

DUTCH COURT ORDERS SHELL TO REDUCE CO2 EMISSIONS BY 45% BY THE END OF 2030 RELATIVE TO 2019 LEVELS IN ACCORDANCE WITH PARIS CLIMATE AGREEMENT

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Legal Briefings

On 26 May 2021, the Hague District Court handed down its judgment in the *Milieudefensie et al. vs. Royal Dutch Shell* ("**RDS**") case regarding RDS's compliance with the objectives of the 2016 Paris Agreement.

The claim was brought by seven environmental associations and NGOs acting as co-claimants - led by Milieudefensie (Friends of the Earth Netherlands) alongside Greenpeace Netherlands, Fossilvrij NL, Waddenvereniging, Both Ends and Jongeren Milieu Actie - together with 17,319 individual co-claimants.

THE KEY ISSUES AND RULING:

The central question for the Court was whether or not RDS should be required make further changes to the Shell group's existing corporate policy to reduce the CO2 emissions of the entire Shell group's energy portfolio to achieve lower emission levels by the end of 2030, relative to 2019 levels.

The Court also had to consider whether any such obligation should extend across all scopes of emission, including 'direct' emissions from sources owned or controlled by the Shell group and 'indirect' emissions that occur in the Shell group companies' value chain but which are not in the Shell group's control or ownership. The World Resources Institute Greenhouse Gas Protocol (GHG Protocol) categorises greenhouse gas emissions in Scope 1, 2 or 3 as follows:

- Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organisation;
- Scope 2: indirect emissions from third-party sources from which the organisation has purchased or acquired electricity, steam, or heating for its operations; and
- Scope 3: all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organisations or consumers, including emissions from the use of third-party purchased crude oil and gas.

The Court accepted that Dutch law applies to the claimants' non-contractual claims arising out of CO₂ emissions related climate change because, under Article 7 of EU Regulation No. 864/2007 on the law applicable to non-contractual obligations (Rome II), the law to be applied was that where the '*event giving rise to the damage*' occurred. The Court found that, in this case, the '*event giving rise to the damage*' was RDS's development of its corporate policy for the entire Shell group in its Dutch headquarters, as this could contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region. The policy-setting position of RDS within the Shell group therefore meant that Dutch law should apply to these claims.

Having ruled that Dutch law was applicable, the Court then determined that under Book 6 Section 162 of the Dutch Civil Code, RDS owed an unwritten duty of care to Dutch residents and the inhabitants of the Wadden region to take adequate action to curb contributions to climate change, even as a private company and not a state actor. The Court held that to act contrary to what is generally accepted under that duty of care is unlawful under Dutch law.

The Court had regard to a wide range of 'soft law' instruments (in particular, the UN Guiding Principles on Business and Human Rights), internationally recognised guidance, human rights conventions and relevant facts specific to the Shell group's operations. In particular, the Court stressed what it considered to be the significant CO₂ emissions output from the Shell group in its assessment of what standard should be expected of RDS in meeting that duty. It commented that "*the total CO₂ emissions of the Shell group (Scope 1 through to 3) exceeds the CO₂ emissions of many states, including the Netherlands*".

Ultimately, the Court ruled that RDS should be '*obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy*'. This decision means that RDS and the Shell group are required to accelerate their existing emissions reductions programmes to achieve a drastic 45% reduction in RDS and the Shell groups' CO2 emissions by 2030 (relative to 2019 levels). Such reduction is required to ensure the Shell group's corporate policy is in line with the Paris Agreement. The reduction ordered by the Court applies to 'direct' and 'indirect' emissions across Scopes 1-3, but the Court gave RDS discretion in allocating emissions reductions between Scope 1, 2, and 3 related emissions, provided that the total emissions were reduced by 45% in aggregate. The Court also differentiated between the different scopes of emissions by Shell and related reduction obligations: whereas the Court imposed an absolute obligation (*resultaatsverplichting*) to reduce Scope 1 emissions and emissions by the Shell group, the reduction obligation in relation to Shell's supply chain and Scope 3 emissions is expressed on a 'best efforts' basis (*zwaarwegende inspanningsverplichting*).

THE SIGNIFICANCE OF THE RULING:

The judgment is significant as it is the first time a national court has compelled a private company to reduce its emissions in line with the Paris Agreement, and builds on the earlier landmark Dutch decision in Urgenda imposing similar obligations on the Dutch government itself to augment its policies to ensure speedier emissions reductions in line with the Paris Agreement.

This ruling will likely have wider implications for the energy industry or other companies with significant CO2 emissions levels, in particular in circumstances where corporate policy decisions are alleged to have been taken by group entities registered in the Netherlands.

Shell has announced its intention to appeal the judgment. In the Netherlands, cases are heard at first instance in District Courts. The first instance decision can then be appealed to the Court of Appeal, without leave for appeal, on one of the following grounds:

- the court's assessment of the facts and/or evidence;
- the court's application of the law; and/or,
- the grounds the court gave for its decision.

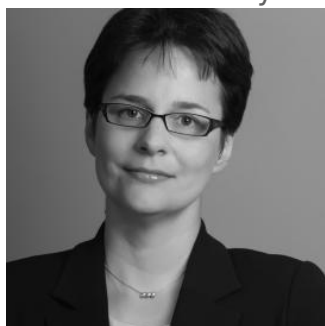
Following a decision by the Court of Appeal, under certain circumstances it may be possible to appeal to the Supreme Court of the Netherlands.

The Dutch Supreme Court is a court of cassation, which means that it has the competence to quash or affirm rulings of lower courts (usually the Court of Appeal), but has no competence to re-examine or question the facts. It only considers whether the lower courts applied the law correctly and whether the judgment has sufficient reasoning. If the Supreme Court quashes a judgment, the case will be referred back to the lower court for new adjudication.

We will continue to monitor developments in this area, and encourage you to subscribe to be kept informed of latest developments. Please contact the authors or your usual Herbert Smith Freehills contacts for more information.

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