings for which an environmental permit is requested for urban planning actions related to new construction as of January 1, 2026. By the decree of
June 17, 2022 " amending Article 4.1.16/2 of the Energy Decree of May 8, 2009 ".

the date for the ban on natural gas connections for new housing was brought forward to January 1, 2025.

With regard to the scope of actions for annulment

B.3.1. The Court must determine the scope of the action for annulment on the basis of the content of the application.

The Court of Justice may annul only provisions that are expressly challenged by law and against which pleas in law are raised and, where appropriate, provisions that, although not challenged, are inextricably linked to the provisions to be annulled.

B.3.2. It is clear from the applications in Cases Nos. 7707 and 7726 that objections were raised only to Articles 1 and 3 of the contested Decree. Insofar as Article 4 of the contested decree imposes on oil boiler installers an obligation to submit a report on the residential and non-residential buildings in which they have installed or replaced one or more oil boilers or boiler bodies during the last quarter, and insofar as Articles 7 and 8 of the contested decree provide for an administrative sanction in the event of a violation of the prohibition on installing or replacing an oil boiler, respectively, those provisions are inextricably linked to Articles 1 and 3 of the contested decree.

In contrast, Articles 5 and 6 of the contested Decree, which refer to the energy use and production database to be maintained by VEKA, are not inextricably linked to Articles 1 and 3 of the contested Decree.

B.3.3. Consequently, the Court limits its examination to Articles 1, 3, 4, 7 and 8 of the contested Decree.

In terms of interest

B.4.1. The Flemish Government challenges the interest of the plaintiffs in Case No. 7707 in so far as they seek to protect the interests of consumers in their action for annulment. It also denies the interest of the plaintiff in Case No. 7726.

B.4.2. The Constitution and the Special Act of 6 January 1989 on the Constitutional Court require that any natural or legal person bringing an action for annulment prove an interest. The required interest is present only in the case of those persons whose situation could be directly and unfavorably affected by the challenged legal norm.

B.4.3. The first plaintiff in Case No. 7707 describes itself as.
" recognized, representative professional organization of and for companies in the field of trade and distribution of fuels, motor fuels, lubricants and similar products ". The second to the fifth plaintiff parties are suppliers of energy products such as heating oil and comparable fuels.

B.4.4. Since Article 3 of the contested Decree prohibits the installation of an oil-fired boiler and the replacement of an oil-fired boiler with an oil-fired boiler as of January 1, 2022, there is a sufficient interest in the annulment of the contested provision at least in the case of the second to the fifth plaintiff parties in Case No. 7707 in their capacity as suppliers of heating oil products. It is therefore not necessary to examine the interest of the other plaintiff parties.

With regard to the admissibility of the single plea in law in Case No. 7726

B.5. in order to comply with the requirements of Article 6 of the Special Act of 6 January 1989 on the Constitutional Court, the pleas submitted in the application shall indicate which provisions, the observance of which the Court ensures, would be violated and which provisions would violate such provisions; and

set out in what respects these provisions would be violated by the provisions in question.

The applicant party in Case No. 7726 does not set out how the challenged provisions would violate Articles 15, 22 and 23 of the Constitution, Articles 1 and 8 of the European Convention on Human Rights and Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

To the extent that the single plea in Case No. 7726 is derived from an infringement of those provisions, it is inadmissible.

The main thing

With regard to the first plea in law in Case No. 7707.

B.6. the applicant parties in case no. 7707 derive a first plea in law from an infringement by the contested decree of Article 6 § 1 II, second paragraph, point 1, of the Special Act of 8 August 1980 on institutional reform, of the principle of federal loyalty guaranteed by Article 143 § 1 of the Constitution, and of the principle of proportionality. According to the complaining parties, the contested decree introduces an almost absolute prohibition with regard to the installation and replacement of oil boilers, thus having a market-excluding effect and making it impossible for the federal authority to exercise its competence in the field of product standards.

B.7.1. Article 6 § 1 II paragraph 1 No. 1 and paragraph 2 No. 1 and VII of the Special Act of

August 8, 1980, designated for institutional reform:

"The matters referred to in Article 39 of the Constitution are: [...]

II. concerning the environment and water policy:

1. environmental protection, in particular the protection of soil, subsoil, water and air against pollution and degradation, and noise abatement,

[...]

However, the federal agency is responsible for:

1. the establishment of product standards,

[...]

VII. as far as energy policy is concerned:

the regional aspects of energy and in any case::

[...]

f) the new energy sources, except those related to nuclear energy,

[...]

h) the rational use of energy.

However, the federal authority is responsible for matters that, due to technical and economic indivisibility, require homogeneous application at the national level, namely:

a) the studies on the prospects in terms of energy supply,

b) the nuclear fuel cycle,

c) the large storage facilities, energy transport and power generation,

d) the tariffs, including the pricing policy, without prejudice to the provisions of paragraph 1 (*a)*
and *b)* mentioned competence of the regions in matters of tariffs ".

B.7.2. Unless they have decreed otherwise, the Constitutional and Special Legislatures have conferred on the Communities and the Regions the full competence to adopt rules related to the matters assigned to them.

Based on the aforementioned Article 6 § 1 II, the Regions are responsible for preventing and combating the various forms of environmental pollution. The

Regional legislator derives from No. 1 of this provision the general power that allows him to regulate what concerns environmental protection, especially the protection of air against pollution and damage.

B.7.3. From the preparatory work for the special law of August 8, 1980, it appears that the competence assigned to the Regions for the protection of air concerns, among other things, those matters that were regulated by the law of December 28, 1964 " on the control of air pollution " (*Parl. Doc.*, Senate, 1979-1980, No. 434/1, p. 13).

Based on article 2 of the aforementioned law of December 28, 1964, " air pollution " is understood as any emission into the air of gaseous, liquid or solid substances that may endanger human health, harm animals and plants or damage property and landscapes, regardless of their origin ".

B.7.4. It follows from the above that the competence of the Regions in the field of air protection includes the competence to take measures to reduce greenhouse gas emissions in the air. This competence is not limited to fixed installations, but concerns all greenhouse gas emissions regardless of their origin. Consequently, given the impact of greenhouse gases on the environment and, in particular, on the climate, the Regions may take measures to reduce greenhouse gas emissions from oil boilers.

B.7.5. The adoption of a ban regarding the installation of an oil boiler and the replacement of an oil boiler with an oil boiler also fits the regions' responsibility for the rational use of energy.

B.8.1. However, according to Article 6 § 1 II, paragraph 2, no. 1 of the Special Law of August 8, 1980, the federal authority is responsible for setting the product standards. The regional governments must be involved in the determination of these standards (Article 6 § 4 No. 1 of the same special law).

Product standards are rules that specify in a mandatory manner the conditions that a product must meet when it is placed on the market, including with regard to the protection of the environment. In particular, they set limits on the level of contamination or nuisance

which must not be exceeded in the composition or emissions of a product, and they may contain specific provisions on properties, test methods, packaging, marking and labeling of products.

B.8.2. In the preliminary work on Article 6 § 1 II paragraph 2 No. 1 of the Special Act of August 8, 1980 (*Parl. Doc*, Senate, 1992-1993, No. 558/1, p. 20; *Parl. Doc*, House, 1992-1993, No. 1063/7, pp. 37, 38, 39, 42, 43, and 44), it was pointed out that, under.
The term "product standards", the definition of which is reserved to the federal authority, is to be understood only as rules with which products must comply "when they are placed on the market", inter alia, with regard to the environment. The fact that the competence for product standards is reserved to the federal authority is in fact justified precisely by the need to preserve the Belgian economic and monetary union (*Parl. Doc.*, Senate, 1992-1993, No. 558/1, p. 20; *Parl. Doc.*, Chamber, 1992-1993, No. 1063/7, p. 37).
and remove obstacles to the free movement of goods between regions (*Parl. Doc.*, Senate, 1992-1993, No. 558/5, p. 67).

B.8.3. The contested decree does not in itself contain any requirements that oil boilers must meet when they are introduced to the market. It only regulates their installation and replacement. Consequently, the contested decree does not contain product standards and it falls within the competence of the decree maker in the field of environmental protection and rational use of energy.

B.9.1. Nevertheless, as provided for in Article 143 § 1 of the Constitution, the decree-maker shall observe federal loyalty in the exercise of his powers.

B.9.2. The observance of federal loyalty presupposes that the federal authority and the constituent states, in the exercise of their competences, do not disturb the balance of the federal structure as a whole. Federal loyalty concerns more than the mere exercise of competences; it indicates in what sense this must be done.

The principle of federal loyalty obliges each legislature to take care that the exercise of its own jurisdiction does not render impossible or excessively difficult the exercise of the jurisdiction of the other legislatures.

B.10.1. The contested decree does not prohibit the sale of oil boilers or their use. It provides for a ban on the replacement of an oil boiler with an oil boiler, a boiler body with a boiler body or a heating technology other than an oil boiler with an oil boiler for existing residential and non-residential buildings. Therefore, for existing buildings, the ban applies only when the service life of the oil boiler, boiler body or other heating technology has expired.

B.10.2. Moreover, the prohibition refers only to the complete replacement of the oil boiler by an oil boiler or of the boiler body by a boiler body. It is clear from the preparatory works to the contested decree that the replacement of individual parts of an oil boiler, such as the burner or the chimney (Amendment No. 1, *Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/5, p. 2; ibid., No. 813/7, pp. 4, 7 and 9), the pump (ibid., No. 813/7, pp. 4, 7 and 9) or the electronics (Amendment No. 2, ibid., No. 813/5, p. 3; ibid., No. 813/7, p. 4) is not covered by the contested ban.

B.10.3. Furthermore, the contested measure does not provide for an absolute prohibition with respect to the replacement of an oil-fired boiler with an oil-fired boiler, a boiler body with a boiler body, or any other heating technology with an oil-fired boiler in an existing dwelling. If there is no natural gas system available in the street at the height of the building or the building cannot be connected to the natural gas system on the opposite side of the street by drilling under it, the prohibition does not apply.

B.10.4. Finally, it is clear from the explanations provided by the Government Commissioner at the request of the Legislative Department of the Council of State that the impact of the prohibition rule on the possibility of installing or replacing an oil-fired boiler is not of such a nature that it can be said to have a market-excluding effect (Council of State, Opinion No. 69.562/3 of July 12, 2021, *Parl. Doc.,* Flemish Parliament, 2020-2021, No. 813/3, pp. 8-9):

"En effet, interrogé sur le nombre de cas dans lesquels le remplacement d'une chaudière à mazout est noch möglich en cas d'absence d'un réseau de gaz naturel ainsi que sur la proportion de ce cipher par rapport aux ciffres - déjà en forte diminution - relatifs à l'installation d'une chaudière à mazout dans le cadre de nouvelles constructions et de rénovations, le délégué a déclaré ce qui suit :

In the study entitled "The effects of the measures relating to the heating system in the dwellings and buildings not affected by the residence, provided for in the government agreement", Trinomics calculated for VEKA the number of heating systems that would no longer be installed due to the prohibition to install or replace a heating system. Trinomics est parvenue aux résultats suivants :

- À l'heure actuelle, le nombre de chaudières à mazout vendues en Flandre est estimé à 3 900 (estimation sur la base des chiffres de vente 2020 pour le marché belge résidentiel et non résidentiel, la part flamande dans le total des ventes étant estimée à 30 %).

- L'interdiction d'installer une chaudière à mazout lorsque le gaz naturel est disponible dans la rue entraînerait - selon le scénario de base de l'étude - une baisse totale annuelle des chaudières à mazout installées de l'ordre de 865 à 875 unités (à savoir, proportionnellement, environ 22 % du nombre total de chaudières vendues).

. Environ 850 à la suite de l'interdiction de remplacement dans le cas où le gaz naturel est disponible dans la rue (dans l'étude : mesure 1).

. Environ 10-15 à la suite de l'interdiction d'installer des chaudières à mazout dans de nouvelles constructions (dans l'étude : mesure 2).

. Environ 5 à 10 à la suite de l'interdiction d'installer des chaudières à mazout dans le cadre de rénovations énergétiques substantielles (dans l'étude : mesure 2).

- Tout compris, ces deux mesures provoqueraient une diminution des ventes annuelles de chaudières à mazout d'environ 22 % par rapport au nombre actuel.

En raison de la couverture étendue du réseau de gaz naturel en Flandre, de l'émergence de nouvelles technologies (notamment les pompes à chaleur) et des coûts plus avantageux du gaz naturel par rapport au mazout, les ventes actuelles de nouvelles chaudières à mazout en Région flamande sont relativement limitées par rapport aux ventes de chaudières au gaz naturel. Voy. l'étude de Trinomics figurant en annexe pp. 5 et 6. ' ".

Consequently, there is no market-excluding effect. The contested decree does not violate the principle of federal loyalty guaranteed by Article 143 § 1 of the Constitution, nor the rules of division of powers.

B.11. In view of the foregoing, the contested decree does not violate Article 6 § 1 II, paragraph 2, item 1, of the Special Law of August 8, 1980 on the Reform of Institutions, nor the principle of federal loyalty guaranteed by Article 143 § 1 of the Constitution, nor the principle of proportionality.

B.12. The first plea in law in Case No 7707 is unfounded.

With regard to the second plea in law in Case No. 7707.

B.13. The plaintiff parties in Case No. 7707 derive a second plea from an infringement by the contested decree of Articles 10 and 11 of the Constitution, in conjunction with Article 34 of the Treaty on the Functioning of the European Union, and of the freedom of enterprise, guaranteed by Articles II.3 and II.4 of the Economic Code.

In the first part, the complaining parties argue that the contested decree creates a double difference in treatment. Firstly, persons who own a more environmentally friendly oil-fired boiler suffer disadvantages as a result of the contested decree, whereas persons who use other, equally environmentally friendly heating technologies are not covered by the contested decree. Secondly, the owner of a building heated by an oil-fired boiler, which can be connected to the natural gas network, can only switch to natural gas, which is sometimes more polluting, or to a heat pump, whereas the owner of a building heated by an oil-fired boiler, which cannot be connected to the natural gas network, is completely free to keep his oil-fired boiler or to replace it with any heating system. According to the plaintiff parties, none of these differences in treatment is based on a relevant distinguishing criterion.

In the second part, the applicant parties argue that the contested decree, by prohibiting the installation and replacement of oil boilers and not providing for an exception for more environmentally friendly oil boilers, contains a prohibited measure having equivalent effect and disproportionately restricts their freedom to conduct business. According to the plaintiffs, a ban depending on the characteristics of the oil boiler would have achieved the objective pursued by the legislator in an equally effective manner, while restricting trade between Member States in a less restrictive manner.

B.14.1. The principle of equality and nondiscrimination does not preclude the introduction of a difference in treatment between categories of persons to the extent that this

difference is based on an objective criterion and is reasonably justified.

The existence of such justification must be assessed in light of the purpose and consequences of the impugned measure, as well as the nature of the relevant principles; it will be contrary to the principle of equality and non-discrimination if it is established that the means used are disproportionate to the purpose pursued.

B.14.2. Articles 10 and 11 of the Constitution have a general scope. They prohibit any discrimination, whatever its origin; the constitutional rules of equality and non-discrimination apply in the face of all rights and all freedoms, including those deriving from international treaties binding on Belgium.

B.15. In determining energy policy, the decree-maker has a broad power of judgment. In this matter, the Court of Justice may only disapprove the political decisions of the decree-maker and the reasons on which they are based if they are based on a manifest error or if they would be objectively unjustified.

However, it must take into account the limits provided in Union law for the freedom of judgment of the decree-maker.

B.16. The Court shall first examine the compatibility of the contested decree with Articles 10 and 11 of the Constitution in conjunction with Article 34 of the Treaty on the Functioning of the European Union.

With respect to the violation of Articles 10 and 11 of the Constitution in connection with the prohibition of measures having the same effect (second part).

B.17. Based on Article 34 of the Treaty on the Functioning of the European Union (TFEU), quantitative restrictions on exports and all " measures having equivalent effect " are prohibited between Member States.

Legislative provisions introducing a general ban on the installation of an oil-fired boiler and the replacement of an oil-fired boiler by an oil-fired boiler, of a boiler body by a boiler body or of another heating technology by an oil-fired boiler are of such a nature that intra-Community trade in such products is in any event indirectly hindered and must therefore be regarded as a measure prohibited in principle by Article 34 of the TFEU, having an effect equivalent to quantitative restrictions on imports (ECJ, 10. April 2008, C-265/06, *Commission v. Portugal*, paragraphs 32-36; 10 February 2009, C-110/05, *Commission v. Italy,* paras 56-58; 4 June 2009, C-142/05, *Mickelsson and Roos*, paras 16-17).

The Court must therefore examine whether the prohibition in principle can be justified on the basis of Article 36 of the TFEU or on the basis of other imperative requirements, taking into account the case law of the Court of Justice of the European Union.

B.18. It follows from the preliminary work mentioned in B.2.1 that the contested measure is intended, on the one hand, to address soil contamination and, on the other hand, to implement the Flemish, Belgian and European objective of reducing greenhouse gas emissions.

The protection of the environment and the climate are legitimate objectives of general interest, the public interest nature of which has already been expressed, in particular, in the legislation of the European Union, such as, in relation to climate protection, the Regulation (EU) 2018/842 mentioned in B.2.2 and the so-called " European Climate Act ", which oblige the Member States to take the necessary measures to achieve the objectives in the field of reduction of greenhouse gas emissions.

According to Article 36 of the TFEU, the provisions of Articles 34 and 35 do not preclude prohibitions or restrictions justified on grounds of the protection of health and life of persons, animals or plants.

Moreover, according to the established case law of the European Court of Justice, it is possible to justify restrictions on the free movement of goods on the basis of imperative requirements such as environmental protection (ECJ, 14 July 1998, C-341/95, *Bettati*, paragraph 62;
12 October 2000, C-314/98, *Snellers*, paragraph 55; 19 June 2008, C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Others*, paragraph 29; judgment of 11 December 2008, C-524/07, *Commission v Austria*, paragraph 57; 4 June 2009, C-142/05, *Mickelsson and Roos*, paragraph 32).

B.19.1. As can be seen from the preliminary work mentioned in B.2.1 above, the scientific study commissioned by the Decretary prior to the adoption of the contested Decree shows that heating oil accounted for 35% of residential and non-residential GHG emissions in 2019 and 10% of total non-ETS GHG emissions in the Flemish Region, and that a phase-out of oil boilers can make a significant contribution to the Flemish non-ETS reduction target in the short term (2030) and long term (2050).

Moreover, it is not unreasonable to assume that the contested measure may contribute to the improvement of soil quality because, as is also stated in the aforementioned preliminary work, the use of oil-fired boilers may be associated with a higher risk of soil contamination, for example, due to spillage of fuel oil during delivery or pollution from leaking fuel oil tanks.

The issuer of the decree was entitled to assume that merely motivating the owners concerned by way of raising awareness and granting bonuses would not be sufficient to achieve the aforementioned reduction targets and that, as mentioned above in the consideration of the first plea, a ban on the installation and replacement of oil boilers was necessary, taking into account the limits of its powers.

B.19.2. The plaintiff parties in Case No. 7707 challenge the necessary character of the challenged measure because various studies showed that

modern oil boilers emitted significantly fewer greenhouse gases, not only compared to older oil boilers, but also compared to natural gas boilers.

In light of the objectives imposed by the European Union to achieve a significant reduction in greenhouse gas emissions by 2030 and even complete climate neutrality by 2050, a ban that depends on the characteristics of the oil boiler would have only short-term effects and it would not exempt the decree maker from the obligation to adopt prohibitive measures such as the present measure in the longer term. By virtue of Article *7bis* of the Constitution, the Federal State, the Communities and the Regions, in the exercise of their respective powers, must pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account intergenerational solidarity. During the preparatory work for the amendment of the Fundamental Law in order to insert a Title *Ibis* and an Article *7bis* on sustainable development as a general policy objective, it was pointed out that the respect for " environmental aspects " should also be understood as " global warming ", the consequences of which will have to be borne by others " (*Parl. Doc.*, Senate, 2005-2006, No. 3-1778/2, p. 54). By providing for a general ban on the installation and replacement of oil-fired boilers, the legislator is taking into account the consequences of its policy for future generations.

Without doubt, the Flemish, Belgian and European reduction targets could be even better achieved if the contested measure would ban not only the installation and replacement of oil boilers, but also the installation and replacement of natural gas boilers. Given the consequences of such a prohibition measure for mainly the owners of existing installations, it is nevertheless not unreasonable to opt for a partial phase-out of fossil heating systems, primarily targeting the most polluting installations and at the same time offering these owners an economically feasible alternative.

Since the study referred to in the preliminary work cited in B.2.1 shows that the CO_2 emission factor for heating oil is about 32% higher than for natural gas and 15 to 18% higher than for propane and butane gas, and that the NOx emissions of a new oil boiler are still about 45% higher than those of a new natural gas boiler, and since more than 90% of the buildings in the Flemish Region will be connected to the natural gas network in 2018

could, the decree-maker was allowed to opt for a ban on the installation of oil boilers and the replacement of an oil boiler with another oil boiler in the first phase, if a natural gas network is available in the street.

Taking into account the discretion that must be granted to the competent legislature in this field and the *a priori* reasonable nature of the elements on which it relies, it is not incumbent upon the Court to question the analysis of the decree-maker on the sole ground that other studies cited by the plaintiff parties in Case No. 7707 - whether or not they are representative - would make it possible to reach a different conclusion.

Moreover, it follows from what is stated in B.2.3 that the decree-maker has already started the execution of the next phase in the phasing out of fossil heating systems. Indeed, Article 4.1.16/2 of the Energy Decree contains a prohibition to connect residential and non-residential buildings to the natural gas supply network, for which an environmental permit for urban planning actions related to new construction is requested as of January 1, 2025.

B.20. It can be seen from the above that the contested provisions meet the conditions to be respected under Article 36 of the TFEU and the case law of the Court of Justice of the European Union in the context of restrictions on the free movement of goods.

The finding that other Member States of the European Union have less stringent provisions than the Flemish Region does not in itself mean that the basic ban would be disproportionate and therefore incompatible with European Union law. The mere fact that a Member State has adopted other measures in order to achieve European objectives in the field of greenhouse gas emissions reduction is irrelevant for the assessment of the necessity and proportionality of the contested provisions (ECJ, 1 March 2001, C-108/96, *Mac Quen and others*, paragraphs 33-34; 19 June 2008, C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and others*, paragraph 31).

B.21. The second plea is unfounded in so far as it is derived from an infringement of Articles 10 and 11 of the Constitution in conjunction with the prohibition of measures having equivalent effect laid down in Article 34 of the TFEU.

With respect to the violation of Articles 10 and 11 of the Constitution in connection with the freedom of enterprise (second part).

B.22.1. The law of February 28, 2013, which introduced Article II.3 of the Economic Code, repealed the so-called d'Allarde Decree of March 2-17, 1791. This decree, which guaranteed freedom of trade and commerce, has been included several times by the Court in its examination based on Articles 10 and 11 of the Constitution.

B.22.2. The freedom of enterprise within the meaning of Article II.3 of the Economic Code shall be exercised " with respect for the international treaties in force in Belgium, the general legal framework of the Economic Union and the monetary unit, as established by or pursuant to the international treaties and the law " (Article II.4 of the same Code).

Thus, the freedom of enterprise must be considered in conjunction with the applicable provisions of the law of the European Union, as well as with the third paragraph of Article 6 § 1 VI of the Special Law of August 8, 1980 on the Reform of Institutions, on the basis of which the Court of Justice - as a rule of the distribution of jurisdiction - may conduct a direct examination.

Finally, freedom of enterprise is also guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union.

B.23. Freedom of enterprise cannot be regarded as an absolute freedom. It does not prevent the competent legislator from regulating the economic activity of persons and enterprises. The latter would only act in an inappropriate manner if it were to restrict the freedom of enterprise without this being necessary in any way or if this restriction were disproportionate to the objective pursued.

B.24. It follows from the statements in B.19.1 to B.20 that the contested measure is proportionate in the light of the objectives it pursues.

B.25. The second plea is unfounded insofar as it is derived from a violation of Articles 10 and 11 of the Constitution in connection with freedom of enterprise.

With regard to the violation of the principle of equality and non-discrimination (first part).

B.26. It follows from the explanations in B.19.1 to B.20 that the decision of the decree-maker to introduce a general prohibition in principle regarding the installation of an oil-fired boiler and the replacement of an oil-fired boiler with an oil-fired boiler instead of a prohibition depending on the characteristics of the oil-fired boiler is objectively justified.

B.27. The second plea in law in the case is unfounded in so far as it is derived from an infringement of the principle of equality and non-discrimination.

With regard to the third plea in law in Case No. 7707 and the single plea in law in Case No. 7726

B.28. The plaintiff parties in Case No. 7707 derive a third plea from a violation by the contested decree of Articles 10 and 11 of the Constitution in conjunction with Article 1 of the First Additional Protocol to the European Convention on Human Rights. According to the plaintiffs, the contested provisions result in different treatment of owners of oil boilers depending on whether or not their home is located in a street with the possibility of connection to the natural gas network.

B.29.1. The plaintiff in Case No. 7726 derive a single cause of action from an infringement by the contested decree of Articles 10, 11 and 16 of the Constitution, per se or in conjunction with Articles 3 and 14 of the European

The applicant submits that the contested provisions introduce a difference in treatment which is not objectively justified between, on the one hand, the owner of an apartment heated by an oil-fired boiler and, on the other hand, the owner of an apartment heated by a natural gas-fired boiler. According to the applicant, the contested provisions introduce a difference in treatment that is not objectively justified between, on the one hand, the owner of an apartment heated by an oil-fired boiler, where the natural gas connection is located on the side of the apartment, and, on the other hand, the owner of an apartment heated in the same way, but where the natural gas connection is located on the opposite side of the street.

B.29.2. Article 14 of the European Convention on Human Rights also guarantees the principle of equality and non-discrimination, but adds nothing to Articles 10 and 11 of the Constitution.

B.29.3. Article 3 of the European Convention on Human Rights states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Torture or cruel and inhuman treatment means those acts in which severe pain or suffering of a physical or mental nature is intentionally inflicted, for example with the aim of obtaining information or confessions from the victim, punishing the victim, or pressuring or intimidating the victim or third parties.

Degrading treatment are actions that seriously offend the person subjected to them in his or her eyes or in the eyes of third parties, or that touch his or her human dignity.

Prohibition of installation of an oil boiler and replacement of an oil boiler with an oil boiler is obviously not an act prohibited by the aforementioned contractual provision. Insofar as the plea alleges that the contested measure violates this contractual provision in a discriminatory manner, it is unfounded.

B.29.4. There is no general principle of law according to which " no one is obliged to perform the impossible ". However, the Court understands the plea as alleging a violation of the general principle of law that the harshness of the law may be mitigated in case of force majeure or unavoidable error.

B.30.1. Article 16 of the Constitution provides:

" No one may be deprived of his property except for the benefit of the general public, in the cases and in the manner determined by law, and against just and prior compensation ".

Article 1 of the First Additional Protocol to the European Convention on Human Rights provides:

"Every natural or legal person has a right to respect for his property. No one may be deprived of his property unless the public interest so requires, and only under the conditions provided by law and by the general principles of international law.

The foregoing provisions, however, shall in no way impair the right of the State to apply such laws as it may deem necessary for regulating the use of property in accordance with the general interest or for securing the payment of taxes or other duties or fines ".

B.30.2. Since Article 1 of the First Additional Protocol to the European Convention on Human Rights has a scope analogous to that of Article 16 of the Constitution, the guarantees contained therein form an inseparable whole with those set forth in Article 16 of the Constitution, which is why the Court takes the former provision into account when examining the challenged provision.

B.30.3. However, Article 1 of the aforementioned Protocol to the European Convention on Human Rights provides protection not only against expropriation or deprivation of property (paragraph 1, second sentence), but against any interference with the right to respect for property (paragraph 1, first sentence) and against any regulation of the use of property (paragraph 2).

B.30.4. As mentioned in B.8.3 and B.10.1, the contested measure does not prohibit the use of an oil boiler, but only regulates the installation or replacement of an oil boiler, respectively. The contested measure therefore regulates the use of property within the meaning of Article 1(2) of the First Additional Protocol and therefore falls within the scope of this treaty provision in conjunction with Article 16 of the Constitution.

B.30.5. According to Article 1 of the First Additional Protocol, the protection of the right to property shall in no way prejudice the right of any State to apply such laws as it may deem necessary to regulate the use of property in accordance with the general interest. A fair balance must be struck between the requirements of the general interest and those of the protection of the right to property. There must be a reasonable connection of proportionality between the means used and the objective pursued.

B.31. As mentioned in B.18, the contested measure pursues legitimate public interest objectives, namely, on the one hand, the reduction of soil contamination cases and, on the other hand, the implementation of the Flemish, Belgian and European objective to reduce greenhouse gas emissions.

B.32.1. Article 23(3)(2) and (4) of the Constitution obliges the competent legislators to ensure the right to health protection and the right to the protection of a healthy environment. In order to protect human health and the environment, it is very important to avoid, prevent or reduce the emission of harmful air pollutants.

B.32.2. Article 23 of the Constitution obliges the competent legislators to guarantee the economic, social and cultural rights whose conditions of exercise they determine, taking into account the corresponding obligations.

From the wording of Article 23 of the Constitution, as well as from its preparatory works, it is clear that the author of the Constitution intended not only to guarantee rights, but also to prescribe duties, starting from the idea that " the citizen is obliged to participate in the social and economic progress of the society in which he lives " (*Parl. Doc.*, Senate, Special Session 1991-1992, No. 100-2/4°, p. 17). Therefore

legislators take into account the " corresponding obligations " when guaranteeing economic, social and cultural rights, according to the wording of paragraph 2 of Article 23.

B.32.3. Although the European Convention on Human Rights does not explicitly include the right to a healthy environment, its protection is an important societal duty (ECtHR, 27 November 2007, *Hamer v. Belgium,* § 79). Moreover, the right to respect for private and family life could be affected if persons become direct and serious victims of air pollution. Economic concerns and even some fundamental rights, such as the right to property, do not necessarily take precedence over considerations of protection of the environment and public health. Restrictions on property rights can therefore be accepted, but on condition that a fair balance is struck between the individual interests involved and those of society as a whole (ECtHR, 27. November 2007, *Hamer v. Belgium*, §§ 79-80; November 18, 2010, *Richet and Le Ber and others v. France*, §§ 115 and 124; March 16, 2021, *Gavrilova and others v. Russia,* §§ 74 and 87; September 21, 2021, *Bērziņš and others v. Latvia,* § 90).

The Contracting Party has a wide freedom of judgment in this regard, both in determining the manner in which the objective of protecting the environment can best be achieved and in assessing whether the consequences of the regulation in question are justified in the light of that objective. This assessment can be disapproved only if it is manifestly objectively unjustified (ECtHR, 25 November 2014, *Plachta and Others v. Poland*, § 101; 28 July 1999, *Immobiliare Saffi v. Italy*, § 49;
November 20, 2003, *Koustelidou and others v. Greece*).

In this context, the fact that the use of property regime is intended to implement the obligations imposed by the European Union to protect the environment is particularly significant (ECtHR, June 7, 2018, *O'Sullivan McCarthy Mussel Development Ltd. v. Ireland,* § 125).

B.33. As mentioned in B.19.1, the general ban on the installation and replacement of oil-fired boilers, due to its positive impact on the

reduction of greenhouse gas emissions and soil protection is an appropriate measure to ensure effective protection of the environment and the climate.

Insofar as the plaintiff parties in Case No. 7707, with their objection regarding the lack of relevance of the distinguishing criterion, criticize the decision of the issuer of the decree not to establish the contested measure as a function of the characteristics of the oil-fired boiler, this objection is unfounded for the reasons mentioned in B.19.1 above.

B.34.1. With respect to the proportionality of the contested measure, as mentioned in B.19.2, by opting for a partial phase-out of fossil heating systems, the Decretary has taken into account the impact of such a prohibition measure on mainly the owners of existing installations. The contested measure is therefore limited to those installations that, according to the scientific study commissioned by the Decretary, are the most polluting and, at the same time, is intended to provide the owners concerned with an economically feasible alternative by allowing them to convert to natural gas and not obliging them to switch immediately to non-fossil heating systems, such as a heat pump.

B.34.2. In this regard, the Claimant Parties concede in Case No. 7707 that in the Flemish Region the vast majority of buildings can be connected to the natural gas network and that Article 4.1.13 of the Energy Decree limits the cost of connecting an existing connectable or unconnectable residential unit or building to the natural gas supply network to EUR 250.

In contrast, it is clear from the preparatory work on the contested decree that a switch to non-fossil heating systems such as a heat pump is not so easy for owners of existing apartments. When asked about a rationale for limiting the exception regarding the availability of a natural gas network to existing buildings, the initiators of the contested decree replied as follows:

" Les bâtiments existants ont une structure et un emplacement déjà établis, de sorte qu'il n'est pas toujours possible de remplacer le mazout par une autre option, quelle qu'elle soit, de

manière rentable. Cependant, pour les nouveaux bâtiments et les rénovations énergétiques substantielles, l'architecte peut toujours faire les choix nécessaires durant la phase de conception et adapt le projet en fonction des autres solutions de chauffage disponibles. Une telle méthode n'est pas ou est moins évidente lors du remplacement d'une chaudière à mazout dans un bâtiment existant. Dans ces situations, le gaz naturel joue encore un rôle prépondérant pour remplacer le mazout, ce qui implique que l'absence d'un réseau de distribution de gaz naturel comme solution de remplacement emporterait une charge disproportionnée pour les propriétaires de chaudières à mazout existantes qui doivent être remplacées " (*Parl. Dok.*, Flemish Parliament, 2020-2021, No. 813/5, p. 3).

This justification was also referred to during the preparatory work for the aforementioned decree of March 18, 2022:

"La distinction est ainsi justifiée par la circonstance objective, d'une part, que, dans les habitations existantes, il n'est pas toujours possible d'installer rapidement d'autres solutions de chauffage, lesquelles nécessitent parfois des rénovations particulièrement lourdes (pompe à chaleur basse température, haut degré d'isolation nécessaire, systèmes d'émission de chaleur différents, etc.).), et aussi que le gaz naturel est mis en avant comme remplacement du mazout dans ces autres mesures, et, d'autre part, que le maître d'ouvrage et l'architecte tiennent compte beaucoup plus facilement d'autres options de chauffage dans le cadre de la conception et du design de nouveaux bâtiments " (*Parl. Dok.*, Flemish Parliament, 2021-2022, no. 1154/1, p. 21).

Thus, the cost of a heat pump, regardless of the other investments associated with a switch to such a heating system, turns out much higher than for a natural gas condensing boiler.

Under these circumstances, there is no manifest error of judgment in imposing on the owner of an existing dwelling heated by an oil-fired boiler a prohibition on replacing the boiler or boiler body if a natural gas network is available in the street.

In this regard, it must be recalled that, as mentioned in B.10.1 and B.30.4, the contested measure does not prohibit the use of an oil boiler, but only applies when the life of the oil boiler, boiler body or other heating technology has expired or when the owner himself decides to no longer heat his dwelling with the help of an oil boiler. Moreover, the contested decree allows the replacement of other parts of the oil boiler, such as the burner, the chimney, the pump or the electronics.

B.34.3. Moreover, contrary to the claimant's submission in Case No. 7726, it is established in an objective and legally certain manner in which cases an apartment can be connected to the natural gas network, even with regard to the situation in which the natural gas supply network is located on the opposite side of the street.

In the context of the exception to the prohibition measure, " if there is no natural gas network available in the street ", the contested decree refers to articles 1.1.3, 4.1.13 and 4.1.15 of the Energy Decree, which describe the cases in which a dwelling must or can be connected to a natural gas network.

Article 1.1.3 of the Energy Decree states:

" Dans le présent décret, on entend par :

[...]

3° unité d'habitation ou bâtiment raccordable : une unité d'habitation ou un bâtiment qui n'est pas encore raccordé au réseau de distribution de gaz naturel, et qui répond à l'une des conditions suivantes :

a) une conduite à basse pression est présente le long de la voie publique du même côté de la voie et à la hauteur de l'unité d'habitation ou du bâtiment;

b) l'unité d'habitation ou le bâtiment n'est pas situé dans une zone destinée à l'habitat, et une conduite à basse pression est présente le long de la voie publique à la hauteur de l'unité d'habitation ou du bâtiment, du même côté, ou non, que l'unité d'habitation ou le bâtiment concerné;

c) a conduit à moyenne pression de catégorie A ou B est présente le long de la voie publique du même côté de la voie que l'unité d'habitation ou le bâtiment et cette conduit a été réalisée spécifiquement pour le raccordement respectivement des unités de logement ou des bâtiments;

[...] ".

Article 4.1.13 of the Energy Decree, as last amended by Decree 18 March 2022. " amending the Energy Decree of May 8, 2009 ", determined:

" § 1er. Pour le raccordement au réseau de distribution de gaz naturel d'une unité d'habitation ou d'un bâtiment raccordable dans la zone géographique pour laquelle il a été désigné, le gestionnaire du réseau de distribution de gaz naturel peut facturer un prix maximal de 250 euros, si les conditions suivantes sont satisfaites de manière cumulative :

1° la capacité de la conduite de gaz naturel le long de la voie publique, où l'unité d'habitation ou le bâtiment raccordable est situé, est suffisante;

2° la distance entre la conduite de gaz naturel et le futur point de prélèvement ne dépasse pas 20 mètres;

3° la capacité de raccordement demandée est inférieure ou égale à 10 m^3 (n) par heure;

4° la pression de fourniture demandée est de 21 ou de 25 mbar.

§ 2. Si le gestionnaire de réseau de distribution de gaz naturel décide néanmoins, pour des raisons d'ordre technique ou économique, de raccorder un bâtiment non raccordable situé dans une zone destinée à l'habitation, par forage sous voirie à une conduite de gaz naturel située de l'autre côté de la rue, dans la zone géographique pour laquelle il a été désigné, il peut facturer un prix maximal de 250 euros, si les conditions suivantes sont satisfaites de façon cumulative :

1° la capacité de la conduite de gaz naturel le long de la voie publique, où l'unité d'habitation ou le bâtiment non raccordable est situé, est suffisante;

2° la distance entre la conduite de gaz naturel et le futur point de prélèvement ne dépasse pas 20 mètres;

3° la capacité de raccordement demandée est inférieure ou égale à 10 m^3 (n) par heure;

4° la pression de fourniture demandée est de 21 ou de 25 mbar ".

Article 4.1.15 of the Energy Decree, as last amended by the Decree of March 10, 2017. "amending the Energy Decree of 8 May 2009 in relation to connectivity to a natural gas supply network and confirming the continuity of the sanctioning of energy efficiency regulations ", determined:

" Chaque gestionnaire de réseau de gaz naturel est tenu de raccorder chaque client qui achète du gaz naturel pour sa propre utilisation domestique et non pas pour des activités commerciales ou professionnelles au réseau de distribution de gaz naturel en conformité avec les règles du règlement technique applicable s'il y est invité, à condition que :

a) le demandeur puisse produire un permis d'environnement pour les actes urbanistiques valable en cas de construction neuve;

b) l'habitation soit principalement autorisée ou réputée autorisée en cas d ' unités d'habitation existantes ou d'habitations existantes ".

It follows from these provisions of the Energy Decree that it is incumbent upon the operator of the natural gas supply network, on the basis of technical and economic reasons and on the basis of the objective criteria provided in these provisions, to

are to consider whether a dwelling, which, like that of the plaintiff in Case No. 7726, is located on the opposite side of the natural gas supply network, can be connected. In this regard, the explanatory memorandum to the decree proposal that led to the contested decree indicates that the question " whether or not an apartment or residential building can be connected to the natural gas supply network [...] can be easily checked via the Fluvius website " (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/1, p. 16).

Thus, the criticism raised by the plaintiff in Case No. 7726 is unfounded, all the more so as the contested decree allows it to replace its oil-fired boiler or boiler body with another oil-fired boiler or boiler body if the operator of the natural gas supply network considers that its dwelling cannot be connected to a natural gas network. Against this background, it is not necessary to consider whether the contested provisions violate the general principle of law that the hardship of the law may be mitigated in case of force majeure or unavoidable error.

To the extent that the criticism raised by the applicant in Case No. 7726 relates to the criteria which the operator of the natural gas supply network must observe in its investigation or to the manner in which it conducts its investigation, it criticizes the provisions in respect of which the time limit for bringing an action for annulment has long expired, or criticizes the application of those provisions, in respect of which the Court does not have jurisdiction.

B.34.4. Furthermore, although the contested decree is intended to provide the owner of an existing dwelling heated by an oil boiler with an economically and practically feasible alternative, it does not oblige him to switch to natural gas. The contested decree does not prevent him from replacing his oil boiler with a non-fossil heating system, such as a heat pump, in light of recent developments in the gas market.

As stated in the explanatory memorandum to the proposal regarding the contested decree (*Parl. Doc.*, Flemish Parliament, 2020-2021, No. 813/1, p. 16), the Flemish

region not only addresses the possibility of switching to environmentally friendly heating systems, but also facilitates it.

On the one hand, the decree of the Flemish Government of November 19, 2010 " establishing general provisions on energy policy " contains all kinds of premiums for, among other things, the promotion of environmentally friendly heating methods such as heat pumps and for building insulation in order to reduce energy demand related to heating. These premiums have also been increased such as the premiums for air-source heat pumps and hybrid heat pumps installed in residential and other buildings, these premiums having been increased by the Decree of the Flemish Government of February 4, 2022 " creating a community desk for the application and processing of certain housing and energy premiums and amending the Energy Decree of November 19, 2010 and the Decree on the Flemish Housing Code of 2021 ".

On the other hand, only the protected customers and the preferred target group can still benefit from the energy loan related to a premium for the installation of a new condensing central heating boiler fuelled by natural gas, butane gas or propane gas (article 6.4.1/4 of the Decree of the Flemish Government of November 19. (Article 6.4.1/4 of the Decree of the Flemish Government of November 19, 2010 "establishing general provisions on energy policy", amended by the Decree of September 18, 2020 "amending the Energy Decree of November 19, 2010 as regards the introduction of a premium for the installation of photovoltaic solar panels and the amendments concerning the premiums for the rational use of energy"). In this way, the Flemish Region wishes to mitigate the impact of the contested measure on vulnerable persons within the meaning of Article 1.1.1 § 2 nos. 7 and 81/1 of the Energy Decree of 19 November 2010 (*Parl. Doc.*, Flemish Parliament, 2020-2021, no. 813/1, p. 16), but at the same time a general incentive is created to opt for the replacement of an oil boiler by a non-fossil heating system.

B.34.5. Finally, it follows from B.10.4 that the impact of the contested measure on the sale (and therefore also on the installation and replacement) of oil boilers can be considered limited. Moreover, the scientific study referred to in the aforementioned recital states in this context that, due to the well-developed natural gas network in

the Flemish Region and the rise of new technologies such as heat pumps had already decreased before the adoption of the contested measure. The plaintiff parties in Case No. 7707, who are professional suppliers of heating oil products, should thus already have been aware of the impact of the rise of environmentally friendly heating technologies on their activities and of the reinforcing effect that the obligations that European law on the protection of the environment and the climate imposes on the Member States could have on them.

B.35. It is clear from the above that there is an appropriate relationship between the means employed and the objective pursued. The contested provisions strike a fair balance between the requirements relating to the protection of property rights, on the one hand, and the requirements relating to the general interest and other affected individual interests, on the other.

B.36. In so far as they are derived from a violation of Articles 10, 11 and 16 of the Constitution, per se or in conjunction with Article 14 of the European Convention on Human Rights and with Article 1 of the First Additional Protocol to the European Convention on Human Rights, the third plea in Case No. 7707 and the single plea in Case No. 7726 are unfounded.

B.37. Since the applicant in Case No. 7726 does not take from the principle of reasonableness and the principle of proportionality any arguments other than those which it derives from Article 16 of the Constitution and Article 1 of the first Additional Protocol, the plea is also unfounded in so far as it is derived from a violation of Articles 10 and 11 of the Constitution in conjunction with those principles.

For these reasons:

The Court

rejects the claims.

Issued in Dutch, French and German, pursuant to Article 65 of the Special Act of 6 January 1989 on the Constitutional Court, on 10 November 2022.

The Chancellor, The President,

P.-Y. DutilleuxL . Lavrysen