Case note to Schaefer Kalk GmbH tegen Bundesrepublik Deutschland, C-460/15 (calculation of CO2 emissions transported outside the installation)

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The Urgenda case in the EU multi-level governance system

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1. Introduction

On 24 June 2015, the District Court in The Hague issued a long-awaited judgment in the case of *Urgenda Foundation v. The State of the Netherlands*.[2] The decision obliges the Dutch State to reduce its greenhouse gas ("GHG") emissions by at least 25% by 2020, instead of the currently envisaged 17%, compared to 1990 levels. The decision is unique in its kind in Europe in that it forces a government to change its policies in pursuit of more ambitious greenhouse gas reduction targets on the basis of the State's "duty of care". It is, from this perspective, the first case in which the tort of negligence has been successfully used to hold a state liable for failing to adequately mitigate climate change.

The ruling under examination contains legal issues which are typical of a multi-level governance system: the court had to consider questions of Dutch constitutional and tort law, European law, and international climate and human rights law. The questions examined by the Dutch judges are relevant for lawyers of all expertise: how to determine causation in scientifically complex situations? What is the role and enforceability of principles of constitutional, European and international law? Where is the limit to the courts' mandate? How should one interpret *trias politica* and what room should be left for the government to make unreviewable policy choices?

One of the more "technical" and seemingly less political questions which can be found in the ruling concerns the role of EU law. The question that the court had to address is whether the Dutch State acted unlawfully by "only" pursuing the reduction targets that were imposed upon the Netherlands by EU law. In other words, can or must the Netherlands go beyond the climate legal framework set up by the EU and, more generally, can, or must, a Member State go beyond the sets of obligations imposed to it by European law?

This case note will concentrate further on this specific European dimension which "the scholarly debate on the legal and constitutional implications of *Urgenda* has left […] relatively unexplored".[3] First, this case note will briefly review the EU legal framework which the *Urgenda* ruling is set against, and, secondly, it will assess whether the District Court in the Hague has correctly used EU law in its decision. In doing so, an account will be given of the doctrine which has dealt with this question in commenting the *Urgenda* decision.[4]

2. The EU law framework and how it has been considered by the Dutch court

The *Urgenda* ruling must be set against the climate change legislation adopted by the European Union. The EU climate policy for 2020 has been formulated in the Presidency conclusions of the European Council of May 2007, in which a reduction policy of 20% with regard to 1990 emissions was pledged to be achieved by 2020.[5] This reduction policy has been implemented through the European Emission Trading Scheme and the Effort Sharing Decision.

The European Emissions Trading Scheme ("ETS") establishes an EU-wide GHG emission reduction target for 2020. All industrial sectors covered by the ETS Directive[6] must reduce their emissions by 21% compared to 2005 levels. Sectors not covered by the ETS, such as buildings, agriculture and transport are covered by the Effort Sharing Decision,[7] which esta-

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2 Urgenda v. The Netherlands, The Hague District Court (24 June 2015) ECLI:NL:RBDHA:2015:7196(originallanguage:ECLI:NL:RBDHA:2015:7145).

3 J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?', *Transnational Environmental Law* 2015/4 (issue 2, p. 339-357) 357. Interesting to note is that while van Zeben remarks the absence of a discussion of the EU law aspects of the case, she does not discuss these aspects herself. See, however, for notable exceptions: T. Thurlings, 'The Dutch Climate Case – Some Legal Considerations', available at http://ssrn.com/abstract=2696343 (last accessed on 14 January 2016) and M. Peeters, 'Europees klimaatrecht en nationale beleidsruimte' *NJB* 2014 (issue 41, p. 2918-2925).

4 Please note that this perspective is by nature short and will touch upon issues that require further consideration; hence, this perspective primarily intends to raise some fundamental questions of EU law that merit further and more in-depth discussion (and also consideration by the courts).

5 Presidency Conclusions points 31 and 32, available at www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/93135.pdf (last accessed on 14 January 2016).

6 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 [2003] OJ L 275/32.

7 Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136.

blishes binding annual greenhouse gas emission targets for Member States. According to the Decision, the Netherlands must achieve a reduction of 16% compared to 2005 levels.

According to the *Urgenda* ruling, the current Dutch climate policies are expected to achieve a 17% GHG emission reduction by 2020. This was considered a fact in the District Court ruling, and was not disputed by either party.[8]

The core of the Dutch State's argument regarding EU law was that the Netherlands cannot go beyond the EU ETS reduction target. The Dutch Court dismissed the State's argument. According to the Court, the ETS does not prevent EU Member States from pursuing higher GHG emission cuts. The Court also added that Urgenda mentioned several national measures (such as renewable energy measures in Denmark and the "carbon price floor tax" in the United Kingdom)[9], taken outside the EU ETS scheme, which allegedly serve to influence (directly or indirectly) the greenhouse gas emissions of national ETS businesses.[10]

An assessment of the Court's use of EU law in the ruling means an assessment of the correctness of the Court's approach vis-à-vis the Dutch State's argument. The ruling of the Court could be interpreted in at least two different ways, which will be reviewed below.

2.1. *By questioning the Dutch transposition of the EU targets, the Dutch court is implicitly questioning EU law*

Thurlings, and a number of other commentators, have argued that, by ruling that the established Dutch target is below the effort deemed necessary for developed countries (25-40% by 2020) in order to prevent dangerous global climate change, the Dutch court implicitly considered the EU target (unlawfully) below the necessary standard. This is because Dutch policy aims to be entirely consistent with the EU requirements. So, by finding the Dutch policy insufficient and thus unlawful, the Dutch court implicitly finds the EU climate law approach, implemented through the EU Effort Sharing Decision and the EU ETS, unlawful.[11]

However, when national courts have doubts on the lawfulness of EU legislation, they must seek a preliminary ruling from the European Court of Justice pursuant to Article 267 TFEU and the Court's ruling in *Foto-Frost*.[12] The possible consequence of such a preliminary question, if the Court finds the challenged EU measure unlawful, is the invalidation of the measure, i.e. the deprivation of its legal effects.

Questioning the lawfulness of EU law and implicitly suggesting it is unlawful without sending a preliminary question of validity to the Court of Justice represents a violation of the division of competences between the Court of Justice and the national courts. It also brings about a high degree of legal uncertainty, as it is not clear which legal consequences should be attached to this implicit "declaration of unlawfulness" made by the Dutch court. Should we equate this declaration to an "implicit invalidation"? And what would be then, in turn, the legal consequences of such "implicit invalidation"?

If one were to argue that the Dutch court implicitly invalidated the EU Effort Sharing Decision and the EU ETS, it could mean that the two pieces of legislation would now in principle no longer produce legal effects in the Netherlands. This would create a considerable legal vacuum, as parts of EU climate law would no longer apply in the Netherlands. This situation would endanger the uniform application of EU law and the duty of loyal cooperation contained in Article 4 TEU. On this basis, the European Commission could conceivably soon start considering whether to start infringement proceedings against the Dutch State under Article 258 TFEU for failure to comply with its EU law obligations stemming from EU climate legislation.

In my view, while it seems that the Dutch court did doubt the lawfulness of EU law, it is not entirely straightforward whether an "implicit invalidation" of EU law has taken place in *Urgenda*. The wording of the ruling does not seem to suggest this: "[I]t is an established fact that with the current emission reduction policy of 20% at most in an EU context (about 17% in the Netherlands) for the year 2020, the State does not meet the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2°C target". The reference to the EU system is present and it is considered the basis for the current Dutch climate legislation. However, questioning Dutch climate legislation "in an EU context", might mean, but does not necessarily need to mean, invalidating EU climate legislation.

One wonders, in this light, whether the Dutch court knew exactly what the legal consequences would be of questioning Dutch climate policy "in an EU context", and, if so, why it did not state them explicitly.

The lack of clarity surrounding the relevant paragraphs of the ruling allows also for a second possible interpretation of the Court's considerations on EU law: the language used by the Dutch court seems indeed to also point in the direction

8 See para 4.33 of the ruling.

9 While no in-depth discussion of these systems will be provided in this case note, it should be pointed that it is at least debatable whether a tax could be considered as providing the necessary certainty to achieve a reduction of GHG emissions.

10 See para 4.80 of the ruling.

11 T. Thurlings, 'The Dutch Climate Case – Some Legal Considerations' available at http://ssrn.com/abstract=2696343 (last accessed on 14 January 2016), 2; K.J. de Graaf and J. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', *Journal of Environmental Law* 2015/27 (p. 517-527) 518; L. Bergkamp in The Urgenda judgment: a "victory" for the climate that is likely to backfire, available at http://www.energypost.eu/urgenda-judgment-victory-climate-likely-backfire/ (last accessed 14 January 2016); Ch. Backes, Noot bij Rechtbank Den Haag, 24 juni 2015, nr. C/09/456689 / HA ZA 13-1396, *AB Rechtspraak Bestuursrecht* 2015 (issue 36, 2095-2116) 2115.

12 Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, ECLI:EU:C:1987:452.

of the obligation for the Netherlands to adopt more stringent, yet fully EU-compliant, climate policies. This second interpretation will be discussed below.

2.2. *The Dutch court is questioning the nature of 'full harmonisation' pursued by EU climate legislation*

In para 4.80 of the ruling, the Dutch court states that "Urgenda was right in arguing that regardless of the ceiling Member States have the option to influence (directly or indirectly) the greenhouse gas emissions of national ETS businesses by taking own, national measures." and that "[I] n response to Urgenda's argument, the State acknowledged in a more general sense that it is legally and practically possible to develop a national ETS sector policy that is more far-reaching than the EU's policy. It is of the opinion of the court that the European legislation discussed here does not prevent the State from pursuing a higher reduction for 2020." The court thus argued that the EU-wide cap set in the EU ETS should be seen as a minimum threshold rather than a reduction ceiling.

In this paragraph, the Dutch court seems to suggest that Dutch law, while in compliance with EU law, should have set more ambitious goals than those provided for by EU law. In order to explain this perspective, reference should be made to Article 193 TFEU which allows a Member State to pursue a more ambitious environmental policy than that set at EU level, provided that it is compatible with the Treaties.

If one were to argue that this is the Court's approach vis-à-vis EU law (rather than an invalidation approach), one could conclude that the Dutch court is in essence 1) *ordering* the Dutch State to make use of Article 193 TFEU and 2) suggesting that *omitting* to do so would end up in a violation of Dutch tort law.

This approach can be considered controversial, because it is not clear to what extent such more ambitious national action would be lawful from the perspective of EU law, which is a necessary prerequisite for the use of Article 193.[13] While more stringent national measures are allowed under the Effort Sharing Decision,[14] a preliminary question of primary (i.e. Article 193 TFEU) and secondary (i.e. the EU ETS Directive) EU law should have been asked by the Dutch court, before concluding that a more stringent Dutch policy is compliant with EU law in the first place. Instead the Dutch court merely states that it does not agree with the State's argument that a "Member State is not allowed to reduce more than the amount adopted in EU policy" (para 4.80), without arguing why such Member State action is allowed under EU law.

As such, national courts escape the obligation to ask preliminary questions of interpretation to the Court of Justice under Article 267 TFEU only if three conditions, set in the *CILFIT* ruling,[15] are met i.e. whether the question raised is irrelevant to render judgment, whether the question has already been answered in a previous ruling of the Court of Justice, or whether the answer to the question is so obvious as to leave no room for doubt as to what interpretation should be given to a certain EU law provision. The latter situation, the so-called *acte claire* doctrine, might be what could have been at stake in the *Urgenda* case.

In other words, the Dutch court, by not asking whether and to which extent more stringent national measures are allowed by EU law in such situation, seem to have taken for granted that the question can be answered in the affirmative, and that the *acte claire* doctrine would not require a preliminary question.

In my view, this approach might be considered in violation of Article 267 TFEU and the *acte claire* doctrine. This is because, in order for a national court to be exempted from asking a preliminary question on the basis of the *acte claire* doctrine, it is required that the interpretation of EU law must be "so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the court of justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it."[16]

It can hardly be sustainable that the legal issue at stake required no preliminary question on the basis of the *acte claire* doctrine, given the highly integrated nature of the EU ETS system (which makes it at least questionable whether more stringent national measures are allowed) and the uncertainties surrounding the scope of application of Article 193 TFEU.[17] The fact that, according to the Court, Urgenda reported the alleged existence of several of such more stringent measures[18] does not alter this conclusion, as the compatibility of these measures with EU law has not been established. It could therefore be concluded that, by not as-

13 L. Squintani, M. Holwerda and K. de Graaf, 'Regulating greenhouse gas emissions from EU ETS installations: what room is left for the member states?', in M. Peeters, M. Stallworthy, Javier De Cendra de Larragán (Eds) *Climate Law in EU Member States: Towards National Legislation for Climate Protection* (Edward Elgar, 2012), 67-88.

14 See para 17 of Decision 406/2009/EC.

15 Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, ECLI:EU:C:1982:335.

16 Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, ECLI:EU:C:1982:335, para 16.

17 See for a discussion, M. Peeters, 'Case Note - Urgenda Foundation and 886 Individuals vs The State of The Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' Review of European, Comparative and International Environmental Law 2016/25 (issue 1) (forthcoming). See also Thurlings, who is skeptical on the possibility to adopt more stringent measures in ETS sectors. T. Thurlings, 'The Dutch Climate Case – Some Legal Considerations', Considerations' available at http://ssrn.com/abstract=2696343 (last accessed on 14 January 2016), 6.

18 The Court reports "increasing the share of sustainable energy in the national electricity network in Denmark and the introduction of the carbon price floor tax in the United Kingdom". See para 4.80.

king a preliminary question, the Dutch court seems to have violated Article 267 TFEU and the duty of loyal cooperation contained in Article 4 TEU which invites the EU and the Member States to respect and assist each other in carrying out tasks which flow from the Treaties.

3. The EU external relations perspective: by questioning the EU climate change mitigation measures, the Dutch court is breaching the duty of loyal cooperation

Because of the interlocked (international, European, and national) legal orders which the Dutch court had to consider, the ruling needs to be examined not only for compliance with "internal" EU law, but also from that of the external relations of the EU and their interaction with those of the Member States.

In particular, in the case under examination, the framework is provided by the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, as well as by the declarations made by the Parties under the auspices of these instruments. Both the UNFCCC and the Kyoto Protocol are so-called "mixed agreements" as both the EU and the Member States are parties to it and they both share the competence to negotiate and conclude international agreements in the field of environmental law.

While Member States thus negotiate and conclude international agreements independently from the EU and as full actors in international law (also in areas of EU competence), it was already in the *AETR* judgment of 1971, that the CoJ derived from former Article 5 EEC Treaty (now Article 4(3) TEU) a prohibition for the Member States to exercise their external competences when this would risk to affect internal Union rules or alter their scope.[19] Furthermore, the CoJ has also more clearly constrained Member States' action in the context of mixed external action in the *PFOS* case,[20] in which it held that a Member State's unilateral action under a mixed agreement would violate the principle of unity in international representation as well as the EU's negotiating power on the international stage.[21]

While the *PFOS* case concerns a national government's action in the framework of the State's membership in an international organisation, the principle contained in the ruling seems to be equally applicable to the case under examination, because, for the purposes of EU law, all actions by all national authorities are imputable to the Member State.

In this context, one should be reminded that, as part of its negotiation strategy for 2020, the European Union reiterated its *conditional* offer "to move to a 30 per cent reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities".[22] Such strategy could be jeopardized if Member States take unilateral action (in form of legislation as a consequence of court orders) to achieve more ambitious targets than the EU promised at the international level.[23]

Therefore, although within its sole discretionary power, one may not exclude that the European Commission could, in principle, start infringement proceedings against the Dutch State under Article 258 TFEU for violation of the principle of loyal cooperation. It could be imagined that the Commission would have indeed an interest in setting a clear precedent against national courts' unilateral actions deviating from the EU international negotiating strategy.

4. Conclusion

The *Urgenda* ruling might open a new era of climate change litigation, marked by the empowerment of environmental NGOs in asking national courts to order the national legislators to comply with internationally recognized (though not binding) climate change mitigation targets. The complexity of the case leaves lawyers with many open questions, which will hopefully be dealt with and answered in appeal.

From a EU law perspective, one is faced with a rather disappointing picture: the EU climate change legislative framework is examined only in passing, and the Dutch court did not seem to have taken its role as "Community court of general jurisdiction"[24] seriously. While the wording of the ruling and its intention does not seem to point towards a willingness on the side of the Court to rule on the validity of EU climate law, the ambiguity in the formulation of the underlying EU law problem does certainly not contribute to the overall clarity of the Court's reasoning. Furthermore, even if one only reads a willingness on the side of the Court to interpret the current EU legislative framework as allowing more stringent national measures, a preliminary question should have been asked to establish whether and to what extent that very specific framework does indeed allow a Member State to go beyond the EU requirements. Altogether, it is regrettable that the EU law framework, although highly relevant for the questions discussed in the ruling, seems to have been neglected (or so it seems by reading the judgment) by all parties to the proceedings and by the court.

19 Case 22-70, Commission of the European Communities v Council of the European Communities, ECLI:EU:C:1971:32.

20 Case C-246/07, Commission v Sweden, ECLI:EU:C:2010:203.

21 Case C-246/07, Commission v Sweden, ECLI:EU:C:2010:203, para 14.

22 See footnote 7 of the new Annex B proposed by the Doha Amendment.

23 See along those lines Peeters, who argues that the unity in the EU's international negotiation strategy might be undermined by national courts rulings setting tougher standards than the EU wishes to negotiate at the international level. M. Peeters, 'Case Note - Urgenda Foundation and 886 Individuals vs The State of The Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' Review of European, *Comparative and International Environmental Law* 2016/25 (issue 1) (forthcoming).

24 Case T-51/89, Tetra Pak Rausing SA v Commission of the European Communities, ECLI:EU:T:1990:41, para 42.

Therefore, it is certainly to be hoped that the Court of Appeal will ask a preliminary question to clarify the EU law component of the litigation[25] and that the competent Belgian court where a claim similar to the one brought by *Urgenda* is pending[26] will also not shy away from using the preliminary ruling procedure, the unique dialogue mechanism created by the Treaties and the necessary instrument to allow a uniform interpretation and application of EU law, an essential pre-requisite of the EU multi-level governance system.

25 It is confirmed that an appeal will be filed. See https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal (last accessed on 14 January 2016).

26 For more information, see http://klimaatzaak.eu/nl/rechtzaak/ (last accessed on 14 January 2016).