[UNOFFICIAL TRANSLATION]
Supreme Court of the Netherlands
Case number: 25/00497
Hearing: 7 November 2025

Statement of defence and conditional cross-appeal in cassation

in the matter of

Shell plc,

having its registered office in London, United Kingdom,
defendant in the principal appeal in cassation,
claimant in the conditional cross-appeal in cassation,
hereinafter: "**Shell**",
lawyers: F.E. Vermeulen and A.G. Colenbrander

and

Stichting Milieu en Mens,

having its registered office in Amsterdam,
as joined party on the side of Shell,
lawyer: C.S.G. Janssens

versus

1. **Vereniging Milieudefensie**, having its registered office in Amsterdam,
2. **Stichting Greenpeace Nederland**, having its registered office in Amsterdam,
3. **Landelijke Vereniging tot Behoud van de Waddenzee**, having its registered office in Harlingen,
4. **Stichting ter bevordering van de Fossielvrij-beweging**, having its registered office in Amsterdam,
5. **Stichting Both ENDS**, having its registered office in Amsterdam,
6. **Jongeren Milieu Actief**, having its registered office in Amsterdam (dissolved 1 September 2022),

claimants in the principal appeal in cassation,
defendants in the conditional cross-appeal in cassation,
hereinafter jointly (in the singular): "**Milieudefensie**",
lawyers: P.A. Fruytier and J.P. Jas

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Defence in the principal appeal in cassation

1. Shell[1] concludes that the appeal in cassation should be rejected; costs to be determined by the court.

Conditional cross-appeal in cassation:

2. Shell hereby lodges a conditional cross-appeal in cassation, on condition that one or more of the complaints raised in the principal appeal in cassation are upheld, against the judgment rendered by the Court of Appeal of The Hague on 12 November 2024, in case number 200.302.332/01 (the "**Judgment**"), on the grounds that the Court of Appeal erred in law or failed to comply with procedural requirements, the breach of which entails nullity, for one or more of the following reasons, which must be considered, if necessary, in context and one in relation with the other.

Introduction

What is this case about and what is this case not about?

3. Before addressing the basis of Shell's principal defence and conditional cross-appeal, it is important to note where the parties are agreed in these proceedings. Shell and Milieudefensie agree that climate change exists and that greenhouse gas ("**GHG**") emissions, which include carbon dioxide ("**CO_2**"), are contributing to climate change. Parties also agree that urgent action is needed to address climate change, that this requires a transformation of the current energy system, and that enterprises like Shell have a role to play in this.[2]

4. Where the parties disagree is the means of achieving this. Unlike the Urgenda case brought against the Dutch State, this case is not about targets for emissions reductions across society and the economy as a whole effectuated by states within their sovereign territory. This case, which takes the path of a civil suit against an individual enterprise, is about *how* emissions should be reduced in society. Milieudefensie is targeting the direct emissions of Shell (so-called Scope 1 emissions) and emissions from the energy Shell purchases (so-called Scope 2 emissions), as well as the emissions of the end-users of its products, such as car owners, shipping enterprises and airlines (so-called Scope 3 emissions). More than 90% of the emissions Shell reports are Scope 3 emissions.[3] It is asking the Dutch courts to impose a reduction obligation on individual enterprises such as Shell, and also ING for example,[4] which would require such enterprises to reduce the emissions they report faster than governments and the EU have laid down in legislation and policy. More specifically, Milieudefensie requests the court to impose a civil law duty on an individual enterprise to reduce reported absolute emissions (Scope 1, 2 and 3) by a certain (minimum) percentage by a particular date fixed in the future.

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1 The enterprises in which Shell plc directly and indirectly owns investments are separate entities. In this Statement of Defence, "Shell" or "Shell Group" are sometimes used to reference Shell plc and its subsidiaries in general. Likewise, the words "we", "us" and "our" are also used to refer to Shell plc and its subsidiaries in general or to those who work for them. These terms are also used where no useful purpose is served by identifying the particular entity or entities.

2 Statement of Defence, no. 1-3; Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 1 and 2; Statement of Appeal, no. 1.1.1; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.2, 1.2.4 and 1.2.5.

3 Statement of appeal, no. 8.2.4 and 9.2.8 under (b)(iii); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.2.1.

4 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.3.3 and 1.3.4; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.3.7.

5. Shell maintains that the imposition of such an unwritten reduction duty on an individual enterprise is not the appropriate means of advancing the energy transition, and has no basis in the law. To achieve the objectives of the Paris Agreement, the energy transition requires an unprecedented displacement of existing energy sources and infrastructure to occur at a rapid pace, whilst at the same time meeting the needs of energy security and sustainable economic development for a global population of over eight billion people. The need for a just and orderly transition – one that balances social, environmental, and economic considerations – is now well recognised and understood globally.[5] Emissions reductions cannot be considered in isolation from the broader energy security and sustainable economic development considerations that are critical in, and inextricably linked to, the energy transition. Ongoing policy developments at national, regional and international levels seek to address these multifaceted challenges.[6] A court-imposed global reduction obligation imposed on an individual enterprise does not help to meet those challenges, and in various ways is at odds with European and Dutch law.

What did the Court of Appeal decide and what did it not decide?

6. The Court of Appeal observed that enterprises like Shell have a responsibility to contribute to combating climate change.[7] The Court of Appeal also considered that this responsibility means that enterprises like Shell have a societal duty of care to reduce emissions in a general sense.[8] It did not specify the nature, content and scope of this 'general' duty for (enterprises like) Shell.[9] The Court of Appeal did not take any step towards a concrete, enforceable legal duty in its judgment because it concluded that the claim as Milieudefensie framed it cannot be awarded. The Court of Appeal dismissed Milieudefensie's claims in respect of Scope 1 and 2 emissions Shell reports for lack of interest because there is no threat of unlawful conduct by Shell considering its progress towards its Scope 1 and 2 absolute target.[10] Milieudefensie's claims regarding the Scope 3 emissions reported by Shell were dismissed by the Court of Appeal on two distinct grounds:

   a) The first ground is that global or sectoral reduction pathways cannot be applied to Shell: the scientific consensus that Milieudefensie claims exists on a (minimum) reduction percentage relevant to Shell does not in fact exist.[11] A legal duty directed at reducing the Scope 3 emissions it reports also does not take into account activities by Shell, such as supplying gas

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5 The outcome of the *Conference of the Parties 28* includes the global effort for "*transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner*", Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.4.

6 See for example the overview of measures in the area of climate legislation and policy at the EU level and in the Netherlands that do not only address climate policy, but also energy affordability and security of supply, Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.3.

7 Paras. 7.26 and 7.55 of the Judgment.

8 In particular, in paras. 7.27, 7.53, and 7.55-7.57 of the Judgment.

9 The Court of Appeal did not further specify what it considers to be "*companies like Shell*". However, the Court of Appeal did apparently consider that the duty of care central to its considerations should not be limited to Shell only and that suffices to note for the purpose of these proceedings, e.g. in para. 7.27, concluding that "*companies like Shell*" have an obligation to limit CO_2 emissions, para. 7.53, finding that "*companies* (…) *have their own duty of care to reduce emissions*", para. 7.55 where it finds that "*companies also have an obligation*" and differentiates Shell from "*most other companies*", para. 7.57, stating that "*companies have a social duty of care to reduce their emissions*", para. 7.79 where it finds that "*companies* (…) *must make an appropriate contribution*" and states that major oil enterprises, such as Shell, have a special responsibility, and para. 7.81 where it finds that major players in the oil and gas market such as Shell can be expected to make a special effort. Milieudefensie similarly seems to be of the position that the alleged duty of care underlying its claims should apply to other enterprises as well, which is for example demonstrated by its position in the proceedings it initiated against ING, where it repeatedly invokes the Judgment in support of such alleged duty of care of ING.

10 Paras. 7.65 and 7.66 of the Judgment.

11 Paras. 7.91-7.96 and 7.111 of the Judgment.

to an enterprise that previously obtained its energy from coal, that could result in a reduction in global emissions while leading to an increase in the reported Scope 3 emissions.[12] Models for global or sectoral reduction pathways are, moreover, not designed to be applied to an individual enterprise and are not applicable to it, also because they are constantly evolving.[13]

b) The second ground is that the reduction order sought will not reduce global CO_2 emissions because other fossil fuel producers will take over the supply of those fuels and customers will continue to use those products.[14] A reduction order would therefore be ineffective and the court cannot impose an order on Shell where there is no interest.[15]

7. As Shell will explain in more detail by written explanation, the Court of Appeal thereby honoured important defences of Shell in a legally correct and adequately reasoned manner in reaching its decision. Further, the Court of Appeal made it clear through its identification of two separate grounds for rejecting Milieudefensie's claims regarding Scope 3 emissions that Milieudefensie is asking something of the court in this case that will simply not achieve the intended aims and for which no basis can be found in any unwritten legal duty.

8. This way of deciding the case enabled the Court of Appeal to disregard some fundamental legal questions that would need to be answered in deciding whether there is an unwritten civil-law legal duty in Dutch law that obliges individual enterprises like Shell to reduce the absolute emissions they report by a certain (minimum) percentage at a date fixed in the future. The existence of a societal duty of care with such specific and static[16] content is a necessary condition for Milieudefensie's claims to be eligible for award.

9. Shell refers to this alleged specific legal duty with the aforementioned characteristics as an "**MD Reduction Duty**" for short. The placement of an MD Reduction Duty in the context of the broader duty of care framework is illustrated in the graphic below. In summary:

- **Level A**: this refers to a non-legal responsibility to limit emissions, which is referred to by the Court of Appeal in paras. 7.17, 7.23 and 7.26-7.27 of the Judgment.

- **Level B**: this refers to a general legal duty to limit emissions, which is cited by the Court of Appeal in paras. 7.55 and 7.57 of the Judgment.

- **Level C**: this refers to an MD Reduction Duty: an alleged civil law duty on an individual enterprise to reduce absolute emissions by a set percentage by a fixed moment in the future.

- **Level D**: this refers to an MD Reduction Duty with a Shell specific percentage, as sought by Milieudefensie in these proceedings, which the Court of Appeal rejected in paras. 7.68-7.96

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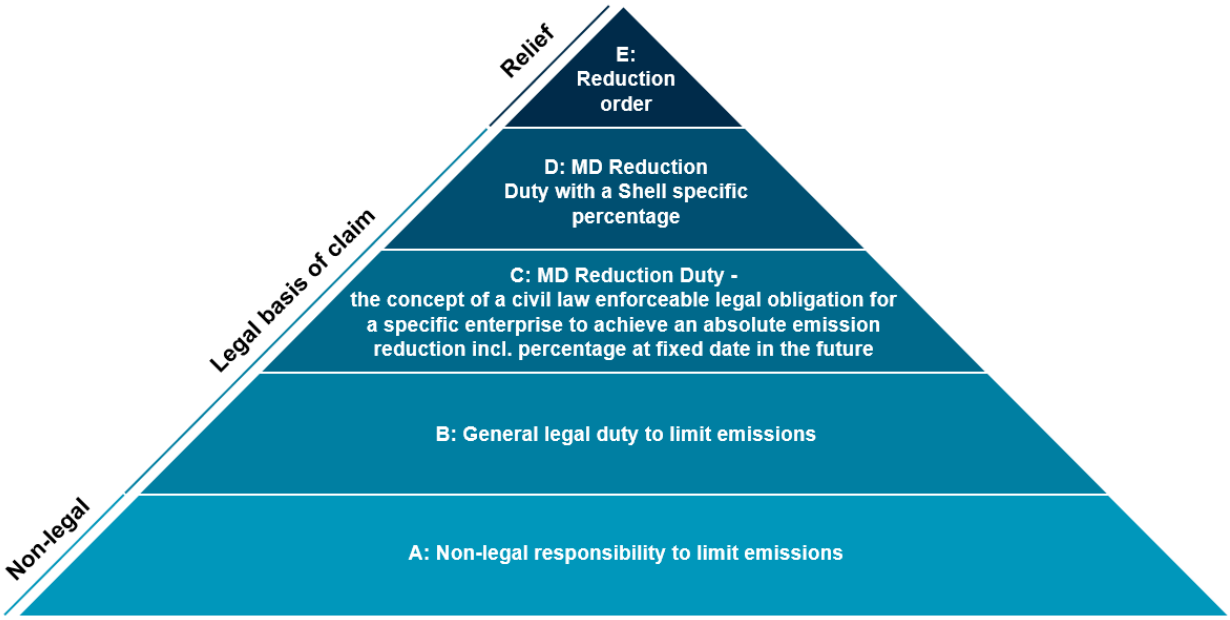
12 Paras. 7.74 and 7.75 of the Judgment.
13 Paras. 7.79-7.81 and 7.91-7.96 of the Judgment.
14 Para. 7.106 of the Judgment.
15 Para. 7.110 of the Judgment.
16 The alleged legal duty on which Milieudefensie bases its claim requires a court to impose an obligation on an individual enterprise that is both fixed at a certain moment in the future and fixed in history (where it comes to the reference date used in the formulation of the claim). It allows for no flexibility, in a matter that is inherently and fundamentally linked to the ever-changing circumstances surrounding the energy transition and geopolitics.

of the Judgment.

- **Level E**: this is the relief sought by Milieudefensie (that is the imposition of a reduction order on Shell), which presupposes the existence of an MD Reduction Duty with a Shell specific percentage (as referred to on level D).



What is the basis of this defence and conditional cross-appeal?

10. Milieudefensie's principal appeal targets the Court of Appeal's rejection of an MD Reduction Duty with a Shell specific percentage (D). Shell will respond to Milieudefensie's complaints in this respect in its written explanation. The central assumption underlying Milieudefensie's appeal, is that there is a general legal duty to limit emissions (B) and, on that basis, an MD Reduction Duty (C). According to Shell, both elements of this assumption err in law.

11. As Shell will explain in its Statement of Defence, there is no legal basis for an unwritten general legal duty to limit emissions (B). Such a general legal duty finds no basis in Dutch law. A civil law duty can only exist, and may only be enforceable, if it is capable of being specified both with respect to its content and the persons or narrowly defined group of persons the duty is owed to.

12. As Shell will further explain in its Statement of Defence, the alleged MD Reduction Duty (C) - and consequentially any specified reduction obligation within the parameters of an MD Reduction Duty, such as an MD Reduction Duty with a Shell specific percentage (D) - cannot exist as a concept under Dutch law.

13. In this Statement of Defence, Shell argues as its **principal defence** that Milieudefensie's cassation appeal fails for lack of interest for these reasons: the reduction order sought by Milieudefensie with its cassation appeal cannot be granted because a general legal duty to reduce emissions (B) and, in

any event, an MD Reduction Duty (C) find no support in law. Shell is already raising this defence at the time of this Statement of Defence, in part to enable Milieudefensie to respond to it adequately. Unless stated differently, where Shell speaks of an MD Reduction Duty in this Statement of Defence, it refers to the concept of an MD Reduction Duty (C).[17]

14. In the alternative, Shell submits this Statement of Defence as a **ground for a conditional cross-appeal in cassation**, in the event the Supreme Court accepts Milieudefensie's appeal. The proposed cross-appeal seeks to ensure that the Supreme Court will not be bound by any final decisions of the Court of Appeal that may have amounted to a rejection of Shell's defences.

15. The primary focus of the Statement of Defence is on the concept of an MD Reduction Duty (C). It is this concept that underlies Milieudefensie's appeal. As this purported legal duty cannot find a basis in Dutch law and Milieudefensie's claims therefore cannot be awarded, there is no need for the Supreme Court to deal with Shell's complaints that challenge the Court of Appeal's findings on the existence of a general legal duty to limit emissions (B), independently from Shell's complaints targeting an MD Reduction Duty (C). Shell's complaints relating to the Court of Appeal's findings on the existence of a general legal duty to limit emissions (B) mainly serve to pre-empt any assertion that Shell, absent such complaints, could be deemed to have accepted such a general legal duty.

What topics are covered in this Statement of Defence?

16. Shell addresses the following topics in turn below:

- Part 1 argues that EU law precludes an MD Reduction Duty. Such an unwritten civil-law legal duty, if accepted, would upset the balance of interests and objectives pursued by the EU legislator and would therefore violate the EU law principle of sincere cooperation. Any MD Reduction Duty and a court order based on such a duty would also be an impermissible violation of the free movement of goods. This part concerns an MD Reduction Duty (C). A general legal duty to limit emissions (B) without any specification has no legal effect and cannot be tested against EU law.

- Part 2 argues that objective reference points for interpreting the societal standard of care laid down in article 6:162 DCC do not support and justify the existence of an unwritten MD Reduction Duty for individual enterprises like Shell. This part also contains Shell's complaints that target the Court of Appeal's findings of the existence of a general legal duty to limit emissions (B).[18]

- Part 3, following on from Part 2, sets out that objective reference points for an MD Reduction Duty for reported Scope 3 emissions in particular are lacking and that such a reduction duty for Scope 3 emissions has no basis in unwritten law. This part therefore focuses on an MD

[17] Throughout this submission, where Shell challenges the existence of an MD Reduction Duty (C), this should be understood as also encompassing a challenge of the possibility that an MD Reduction Duty with a Shell specific percentage can exist (D) and/or that a reduction order can be imposed against Shell (or enterprises like Shell) on the basis of such duty (E). This for example applies to the defences and complaints set out in Section 1.1.3, principal defences and subparts 1.2, 2.6 and 2.11, and complaints in Part 5 to the effect that the position of the court in the trias politica bars rendering a court order based on the alleged duty of care.

[18] Reference is made to subparts 2.3, 2.4, 2.5, 2.7 and 2.13.

Reduction Duty (C).

- Part 4 requests a confirmation from the Supreme Court that the Court of Appeal's considerations on investments in new oil and gas fields, that go beyond the legal dispute on appeal, are indeed *obiter dicta* and that they can have no significance in the Judgment.

- Part 5 argues that the Dutch court cannot impose an MD Reduction Duty on enterprises like Shell. This goes beyond the limits of judicial lawmaking and runs counter to the restraint to be exercised by the court vis-à-vis the political domain.

17. Parts 1, 2, 3 and 5 have equal weight and force in Shell's argumentation. Shell considers it appropriate to deal with EU law, a source of higher law within the Dutch legal order, in the first Part of this Statement of Defence in a detailed manner, before turning to the equally important discussion of Dutch national law. Shell put forward its arguments based on EU law prominently on appeal, but the Court of Appeal did not have to deal with these arguments in any detail given the other reasons it identified to reject Milieudefensie's claims. The relevance of these arguments extends beyond EU law alone and also affects various of Shell's arguments based on Dutch national law. For these reasons Shell chooses to elaborate its arguments on EU law at the start of this brief.

PART 1: AN MD REDUCTION DUTY IS CONTRARY TO EU LAW[19]

Introduction and summary

18. In para. 7.50, the Court of Appeal determined that "*since the District Court's judgment, many new regulations have been created in the European Union to combat dangerous climate change and achieve a 55% reduction in greenhouse gases by 2030.*" In paras. 7.51 and 7.56, the Court of Appeal also recognised that this EU climate legislation is not based on the starting point that each individual enterprise is subject to an absolute reduction percentage set by the European Union. The Court of Appeal then decided that this climate legislation in itself is not exhaustive and that obligations thereunder do not, in and of themselves, preclude a duty of care based on the societal standard of care on the part of individual enterprises to reduce their CO_2 emissions (paras. 7.53 and 7.57). According to the Court of Appeal, the existing climate legislation does affect Shell's obligations under the unwritten standard of care (para. 7.54).

19. EU law has an important role in shaping an orderly energy transition. Coordinated action at the European level is important to ensure that the many interlinked interests affected by the energy transition are advanced in a just, orderly and equitable manner. This ensures effective action in this field that does not disproportionally harm some and benefits others, with little to no benefit for the climate. A proper functioning European internal market is indispensable in this respect. It provides for an even playing field across jurisdictions (with uniform standards throughout the internal market) and legal certainty. Against this background, Shell argued on appeal that EU law does not permit the imposition of an MD Reduction Duty on Shell, drawing particular attention to the now-realised economy-wide EU law and policy framework on the energy transition (including the instruments adopted as part of EU Fit for 55). This is the case because an MD Reduction Duty would undermine the aforementioned EU law and policy framework and is at odds with primary EU law. The main points of Shell's argument, which Shell maintains in these Supreme Court proceedings as principal defence and conditional complaints on cross-appeal, are as follows:

    a) Measures taken by European Union member states at a national level must be compatible with primary EU law (the Treaty on European Union (hereinafter the "**TEU**"), the Treaty on the Functioning of the European Union (hereinafter the "**TFEU**")) and secondary Union law (directives, regulations, etc.) and comply with general principles of EU law. The European legislation and policy on the internal market, the environment (and energy transition) and the supply of energy brings together and balances a complex set of interests and objectives. An MD Reduction Duty fundamentally disrupts the balance and objectives pursued by the European legislator (**subpart 1.1**).[20]

    b) The imposition of an MD Reduction Duty runs counter to the free movement of goods, as it could hamper cross-border trade. The impact of an MD Reduction Duty on other objectives of Union law and/or on the relevant individual enterprises like Shell is disproportionate to

[19] In presenting the finding of the Court of Appeal, the exact wording of the Court of Appeal is followed as closely as possible. This does not mean that Shell endorses that wording and any possible implications thereof.

[20] Statement of Appeal, par. 6.4; Shell Written Pleading Notes, in particular chapter 2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.1.2 under (b) and par. 9.6.

the effect it would achieve (if any) (**subpart 1.2**).[21]

20. It follows that EU law precludes the imposition of an MD Reduction Duty. Consequently, EU law precludes setting aside the Judgment on Milieudefensie's grounds for cassation. Prior to further setting out this principal defence and conditional complaints on cross-appeal, Shell makes a few preliminary comments.

21. EU law precludes an MD Reduction Duty for an enterprise under the jurisdiction of a member state, whether it relates to emissions inside or outside the European Union. An MD Reduction Duty, even insofar as it relates to the extra-European emissions of an enterprise under the jurisdiction of a member state, amongst other things constitutes an impermissible restriction of competition in the internal market. Such a legal duty, imposed by a court in an EU member state, thus equally undermines European climate policy goals, as it will significantly affect the level playing field between enterprises in Europe. Moreover, the imposition of an MD Reduction Duty with extraterritorial effect interferes with the balancing of the interests and policy choices that governments have made or have yet to make in the many countries in which global enterprises like Shell operate. This requires special judicial restraint as it is for the legislature and the executive to decide whether such interference is warranted (see Section 5.1.3).

22. In any case, the national courts in member states must justify the existence, extent and content of a duty of care on the part of enterprises like Shell against the limits imposed by EU law. Those limits, which are discussed in this first Part, are therefore essential to the question of whether Dutch unwritten law can form the basis of an MD Reduction Duty (see Part 2). This means that the existence, extent and content of a legal duty and its civil law enforcement in the national member state courts must be compatible with European climate policy objectives and the EU law principles of sincere cooperation, energy solidarity, and proportionality. Without clear, coordinated standard-setting from the European Union, climate cases aimed at time-bound, absolute emissions reductions against enterprises in member states, such as this climate case from Milieudefensie, could lead to fragmented and irreconcilable standards throughout the Union and could cause serious disruptions to energy security and affordability, free market competition and the EU's overall competitiveness. In doing so, they also pose a threat to an orderly and effective energy transition in the Netherlands and in Europe and to the broad societal support required for a successful transition.[22]

23. The European Union and her Member States are bound by treaty obligations aimed at reducing global emissions, including the obligation under the Paris Agreement to make and communicate ambitious efforts to achieve the Paris goals in the form of nationally determined contributions ("**NDCs**"). The European Union communicates one NDC on behalf of the European Union as a whole.[23] The wide-ranging European system of climate and energy transition regulation is designed to meet the

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[21] Statement of Appeal, par. 6.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.1.2 under (a) and par. 9.2-9.5.

[22] See W. Frenz, 'Perspektiven für den EU-Klimaschutz nach dem EGMR-Klimaurteil und den Europawahlen', *EuropaRecht* 2024/401, p. 412: "*Genau diese Wirksamkeit des Klimaschutzes in EU-Regelungen steht auf dem Spiel, wenn durch scharfe nationale Maßnahmen, von denen sich die Betroffenen überfordert fühlen, die Akzeptanz des Klimaschutzes insgesamt verloren zu gehen droht […]. Diese freiwilligen Änderungen werden langfristig höhere CO_2-Emissionen einbringen als anspruchsvolle staatliche Maßnahmen in einzelnen Bereichen. Die Bereitschaft dazu geht aber verloren, wenn ein nationaler Gesetzgeber etwa scharfe Standards zum Heizungstausch setzt, ohne dass eine hinreichende Förderung gewährleistet ist. Genau auf diese zielt aber der EU-Rahmen.*"

[23] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.2.3.

European Union's international law obligations, including under the Paris Agreement.[24] The Dutch State has also pointed this out in the pending 'Bonaire case'[25] and in that regard remarked that this is a relevant difference from the situation as it was at the time of the Urgenda proceedings.[26] Under these circumstances and in addition to the European regulatory framework, an obligation for an individual enterprise with the same objective (achieving the objectives of the Paris Agreement) cannot be accepted. Furthermore, the European Commission takes the view that the European regulation in this field offers at least an equivalent level of protection as the protection that member states must provide to their residents under the European Convention of Human Rights ("**ECHR**").[27] Indeed, it is established case law of the European Court of Human Rights ("**ECtHR**") that EU laws and regulations, with which Shell complies, are presumptively deemed to provide a level of protection equivalent to the protection prescribed by the ECHR.[28] For that reason, as further explained in Part 2, no MD Reduction Duty (partly) inspired by Articles 2 and 8 ECHR can rest on Shell in addition to that European regulatory framework.[29]

24. In view of Milieudefensie's decision not to appeal the District Court's finding that Shell is presently not acting unlawfully,[30] these proceedings at this stage only concern the inherently prospective question of whether Shell is threatening to act unlawfully against the residents of the Netherlands and the Wadden Sea Region. In addition, the European regulatory and policy framework concerning the energy transition, which the Court of Appeal acknowledged affects Shell's obligations under the unwritten standard of care (para. 7.54), is continuously evolving, which has inevitably left its mark on how the party debate in the present proceedings has progressed to date. Given that the Court of Appeal did not engage with Shell's EU law arguments in any detail, Shell puts forward the arguments contained in this Part 1 as a principal defence, which calls for an (*ex nunc*) assessment of the question whether EU law precludes the granting of Milieudefensie's claim. In view of this, the elaboration of this Part 1 also contains references to certain legal developments post-dating the Judgment.

25. The above means that an MD Reduction Duty cannot be imposed due to incompatibility with EU law. Milieudefensie is therefore wrong to argue in the Initiating Document that "*European public law regulations do not have a restrictive effect on the scope of the duty of care that a company has under the societal standard of care.*"[31] If and to the extent that the Supreme Court considers that there may still be ambiguity in this regard, there is reason to refer questions to the European Court of

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[24] Regulation (EU) 2021/1119 (the European Climate Law), Article 1. EU climate and energy regulation is constantly evolving to account for changing circumstances and insights into what effective, workable and fair regulation should entail. That does not alter the fact that the economy-wide regulation in the EU, which is not perfect and subject to ongoing revision, is based on fundamental choices concerning the energy trilemma, which are incompatible with an MD Reduction Duty.

[25] In ongoing proceedings, the State assumes that the European regulatory framework guarantees that the objectives of the European Climate Law and the NDC will be achieved on behalf of the entire European Union, thereby ensuring the comprehensive implementation of the Paris Agreement at Union law level. This concerns the proceedings brought by Greenpeace Netherlands on behalf of residents of Bonaire against the State, the oral hearing of which took place at the District Court of The Hague on 7 and 8 October 2025. See the State's Statement of Defence, no. 10.45. See also the recent comments by the Minister for Climate and Green Growth in this regard: *Aanhangsel Handelingen II*, 2025/26, no. 104, p. 2-3.

[26] See the Statement of Defence of the State in the proceedings referred to in the previous footnote, no. 15.145.

[27] European Commission, 19 May 2021, *Written Observations of the European Commission - Case: Duarte Agostinho and Others v. Portugal and Others* (Exhibit S-208), no. 65-72, 77 and 78.

[28] ECtHR 30 June 2005, ECLI:CE:ECHR:2005:0630JUD004503698 (*Bosphorus Hava Yollan Turizm ve Ticaret Anonim Şirketi v Ireland*), paras. 155, 156 and 159-166, as further specified in ECtHR 23 May 2016, ECLI:CE:ECHR:2016:0523JUD001750207 (*Avotiņš v. Latvia*), paras. 101 and following.

[29] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (d); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.4.6-6.4.12; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 1.2.1.

[30] District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), para. 4.5.8.

[31] Document Initiating Supreme Court Proceedings Milieudefensie, no. 1.36.

Justice for a preliminary ruling ("**CJEU**"), should one or more of Milieudefensie's complaints, which can lead to setting aside of the Judgment, be found to be justified.

1.1 Defence in the principal cassation appeal and subpart: an MD Reduction Duty is not compatible with the European legal and policy framework and conflicts with Article 4(3) TEU

Defence

26. As the Court of Appeal determined, an MD Reduction Duty has no basis in the existing European legal and policy framework. The impact of this framework on Dutch unwritten law is such that an MD Reduction Duty cannot be accepted. An MD Reduction Duty conflicts with directly effective provisions of Union law and the obligation of national courts to interpret national law as far as possible considering the relevant European instruments. It also detracts from realising the full effect of the European legal and policy framework and its objectives. For this reason, imposing an MD Reduction Duty on an individual enterprise is also at odds with the Dutch State's obligation of sincere cooperation under Article 4(3) TEU. That an MD Reduction Duty is at odds with EU's legal and policy framework and its objectives manifests itself at least as follows:

a) An MD Reduction Duty disrupts the balance struck by the EU legislator between the various interests involved, including those that form part of the energy trilemma (climate, energy security and affordability of energy). An MD Reduction Duty is static and blunt and does not leave the policy flexibility required to adequately respond to future developments and thus (continue to) represent all interests involved. If presumed effective, an MD Reduction Duty impairs the ability of certain member states who rely on oil and gas more than other member states for their energy supply, to provide secure and affordable energy. As such, an MD Reduction Duty is also at odds with the EU law principle of energy solidarity (see Sections 1.1.3a-1.1.3b below).

b) An MD Reduction Duty systematically runs counter to key elements of European policy for the energy transition, including the European Emissions Trading System (EU ETS), which provides for a coordinated approach and was deliberately crafted to give effect to policy goals such as fair competition, cost-efficiency and encouraging innovation (see Section 1.1.3c below).

c) An MD Reduction Duty undermines the proper functioning of the single market and ignores the importance of a level playing field. Reduction duties imposed by national courts on individual enterprises in their own jurisdictions inevitably lead to an uneven playing field across jurisdictions (and, thereby, to fragmentation of the internal market) and legal uncertainty (see Section 1.1.3d below).

d) Imposing obligations, such as an MD Reduction Duty, on individual enterprises without any, let alone a sufficient guarantee, that competing enterprises across borders are subject to similar obligations (in form or scope) jeopardises the competitive position of the European Union (see Section 1.1.3e below).

e) The imposition of an MD Reduction Duty is contrary to the EU law principle of proportionality, as an MD Reduction Duty is neither appropriate nor necessary to achieve the objectives pursued thereby (see Section 1.1.3f below).

f) An MD Reduction Duty paradoxically inhibits investment in renewable technologies. It does not encourage investment in low-carbon solutions. Nor is it the case that investing in low-carbon energy solutions necessarily reduces emissions that are reported by the enterprise making the investments (see Section 1.1.3g below).

27. This means that the complaints brought forward by Milieudefensie in its principal appeal in cassation, even if the Supreme Court considers them to be well-founded, cannot result in Milieudefensie's claims against Shell being awarded.

Complaints

28. To the extent that the Court of Appeal ruled in its final decision that:

- an MD Reduction Duty is compatible with EU law and fits into the system of the law (in particular, paras. 7.53 and 7.57, in conjunction with para. 7.28); and/or
- the influence of existing legislation on the obligations which the Court of Appeal considers arising from the unwritten standard of care does not preclude the assumption of an MD Reduction Duty on Shell's part (paras. 7.54 and 7.57, in conjunction with paras. 7.53 and 7.28); and/or
- EU ETS and ETS2 alone should be taken into account in giving substance to a duty of care (para. 7.54, in conjunction with para. 7.50),

Shell raises, also against the background of the reasons mentioned above in no. 26, the following complaints in the conditional cross-appeal.

i) The Court of Appeal wrongly considered an MD Reduction Duty to be compatible with the EU legal and policy framework (Judgment, para. 7.53). An MD Reduction Duty conflicts with directly effective provisions of EU law, and in any event conflicts with the obligation of the Court of Appeal to interpret national law as much as possible in light of the wording and objectives of the relevant EU instruments in order to achieve the result envisioned by these. That interpretative obligation also applies to general norms of civil law, such as the unwritten standard of care of Article 6:162 DCC.[32]

ii) In inter alia para. 7.54, the Court of Appeal wrongly did not recognise that the influence of the existing broad EU legislation and its underlying objectives on Dutch unwritten law is

[32] CJEU 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing*), para. 8. Statement of Appeal, no. 1.5.1 under (d) and par. 6.2; and Shell Written Pleading Notes, particularly Chapter 2.

such that an MD Reduction Duty cannot be accepted by the court.[33]

iii) The Court of Appeal failed to recognise that an MD Reduction Duty detracts from the full effect (the useful effect or *effet utile*) of Union law, and as a national measure, comes into conflict with the obligation of the Dutch state under Article 4(3) TEU. It was not enough for the Court of Appeal to state in paras. 7.53 and 7.57 that the existing European regulations were not meant to be exhaustive. Even where existing EU legislation does not preclude stricter national measures, these national measures must be tested against all relevant principles and provisions of EU law, which the Court of Appeal failed to do.[34]

iv) The Court of Appeal seems to have recognised that the EU regulations on the energy transition as a whole strike a balance between different, sometimes conflicting interests (cf. Judgment, paras. 7.47 and 7.49). The Court of Appeal did not draw the correct conclusion here that an MD Reduction Duty would disrupt the balance so carefully struck in those regulations and jeopardise the achievement of their objectives, so that EU law precludes its imposition.

v) The Court of Appeal failed to consider in paras. 7.50-7.54 and 7.57 that much of the EU climate regulation is (also) based on treaty provisions other than Article 191 in conjunction with 192 TFEU (on environmental regulation), including Article 114 TFEU (on internal market regulation) and Article 194 TFEU (on energy regulation). These treaty bases indicate that the EU legislator gave great, if not decisive, significance to the importance of the proper functioning of the internal market or the European energy supply, respectively, when drafting these regulations.[35] The imposition of an MD Reduction Duty is not compatible with the objective of these EU climate regulations to promote the proper functioning of the internal market and European energy supply, respectively.[36] This is all the more true since its application and effect extends far beyond the borders of the Dutch territory, and will undeniably also affect Shell's activities in (and towards) other member states.[37]

vi) The Court of Appeal's decision in paras. 7.50-7.54 and 7.57 is incorrect because an MD Reduction Duty, if it would be presumed to be effective, is at odds with the EU law principle of energy solidarity. This principle required the Court of Appeal, if necessary by supplementing the legal grounds under Article 25 DCCP, to assess to what extent the imposition of an MD Reduction Duty as a national measure could harm the interests of other EU member states and balance these interests against the interests pursued with the reduction duty. Indeed, the reduction duty as a national measure disproportionally affects the interests

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33 Statement of Appeal, no. 1.5.1 under (d) and par. 6.2 and 6.4; Shell Written Pleading Notes, particularly Chapter 2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.1.2 under (b) and par. 9.6.

34 Statement of Appeal, no. 1.5.1 under (d) and 6.1.2-6.1.6, and par. 6.4; Shell Written Pleading Notes, particularly Chapter 2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - par 3 of 4, no. 9.1.2 under (b) and par. 9.6.

35 Kellerbauer et al. (ed.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford: OUP 2019, p. 1242 and 1243; and J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 79-81.

36 Statement of Appeal, no. 1.5.1 under (d) and 6.4.5 and following; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.6.

37 M. Dougan, 'Minimum harmonization and the internal market', *Common Market Law Review* 2000/4, p. 878: "[t]*he Member State must not attempt to project its particular policy preferences outside the national territory*". Cf. F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 67: "[t]*his duty of sincere cooperation manifests itself as soon as the actions of an EU institution or a Member State have cross-border effects or encroach upon an area of EU policy.*" Cf. also CJEU 22 June 1993, C-222/91, ECLI:EU:C:1993:260 (*Philip Morris*), paras. 13 and 17.

of those EU member states which rely on oil and gas more heavily than others for their energy supply, whose ability to provide secure and affordable energy is impaired.[38]

vii) In addition, the Court of Appeal's decision in paras. 7.50-7.54 and 7.57 is incorrect because an MD Reduction Duty is contrary to the principle of proportionality, a general principle of EU law.[39] The imposition of an MD Reduction Duty will, after all, have a large impact on important other objectives underlying EU law and/or on the individual enterprises, like Shell, on which it is imposed, while the result actually achieved therewith does not contribute to its objective of effectively reducing global CO_2 emissions, as the Court of Appeal itself recognised in paras. 7.97-7.110. Even if it were presumptively assumed that the imposition of an MD Reduction Duty will have some effect on global CO_2 emissions, there is a mismatch between that effect and the necessarily huge impact that duty will have on the other objectives underlying EU law and/or the individual enterprises, like Shell, subjected thereto.[40]

Explanation of defence and complaints

29. The defence in the principal cassation appeal and the complaints in the conditional cross-appeal are explained below. This explanation is structured as follows:

- Section 1.1.1 deals with the general EU law framework. More specifically, it deals with the notion of shared competences between the European Union and its member states, which for example applies in respect of the internal market, the environment and energy. It explains that, if EU law in an area with respect to which the EU and member states possess shared competence is in itself not exhaustive, more stringent national measures can still only exist if compatible with (the objectives of) the relevant European regulation and general principles of European law. It discusses a number of principles of European law that are relevant for this assessment, including the EU law principle of sincere cooperation, the closely related EU law principle of energy solidarity, and the general EU law principle of proportionality.

- Section 1.1.2 provides an overview of the content and objectives of EU regulations developed to implement the European energy and climate policy. This policy seeks to regulate and achieve emissions reductions with a view to mitigating climate change whilst taking account of the broad range of other interests involved.

- Section 1.1.3 explains from different angles why an MD Reduction Duty is not compatible with the instruments of the European energy and climate policy and its objectives discussed in Section 1.1.2, and with EU law more broadly. The Court of Appeal did not perform the appropriate analysis of the compatibility of an MD Reduction Duty with existing EU regulation and principles of EU law. This analysis leads to the conclusion that the instrument

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38 Statement of Appeal, par. 6.4. (particularly no. 6.4.5); Shell Written Pleading Notes, particularly Chapter 2; and Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 3 of 4, par. 9.6.

39 CJEU 13 July 2017, C-129/16, ECLI:EU:C:2017:547 (*Túrkevei Tejtermelő*), para. 61.

40 Statement of Appeal, no. 6.1.3, 6.3.9-6.3.18, 6.4.3, 6.4.19 and 7.5.1 under (b)(i); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1.1 under (d)(iii) and 10.4.3.

of an MD Reduction Duty is more stringent to an extent that is incompatible with European law.

30. The explanation set out in these Sections 1.1.1-1.1.3 serves as an elaboration and forms part of Shell's complaints i)-vii) set out above. Shell has included references to the individual complaints where appropriate.

1.1.1 The general EU law framework: shared competences, minimum harmonization and the extent to which member states can adopt more stringent measures

a. Shared competences; EU law limitations to more stringent national measures

31. In areas where the European legislator and member states have shared competence (such as the internal market, the environment and energy, see Article 4(2) TFEU), member states can take measures themselves to the extent that the European legislator has not exercised its regulatory power (Article 2(2) TFEU). The European legislator can (implicitly or explicitly) opt for minimum harmonisation and thus leave room for member states to adopt stricter measures.[41] However, even in that case, such measures must be fully compatible with the harmonized regulation at the European level, the TEU, the TFEU and principles of EU law, such as the principles of proportionality and energy solidarity.[42] Establishing that a certain EU regulation is not intended to be exhaustive therefore constitutes the starting point of the analysis, rather than its conclusion, which the Court of Appeal failed to recognise in para. 7.53.

32. Indeed, a stricter national measure in scope of European regulation will always have to comply with the provisions and principles of EU law, including the principle of sincere cooperation under Article 4(3) TEU discussed below. This means that the stricter measure and its objectives must be *compatible* with the provisions and objectives of the relevant European regulations.[43] The scope of European regulation is interpreted extensively, and also comprises national measures whose scope partially overlaps or, more indirectly, relates to the scope of the relevant European regulation.[44] Relevant factors in this respect include (a) whether the national measure serves to implement Union law; (b) the nature of the national measure and whether it pursues objectives other than those covered by Union law; and/or (c) whether there are specific rules of EU law on the matter regulated by, or capable of affecting, the national measure.[45] Also provisions of national law that do not have their basis (directly or entirely) in European regulations, but whose application could impede the operation of

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41 A "stricter" national measure can either take the form of a measure that deviates as to the type of instrument selected, or a measure employing the same instrument as the European legislator albeit with a stricter standard to comply with.

42 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 199; C. Barnard & S. Peers (eds.), *European Union Law*, Oxford: OUP 2023, p. 701; L. Squintani, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge: CUP 2019, p. 8; and F. de Cecco, 'Room to move? Minimum harmonization and fundamental rights', *Common Market Law Review* 2006/43, p. 20. See also expressly CJEU 15 April 2010, C-64/09, ECLI:EU:C:2010:197 (*Commission v France*), para. 35; and CJEU 13 July 2017, C-129/16, ECLI:EU:C:2017:547 (*Túrkevei Tejtermelő*), paras. 60 and 61.

43 J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 121-123; and L. Squintani, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge: CUP 2019, p. 50. CJEU 15 April 2010, C-64/09, ECLI:EU:C:2010:197 (*Commission v France*), paras. 35-38; CJEU 9 March 2010, ECLI:EU:C:2010:127 (*ERG II*), paras. 65 and 66; and CJEU 26 February 2015, ECLI:EU:C:2015:120 (*Sko-Energo*), para. 28.

44 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 194.

45 Cf. in the context of the European Charter CJEU 6 March 2014, C-206/13, ECLI:EU:C:2014:126 (*Siragusa*), para. 25; CJEU 26 February 2013, C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), paras. 25-28; and F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 123.

provisions from, or the achievement of the objectives of European regulations, may conflict with a member state's obligations under EU law.[46]

33. The CJEU has ruled in several cases that a stricter national measure is contrary to EU law. This is the case, for example, according to the CJEU, if (the application or effect of) that national measure can (i) prevent the objective of provisions of EU law from being achieved; (ii) preclude the full effect (also called the useful effect (*effet utile*[47])) or the full functioning of specific provisions of EU law; and/or (iii) pose an obstacle to the implementation of those EU law provisions.[48]

b. Shared competences; regulating the internal market (Article 114 TFEU)

34. The TFEU provides different bases for the adoption of European legislation, with varying procedures, depending on the area that the relevant European legislation pertains to. These for example include Article 114 TFEU for the regulation of the internal market, Articles 191 in conjunction with 192 TFEU for regulation of the environment and Article 194 TFEU for regulation in the field of energy. In European regulations that pursue both the proper functioning of the internal market and other objectives (such as the protection of the environment, consumers and workers), a tension may arise between the different objectives pursued as a result of stricter national measures. It follows from the case-law of the CJEU that, when assessing the compatibility of a national measure with (the objectives of) such European regulations, it must in any case be determined whether (a) it is possible to deduce from the context of the European regulations concerned what weight the European legislator intended to give to the respective objectives concerned (for which the legislative basis of the regulations concerned provides an important point of reference); and (b) the stricter national measure concerns purely regulation within the territory of the member state concerned or that extraterritorial application or elaboration of the national measure is (also) possible, thus imposing the national standard set by that measure extraterritorially as well.[49]

35. European regulation based on Article 114 TFEU for regulation of the internal market generally leaves

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46 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 198 and 199; and R. Barents & L.J. Binkhorst, *Grondlijnen van Europees Recht*, Deventer: Kluwer 2012, p. 199. For example, the CJEU has ruled that there is no room for filling a gap left by the nullification of a contractual term under the Unfair Contract Terms Directive on the basis of general civil law standards, as this could impair the dissuasive effect of that Directive (see CJEU 27 January 2021, C-C-229/19 and C-289/19, ECLI:EU:C:2021:68 (*Dexia*), para. 64; and CJEU 12 January 2023, ECLI:EU:C:2023:14 (*D.V. v M,A,*), para. 67). The same applies to provisions of national procedural law that may hinder the effectiveness of the provisions and objectives of European policy and legislation, for example, by making it unattractive for rightsholders to exercise their rights under Union law (see CJEU 9 April 2024, C-582/21, ECLI:EU:C:2024:282 (*Profi Credit Polska*), para. 78; CJEU 25 January 2024, ECLI:EU:C:2024:81 (*Caixabank*), paras. 54, 55 and 61; CJEU 18 January 2024, ECLI:EU:C:2024:58 (*Noble Bank*), para. 61; and CJEU 29 February 2024, ECLI:EU:C:2024:182 (*Investcapital*), para. 58). As to the latter category, see recently in a national context HR 23 May 2025, ECLI:NL:HR:2025:820.

47 See regarding this principle and the direct and indirect way in which it is used by the CJEU, J. Blockx, 'Effet utile reasoning by the Court of Justice of the European Union is mostly indirect: evidence and consequences', *European Journal of Legal Studies* 2022/14, p. 141-171.

48 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 198 and199, citing CJEU 30 November 1978, C-31/78, ECLI:EU:C:1978:217 (*Bussone*), para. 43; CJEU 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz*), paras. 28-30; and CJEU 21 March 2024, C-714/22, ECLI:EU:C:2024:263 (*S.R.G. v Profi Credit Bulgaria*), para. 84. K. Lenaerts & P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2023, p. 108 and 109; and R. Barents & L.J. Binkhorst, *Grondlijnen van Europees Recht*, Deventer: Kluwer 2012, p. 101-102. Cf. J. Temple Lang, 'The duties of national authorities under Community constitutional law', *E.L. Rev.* 1998/23, 2, p. 118, who notes that this may occur, for example, when the respective European and national measures may result in "*mutually inconsistent results*".

49 M. Dougan, 'Minimum harmonisation and the internal market', *Common Market Law Review* 2000/4, with references. See further CJEU 15 April 2010, C-64/09, ECLI:EU:C:2010:197 (*Commission v France*), para. 35; and CJEU 13 July 2017, C-129/16, ECLI:EU:C:2017:547 (*Túrkevei Tejtermelő*), paras. 60 and 61.

less room for a stricter national measure than other legislative bases.[50] Such regulation can pursue multiple objectives, but the use of Article 114 TFEU as a legislative basis indicates that the legislator attached decisive, or in any event great importance to the predetermined goal of establishing and maintaining the EU internal market.[51] In addition, European regulations based on Article 114 TFEU which, in addition to the proper functioning of the internal market, also aim to promote environmental interests, are deemed, on the basis of paragraph 3 of the same article, to provide "*a high level of protection*" with regard to those environmental interests, so that there is all the more reason to thoroughly examine the need for a more far-reaching measure (see also paragraph 1.1.1c below).[52]

c. Shared competences; the general principle of proportionality

36. In addition, the stricter national measure must be *proportionate* under the principle of proportionality and thus appropriate and necessary to achieve the desired objective.[53] This also requires a weighing of the appropriateness and necessity of the relevant measure in light of other objectives or interests worthy of protection.[54] If the objective of the stricter national measure corresponds to the same objective pursued by the relevant European regulation, the bar is high for assuming that the stricter measure is necessary and proportionate and thus complies with the principle of proportionality. After all, the relevant European regulations with the same objective are already subject to a proportionality test.[55] A stricter proportionality test is appropriate in the case of national measures derogating from an EU law instrument based on Article 114 TFEU, for regulation of the internal market, or Articles 191 in conjunction with 192 TFEU, for regulation of the environment, as these instruments are already considered to afford a "*high level of protection*" (Articles 114(3) and 191(2) TFEU).[56] With regard to the European environmental policy established on the basis of Articles 191 in conjunction with 192 TFEU, this also applies, as it is based on the precautionary principle which implies that in case of uncertainty about what is necessary to achieve the set objectives, a high level of protection should be chosen (Article 191(2) TFEU).[57]

d. The EU law principle of sincere cooperation (Article 4(3) TEU)

37. European member states are bound by the principle of sincere cooperation enshrined in Article 4(3) TEU, aimed at achieving the objectives of the European Union. The principle of sincere cooperation

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50 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 197: "*Art. 114 TFEU is not just a legislative foundation of the EU, but exists for the purpose of achieving a predetermined goal of establishing an internal market in the EU. From this perspective, it can be explained that internal market legislation leaves less room for additional national law than, for example, environmental legislation.*", ibid. p. 205.

51 Kellerbauer et al. (ed.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford: OUP 2019, p. 1242 and 1243, where it is noted that Article 114 TFEU "[does] *not stand against interests other than market integration being taken into account when harmonization measures are adopted pursuant to Article 114(1) TFEU* (...) *However, such other interests must not be the primary purpose*." (underlining added by lawyers); J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 81; and W.T. Eijsbouts et al. (ed.), *Europees recht – algemeen deel*, Groningen, Europa Law Publishing, 2015, p. 122 and 123.

52 J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 290; Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford: OUP 2021, p. 2115.

53 CJEU 13 July 2017, C-129/16, ECLI:EU:C:2017:547 (*Túrkevei Tejtermelő*), paras. 61 and 66; and J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 119 and 120.

54 K. Lenaerts & P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2023, p. 99 : "[i]*n case law, the principle of proportionality is primarily intended to assess the lawfulness of an exercise of power when it pursues a legitimate aim but at the same time harms other objectives or interests worthy of protection.* (…) *The principle of proportionality is invoked when the Union's exercise of its function interferes with other objectives of the European Union of with the legitimate interests of individuals or member states.*"

55 L. Squintani, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge: CUP 2019, p. 125.

56 J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Zutphen: Europa Law Publishing 2024, p. 290.

57 General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 613-621, 650 and 663.

gives rise to both negative and positive obligations for member states. The principle of sincere cooperation moreover influences the interpretation of substantive provisions of primary and secondary EU law.[58]

38. The principle of sincere cooperation obliges member states – in their relation towards the European Union and in their mutual relations[59] – to "refrain from any measure which could jeopardise the attainment of the Union's objectives."[60] This is a prohibition on member states not "*to circumvent the obligations that are imposed upon it by EU law*"[61], not to adopt measures which undermine the effectiveness of EU provisions,[62] and it furthermore prohibits member states "*from prejudicing, through the exercise of their own competences, the effectiveness of the Community's competences*".[63] Such a circumvention of EU obligations, undermining of their effectiveness (*effet utile*), or disloyal exercise of a member state's own competences can also occur in a concrete application and/or elaboration of general civil law doctrines such as tort.[64] Furthermore, in the mutual relations between member states, a member state adopting a stricter measure than provided for in EU law has to ensure this does not interfere with the competence of other member states to make their own assessment in this respect.[65] The wording of the negative obligation in Article 4(3) TEU suggests that "*a certain level of seriousness*" is required for its violation.[66]

39. The principle is "*of fundamental importance* (…) *and* [occupies] *a key position in EU law*"[67] and counts as an "*enhanced obligation of good faith*".[68] According to the CJEU, the principle of sincere cooperation "*is of general application*",[69] and must be observed by all national authorities, including the courts.[70] This means that the Dutch courts are bound by the principle of sincere cooperation and that a Dutch court's ruling must be tested against this principle. Accordingly, the principle of sincere cooperation also underlies and permeates each of the subparts based on EU law raised in this defence statement.

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58 F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 67 and 68.

59 T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(bb); and K. Lenaerts & P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2023, p. 104.

60 Article 4(3) TEU, third paragraph. See also CJEU 7 September 2023, C-15/22, ECLI:EU:C:2023:636 (*RF v Finanzamt G)*, para. 57.

61 CJEU 18 October 2016, C-135/15, ECLI:EU:C:2016:774 (*Republik Griechenland/Grigorios Nikiforidis*), para. 54.

62 CJEU 11 April 1989, 86/88, ECLI:EU:C:1989:140 (*Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH/Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*), para. 48; and CJEU 23 April 1991, C-41/90, ECLI:EU:C:1991:161 (Klaus Höfner and Fritz Elser/Macrotron GmbH), para. 26. See in this respect C.W.A. Timmermans, 'The basic principles', in: P.J.G. Kapteyn et al. (eds.), *Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International 2008, p. 151 and 152.

63 Opinion A-G 15 June 2010, C-132/09, ECLI:EU:C:2010:342 (*Commission v Belgium*), para. 118; and Statement of Appeal, no. 6.4.1, footnote 349. See also footnote 48 above.

64 J.R. Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen', *NTBR* 2024/24, p. 206. Cf. also J. Temple Lang, 'The duties of cooperation of national authorities and Courts under Article 10 EC: two more reflections' *E.L. Rev.* 2001/26, 1, p. 93, who notes that this can occur "*even when the national measure in question is not formally or directly contrary to Community law.*"

65 T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(bb): "[u]*nbeschadet der aus Art. 193 AEUV resultierenden Grenzen folgt daraus aber ganz allgemein, dass dieser Spielraum allerdings nicht nur dem Urteilsstaat, sondern auch allen anderen Mitgliedstaaten zusteht. Der Erlass grenzüberscheitender Reduktionsanordnungen berührt deshalb zugleich den Grundsatz der loyalen Zusammenarbeit (Art. 4 Abs. 3 EUV), der - unbeschadet der ebenfalls aus Art. 4 Abs. 3 folgenden Pflicht zur loyalen Zusammenarbeit mit der EU94 - auch die Mitgliedstaaten untereinander zur Rücksichtahme verpflichtet.* (…) *Sieht ein Mitgliedstaat schutzverstärkende Maßnahmen des Umweltschutzes vor, muss deshalb der anderen Mitgliedstaaten kraft Unionsrechts zustehende Spielraum beachtet werden.*"

66 CJEU 7 September 2023, C-15/22, ECLI:EU:C:2023:636 (*RF v Finanzamt G)*, para. 63.

67 F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 77 and 78.

68 Opinion A-G J. Mazák, ECLI:EU:C:2008:270, with CJEU 6 November 2008, C-203/07 (*Greece v Commission (Project Abuja)*), para. 83.

69 CJEU 2 June 2005, C-266/03, ECLI:EU:C:2005:341 (*Commission v Luxembourg*), para. 58. CJEU 14 July 2005, C-433/03, ECLI :EU:C:2005:462 (*Commission/Germany*), para. 64 ; CJEU 20 April 2010, C-246/07, ECLI :EU:C:2010:203 (*Commission/Sweden*), para. 71; and Opinion A-G Medina, ECLI:EU:C:2025:128, with C-271/23 (*Commission/Hungary*), para. 160. See also CJEU 4 December 2008, T-284/08, ECLI:EU:T:2008:550 (*People's Mojahedin Organization of Iran/Council*), para. 52.

70 Statement of Appeal, no. 6.4.1. F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 80, 81 and 95; K. Lenaerts & P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2023, p. 104; T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(bb); CJEU 14 December 2000, C-300/98 and C-392/98, ECLI:EU:C:2000:688 (*Dior*), paras. 36-38; and M. Klamert, *The Principle of Loyalty in EU Law,* Oxford: Oxford University Press 2014, p. 14.

e. The EU law principle of energy solidarity

40. Another fundamental principle of EU law relevant to the assessment of this case is the principle of energy solidarity, expressed in Article 194 TFEU as the "*spirit of solidarity between the Member States*".[71] This principle – read in conjunction with the EU law principle of sincere cooperation[72] – requires the EU institutions and the member states, when taking decisions, to consider, among other things, whether there are risks to the energy interests of (other) member states and the EU as a whole, and in particular to the security of the energy supply, and to make a (substantiated) balancing of interests in the event of a clash of interests.[73] This assessment should as much as possible be made on the basis of specific information and not on the basis of assumptions.[74] The principle of energy solidarity constitutes an autonomous and legally enforceable principle of EU law, which binds and should be applied by national courts if the circumstances of a case call for it.[75]

41. The General Court of the European Union has recently expressed its opinion on the principle of energy solidarity in the context of the energy transition.[76] The General Court confirmed that the EU institutions and the Member States must take into account the principle of energy solidarity when adopting measures aimed at the internal (energy) market, which according to the General Court includes the obligation to ensure the security of energy supply in the European Union when adopting those measures.[77] The General Court points out that energy security is an essential condition to effective climate policy.[78] According to the General Court, this means amongst others that gas must be allowed as a transition fuel if no technologically and economically feasible low-carbon alternative exists, and any other interpretation "*disregards the imperative of security of supply*".[79]

42. The notion underpinning the principle of energy solidarity also resounds in the starting point that the European legislator cannot interfere with individual member states' choice between different energy sources and the structure of their energy supply, which starting point is laid down in Articles 192(2)(c) and 194(2) TFEU.[80]

1.1.2 European Union regulations and policy in relation to energy and the environment

43. Under Article 4(2) TFEU, the European Union and its member states have shared competences in areas such as the internal market, the environment and energy. The TFEU has specific provisions on the policy to be pursued by the European Union in those areas and the regulations to be realised by

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71 CJEU 15 July 2021, C-848/19, ECLI:EU:C:2021:598 (*OPAL*), para. 69. See also B.J. Drijber, 'De OPAL-zaak: energiesolidariteit als toetsbare norm', *NTE* 2021, p. 250 and 251.
72 CJEU 15 July 2021, C-848/19, ECLI:EU:C:2021:598 (*OPAL*), para. 52.
73 CJEU 15 July 2021, C-848/19, ECLI:EU:C:2021:598 (*OPAL*), paras. 69-73. General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 164-166.
74 B.J. Drijber, 'De OPAL-zaak: energiesolidariteit als toetsbare norm', *NTE* 2021, p. 253.
75 J. Keypour, M. Dutra Trindade and M. Terletska, 'Reassessing EU energy solidarity: legal implications and challenges in the aftermath of the CJEU's final decision in the OPAL case C-848/19 P, *European Studies – the Review of European Law, Economics and Politics* 2023/2, 78, p. 94.
76 General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*). This ruling was issued in the specific context of the Taxonomy Regulation (as defined in no. 47g and discussed in no. 47h below) and concerns the question whether the European Commission could determine that fossil gas qualifies as sustainable under the conditions set out in the Taxonomy Regulation.
77 General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 164-166.
78 General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 167 and 168.
79 General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 503-519.
80 Cf. General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 210.

the European Union to that end. For the internal market, this concerns Articles 26 in conjunction with 114 TFEU, for the environment Articles 191 in conjunction with 192 TFEU and for energy Article 194 TFEU. Partly based on these competences, the European Union has realised European policies and adopted underlying regulations on energy and the environment:

a. At the European level, the energy union was created with the aim of ensuring affordable, secure and sustainable energy for Europe and its citizens.[81] To this end, in 2016, the European Commission announced the '*Clean Energy for all Europeans*' package, consisting of several legislative acts aimed at making the European energy sector more sustainable,[82] which legislative acts were adopted in the period 2016-2019.[83] As part of this, in 2018, the European legislator adopted the Governance Regulation[84], based on Articles 192 and 194 TFEU, to regulate the functioning of the energy union and European climate action more broadly.

b. In the period starting from 2019, the European legislator adopted a comprehensive package of measures aimed at combating climate change as part of the Green Deal.[85]

c. In the aftermath of the Russian invasion of Ukraine, the European Commission published the *REPowerEU* policy in 2022, aimed at reducing Europe's dependence on Russian gas and ensuring security of supply and affordability of energy. Besides driving greater investment in renewable energy, this policy also envisages a continued role for gas in the European energy mix, reflected in measures aimed at increasing gas storage, diversifying gas supply lines and building more LNG import terminals.[86]

d. In September 2024, Mario Draghi published what has become known as the 'Draghi report'. In this report, which was commissioned by the European Commission, Draghi gives his vision on the future of Europe and provides recommendations to deal with the challenges presently faced by the European Union. These include that the European Union pursue its decarbonization and competitiveness goals in a coordinated manner. Draghi notes in that regard that the European Union "*must confront some fundamental choices about how to pursue its decarbonisation path while preserving the competitive position of its industry.*"[87] Building on the Draghi report, after the date of the Judgment, the European Commission published the *Competitiveness Compass* in January 2025, which highlighted the importance of strengthening the competitiveness of the European business sector.[88] Shortly after, in February 2025, the European Commission presented the Clean Industrial Deal as the overarching European policy framework for competitiveness and decarbonization.[89] The

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81 See the website of the European Council, available at: https://www.consilium.europa.eu/nl/policies/energy-union/ (most recently accessed on 30 October 2025).
82 Including – among others – (a revision of) EU ETS, the ESA, the LULUCF (each as defined below) and the Renewable Energy Directive.
83 European Commission, 19 May 2021, *Written Observations of the European Commission – Case: Duarte Agosthino and Others v. Portugal and Others*, (Exhibit S-208), no. 30.
84 Regulation (EU) 2018/1999 on Energy Union Governance and Climate Action.
85 European Commission, 11 December 2019, *The European Green Deal*, COM(2019) 640.
86 Shell Written Pleading Notes, no. 2.4.3 and 2.4.10-2.4.13. See also European Commission, 24 October 2023, *State of the Energy Union Report 2023*, COM(2023) 650 (Exhibit S-216).
87 M. Draghi, *The future of European Competitiveness. Part A: A competitiveness strategy for Europe*, Luxembourg: Publications Office of the European Union 2025, p. 41.
88 European Commission, 29 January 2025, *A Competitiveness Compass for the EU*, COM(2025) 30.
89 European Commission, 26 February 2025, *The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation*, COM(2025) 85.

Clean Industrial Deal builds on and unifies the aforementioned policy frameworks, including the Green Deal. The sustainability goals of the Green Deal – including the target to reduce emissions by 55% by 2030 compared to 1990 as well as the target to reduce net greenhouse gas emissions in 2024 by 90%[90] – are intended to remain unchanged in the Clean Industrial Deal. At the same time, the Clean Industrial Deal takes greater account of the role and (competitive) position of the European business sector in the path to achieving those goals.[91] The orientation of the Clean Industrial Deal on decarbonization and competitiveness also resounds in the European Commission's recognition in its recent global energy and climate vision that "*fossil fuels will continue to be used during the transition*", whilst "*the secure long-term choice is to build on clean and affordable energy*".[92]

44. The Governance Regulation, mentioned above under no. 43a, clarifies that the energy union rests on five closely intertwined pillars. These pillars include (i) security of energy supply (energy security), (ii) a well-functioning integrated internal energy market, (iii) promoting energy efficiency, (iv) decarbonisation and (v) research and innovation.[93] The Governance Regulation provides a governance mechanism for implementing and monitoring policies that focus on the energy union's objectives (the five pillars) and being able to meet the European Union's climate goals and satisfying reporting obligations under the United Nations Framework Convention on Climate Change ("**UNFCCC**") and the Paris Agreement.[94] The European Commission can issue recommendations to individual Member States to ensure the achievement of the aforementioned objectives.[95] This regulation thus provides the necessary European framework for developing and implementing combined and coordinated European policies, that is including member states' policies, on the aforementioned five pillars and meeting the EU's climate goals.[96]

45. The European Union's climate goals, set with a view to achieving the goals of the Paris Agreement,[97] are laid down in the European Climate Law. The European Climate Law is directed at transitioning to a "*safe, sustainable, affordable and secure energy system*",[98] and in that context lists a large number of factors to be taken into account in the development of climate policies, including environmental quality, competitiveness of the economy and increased energy security.[99]

46. To implement the climate goals of the European Climate Law, a wide range of regulations have been developed at European level under the heading of '*EU Fit for 55*', aimed at achieving the binding target of the European Union and its member states of net 55% reduction by 2030 compared to

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90 European Commission, 26 February 2025, *The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation*, COM(2025) 85, p. 1.

91 Cf. for example European Commission 29 January 2025, *A Competitiveness Compass for the EU*, COM(2025) 30, p. 2: "[t]*he transition to a decarbonised economy must be competitiveness-friendly and technology neutral, while the shift to cleaner sources of energy must reduce energy costs and price volatility. EU regulation must be proportionate.*" See also European Commission 26 February 2025, *Action Plan for Affordable Energy*, COM(2025) 79.

92 European Commission, 16 October 2025, *EU global climate and energy vision: securing Europe's competitive role in world markets and accelerating the clean transition*, JOIN(2025) 25, p. 1, 3-6, 11 and 13.

93 Regulation (EU) 2018/1999, recital 2 and Article 1(2).

94 Regulation (EU) 2018/1999, Article 1. See also recital 1. European Commission, 19 May 2021, *Written Observations of the European Commission – Case: Duarte Agosthino and Others v. Portugal and Other*s, (Exhibit S-208), no. 27.

95 Regulation (EU) 2018/1999, Articles 32(1) and 34(1).

96 Regulation (EU) 2018/1999, Article 1. See also recital 3. European Commission, 19 May 2021, *Written Observations of the European Commission – Case: Duarte Agosthino and Others v. Portugal and Other*s, (Exhibit S-208), no. 22.

97 Regulation (EU) 2021/1119, Article 1.

98 Regulation (EU) 2021/1119, recital 11. See also Statement of Appeal, no. 6.4.5.

99 Regulation (EU) 2021/1119, recital 34. See also Article 4(5). See also European Commission, 6 February 2024, *Impact Assessment Report*, SWD(2024) 63 (Exhibit S-266), p. 13.

1990.[100] As elaborated in more detail below, these regulations, which should be viewed explicitly in context and conjunction, clearly reflect the five pillars of the energy union and the European climate goals, and reiterate the importance of a coordinated approach. A combination of cross-sector regulation[101] and sector-specific rules was chosen.[102] This regulation aims to bring about the necessary behavioural change in a cost-efficient manner through market forces, pricing and subsidisation,[103] without disrupting the proper functioning of the internal market[104] and the competitive position of European enterprises[105] (as also found by the Court of Appeal in paras. 7.47 and 7.49), while also considering affordability and energy security.[106] As the Court of Appeal also recognised in paras. 7.51 and 7.56, the EU climate regulation is not based on the starting point that each individual enterprise is subject to an absolute reduction percentage set by the European Union.[107] Based on EU Fit for 55, total EU GHG emissions are intended to be reduced by 55% to 57% by 2030 compared to 1990 levels,[108] a target which the European Commission in May 2025 announced the European Union is "*well on track*" to meet.[109]

47. An overview is provided below of the content and objectives of EU regulations developed to implement the European energy and climate policy. All these regulations, which are directly or indirectly (via its customers) relevant to Shell, are each of equal weight from the perspective of the Union law arguments set out herein. Furthermore, all these regulations are designed to, from different angles, regulate and reduce emissions. Consequently, against the background of Section 1.1.1, these regulations determine, both in themselves and in mutual connection and coherence, the remaining room for manoeuvre of the member states to adopt more stringent national requirements aimed at regulating and reducing emissions.

Cross-sector regulations and policy of the EU in relation to energy and the environment – EU ETS and other legislation

a. The EU ETS sets a single emission cap at European level for all sectors covered by the EU ETS, expressed in tradable emission allowances, which cap is reduced annually to meet the European Union's emission reduction targets (cf. Court of Appeal, paras. 7.29 and

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100 Statement of Appeal, par. 2.6 and no. 6.4.5 and following, 10.2.18 and 10.2.19; and Shell Written Pleading Notes, Chapter 2. These European regulations are producing results: by February 2025, emissions in the European Union were reduced 37% from 1990 levels, while GDP grew 68% over the same period, see European Commission, 26 February 2025, *The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation*, COM(2025) 85, p. 23 (cf. Shell Written Pleading Notes, no. 2.1.3).

101 Shell Written Pleading Notes, par. 2.2 and 2.4.

102 Shell Written Pleading Notes, par. 2.3.

103 Cf. Regulation (EU) 2021/1119 (the European Climate Law), recital 18; and Regulation (EU) 2023/956 (CBAM).

104 Cf. Directive (EU) 2003/87 (EU ETS), recital 7; Directive 2022/2464 (CSRD), recital 16; and Directive 2024/1760 (CSDDD), recitals 31 and 99.

105 Cf. Regulation 2018/842 (ESA), recital 7; Directive 2022/2464 (CSRD), recital 20; and Regulation (EU) 2021/1119 (the European Climate Law), recital 18 and Article 2(2).

106 Statement of Appeal, no. 6.4.5 and 7.5.1 under (b)(ii); Shell Written Pleading Notes, Chapter 2; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.5; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.2 under (a); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.4.9 under (b) as read out; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 1.1.3.

107 In response to Parliamentary questions, the Dutch government recently acknowledged the correctness of the Court of Appeal's considerations in this regard, see *Aanhangsel Handelingen II,* 2024/25, no. 865, p. 2: "*I can well follow the Court of Appeal's considerations. Indeed, current European and Dutch climate legislation does not assume absolute emission reduction percentages for individual companies. European and national climate policies include a broad package of incentivising, pricing and standard-setting measures to meet climate goals.*"

108 Shell Written Pleading Notes, no. 2.3.6. See also European Commission, 6 February 2024, *Impact Assessment Report*, SWD(2024) 63 (Exhibit S-266), Annex 14, p. 9.

109 European Commission, 27 May 2025, *EU-wide assessment of the final updated national energy and climate plans - Delivering the Union's 2030 energy and climate objectives*, COM(2025) 274.

following).[110] Even before the introduction of the EU ETS, the European legislator stressed the great importance of regulating this system at European – rather than national – level "*to ensure competition is not distorted within the internal market.*"[111] This is also reflected in the objective of the EU ETS to "*contribute to preserving the integrity of the internal market and to avoid distortions of competition.*"[112] The importance of a comprehensive approach is emphasized both with a view "*to achieving the European Green Deal objectives*" and "*for the competitiveness of the European industry*", which "*is of particular importance for sectors that are hard to decarbonise*".[113] With the introduction of ETS2, which significantly expands the scope of the European emissions trading system, the vast majority of Shell's and the end users of its products' operations in Europe will be covered (cf. Court of Appeal, para 7.38).[114]

b. To ensure a level playing field for enterprises operating in the European market, the European legislator adopted the *Carbon Border Adjustment Mechanism* Regulation ("**CBAM**"). Under it, an import duty equivalent to the price of emission allowances under EU ETS is levied on importers of certain energy-intensive goods. This can help address the carbon leakage risk should certain EU ETS-covered activities in the European Union be relocated to outside the European Union in order to circumvent the EU ETS (cf. Court of Appeal, para. 7.31). Many of the customers of (the products of) Shell are in sectors covered by CBAM.[115]

c. The Land Use, Land-Use Change and Forestry Regulation ("**LULUCF**") contains regulations on GHG emissions and removals within the land use, land-use change and forestry sectors, and on the accounting, reporting and verification of those emissions and removals.[116] The regulation aims to harness the potential of land use, for example by providing the raw materials needed for low carbon fuels or the carbon removal achieved through forestry.[117]

d. The Effort Sharing Regulation ("**ESR**") aims to reduce GHG emissions in the remaining sectors not covered by the EU ETS or LULUCF by 40 percent by 2030 compared to 2005.[118] This regulation takes as its starting point that emissions reductions in these sectors "*needs to be achieved in a way that preserves the Union's competitiveness and takes account of Member States' different starting points and specific national circumstances and greenhouse gas emission reduction potential*".[119] To take this into account, the ESR provides member

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110 Shell Written Pleading Notes, no. 2.2.1-2.2.7, citing C.J.H. (Jos) Cozijnsen, *Expert opinion of Mr. C.J.H. Cozijnsen,* 3 March 2024 (Exhibit S-241) and J. Delbeke, 28 February 2024, *Letter about the climate activities of Shell* (Exhibit S-275).

111 European Commission 8 March 2000, '*Green Paper on greenhouse gas emissions trading within the European Union*', COM(2000) 87, p. 5.

112 Directive 2003/87/EC, recital 7.

113 Directive (EU) 2023/958, recital 42. See also Directive (EU) 2023/959, recital 51, on EU ETS which concerns using revenues from the EU ETS to "*speed up the decarbonisation of the economy while strengthening the industrial competitiveness of the Union*".

114 Shell Written Pleading Notes, no. 2.2.4-2.2.6; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, question 4. Shell has long supported the creation of the EU ETS, as has been recognized by the European Commissioner responsible for introducing the EU ETS (see J. Delbeke, *Letter about the climate activities of Shell*, 28 February 2024 (Exhibit S-275)), and sees the expanded scope of ETS2 as an important step toward meeting the European Union's 2030 emissions reduction target (see Shell Written Pleading Notes, no. 2.2.1 and 2.2.7).

115 Shell Written Pleading Notes, no. 2.2.8 and 2.2.9; and C.J.H. Cozijnsen, *Expert opinion of Mr. C.J.H. Cozijnsen*, 3 March 2024 (Exhibit S-241), no. 5.10-5.12.

116 Regulation (EU) 2018/841, consolidated text as amended by Delegated Regulation (EU) 2021/268 and Regulation (EU) 2023/839, Articles 1, 4 and 7(1); and Shell Written Pleading Notes, no. 2.3.6.

117 Regulation (EU) 2018/841, recital 5. Shell Written Pleading Notes, no. 2.3.6.

118 Regulation (EU) 2023/857, Articles 1 (setting the 40% target) and 2 (defining the sectors covered, excluding sectors covered by EU ETS and LULUCF).

119 Regulation (EU) 2023/857, recital 12.

states with flexibility with regard to their emissions reductions, for example by allowing notified reduction percentages to be revised and making a reserve available if less CO_2 reduction takes place due to national circumstances.[120] The ongoing review of the ESR also takes into account changing national circumstances.[121]

e. The Energy Efficiency Directive ("**EED**") establishes 'energy efficiency first' as a fundamental principle of EU energy policy.[122] It requires member states to take energy efficiency into account in policy, planning and major investment decisions that meet specific thresholds, relating to both energy systems and non-energy sectors that impact energy consumption and efficiency.[123] It furthermore sets targets for the member states to reduce the overall European energy consumption, amongst other things by imposing an annual energy savings obligation on the member states.[124] Whilst the energy efficiency first principle ensures that energy efficiency is always considered as an important policy consideration, it does not preclude looking at other policy considerations as well. Indeed, the principle implies a holistic approach, which takes into account the overall efficiency of the integrated energy system, security of supply and cost effectiveness and promotes the most efficient solutions for climate neutrality across the whole value chain.[125] Particular attention is paid to the position of people facing or risking energy poverty. All measures affecting energy consumption or supply should reduce energy poverty and should not encourage any disproportionate increase in housing, mobility or energy costs.[126]

f. The combination of EU ETS, LULUCF and ESR covers almost all emissions within the European Union.[127]

Cross-sector regulations and policy of the EU in relation to energy and the environment – reporting and due diligence obligations

g. Discussed below are Regulation (EU) 2019/2088 on the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation**"), the Corporate Sustainability Reporting Directive (the "**CSRD**") and the Corporate Sustainability Due Diligence Directive (the "**CSDDD**"). These contain sustainability obligations for individual enterprises. These directives and regulation, and their legislative history therefore provide insight into the conditions under which, according to the European legislator, enterprises can effectively contribute to the energy transition. In this context, it is relevant that against the background of the aforementioned Clean Industrial Deal, the European Commission recently proposed several amendments to, among others, the Taxonomy Regulation, the CSRD and the CSDDD (the "**Omnibus revision**"). This Omnibus Revision aims to leave the European

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120 Regulation (EU) 2018/842, consolidated text as amended by Regulation (EU) 2023/857, Articles 4(2), 6(3), 11 and 14. Articles 5-7 provide further flexibilities for member states.
121 Regulation (EU) 2018/842, Article 15.
122 Directive (EU) 2023/1791.
123 Directive (EU) 2023/1791, Article 3.
124 Directive (EU) 2023/1791, Articles 4 and 8.
125 Directive (EU) 2023/1791, recitals 18 and 19, and Article 3.
126 Directive (EU) 2023/1791, recitals 15, 22, 23, 76, and 78.
127 Shell Written Pleading Notes, no. 2.2.3; and European Commission, 6 February 2024, *Impact Assessment Report*, SWD(2024) 63 (Exhibit S-266), p. 22.

sustainability objectives unchanged and simplify the European regulatory framework for sustainability in order to strengthen the competitiveness of European business, and enhance the ability of the business sector to contribute to the energy transition through its business activities.[128]

h. The Taxonomy Regulation classifies economic activities that are environmentally sustainable according to the EU standards. The Regulation, based on the European Union's legislative competence regarding the internal market (Article 114 TFEU), aims to clarify for investors the degree to which an investment is environmentally sustainable, to enable an efficient movement of capital into sustainable investments.[129] The Taxonomy Regulation provides that the European Commission establish 'technical screening criteria' to give further content to the aforementioned classification by way of delegated act.[130] These criteria must be based on conclusive scientific evidence and the precautionary principle enshrined in Article 191 TFEU.[131] The European Commission has complied therewith. Amongst others, it has under conditions classified power generation with fossil gas as an activity that contributes substantially to climate change mitigation and adaption.[132] In doing so, the Commission has remarked that "*the fossil gas and nuclear energy generation activities can contribute to the decarbonisation of the Union's economy*".[133] In other words, the European Union acknowledges that gas has an important role to play as a transition fuel. The General Court of the European Union has rejected Austria's objection directed against this in an extensively reasoned judgment, which has already been mentioned above under no. 41.

i. The CSRD, by introducing a uniform standard for the disclosure of sustainability information, aims to provide policymakers with information for creating public policy, guide behavioural change through market forces, by enabling investors and financiers to decide which enterprises to direct financial resources to, and empower citizens to participate in social dialogue (cf. Court of Appeal, paras. 7.39-7.41).[134] The CSRD is based on the European Union's legislative competence regarding the internal market (Article 114 TFEU). Against this background, the directive ensures uniform regulation at European level to prevent undermining of "*the internal market,* (...) *right of establishment and the free movement of capital*",[135] while also binding enterprises from non-European countries that meet certain conditions to the CSRD to ensure that there is "*a level playing field for companies operating in the internal market.*"[136]

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[128] European Commission, 26 February 2025, *Commission Staff Working Document*, SWD(2025) 80, p. 2-5. On its website, Shell provides an overview of its positions and the contacts with regulators regarding initiatives in the field of climate and the energy transition, see https://www.shell.com/sustainability/advocacy-and-political-activity/climate-and-energy-transition-advocacy-updates (most recently accessed on 28 October 2025), in which Shell made the following comment on the Omnibus revision: "*Shell supports the Sustainability Omnibus' aim to improve EU competitiveness by simplifying regulatory reporting. Shell supports risk-based corporate management systems for human rights and environmental due diligence, as well as harmonised sustainability reporting standards to improve transparency and comparability.*" Incidentally, in the recent trade agreement with the United States, the European Commission specifically committed itself to simplifying the CSDDD and the CSRD to prevent "*undue restrictions on transatlantic trade*", see Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade, 12 August 2025, no. 12.

[129] Regulation (EU) 2020/852, Article 1. See also recital 6-12.

[130] Regulation (EU) 2020/852, Article 19.

[131] Regulation (EU) 2020/852, Article 19(1)(f).

[132] Regulation (EU) 2020/852, Article 10(3) and 11(3).

[133] Delegated Regulation (EU) 2022/1214, recital 3.

[134] Directive (EU) 2022/2464, recitals 9 and 14.

[135] Directive (EU) 2022/2464, recital 16.

[136] Directive (EU) 2022/2464, recitals 20 and 43.

- Amongst other things, the CSRD requires enterprises to (i) publish information about their transition plans for climate change mitigation (hereinafter in singular: "**climate transition plan**") if they have any – making such plans is not mandatory under the CSRD –, to enable an understanding of the enterprise's past, current and future mitigation efforts to ensure that their business model and strategy are compatible with the objectives of the European Climate Law and the 1.5°C goal of the Paris Agreement; and (ii) provide a description of "*the time-bound targets related to sustainability matters set by the group, including, where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050*".[137]

- The CSRD initially provided for a phased entry into force over a period of three years (imposing reporting requirements for the financial years of 2024, 2025 and 2026 respectively). In April 2025, the "Stop-the-Clock" Directive entered into force, postponing the sustainability reporting requirements on wave 2 and wave 3 enterprises (that is those required to report as from the financial years 2025 and 2026, respectively) by two years, to avoid a situation in which certain enterprises would be required to report for these financial years and then subsequently be relieved of this requirement as a result of the Omnibus Revision.[138]

j. The CSDDD introduces obligations to ensure that enterprises operating in the European internal market contribute to a sustainable energy transition.[139] The CSDDD, like the Taxonomy Regulation and the CSRD, is based on Article 114 TFEU. The CSDDD focuses on achieving, among other things, "*a level playing field for companies in order to avoid fragmentation and to provide legal certainty for businesses operating in the internal market*",[140] and also applies to non-European enterprises operating in the internal market, partly with a view to preserving the competitiveness of European enterprises.[141]

- Article 22 CSDDD contains a generic obligation for enterprises to prepare and implement a climate transition plan and include absolute emission reduction targets "*where appropriate*",[142] without prescribing a specific reduction percentage. The obligation to "implement" the climate transition plan has been removed in the recent Omnibus Revision, whilst a clarification has been added that the climate transition plan should include implementing actions, to ensure consistency with the CSRD (under which in-scope enterprises are already required to report on their climate transition plan, if any) and thus create more clarity for enterprises.[143] The Dutch government supports this proposal.[144] According to the text of the CSDDD adopted

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137 Directive (EU) 2022/2464, Articles 1(4) and (7); and Shell Written Pleading Notes, no. 2.5.2.
138 Directive (EU) 2025/794.
139 Directive (EU) 2024/1760, recital 16.
140 Directive (EU) 2024/1760, recital 31.
141 Directive (EU) 2024/1760, recitals 29 and 47 *in fine*.
142 Proposals to include an unconditional requirement for individual enterprises to include absolute reduction targets for Scope 1, 2 and 3 emissions did not make it into the final version of the CSDDD, see Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.2.3.
143 European Commission, 26 February 2025, *Commission Staff Working Document*, SWD(2025) 80, p. 39.
144 *Parliamentary Papers II* 2024/25, 22112, no. 4012 (Letter from the Minister of Foreign Affairs, File 2: Omnibus Proposal I (CSRD & CSDDD)), p. 12.

in 2024, the obligation to prepare (and implement) a climate transition plan "*should be understood as an obligation of means and not of results*", "*should take due account of* (…) *the complexity and evolving nature of climate transitioning*" and it applies that "[w]*hile companies should strive to achieve the greenhouse gas emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable.*"[145] Unlike the MD Reduction Duty, the CSDDD does not prescribe specific reduction targets. Instead, it opts for a non-static, administratively enforceable best-efforts obligation (see also below Section 1.1.3c (no. 58), subpart 2.1 (no. 86b) and Section 3.2.1 (no. 175). In doing so, the CSDDD leaves room for differentiation between countries, energy sources and sectors.

- Article 22 of the CSDDD contains a new obligation for enterprises covered by the directive and does not codify a duty of care already in place in EU law or the member states (including the Netherlands[146]).[147] This also follows from the fact that the CSDDD initially provided for a phased entry into force over a period of three to five years (from 26 July 2027 to 26 July 2029). With the aforementioned "Stop-the-Clock" Directive, the implementation deadline of the CSDDD for Member States has been postponed by one year.[148] The ensuing obligations for enterprises will likewise be pushed back a year, to allow enterprises to better prepare for the new obligations under the CSDDD. Consequently, the Dutch implementation legislation of the CSDDD will create duties for enterprises from July 2028.[149]

- The CSDDD deliberately does not provide for future civil liability of enterprises for not adopting or putting into effect a climate transition plan. A proposal during negotiations to make the civil liability regime from the CSDDD apply to all parts of the CSDDD did not make it into the final legislation.[150] With regard to the obligation to adopt a climate transition plan, the European legislator opted for administrative enforcement, which was adopted by the Dutch legislator in the consultation bill implementing the CSDDD.[151] The Omnibus Revision removes the EU-wide civil liability regime for breach of certain other provisions from the CSDDD.[152]

- With regard to most provisions of the CSDDD, the text adopted in 2024 opted for minimum harmonisation.[153] At the same time, the CSDDD acknowledged the risk that national measures on the subjects regulated in the CSDDD risked being

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145 Directive (EU) 2024/1760, recital 73.
146 See for example Consultatieversie memorie van toelichting wet(svoorstel) internationaal verantwoord ondernemen, p. 189, confirming that the Dutch implementation of the CSDDD constitutes "*new and lasting law*".
147 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.2.3.
148 Directive (EU) 2025/794.
149 European Commission, 26 February 2025, *Commission Staff Working Document*, SWD(2025) 80, p. 33 and 34.
150 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.4.3. See also M. Sinninghe Damsté, D. Bondarchuk & B. Renshof, 'De implementatie van het civielrechtelijke aansprakelijkheidsregime onder de CSDDD', *Ondernemingsrecht* 2025/29, p. 192.
151 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 5.4. In the draft legislative proposal for the implementation of the CSDDD by the Dutch legislature, which is based on the proposed CSDDD-text prior to the Omnibus Revision, the power of administrative enforcement will be vested in the ACM.
152 European Commission, 26 February 2025, *Commission Staff Working Document*, SWD(2025) 80, p. 8, 39 and 40.
153 Directive (EU) 2024/1760, Article 4(2) and recital 31.

"*ineffective and leading to fragmentation of the internal market*".[154] The Omnibus Revision seeks to extend the scope of the provisions for which the CSDDD achieves maximum harmonization under its Article 4, so that this applies to most of the provisions of the CSDDD on due diligence. In the consultation legislative proposal implementing the CSDDD (which is based on the text of the CSDDD pre-Omnibus Revision), the Dutch legislator chose not to introduce more stringent measures, in order to avoid the risk of national add-ons that would cause a fragmentation of standards throughout the European space.[155]

Sector-specific EU regulations and policy in relation to energy and the environment

k. Besides EU ETS, LULUCF and ESR, various directives and regulations specifically targeting certain (often harder to abate) sectors have been adopted at European level. This took into account the different paces at which different sectors can become more sustainable (cf. Court of Appeal, para. 7.48).[156] Sector-specific policies were introduced to accelerate investment in low-carbon technologies, especially in sectors that are hard to abate, to create demand for low-carbon energy while keeping European industry competitive.[157]

l. The revised Renewable Energy Directive ("**RED III**") sets binding targets for several sectors – including transport, industry and heating of buildings – that are harder or slower to abate, regarding the share of renewable energy in their total energy use (cf. Court of Appeal, para. 7.48). The directive thus aims to support both "*the Union's climate ambitions*" and "*security of supply*",[158] keeping in mind the challenges faced by the different sectors and the importance of maintaining the European Union's international competitiveness.[159] For each of the mentioned sectors, a percentage of total final energy consumption is set for which renewable energy will have to be used (in the transport sector, member states can also alternatively choose a binding reduction percentage for carbon intensity[160]). In addition, for the transport sector, it is stipulated that by 2030 5.5% of the energy supplied (by fuel suppliers such as Shell) to the transport sector must be renewable fuels. The Directive aims to increase the overall share of renewable energy in the European Union to 42.5% by 2030. Shell strongly supports binding sectoral commitments for the use of renewable energy, as this helps stimulate demand and enables supply-side investment.[161]

m. Several emissions reduction measures have been introduced for the transport sector:

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154 Directive (EU) 2024/1760, recital 99.

155 Consultation version Explanatory Memorandum to the International Corporate Responsibility Act/legislative proposal (*Wet internationaal verantwoord ondernemen*, p. 16: "[f]*or the other provisions of the directive, however, Member States may include more stringent provisions in the implementing law, or include provisions that are more specific in terms of the objective or area concerned, with the aim of achieving a different level of protection for human, labour and social rights, the environment or climate. No use is being made of this* (…)". See also p. 26, 192, and 193. Cf. Appendix to *Aanhangsel Handelingen II* 2024/25, no. 2502, p. 3.

156 Shell Written Pleading Notes, par. 2.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.8. See also European Commission, 6 February 2024, *Impact Assessment Report*, SWD(2024) 63 (Exhibit S-266), p. 18.

157 Shell Written Pleading Notes, no. 2.3.1.

158 Directive (EU) 2023/2413, recital 9. See also Article 22a(3).

159 Directive (EU) 2023/2413, recital 11 and 73-75. See also Article 22a(1): "[w]*hen adopting those policies and measures, Member States shall take into account the energy efficiency first principle, effectiveness and international competitiveness and the need to tackle regulatory, administrative and economic barriers.*"

160 Carbon intensity expresses the amount of emissions per unit of energy produced by a given source and is expressed in grams of CO2 equivalent per megajoule (gCO2e/MJ).

161 Shell Written Pleading Notes, no. 2.4.1 and 2.4.2.

- To increase both demand and supply of sustainable aviation fuel (SAF) in the aviation sector, the ReFuelEU Aviation Regulation increases the minimum proportion of sustainable aviation fuel that aviation fuel suppliers must supply to EU airports, whilst airline operators are obliged to refuel at EU airports instead of loading more fuel than necessary at the airport of origin to take advantage of lower fuel prices (so-called 'tankering').[162] Fuel suppliers like Shell are thereby enabled to supply more SAF at airports in Europe, which would reduce emissions from their aviation customers to the extent these now refuel with SAF instead of with ordinary fuels at those European airports. European airports will in turn be required to provide the infrastructure needed for delivery with SAF. This Regulation "*should take measures to prevent that the introduction of SAF affects negatively the competitiveness of the aviation sector by defining harmonised requirements across the Union*"[163] and aims to "*to set out a framework restoring and preserving a level playing field on the Union air transport market as regards the use of aviation fuels.*"[164]

- The FuelEU Shipping Regulation requires ships with a tonnage over 5,000 gross tonnes docking at EU ports (many of which Shell serves) to reduce the emission intensity of energy used on board by 6% by 2030, by 14.5% by 2035 and by 31% by 2040. The Regulation thus creates an incentive for the use in shipping of renewable liquid and gaseous fuels of non-organic origin and low carbon fuels.[165] According to this regulation, "*a level playing field* (...) *is indispensable*" to avoid distortions in the internal market[166] and "*is essential to ensure the proper functioning of and fair competition in the Union maritime transport market*."[167]

- Regulation (EU) 2023/851, which recently came into force, requires new passenger cars and light commercial vehicles placed on the European market to emit less CO_2 from 2030 and be emission-free from 2035, thus encouraging carmakers to produce electric vehicles and consumers to buy electric vehicles.[168] It is important here to "*support the competitiveness of Union industry and strengthen the Union's strategic autonomy*",[169] among other things by gradually reducing targets and by avoiding "*possible market distorting effects*".[170]

- The Truck Regulation[171] requires heavy-duty vehicle manufacturers to reduce CO_2 emissions per kilometre from new vehicles by 45% by 2030, by 65% by 2035 and

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[162] Shell Written Pleading Notes, no. 2.3.3 under (a). Shell had argued during the drafting process of the Regulation for a higher minimum share than was ultimately adopted, as this would more actively stimulate demand (Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.36 under (c)).
[163] Regulation (EU) 2023/2405, recital 10.
[164] Regulation (EU) 2023/2405, recital 15. The importance of a level playing field and the competitiveness of the air transport industry is also emphasized in several other places in this Regulation, see recitals 4, 5, 12, 13, 14 16, 17, 19, 40, 42, 48 and 53.
[165] Shell Written Pleading Notes, no. 2.3.3 under (b).
[166] Regulation (EU) 2023/1805, recital 1. See also recitals 7, 67 and 72.
[167] Regulation (EU) 2023/1805, recital 5. See also recital 42.
[168] Shell Written Pleading Notes, no. 2.3.3 under (c).
[169] Regulation (EU) 2023/851, recital 8. See also recitals 7 and 13.
[170] Regulation (EU) 2023/851, recitals 21 and 28.
[171] Regulation (EU) 2024/1610.

by 90% by 2040 compared to a 2019-2020 reporting period. The Regulation thus seeks to create a growing demand for low-carbon road transport solutions.[172] The Truck Regulation aims in part to "*stimulate innovation in zero-emission technologies in a cost-efficient way*", "*ensure the long-term competitiveness of the Union industry on a global market*", "*alleviate air pollution*" and provide flexibility for enterprises to meet targets by tightening them in steps.[173]

- More generally, the European Union seeks to encourage consumers to choose low-carbon fuel options in transport through policies that stimulate demand for low and zero-emission vehicles and thus low carbon fuels. In addition to ETS2 as a corner-stone of EU policy, examples include the Eurovignette Directive[174] which encourages the use of zero-emission vehicles and the Clean Vehicles Directive,[175] which promotes clean mobility solutions in public procurement[176] and aims to strengthen the European Union's competitiveness.[177] Stressing that this objective can "*by reason of a common* (...) *policy framework* (...) *be better achieved at Union level*".[178]

n. For the energy sector, the Methane Regulation is relevant.[179] This regulation introduces requirements for the fossil fuel sectors to measure, report, verify and limit methane emissions, as methane emissions have a high impact on global warming and are released during energy production, among other things.[180] The maximum methane intensity values that will apply to fossil fuels placed on the European market under this regulation must be set at a level that achieves the balancing of – among other things – reduced methane emissions from these fossil fuels, guaranteed energy security in the European Union and protection of the European Union's competitiveness.[181]

o. The EU regulatory framework concerning the energy transition contains several instruments emphasizing the importance of gas as an energy carrier with the ability to offer flexibility to the European energy system. These rules aim to further renewable and low-carbon gas supply (for example produced with renewable hydrogen), whilst ensuring European energy security, in the context of which it is acknowledged that natural gas has a role to play in the years to come:

- As mentioned above under no. 47h, the European Commission has under conditions classified power generation with fossil gas as an activity that contributes substantially to climate change mitigation and adaptation based on the Taxonomy Regulation. This is based on the realisation that a successful energy transition goes

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172 Shell Written Pleading Notes, no. 2.3.3 under (d).
173 Regulation (EU) 2024/1610, recitals 10, 12 and 18.
174 Directive (EC) 1999/62.
175 Directive (EU) 2019/1161.
176 Shell Written Pleading Notes, no. 2.3.3 under (e).
177 Directive (EU) 2019/1161, recitals 4 and 5.
178 Directive (EU) 2019/1161, recital 33.
179 Shell Written Pleading Notes, no. 2.3.5; and Regulation (EU) 2024/1787.
180 Regulation (EU) 2024/1787, recitals 1 and 6.
181 Regulation (EU) 2024/1787, recitals 76 and 77, and Article 29. Shell is leading the way within its industry in tackling methane emissions, keeping the intensity of methane emissions well below 0.2%, see Shell Written Pleading Notes, no. 5.2.1.

hand in hand with ensuring energy security and that there are sectors in which there are insufficient technological and economically feasible alternatives to ensure energy security.[182]

- The Critical Entities Resilience Directive[183] requires member states to identify so-called critical entities, that deliver essential services, defined in the Directive as services that are "*crucial for the maintenance of vital societal functions, economic activities, public health and safety, or the environment*".[184] The Directive aims to ensure that these entities can continue to deliver these services in an unobstructed manner also in case of disruptive incidents. It does so by obliging these entities to adopt measures to enhance their resilience and ability to keep delivering the relevant services, whilst member states are required to assist these entities in meeting this obligation. Importantly, the Directive designates the gas sector as a subsector that delivers potentially essential services, underscoring the role of gas in maintaining vital societal functions and the variety of interests involved when the activities of an enterprise active in the gas sector are affected.[185]

- Regulation (EU) 2017/1938 aims to warrant a well-functioning internal gas market to safeguard an uninterrupted supply of gas throughout the EU in case of major disruptions of gas supply. Acknowledging that "*natural gas remains an essential component of the energy supply of the Union*", it imposes a shared responsibility on natural gas enterprises, member states and the European Commission to safeguard the security of gas supply in the EU.[186] It prescribes that member states adhere to certain minimum standards as to their gas infrastructure and supply capability. In doing so, this instrument should enable natural gas enterprises to rely on market-based mechanisms when coping with disruptions of gas supply.[187] At the same time, the Regulation provides for emergency measures in case the market-based measures are insufficient to respond to supply crises, catering for solidarity and a coordinated cooperation amongst the member states.[188]

- In 2024, the EU hydrogen and gas decarbonisation package was adopted, aimed at facilitating the uptake of renewable and low-carbon gases, including hydrogen, while ensuring security of supply and affordability of energy for all EU citizens.[189] As part of this package, Directive (EU) 2024/1788 and Regulation (EU) 2024/1789 establish a framework for the organisation and functioning of the internal markets for natural gas and renewable hydrogen.[190] This framework should contribute to achieving the EU's objective to cut GHG emissions, amongst other things by trying to ensure that

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182 The Court of Justice also recognises that "*the approach taken for economic activities in the fossil gas sector is a gradual approach aimed at reducing the generation of energy in the fossil gas sector in stages, whilst allowing for security of supply*", see General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869 (*Austria/Commission*), para. 540.
183 Directive (EU) 2022/2557.
184 Directive (EU) 2022/2557, Article 2(5).
185 Directive (EU) 2022/2557, Annex 1 (subsectors) under d).
186 Regulation (EU) 2017/1938, recitals 1, 7, 25 and 32, and Articles 3 and 6.
187 Regulation (EU) 2017/1938, recitals 32 and 33.
188 Regulation (EU) 2017/1938, recitals 7, 11 and 25.
189 Cf. Shell Written Pleading Notes, no. 2.4.14-2.4.16 concerning the EU Hydrogen Strategy.
190 Directive (EU) 2024/1788, Article 1; and Regulation (EU) 2024/1789, Article 1.

renewable energy sources become a competitive option for consumers,[191] and simultaneously ensuring security of supply and the proper functioning of the internal markets for natural gas and renewable hydrogen, amongst other things by removing trade barriers.[192] In this respect, it is explicitly noted that natural gas "*still plays a key role in energy supply*"[193] and is "*essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union.*"[194] Member states are called upon to ensure that "*their national law does not unduly hamper cross-border trade in natural gas and hydrogen*"[195] and "*no undue barriers exist within the internal markets for natural gas and hydrogen as regards market entry and exit, trading and operation.*"[196]

p. In line with no. 47o above, Directive (EU) 2009/119 aims to ensure energy security by maintaining emergency oil stocks to be used in the event of oil supply disruptions. The Recitals of the Directive amongst other things recognizes that "[t]*he supply of crude oil and petroleum products to the Community remains very important*" and that "*[t]he availability of oil stocks and the safeguarding of energy supply are essential elements of public security*".[197] In line with this, the Critical Entities Resilience Directive also designates the oil sector as a sector delivering potentially essential services.[198]

q. The Net Zero Industry Act ("**NZIA**")[199] aims to increase the production capacity of net zero technologies within the European Union and reduce the European Union's dependence on imports of such technologies. The NZIA requires fossil fuels producers to contribute to the 2030 EU target for annual carbon storage capacity by developing or investing in carbon storage projects.[200] The NZIA is part of a comprehensive approach to support the scale-up of clean energy technology and aims to lower the cost of producing low or zero-emission energy products for enterprises like Shell.[201]

r. The new infrastructure required for the above changes will be promoted by the Alternative Fuels Infrastructure Regulation ("**AFIR**").[202] This regulation requires member states to build infrastructure for electric vehicles. In this way, the regulation supports the use of low carbon fuels.[203] The AFIR aims to reduce differences between member states by pursuing uniformity[204] to ensure "*full connectivity throughout the Union.*"[205] The AFIR stresses in several places the importance of competitive market forces, market access and transparency for the development of charging infrastructure.[206] The AFIR, together with other regulations

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191 Directive (EU) 2024/1788, recital 33.
192 Directive (EU) 2024/1788, recital 5; and Regulation (EU) 2024/1789, recital 3.
193 Directive (EU) 2024/1788, recital 29.
194 Directive (EU) 2024/1788, recital 108; and Regulation (EU) 2024/1789, recitals 57, 60 and 103.
195 Directive (EU) 2024/1788, Article 3(2).
196 Directive (EU) 2024/1788, Article 3(3).
197 Directive (EU) 2009/119, recitals 1 and 8.
198 Directive (EU) 2022/2557, Annex 1 (subsectors) under c).
199 Regulation (EU) 2024/1735.
200 Shell Written Pleading Notes, no. 2.4.4 and 2.4.5; and Regulation (EU) 2024/1735 recitals 1 and 36, and Articles 20 and 23.
201 Shell Written Pleading Notes, no. 2.4.8; and Regulation (EU) 2024/1735, recital 4.
202 Shell Written Pleading Notes, no. 2.3.4.
203 Shell Written Pleading Notes, no. 2.3.3 under (c).
204 Regulation (EU) 2023/1804, recitals 13, 76 and 77.
205 Regulation (EU) 2023/1804, recital 19.
206 Regulation (EU) 2023/1804, recitals 15, 32, 34, 66, 67, 68, 71 and 79.

– including Regulation (EU) 2023/851, which requires new passenger cars to be emission-free from 2035, and the Truck Regulation, which aims to reduce the number of heavy commercial vehicles with internal combustion engines – provides a coordinated regulatory framework aimed at increasing both demand for low-carbon products and the supply of charging infrastructure to meet that growing demand. This enables energy enterprises, such as Shell, to invest in the necessary charging infrastructure.

48. In addition to adopting legislation, the European Union is also offering financial support to help member states, cities, regions, enterprises and vulnerable groups with the energy transition and its costs.[207] That financial support is provided in various ways. The LIFE programme supports the development of environmental and climate policy and legislation through project funding. The Social Climate Fund provides financial support to vulnerable groups significantly affected by the energy transition. The Innovation Fund supports the development of low and zero-emission technologies. The Modernisation Fund provides financial support to lower-income member states to modernise their energy systems and improve energy efficiency.[208] As part of the Clean Industrial Deal, the European Union has published the Action Plan on Affordable Energy, which highlights the growing energy price gap between the European Union and its main competitors and the associated risks to European competitiveness. Against that background, this Action Plan focuses on reducing energy prices for European citizens and enterprises.[209]

1.1.3 An MD Reduction Duty is not compatible with European regulations and is at odds with the principle of sincere cooperation of Article 4(3) TEU, the general EU law principle of proportionality and the EU law principle of energy solidarity

49. It follows from the above that, as Shell also explained in the fact-finding instances,[210] the EU climate and transition policy is based on a balancing of a large number of sometimes conflicting interests, which member states must also take into account.[211] European regulation as a whole embodies a balance between several fundamental interests and objectives, including climate, security of supply and affordability of energy (the interests of the energy trilemma), as the Court of Appeal also seems to have recognized (see Judgment, paras. 7.47 and 7.49).[212] The European legislator adopted legislation to achieve these goals under, among others, Articles 114, 192 and 194 TFEU.

50. Even where this legislation provides for minimum harmonisation, thus leaving room in the base for further-reaching national measures, such measures must still be compatible with Union law. An MD Reduction Duty is not compatible in various ways (and that certainly applies to an MD Reduction Duty with a Shell specific percentage).[213] This gives rise to various complaints in this conditional

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[207] See the European Commission website, available at: https://climate.ec.europa.eu/eu-action/eu-competences-field-climate-action_en (most recently accessed 24 31 October 2025).
[208] European Commission, 6 February 2024, *Impact Assessment Report*, SWD(2024) 63 (Exhibit S-266), p. 14.
[209] European Commission 26 February 2025, *Action Plan for Affordable Energy*, COM(2025) 79, p. 1 and 2.
[210] Statement of Appeal, no. 6.4.6; and Shell Written Pleading Notes, Chapter 2.
[211] Cf. Regulation (EU) 2021/1119 (the European Climate Law), recital 34. Before the Court of Appeal, Shell explained how the measures of the EU climate and transition policy considered not only climate policy, but also affordability and energy security, as reflected in the Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.3 and the images shown there. This occurred not only at the EU level, but also at the national Dutch level.
[212] Statement of Appeal, no. 6.4.5 and 7.5.1 under (b)(ii); Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.5; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.2 under (a); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.4.9 under (b) as read out.
[213] See footnote 17.

cross-appeal, as these complaints are set out under no. 28 above.

a. An MD Reduction Duty cuts across the ability of the European Union and its member states to ensure the security and affordability of energy

51. In the principal cassation appeal, Milieudefensie argues that an MD Reduction Duty can indeed be (sufficiently) effective in the sense that it reduces global GHG emissions, for example because it would lead to an increase in the price of fossil fuels and, consequently, a decrease in demand.[214] As Shell has argued, this is incorrect because Shell's relevant supply activities will be replaced by (an)other enterprise(s) (with a potentially higher emissions intensity) (the displacement effect).[215] However, if it is hypothesised that an MD Reduction Duty does have some effect, such a duty undermines EU law and its underlying principles (cf. complaints i)-vii)).

52. As Shell has extensively elaborated in fact-finding instances, EU regulation seeks to balance various different interests, including those that form part of the energy trilemma (cf. especially complaint (iv)). This means that in addition to mitigating climate risks, ensuring security of energy supply and affordability carries significant weight in this respect. Both interests are impacted when the supply of fossil fuels decreases and/or these become more expensive (which Milieudefensie has argued would be the result of an MD Reduction Duty[216]), particularly in member states relying on these energy sources more than others for their energy supply. Indeed, the existing legal and policy framework takes into account specific national and sectoral circumstances and opportunities, including, for example, available energy resources, technology and infrastructure, when shaping policies on energy transition and setting targets.[217] The models used to map out what is needed to achieve the Paris Agreement goals, which also underpin European regulations,[218] assume reduction pathways per sector, energy source and country. In many of these models, there is room for continued supply of oil and gas until 2030 and beyond, partly to fill the space left by moving away from higher emission energy sources like coal.[219] Also, they leave space to adequately respond to future developments and thus to (continue to) represent all the interests involved.

53. Imposing an MD Reduction Duty on an individual enterprise entails a restriction for such enterprise, without taking into account different national, sectoral and/or energy source-related circumstances. For enterprises like Shell, this could for example include a restriction to supply certain countries seeking to use gas to replace the growth in coal use, thereby helping to reduce global emissions (cf. Court of Appeal, paras. 7.74 and 7.75: "*if Shell starts supplying gas to a company that previously obtained its energy from coal* (...)*, this will lead to an increase in Shell's scope 3 emissions, but on balance* [this can] *lead to lower global CO_2 emissions*"). An inherently static and time-bound MD Reduction Duty runs counter to the aforementioned premise. Countries and sectors more dependent on fossil fuels in the shorter term are disproportionately affected by an MD Reduction Duty in their

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214 Document Initiating Supreme Court Proceedings Milieudefensie, Parts 6-8.
215 Statement of Appeal, no. 3.2.20; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.3; and C.J.H. Cozijnsen, *Expert opinion of Mr. C.J.H. Cozijnsen,* 3 March 2024 (Exhibit S-241), no. 1.6 and par. 3.
216 Defence on Appeal, no. 912, 915, 916 and 920, with reference to the expert letter of Erickson and others (Exhibit MD-469), p. 2.
217 See Regulation (EU) 2018/841; Regulation (EU) 2018/842; and Directive 2023/959/EU, with targets differentiated by sector. See also Regulation (EU) 2021/1119, recitals 19 and 34.
218 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.3.7.
219 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.8; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, par. 7.3.

ability to ensure security of supply and affordability of energy (cf. especially complaint (vi)).[220] Consequently, an MD Reduction Duty as a stricter national measure would also be at odds with the obligation for member states to prevent that such stricter national measures impair the margin European law leaves other member states to give shape to their national policies. This is even more so, given that according to Milieudefensie an MD Reduction Duty would also apply to other enterprises.

> The fact that the ability to arrange for security and affordability of energy is an important factor underlying the European regulatory framework resounds in a great number of the EU law instruments discussed in Section 1.1.2. Shell illustrates that below, and – where relevant – will do the same for each of the other manners in which an MD Reduction Duty is incompatible with the European regulatory and policy framework set out in this Section 1.1.3. The European Climate Law includes "strengthening energy security" as one of the important factors to take into account when taking measures aimed at achieving the climate goals set out therein (recital 34) and points at the need to take account of "different national circumstances" (recitals 19, 34). The Governance Regulation lists energy security as the first of five dimensions of the energy union (Article 1(2)(a)). The ESR emphasizes that it "is a key Union priority to establish a resilient Energy Union to provide secure, sustainable, competitive and affordable energy to its citizens" (recital 7, see also recital 8). The EED requires that measures affecting energy consumption or supply across the EU should take account of the security of energy supply and alleviate energy poverty (recitals 17, 23 and 78). Ensuring security and affordability require that sufficient account is taken of national and sectoral circumstances. EU ETS, LULUCF and the ESR set differentiated targets for individual sectors and/or member states for this reason. Similarly, RED III sets sector-specific targets, whilst for certain specific sectors further tailored sector-specific rules have been established, such as the ReFuelEU Aviation Regulation, the FuelEU Maritime Regulation, the Truck Regulation and Regulation (EU) 2023/851 concerning passenger cars. Regulation (EU) 2017/1938 prescribes cooperation between natural gas enterprises and member states to reduce exposure of individual member states to adverse effects of disruptions of gas supply (recitals 7 and 11), while the Critical Entities Resilience Directive, Directive (EU) 2009/119 (for oil) and Directive (EU) 2024/1788 and Regulation (EU) 2024/1789 (for natural gas) also emphasise the importance of oil and gas respectively for the energy supply and public security of the European Union.

b. An MD Reduction Duty is contrary to the principle of energy solidarity

54. Secondly, if it is presumed that an MD Reduction Duty would be effective, the imposition of such a duty also runs counter to the EU law principle of energy solidarity. This principle requires the EU institutions and member states to consider in their actions whether there are risks to the energy interests of the member states and the EU, and in particular to the security of energy supply (cf. especially complaint (vi)).[221] The aforementioned presumption implies that the reduction duty as a national measure would result in less oil and gas on the market and/or price increases for oil and gas.[222] As noted above, this would interfere with the ability of member states that, more than other member states, for various reasons rely on oil and gas for their energy supply to observe the interests

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[220] Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 29 under (a) and 45; Shell Pleading Notes dated 15 December 2020, hearing day 3 – law-making role of the courts, no. 21-24; Statement of Appeal, no. 1.4.2-1.4.5, 1.5.1 under (c) and 3.4.5, and par. 2.2, 2.3, 5.3 and 5.4; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.3; and Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 1 of 4, no. 6.2.8.

[221] CJEU 15 July 2021, C-848/19, ECLI:EU:C:2021:598 (*OPAL*), para. 69; and General Court 10 September 2025, T-625/22, ECLI:EU:T:2025:869, para. 164-166.

[222] See Document Initiating Supreme Court Proceedings Milieudefensie, no. 7.3 (and also 7.5 and 7.15).

of energy security and affordability. Before the Court of Appeal, Shell amongst other things illustrated the possible impact of an MD Reduction Duty on its European activities by explaining how large amounts of energy run from Shell's refineries in Pernis and Rheinland through the Central European Pipeline System and *Rhein-Main-Rohr* pipeline on a daily basis, passing through and/or supplying a large number of member states.[223] This further underscores how an effective MD Reduction Duty could impact the room for manoeuvre of member states supplied by these pipelines.

> The European Climate Law requires that measures aimed at achieving the climate goals set out therein should "take into account the importance of promoting both fairness and solidary among Member States" (Articles 2(2), 4(5)(h), 7(3)(a), cf. recital 34). The ESR notes that that "all Member States should participate in [achieving these GHG emission reductions], balancing considerations of fairness and solidarity" (recital 2). See also the Governance Regulation, Article 34(2)(a). Regulation (EU) 2017/1938 establishes that solidarity is necessary to safeguard the security of gas supply throughout the EU (recital 38), which is also expressed in Directive (EU) 2009/119 (Article 1) and Regulation (EU) 2024/1789 (recitals 61, 103 and following).

c. An MD Reduction Duty systematically runs counter to key elements and instruments of European policy, such as EU ETS, ETS2, CBAM, CSDDD and CSRD

55. Thirdly, an MD Reduction Duty fails to recognise that achieving the climate goals pursued by EU regulation requires a coordinated systematic approach (cf. especially complaints (i-v)).[224]

56. An MD Reduction Duty is contrary to the system of the EU ETS and similar 'cap-and-trade' systems such as ETS2. The Court of Appeal seems to have signalled this in para. 7.35, but did not draw the correct conclusion from this that an MD Reduction Duty does not fit into the existing legal system. 'Cap-and-trade' systems apply an emissions cap which is lowered over time. Achieving the target reduction in CO_2 emissions is ensured in the most cost-efficient way, driven by the market forces underlying the system. To meet the emissions cap for 2030 (the relevant date for MD's claim), in the period leading towards this date enterprises that can reduce emissions cheaply will to a greater extent do so and sell surplus allowances, and enterprises with high reduction costs will to a greater extent buy allowances. If, for the sake of argument, one considers an MD Reduction Duty in conjunction with such 'cap-and-trade' system, this reveals the systematic disconnect. Indeed, emissions reductions realised by an individual enterprise to meet an MD Reduction Duty would not result in a net additional reduction of CO_2 emissions. Instead, the realised emissions reductions would result in more allowances becoming available for purchase by other enterprises, up to the level of the emissions cap. This would also lower the price that other enterprises have to pay for those allowances, making it cheaper for those other enterprises to emit CO_2 and giving them less of an incentive to invest in reducing their CO_2 emissions in the short-term. If those other enterprises provide products with higher emissions intensity, this furthermore undermines the market efficiency: within the available capacity under the emissions cap, fewer products (such as energy) enter the market as a result of the higher emissions intensity of the operations of those other enterprises.[225]

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[223] Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 3 of 4, no. 9.3.5-9.3.8.
[224] Statement of Appeal, no. 6.4.12.
[225] C.J.H. Cozijnsen, *Expert opinion of Mr. C.J.H. Cozijnsen,* 3 March 2024 (Exhibit S-241), no. 1.6 and par. 3. See also T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.4: "[d]*as europäische Emissionshandelssystem verfolgt insoweit gleichzeitig umweltschützende und wirtschaftliche Zielsetzungen, zu der eine an einzelne Emittenten gerichtete pauschale Reduktionsanordnung*

57. The 'cap-and-trade' system established at EU level is coupled with an import duty, equivalent to the price of emissions allowances under EU ETS, for certain energy-intensive goods under CBAM. This aims to counter 'carbon-leakage' resulting from production being relocated or outsourced outside the European Union. An MD Reduction Duty is incapable of achieving the same result: imposing an obligation on individual enterprises like Shell does not prevent other enterprises from stepping in to take over the relevant activities, leading to similar or higher emissions.[226]

58. An MD Reduction Duty systematically runs counter to the set up and operation of the CSRD and the CSDDD (cf. especially complaints (i-iii)). The objective of the climate components set forth in both the CSRD and the CSDDD is, in brief, to bring about behavioural change by introducing obligations that require enterprises to report on their climate transition plans and to include reduction targets in their climate transition plans (without imposing set reduction percentages to be applied across the board, leaving that for the individual enterprises to determine), respectively. An MD Reduction Duty seeks to achieve this behavioural change too, but its instrument deviates from the instruments chosen by the European legislator, if only because an MD Reduction Duty does not take market forces into account, is not subject to an administrative enforcement regime and leaves no room for enterprises to determine appropriate reduction targets themselves and adjust such targets if future circumstances call for that.

59. An MD Reduction Duty is incompatible with the classification of power generation with gas as a potential environmentally sustainable economic activity based on the Taxonomy Regulation. An MD Reduction Duty targets all activities of Shell, including Shell's activities in the field of gas and renewable energy, and in doing so ignores that the latter activities, including those relating to gas, can according to the EU also "*contribute to the decarbonisation of the Union's economy*". For that reason, these activities are under circumstances classified as sustainable under the Taxonomy Regulation, with the aim of promoting the funding of these activities. In other words: Milieudefensie targets activities classified by the European Union as sustainable (under certain circumstances) for the sake of sustainability goals.

d. An MD Reduction Duty undermines the proper functioning of the single market and ignores the importance of a level playing field

60. Fourthly, an MD Reduction Duty undermines the fundamental objective of the European legal and policy framework to ensure the proper functioning of the internal market in the energy transition (cf. especially complaints (ii)-(v)).[227] Tackling climate change is inextricably linked to the energy transition, which requires a shift in both the demand for and supply of low-carbon energy. For the

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konzeptionell in einem diametralen Gegensatz steht." The Dutch Council of State likewise voiced its concerns about the compatibility of the Dutch national CO_2-levy, which comes on top of EU ETS, with the European emission trading system, see *Kamerstukken II* 2020/21, 35575, no. 4, par. 4 under (a); and *Kamerstukken II* 2022/23, 36206, no. 4, par. 3. See also the opinion of A-G T. Ćapeta in the matter C-519/24, CJEU 9 October 2025, ECLI:EU:C:2025:773, para. 87, with reference to (amongst others) CJEU 26 February 2015, ECLI:EU:C:2015:120 (*Sko-Energo*), para. 28, and CJEU 12 April 2018, ECLI:EU:C:2018:245 (*PPC Power*), para. 27

226 Statement of Appeal, no. 6.4.14-6.4.20.

227 Cf. Directive (EU) 2003/87 (EU ETS), recital 7; Directive (EU) 2022/2464 (CSRD), recital 16; and Directive (EU) 2024/1760 (CSDDD), recitals 31 and 99. T. Pfeiffer, Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.4: "(…) *weitreichende grenzüberschreitende Unterlassungsverfügungen, die an einzelne Emittenten gerichtet, aber mit der weltweiten CO_2-Belastung begründet werden,* [stehen] *mit der Gleichheit der Wettbewerbsbedingungen und damit mit einem Grundprinzip des Binnenmarkts im Widerspruch.*"

energy transition to succeed, the proper functioning of the internal market is essential. One reason for this is that market participants only experience the right (price) incentives to reduce emissions as efficiently as possible across the entire European internal market when the internal market is functioning properly (supported by mechanisms such as EU ETS and ETS2).[228] Proper functioning of the internal market is therefore not contradictory to, but functional and necessary for the effective effort against climate change and indeed is deployed for that purpose by the European legislator in the form of, amongst other things, EU ETS and ETS2.[229]

61. A reduction duty imposed by national courts on individual enterprises through private law inevitably leads to an uneven playing field (and, thereby, to fragmentation of the internal market) and legal uncertainty. These are obstacles to the proper functioning of the internal market that the European legislator, in particular in the CSDDD, has explicitly sought to avoid.[230] The European Commission has also spoken out in other areas of EU legislation against fragmentation of the legal landscape through member states unilaterally taking stricter measures.[231] An MD Reduction Duty indeed disrupts the level playing field created by the existing legal system. Such a reduction duty obliges an individual enterprise to reduce, regarded in a vacuum, the emissions that that enterprise reports by, for example, producing or selling fewer goods. This obliges that enterprise to achieve a static emission reduction at a date set in the future and makes it uncompetitive, while favouring competitors which are not or cannot be brought before a Dutch court.[232] As Shell has argued, no MD Reduction Duty has been imposed in jurisdictions outside the Netherlands, nor is there any indication that courts in relevant competing economies will impose the reduction duty alleged by Milieudefensie on an individual enterprise.[233] Even if non-Dutch courts would accept the legal concept of an MD Reduction Duty for individual enterprises, absent government regulations of reduction pathways, this would inevitably subject the enterprises in question to a fragmented set of mutually different standards (in other words: an MD Reduction Duty with a different enterprise-specific percentage each time[234]), which is the opposite of the level playing field that European regulation and policy serves to achieve.

> The Union legislator relied solely on Article 114 TFEU as a legislative basis for the CSRD and the CSDDD, which goes to confirm the great, if not decisive, importance attached by the European legislator to strengthen the internal market and the level playing field at the Union level through the adoption of these instruments (cf. complaint (v)). The same goes for the NZIA. The Directive introducing EU ETS notes that measures at the EU level are necessary "to contribute to preserving the integrity of the internal market and to avoid distortions of competition" (recital 7).[235] The Governance Regulation lists the internal energy market as one of five dimensions of the energy union (Article 1(2)(b), see also recital 2, 5). The European Climate Law also emphasises the importance of a level playing field (recital 25). Directive (EU) 2024/1788 calls on member states not to impose

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228 Shell Written Pleading Notes, no. 2.2.6; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.2.
229 Cf. C.N. Teulings, 'Recht en economie: gezworen partners', *NJB* 2025/142.
230 Directive (EU) 2024/1760, recital 3.
231 S. Weatherill, 'The fundamental question of minimum or maximum harmonisation', in S. Garben en I. Govaere (eds.), *The Internal Market 2.0*, Oxford: Hart Publishing 2020, p. 279; and S. Weatherill, The Internal Market as a Legal Concept, Oxford: Oxford University Press 2017, p. 219-222.
232 Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 25, 31 and 103; and Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 1 of 4, par. 6.6.
233 Statement of Appeal, no. 6.4.3 and 6.4.4; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.6.3; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 3.1.2-3.1.4. Cf. G. Wagner, 'Klimaschutz durch Gerichte', *NJW* 2021/2256, no. 47 and 48.
234 See footnote 17.
235 Directive 2003/87/EC, recital 7.

unnecessary barriers on cross-border trade in, among other things, natural gas and hydrogen (Article 3). See also the EED, recital 100.

e. An MD Reduction Duty undermines European competitiveness

62. Fifthly, an MD Reduction Duty jeopardises the competitive position of the Netherlands and, particularly if accepted in other member states, the European Union's competitiveness (cf. especially complaint (iv)). In developing the existing legal and policy framework, the legislator has given great weight to ensuring Europe's competitiveness (as well as its "business climate") within the global economy.[236] The emphasis on this theme also follows from the Draghi report (see no. 43d), the European Commission's recently published Competitiveness Compass[237] and the Action Plan on Affordable Energy.[238] Imposing obligations on individual enterprises without a sufficient guarantee that competing enterprises across borders are subject to similar obligations (in form or scope) negatively affects the competitiveness of the national and/or European economy. After all, these individual enterprises will be bound to additional constraints in comparison to their competitors from other member states or non-EU countries. In a more general sense, the prospect of court-ordered national reduction duties will have a dissuasive effect on parties considering establishing or investing in a business in the Netherlands and/or the European Union and will also play a role when enterprises that are already established there would evaluate or reconsider their registered office.

The European Climate Law includes "the competitiveness of the economy" as one of the important factors to take into account when taking measures aimed at achieving the climate goals set out therein (recital 34, see also recitals 2, 14, 18). The Governance Regulation lists competitiveness as one of five dimensions of the energy union (Article 1(2)(e)). Both the CSRD (recital 20) and CSDDD (recital 29; Article 2(2)) contain obligations for enterprises incorporated outside but active within the European Union. Similarly, CBAM aims to address the situation that certain EU ETS-covered European activities would be relocated to outside the European Union ('carbon leakage') by levying an import tax. See also ESR, recital 7, ETS2, recitals 4, 51. The air transport market and maritime transport market are subject to strong competition between economic participants, both globally and within the EU, making a level playing field in those sectors indispensable (see ReFuelEU Aviation Regulation recitals 4, 5, 15 and 16 and FuelEU Maritime Regulation recitals 6, 7 and 72).

f. An MD Reduction Duty is at odds with the general EU law principle of proportionality

63. Sixthly, an MD Reduction Duty is at odds with the fundamental EU law principle of proportionality (cf. especially complaint (vii)). According to that principle, national measures – especially if they concern environmental measures – cannot "*exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*".[239] As Shell has argued, an

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[236] Cf. Regulation (EU) 2018/842 (ESA), recital 7; Directive (EU) 2022/2464 (CSRD), recitals 1 and 20; and Regulation (EU) 2021/1119 (the European Climate Law), recitals 2, 14, 18 and 34, and Article 2(2).

[237] European Commission, 29 January 2025, *A Competitiveness Compass for the EU*, COM(2025) 30.

[238] European Commission 26 February 2025, *Action Plan for Affordable Energy*, COM(2025) 79, which discusses, among other things, the importance "*to reignite economic dynamism in Europe*", "*measures to lower energy bills in the short term*" and preventing the "*potential drain of critical industries*" (p. 1 and 2).

[239] CJEU 9 March 2010, C-379/08 and C-380/08, ECLI:EU:C:2010:127 (*Raffinerie Mediterranee*), para. 86.

MD Reduction Duty cuts across several other objectives of existing EU policy and regulation (as elaborated in Section 1.1.2 above), whilst it also has a particularly significant impact on the individual enterprise(s) subjected thereto (in any event in comparison with competitors in other jurisdictions, who would not be bound to that same obligation in those other jurisdictions, see also no. 61),[240] and on Shell as an individual enterprise in particular. At the same time, the envisaged effect of an MD Reduction Duty on reducing emissions is absent or at best minimal, while such an obligation is at worst even counterproductive, as was explained in Section 1.1.3 under c above.[241] Under those circumstances, an MD Reduction Duty is neither appropriate nor necessary to achieve a real, sustainable global reduction in emissions and therefore does not meet the proportionality standard under EU law (cf. subparts 1.2 (under no. 72-73), 2.6 and 3.1 (under no. 151)).

64. This applies particularly, or also, given that existing energy and climate regulation and policy of the European Union, which like an MD Reduction Duty seeks achievement of the Paris Agreement goals (but in a fundamentally different way), is itself based on a proportionality assessment. As the Court of Appeal has observed, this regulation and policy is not exhaustive, but that does not alter that existing regulation and policy should not go further than necessary to achieve their objectives, namely the achievement of the Paris Agreement goals, and also be proportionate in relation to other objectives of EU regulation. For more stringent national measures pursuing the same objectives as the energy and climate regulation and policy of the European Union, it is at least questionable whether these can pass the proportionality test. In any event, the proportionality assessment underlying existing European policy and regulation should be accounted for when imposing a more stringent national measure like an MD Reduction Duty.

65. This applies particularly, or also, given that existing energy and climate policy of the European Union, such as the CSDDD, CSRD and RED III, is based on Article(s) 114 and/or 192 TFEU, and is therefore in and of itself deemed to offer a high level of protection (cf. Articles 114(3) and 191(2) TFEU). This calls for applying a stricter proportionality test in respect of national measures that are more stringent than the European measures adopted on these legislative bases.

g. An MD Reduction Duty may have adverse consequences for the energy transition

66. Seventhly, imposing an MD Reduction Duty on an individual enterprise can limit that enterprise's ability to contribute to the development of sustainable alternatives to emissions-intensive energy sources. It may therefore be at odds with the change in the energy mix sought by European regulation, a central pillar of the European energy transition policy.[242]

67. An MD Reduction Duty does not take account of the fact that investments and activities aimed at the development of net-zero technologies may increase the emissions that an individual enterprise reports in the short term.[243] Nor does it take account of emissions reductions effectuated as a result

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[240] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3 under (c); and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 3.1.2. As noted in no. 61, the concept of an MD Reduction Duty has not been accepted in other jurisdictions and even if it would be this would lead to a fragmented set of mutually different standards and percentages.

[241] Cf. Statement of Appeal, no. 9.2.13 under (a); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1.1 under (d).

[242] Regulation (EU) 2018/1999, Articles 1(2) and 4(a)(2). See for example also Directive (EU) 2023/2413.

[243] Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 39 under (c); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.6.

of customers shifting to more sustainable alternatives supplied by that enterprise.[244] An MD Reduction Duty is absolute and time-bound and may therefore well discourage an enterprise from engaging in such investments and activities, undercutting this important pillar of EU policy. For Shell, this applies particularly in the case of investment in scaling up biofuel production, where Shell has to report additional emissions for this (from sourcing and transporting the feedstock and building the large-scale production facilities, which is not possible without using fossil fuels). This will increase the emissions Shell reports, even though it could contribute to a reduction in global emissions if end-users use biofuels instead of energy sources with a higher emissions intensity.[245]

68. Enterprises need sufficient certainty and perspective to invest. European regulation aims to and can contribute to that. An MD Reduction Duty has no positive effect on the costs and returns – and therefore the commercial viability – of investments in low-carbon solutions. It therefore does not encourage the relevant enterprise from engaging in such investment.[246] Further, if the enterprise concerned has to forego supply to certain customers in high emission sectors as a result of a reduction duty, that enterprise can also no longer work with those customers to help them transition to and develop more sustainable alternatives to reduce their overall emissions. For Shell, this can manifest itself in respect of SAF for aviation (and the goals set forth in the ReFuelEU Aviation Regulation in that respect), to which Shell can contribute through its global network, client portfolio and knowledge.[247]

> The European Climate Law includes technological innovation, research and development as important drivers for achieving climate neutrality (recital 11). The Governance Regulation lists innovation and research as one of five dimensions of the energy union (Article (1(2)(e)). Similarly, Article 194(1)(c) TFEU lists the development of new and renewable forms of energy as an objective of measures on energy. NZIA includes innovation as a crucial factor in warranting the EU's competitiveness as well as reaching net-zero objectives as soon as possible (recital 52). To foster the production of renewable energy from innovative technology and warrant the EU's future leadership in research and development of innovative renewable energy technology, RED III requires that at least 5% of renewable energy capacity to be of "innovative renewable energy technology" (Article 3(1) and recital 7). ReFuelEU Aviation Regulation emphasises the essential role of research and innovation in the development of sustainable aviation fuel and production capacity (recital 47). FuelEU Maritime Regulation emphasises that it is essential to foster innovation and support research for emerging and future innovation (recital 4).

1.2 Defence in the principal cassation appeal and subpart: an MD Reduction Duty constitutes an impermissible restriction on the free movement of goods

Defence

69. Shell has pointed out in these proceedings that the imposition of an MD Reduction Duty as sought by Milieudefensie violates the free movement of goods under EU law. The Court of Appeal did not

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[244] The absolute and time-bound orientation of the reduction obligation intrinsically fails to take into account the increase in an enterprise's Scope 1 (and possibly reported 2) emissions resulting from the development of sustainable alternatives, whilst in any event the benefits effectuated by these alternatives cannot be measured. This means that such obligation, regardless of whether it is an obligation of result or one of efforts, is unsuitable as an instrument and impossible to supervise and enforce.

[245] R. Druce, 17 March 2024, *Second Expert Report of R. Druce of NERA Economic Consulting* (Exhibit S-287), no. 21

[246] Statement of Appeal, no. 6.3.17 and 9.2.17; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.6.

[247] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.36; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.6.

address this. Shell's defence in the principal cassation appeal is that Milieudefensie's appeal in cassation cannot succeed because an MD Reduction Duty violates fundamental freedoms of movement. The Supreme Court can determine this for itself in the light of the party debate cited in the complaints below.

Complaints

70. In so far as the Court of Appeal's decision is to be understood as also having decided that the fundamental EU law principle of free movement of goods does not preclude the imposition of an MD Reduction Duty (in particular paras. 7.53 and 7.57, in conjunction with para. 7.28), Shell makes the following complaints in the conditional cross-appeal.

71. The Court of Appeal's decision is based on an error in law. It fails to recognise that EU law precludes the imposition of an MD Reduction Duty (and in any event an MD Reduction Duty with a Shell specific percentage[248]), as such a legal duty constitutes an unjustified infringement of the free movement of goods under Articles 34 and 35 TFEU.[249] The concept of an MD Reduction Duty, which according to Milieudefensie applies to other enterprises, qualifies as a measure prohibited by Articles 34 and 35 TFEU, as it can actually or potentially hinder intra-Community trade, directly or indirectly.[250] Shell has indicated that imposing such MD Reduction Duty specifically on Shell, as claimed by Milieudefensie in these proceedings, will inevitably affect trade in the European market.[251] Shell submitted concrete and numerically substantiated assertions and examples to the Court of Appeal about the nature and extent of its European cross-border activities,[252] specifically that an MD Reduction Duty could impede the cross-border trade of the products and energy used for the purpose of its operations (Scope 1 and Scope 2), as well as intra-EU sales of the products resulting from the Shell Group's operations (Scope 3).[253] These factual assertions were not, in and of themselves, disputed by Milieudefensie (with substantiation).

72. The Court of Appeal's decision furthermore demonstrates an error in law because it fails to recognise that there is no justification for imposing an MD Reduction Duty sought on climate protection grounds under Article 36 TFEU. In that context, first of all, an MD Reduction Duty is not suitable for achieving the objective it pursues because it does not achieve that objective in a coherent and systematic manner.[254] If a court imposes an MD Reduction Duty on Shell, it is uncertain – despite the Court of Appeal's decision in para. 7.27 that "companies like Shell" are subject to a reduction duty – whether other enterprises actually have a similar obligation and, if so, what exactly that

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248 See footnote 17.

249 For the sake of completeness, it should be noted that only Article 34 TFEU was mentioned in the courts of fact. Articles 34 and 35 both contain provisions on the free movement of goods invoked by Shell, with Article 34 dealing with import restrictions and Article 35 with export restrictions. What is stipulated and asserted with respect to Article 34 TFEU applies *mutatis mutandis* to Article 35 TFEU, which the Court of Appeal should have determined, if necessary with supplementation of legal grounds.

250 Statement of Appeal, no. 6.3.4-6.3.7. See CJEU 9 March 1978, C-106/77, ECLI:EU:C:1978:49 (*Simmenthal*), para. 22. Also CJEU 11 July 1974, C-8/74, ECLI:EU:C:1974:82 (*Dassonville*), para. 5; and CJEU 19 October 2016, C 148/15, ECLI:EU:C:2016:776 (*Deutsche Parkinson Vereinigung*), para. 22. T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(a): "[a]*us Sicht des betroffenen Unternehmens entsteht eine derartige oder zumindest vergleichbare Marktzutrittsschranke mit einfuhrbehindernder Wirkung auch durch ein pauschales Reduktionsgebot wie im Shell-Fall. Es betrifft all diejenigen Mitgliedstaaten, in denen die von ihm im innerunionalen Handeleingeführten kohlenstoffbasierten Brennstoffe nur noch in abgesenktem Ausmaß vertrieben werden können.*"

251 Statement of Appeal, no. 6.3.5-6.3.7.

252 Statement of Appeal, no. 6.3.4; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.3.

253 Statement of Appeal, no. 6.3.4; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.3.

254 Statement of Appeal, no. 6.3.15 under (f); and CJEU 23 December 2016, C-333/14, ECLI:EU:C:2015:845 (*The Scotch Whisky Association*), para. 37.

obligation entails (see also no. 61).[255] In another sense, too, a measure whose effect is highly uncertain at best cannot qualify as one that is suitable for achieving the objective it pursues (the requirement of appropriateness),[256] one that does not go beyond what is necessary (the requirement of necessity)[257] and whose effect is proportionate to the infringement of the free movement of goods thereby created (the requirement of proportionality *stricto sensu*).[258] Shell pointed out in this context (i) the potentially very far-reaching restrictions resulting from the imposition of the measure;[259] (ii) the lack of effectiveness of imposing an MD Reduction Duty on individual enterprises like Shell;[260] and (iii) the detrimental impact of the imposed restriction on an orderly energy transition and the related public interests of security of supply, affordability of energy and securing the economy's competitiveness.[261] Finally, the imposition of an MD Reduction Duty for Shell goes beyond what is necessary, in the sense that other and/or less far-reaching alternatives exist by which the goal in question can be achieved. The national and European legislators have invariably chosen mechanisms other than an individual reduction duty in the pursuit of environmental protection and the achievement of the objectives of the Paris Agreement, including EU ETS and ETS2. After all, it follows from this that alternatives do exist for achieving the objective Milieudefensie pursues by seeking the imposition of an MD Reduction Duty.[262]

73. In any event, the Court of Appeal's decision is incorrect or insufficiently (comprehensibly) reasoned, because, in the face of Shell's extensively reasoned submissions[263], the Court of Appeal failed to (clearly) investigate and determine, if necessary by supplementing the legal grounds under Article 25 DCCP, whether the imposition of an MD Reduction Duty for Shell would violate Articles 34 and 35 TFEU. The Court of Appeal failed altogether to investigate the extent of the restrictions resulting from the measure and the outcomes that will be achieved as a result. In line with this, the Court of Appeal failed to assess concretely, let alone on the basis of relevant evidence,[264] whether an MD Reduction Duty is appropriate to achieve the objective it seeks to achieve, whether it does not go beyond what is necessary, and whether it is proportionate to the infringement of the free movement of goods caused by the measure. Such an analysis is (therefore) missing from the Court of Appeal's decision and this decision is thus incorrect or insufficiently reasoned.

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255 Statement of Appeal, no. 6.3.15 under (f); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.4.3.

256 CJEU 15 November 2005, C-320/03, ECLI:EU:C:2005:684 (*Commission v Austria*), para. 85; CJEU 7 June 2007, C-254/05, ECLI:EU:C:2007:319 (*Commission v Belgium*), para. 35; CJEU 15 November 2007, C-319/05, ECLI:EU:C:2007:678 (*Commission v Germany*), paras. 88-90; and CJEU 23 December 2016, C-333/14, ECLI:EU:C:2015:845 (*The Scotch Whisky Association*), para. 33. See also Statement of Appeal, no. 6.3.9. T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(cc).

257 CJEU 15 November 2005, C-320/03, ECLI:EU:C:2005:684 (*Commission v Austria*), paras. 85-88; CJEU 8 February 2007, C-254/05, ECLI:EU:C:2007:319 (*Commission v Belgium*), para. 35; CJEU 15 November 2007, C-319/05, ECLI:EU:C:2007:678 (*Commission v Germany*), para. 87; and CJEU 21 December 2011, C-28/09, ECLI:EU:C:2011:854 (*Commission v Austria*), paras. 139 and following. See also Statement of Appeal, no. 6.3.9; and T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(aa).

258 CJEU 20 September 1998, C-302/86, ECLI:EU:C:1988:421 (*Commission v Denmark*), paras. 20 and 21; and F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, The Hague: Boom Juridisch 2022, p. 410. T. Pfeiffer, 'Zivilrechtliche "Klimaklagen", zwischen Recht und Politik', *ZIP* 2025, p. 795-806, Section V.2(b)(bb).

259 Statement of Appeal, no. 6.3.4-6.3.7 and 6.3.14 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.3.

260 Statement of Appeal, no. 6.3.17; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.4. Cf. also Statement of Appeal, no. 6.3.15 under (e).

261 Statement of Appeal, no. 6.3.17; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.4.

262 Statement of Appeal, no. 6.3.12. Cf. also Statement of Appeal, no. 6.3.18.

263 Statement of Appeal, par. 6.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.1-9.5.

264 Statement of Appeal, no. 6.3.10 and 6.3.11; CJEU 7 June 2007, C-254/05, ECLI:EU:C:2007:319 (*Commission v Belgium*), paras. 36 and 37, where the need to adduce "*precise evidence*" in respect of "*the appropriateness and proportionality of the restrictive measure adopted by that State*" is emphasized; CJEU 15 November 2007, C-319/05, ECLI:EU:C:2007:678 (*Commission v Germany*), para. 88; and CJEU 23 December 2016, C-333/14, ECLI:EU:C:2015:845 (*The Scotch Whisky Association*), paras. 54 and following. See also CJEU 15 November 2005, C-320/03, ECLI:EU:C:2005:684 (*Commission v Austria*), para. 87, in which the CJEU held that the member state in question was "*were under a duty to examine carefully"* the relevant grounds for review. At the national level, see Administrative Jurisdiction Division of the Council of State 20 June 2018, ECLI:NL:RVS:2018:2062, para. 13.2; and Administrative Jurisdiction Division of the Council of State 4 December 2019, ECLI:NL:RVS:2019:4101, paras. 13.5 and 13.6.

1.3 Follow-on complaint

74. The success of (one or more of) the complaints raised in this Part, will also (to the extent that this is not already the case by the success of the respective complaint(s)) invalidate the Court of Appeal's decision in paras. 7.26-7.27, 7.53-7.55, 7.57, 7.67, 7.73, 7.79, 7.81, 7.93, 7.96, 7.99 and/or 7.111, insofar as the Court of Appeal wanted to express there that Shell is or may be subject to an MD Reduction Duty (arising from a general legal duty to reduce emissions).

PART 2: AN MD REDUCTION DUTY HAS NO BASIS IN UNWRITTEN LAW

Introduction and summary

75. In paras. 7.63 to 7.111, the Court of Appeal decided that Milieudefensie's claims, which sought the imposition of a reduction order requiring Shell to reduce the absolute emissions it reports by a specific (minimum) percentage by a fixed date in the future, could not be granted. Before rejecting the claims, the Court of Appeal addressed climate change and human rights in a general sense (paras. 7.6-7.17) and the effect of human rights in horizontal relationships (paras. 7.18-7.23). In para. 7.24-7.27 (in particular 7.27), the Court of Appeal decided that enterprises such as Shell, "*which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates.*" Furthermore, the Court of Appeal held that "[c]*ompanies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement.*"

76. In paras. 7.28-7.54, the Court of Appeal addressed the question of the extent to which a reduction obligation, as defined by the claims of Milieudefensie, is consistent with European Union climate legislation. As already discussed in Part 1, the Court of Appeal decided in paras. 7.50-7.54 that the measures taken by the legislature are not in themselves exhaustive, that these measures do not in themselves preclude an individual enterprise's duty of care derived from the societal standard of care to reduce its CO_2 emissions, but that they do affect the obligations imposed on Shell by the unwritten standard of care.

77. In the remainder of the Judgment, the Court of Appeal referred several times to the (existence of) responsibilities and duties of enterprises in general and (enterprises like) Shell in particular.[265] The Court of Appeal referred to "*Shell's obligations under the unwritten social standard of care*" (para. 7.54), the obligation of enterprises "*to contribute to the mitigation of dangerous climate change*" (para. 7.55), "*a societal standard of care to reduce their emissions*" (para. 7.57), "*Shell's reduction obligation*" (para. 7.93) and to "*Shell's responsibility*" (para. 7.99). The Court of Appeal decided that in order to comply with the societal standard of care, "*Shell must make an appropriate contribution to the climate goals of the Paris Agreement*" (para. 7.67); "*the court cannot determine what specific reduction obligation applies to Shell*" (para. 7.73), enterprises, including Shell, "*must make an appropriate contribution to preventing dangerous climate change*" (para. 7.79); "*there is a legal obligation for Shell to reduce its emissions*" (para. 7.81); Shell may be required "*to do its part in combating dangerous climate change*" (para. 7.96); and "*Shell may have obligations to reduce its scope 3 emissions*" (para. 7.111).

78. In this Part, Shell explains that the objective points of reference and/or factors provided by the Court of Appeal for the interpretation of the societal standard of care do not support or justify the existence of an MD Reduction Duty, also in the light of existing European and Dutch regulations (see principal

[265] See also footnote 9 under no. 6.

defence and subpart 2.1 below) and the principal defences and subparts 2.2 to 2.11.[266] This means that the relief sought by Milieudefensie in these proceedings cannot be granted, and Milieudefensie's appeal in cassation cannot lead to the Judgment being set aside. Shell puts forward these arguments by way of a general defence and a general conditional complaint. This is elaborated in the principal defences and/or subparts 2.1 to 2.12, which in summary amount to the following:

2.1 An MD Reduction Duty is inconsistent with the existing system of the law, is not compatible with, and interferes with, the cases regulated by law.

2.2 In interpreting the societal standard of care, the Court of Appeal should have taken into account other interests recognised by the legislature, including energy security and affordability.

2.3 Articles 2 and 8 ECHR and/or other human rights instruments and case law cited by the Court of Appeal do not support and justify a general legal duty to limit emissions and at least not an MD Reduction Duty.

2.4 The instruments discussed by the Court of Appeal in paras. 7.20-7.23 and 7.26-7.27, including the UNGP and the OECD guidelines, do not support or justify a general legal duty to limit emissions and at least not the imposition of an MD Reduction Duty on individual enterprises like Shell.

2.5 The responsibility of enterprises to combat climate change, as repeatedly cited by the Court of Appeal, does not support and justify any general civil-law legal duty to reduce emissions towards all other inhabitants of the earth or residents of the Netherlands and the Wadden Sea region. An unspecified general legal duty to limit emissions cannot as such exist.

2.6 The imposition of an MD Reduction Duty is, also in view of its ineffectiveness, disproportionate for Shell and therefore also violates Shell's fundamental rights as a private party.

2.7 Shell's historical and current position in the oil and gas market does not support the existence of a prospective legal obligation to reduce emissions.

2.8 An MD Reduction Duty is not sufficiently self-evident and recognisable to be legally enforceable as a concrete legal duty and the principle of legal certainty precludes it.

2.9 An MD Reduction Duty is at odds with the duty of Shell's board to balance the various interests involved in running Shell's business.

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[266] See Statement of Defence, no. 467-470; Statement of Appeal, par. 1.2 and 3.2, and no. 7.2.2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, par. 5.1. Cf. NL Supreme Court 30 January 1959, ECLI:NL:HR:1959:AI1600, *NJ* 1959/548 (*Quint v Te Poel*); NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5215, *NJ* 2011/597 (*TNT postbezorger*), para. 3.5; NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/598 (*De Rooyse Wissel*), para. 5.4; Opinion of P-G Langemeijer and A-G Wissink prior to NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 5.22; and Opinion of A-G Valk prior to NL Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, NJ 2020/293 (*IS-uitreizigers*), para. 6.1.

2.10 The order claimed by Milieudefensie cannot be awarded in any event, because it involves conduct by Shell that is not unlawful, or in any case not unlawful under all circumstances, in the future.

2.11 The order claimed by Milieudefensie cannot be awarded in any event, because the order does not correspond to the underlying legal obligation on which the order was based: the order is aimed at the lawful conduct of all entities within the Shell Group, whereas the alleged underlying legal obligation only focuses on the conduct of Shell plc.

2.12 If the Court of Appeal has decided that an MD Reduction Duty imposed on Shell is an obligation of result in respect of the Scope 2 and 3 emissions Shell reports, this decision violates the prohibition of *reformatio in peius*.

79. These subparts, which individually and together lead to the conclusion that Milieudefensie's claims cannot be granted, are set out in more detail below. The subparts are primarily focussed on an MD Reduction Duty. As indicated above certain subparts challenge the Court of Appeal's findings on the existence of a general legal duty to limit emissions.

2.1 Defence in the principal cassation appeal and subpart: an MD Reduction Duty is inconsistent with the existing system of the law, is incompatible with, and interferes with, the cases regulated by law

Defence

80. The Court of Appeal decided in paras. 7.53 and 7.57 that (i) it disagreed with Shell's position that an obligation on individual enterprises to reduce their emissions was inconsistent with the system of the law, and (ii) obligations arising from existing regulations do not as such preclude an individual enterprise from having a duty of care to reduce emissions based on a societal standard of care. This decision concerns a 'general' duty on enterprises (like Shell) to reduce their emissions. This specific, unwritten legal duty, as asserted by Milieudefensie, is not consistent or compatible with the existing system of European and Dutch energy transition and climate legislation and the underlying policy choices. This legal duty and its foreseeable consequences are therefore incompatible with and undermine the balance of interests struck by the European and Dutch legislatures. Milieudefensie's appeal in cassation therefore fails for lack of interest.

Complaints

81. To the extent that the final decision of the Court of Appeal is that an MD Reduction Duty is compatible with the system of the law (in particular in para. 7.53), Shell raises the following complaints in its conditional cross-appeal.

i) The Court of Appeal erred in law. The specific, unwritten legal duty, as asserted by Milieudefensie, is not consistent or compatible with the existing system of European and

Dutch energy transition and climate legislation and the underlying policy choices.[267] This legal duty and its foreseeable consequences are therefore incompatible with and undermine the balance of interests struck by the European and Dutch legislatures.

ii) The Court of Appeal was wrong to limit itself to the observation that climate legislation is not exhaustive and does not in itself exclude the possibility that enterprises may have other obligations. This is because, even if the legislation is not exhaustive, it is necessary to assess whether an unwritten legal duty as propagated by Milieudefensie is consistent with the system of the law, whether it is compatible with the cases it regulates and whether such a legal duty constitutes an impermissible interference.

iii) The Court of Appeal wrongly gave no weight, or incorrect or insufficient weight, to Shell's assertion that the European and Dutch legislatures did not intend to accept a legal duty for enterprises to reduce their (reported) absolute emissions by a certain (minimum) percentage at a fixed date in the future (see no. 86 below).

iv) The Court of Appeal wrongly failed to examine whether the policy choices underlying the objectives, balancing of interests and methodology of European and Dutch energy transition and climate legislation still allow for an MD Reduction Duty. In order to determine whether a certain measure is consistent with the system of the law and compatible with the cases it regulates, it is necessary to look not only at the wording of the law itself, but also at the underlying policy choices.

v) In para. 7.54, the Court of Appeal rightly acknowledged that European and Dutch energy transition and climate legislation does *influence* the obligations that enterprises such as Shell have under the unwritten standard of care, and that these obligations are interpreted in accordance with the obligations that enterprises have under existing climate legislation, such as EU ETS and ETS2. However, the Court of Appeal erred in law, as the nature and magnitude of the influence of this legislation is such that the specific unwritten legal duty asserted by Milieudefensie does not exist.

vi) In para. 7.54 of this general "*influence*" decision, the Court of Appeal also failed to take account of the broad range of European regulation, so also in addition to EU ETS and ETS2, and the policy choices made in respect of the objectives, the balancing of interests and the system underlying this European regulation.

vii) The Court of Appeal also wrongly relied solely on part of the European energy transition and climate legislation to determine whether an MD Reduction Duty is consistent with the system of the law. The Court of Appeal wrongly failed to assess, or at least did not do so sufficiently clearly, whether such a legal duty on Shell was consistent with the broader and multifaceted

[267] NL Supreme Court 30 January 1959, ECLI:NL:HR:1959:AI1600, *NJ* 1959/548 (*Quint v Te Poel*); and NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/598 (*De Rooyse Wissel*), para. 5.4. See also Opinion of P-G Langemeijer and A-G Wissink prior to NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 5.22.

system of European and Dutch energy transition and climate legislation and related policy as well as the underlying balancing of interests.[268]

Explanation of defence and complaints

82. In support of the complaints in this subpart, Shell explains below that an MD Reduction Duty is inconsistent with the existing system of laws and regulations. The European and Dutch legislatures have made complex policy judgements and trade-offs when adopting regulations and policies on the energy transition, which did not include the imposition of an MD Reduction Duty. An MD Reduction Duty is not consistent with these considerations and interferes with these laws and regulations and the underlying objectives of the legislature. This complaint aligns with Part 1 on the laws and regulations in the field of the EU energy and climate policy, the principle of sincere cooperation, the closely related principle of energy solidarity and the general principle of proportionality. For the sake of brevity, Shell therefore refers to what is set out in various places in that subpart.

83. European and Dutch legislatures have regulated energy supply and GHG emissions at the system level by means of a wide range of laws and regulations. As explained in Part 1 above, European legislation has opted for a coherent set of market-wide and sector-specific regulation as well as setting national targets to be realised by individual member states. This regulation reflects the pillars/objectives of the European energy union and energy and climate regulation in a broader sense, including (i) continuity of energy supply (energy security), (ii) a well-functioning integrated internal energy market, (iii) the promotion of energy efficiency, (iv) decarbonisation and (v) research and innovation.[269]

84. These pillars/objectives are also reflected in relevant national laws and regulations. For example, Dutch climate policy, which is partly regulated by the Dutch Climate Act and the climate plan drawn up under this Act, aims to work in coordination with neighbouring countries,[270] which is '*important for energy security*' – one of the spearheads of the national energy transition policy[271] – and to avoid '*leakage effects of greenhouse gas reductions and major competitive disadvantages*'.[272] All this will '*strike a balance between achieving industrial targets and maintaining an attractive business climate*'.[273]

85. European and national energy transition and climate legislation is not based on the premise that a (minimum) percentage set by the European or national legislature for the reduction of (reported) absolute emissions at a fixed date in the future applies to each individual enterprise (cf. para. 7.51). None of the democratically elected legislatures has opted for such a legal duty in shaping energy

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[268] Statement of Defence, no. 400-407; Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 103; Shell Pleading Notes dated 15 December 2020, hearing day 3 – law-making role of the courts , no. 11, 26, 33 and 34; Statement of Appeal, no. 1.3.7 and 3.2.21, and par. 3.3; Shell Written Pleading Notes, par. 2.1, 2.3 and 2.4, and Chapter 3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.3 with overview of energy measures in the European Union and the Netherlands since 2019; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.1 under (b), 3.2.20-30.2.24 and par. 3.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.7 and 5.1.8, and par. 6.1 and 6.2.

[269] Regulation (EU) 2018/1999, recital 2 and Article 1(2). Cf. Regulation (EU) 2021/1119, recital 34.

[270] See, for example, the recent bilateral treaty concluded with Germany on joint gas extraction in the North Sea, discussed below in no. 86g.

[271] Dutch Climate Plan 2021-2030 (Exhibit RO-266), p. 26-28: "[e]*nsuring security of supply. Besides affordability and sustainability, reliability is an important objective of Dutch policy.*"; and Statement of Appeal, no. 3.3.4.

[272] Dutch Climate Plan 2021-2030 (Exhibit RO-266), p. 15.

[273] Dutch Climate Plan 2021-2030 (Exhibit RO-266), p. 54.

transition and climate policy. Proposals at both European[274] and national[275] level to introduce such a reduction obligation for individual enterprises did not make it into the regulations ultimately adopted. European and Dutch legislatures have instead always consistently opted for different measures, such as pricing and subsidies, that are based on adaptability (the ability to adapt to changing circumstances), cost-effectiveness and respect for the fundamental principles of the market economy. These measures are based on a complex balancing of interests which are constantly rebalanced, as evidenced by the recent Omnibus Revision by the European legislature, which aims to change elements of European climate policy, while maintaining the European sustainability objectives. All these measures cover the whole market with a combination of cross-sectoral and sector-specific regulations.[276] By changing the energy mix, increasing energy efficiency (with the aim of reducing energy consumption), promoting methods of CO_2 removal and addressing land-use concerns, the aim is to take into account and balance all the competing interests involved in the energy transition and the pillars/objectives of the European energy union and European climate policy.[277]

86. In line with the above, an MD Reduction Duty is not consistent with the existing legal system and the choices made by the European and national legislatures and rather disrupts the carefully struck balance by European and national legislation. The following instruments, among others, are worth mentioning.

a. As Shell has explained in Section 1.1.2 (no. 47a), the European emission trading system (EU ETS and ETS2) provides for a system at the European level that relies on market forces and does not require individual enterprises to reduce emissions by a certain percentage. The choices and balancing of interests underlying the emission trading system indicate that the European legislature refrained from a reduction obligation such as that proposed by Milieudefensie in these proceedings because such an obligation cuts across the proper functioning of the emission trading system and disrupts the internal market in a broader sense.

b. As Shell has explained in Section 1.1.2 (no. 47j), the European legislature has opted in the CSDDD for a best-efforts obligation for individual enterprises with regard to climate change mitigation. No specific reduction percentages were specified.[278] Administrative enforcement was expressly chosen.[279] A proposal to require individual enterprises to set absolute reduction targets did not make it into the final version of the CSDDD, upon being rejected by a majority of the European Parliament.[280]

c. As explained by Shell in Section 1.1.2 (no. 47i), the European legislature adopted disclosure

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274 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.2.3.

275 Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.24; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4.

276 The systematics of the European legal and policy framework are detailed in Part 1 under no. 43-48. For Dutch laws and regulations, see for example Statement of Defence, par. 2.7.2; Statement of Appeal, no. 3.3.1-3.3.10 and 7.2.3 under (b); Shell Written Pleading Notes, Chapter 3; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 1.1.4 and 1.1.5.

277 Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 46; and Shell Written Pleading Notes, no. 3.2.2. Cf. Regulation (EU) 2018/1999, recital 2 and Article 1(2), and Regulation (EU) 2021/1119, recital 34.

278 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 5.4.

279 Directive (EU) 2024/1760, recital 73. See Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.2.2 and 5.2.3.

280 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 5.2.3.

obligations for individual enterprises in the CSRD. These obligations are intended to bring about behavioural change through the transparency that will be achieved as a result of market forces and while maintaining a level playing field for enterprises active in Europe. The balancing of interests embodied in these obligations is fundamentally different from that underlying the specific reduction duty proposed by Milieudefensie.

d. In the Netherlands, the introduction of a legal reduction duty for individual enterprises to reduce absolute emissions at a fixed date in the future has repeatedly been the subject of legislative proposals and political deliberations, but has always been abandoned and/or rejected:[281]

- In November 2021, a motion to '*impose an absolute reduction obligation for Scope 1, 2 and 3 on all Dutch companies with global emissions exceeding 50 megatonnes per year, in line with the 1.5°C target of the Paris Agreement*' was rejected by almost three quarters of the Dutch House of Representatives.[282]

- Certain Dutch members of parliament asked the Minister of Economic Affairs and Climate Policy in parliamentary questions whether '*the Minister is prepared to introduce a legally binding climate policy, under which companies in the Netherlands are legally bound by the Paris Agreement*', to which the Minister responded in November 2022 that '*the Paris Agreement says nothing about the obligations of individual countries, let alone individual companies*'.[283]

- The Council of State rejected the civilly enforceable duty for certain enterprises and financial institutions to have reduced their emissions by 55% in 2030 compared to 1990 that had originally been included in the private member's bill for the Responsible and Sustainable International Business Conduct Act (*Wet verantwoord en duurzaam internationaal ondernemen*) on the grounds of '*legal certainty, proportionality, practicability and enforceability*'.[284] Following the written procedure in the House of Representatives, the proposal was removed from the bill.[285]

- In the current draft of the Responsible and Sustainable International Business

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[281] Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.24; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.12 and 6.2.4.

[282] Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4 under (a), with reference to Exhibit S-185 (NL House of Representatives motions by Members Van der Lee and Thijssen and by Members Teunissen and Van Raan dated 4 November 2021 and voting results of 9 November 2021).

[283] Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4 under (b), with reference to Exhibit S-186 (Minister of Economic Affairs and Climate, Minister for Climate and Energy & State Secretary for Economic Affairs and Climate, 23 November 2022, *Answers to parliamentary questions in response to budget discussion Economic Affairs and Climate*), p. 36.

[284] Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4 under (c), with reference to *Parliamentary Papers II* 2022/23, 35761, no. 8 (Advisory Division of the Council of State and Response of the Initiators), p. 2.

[285] Shell Written Pleading Notes, no 3.2.3 and 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4 under (c), with reference to *Parliamentary Papers II* 2022/23, 35761, no. 8 (Advisory Division of the Council of State and Response of the Initiators), p. 2.

Conduct Act, the Dutch legislature deliberately opted for '*pure and low-burden*' implementation of the CSDDD.[286] This choice is largely motivated by the importance of a level playing field.[287] The Dutch legislator has furthermore expressed its support of the European legislator's current intention to tone down certain requirements in the CSDDD, amongst other things in relation to the climate transition plan, as part of the Omnibus Revision.[288] Imposing an unwritten legal duty on individual enterprises to reduce absolute emissions by a fixed date in the future deviates from the obligations of such enterprises under the CSDDD and is therefore also contrary to the choice and balance of interests made by the Dutch legislature.

- In response to questions from Dutch members of parliament about the final draft of the Dutch Climate Plan for 2025-2035, the Minister of Climate and Green Growth recently stated that the Dutch government's climate policy aims to "*encourage companies in the Netherlands to become more sustainable rather than achieving emission reductions by scaling back business activities*".[289] The Minister further pointed out that she has "*an extensive regulatory framework at EU and national level*" at her disposal, with which it implements the obligation for states to regulate the activities of private actors under their jurisdiction in such a way that achieving the 1.5°C-objective from the Paris Agreement does not become impossible (see also no. 96 below), as stated in the recent advisory opinion (the "**Advisory Opinion**") of the International Court of Justice (the "**ICJ**").[290]

e. The Dutch government has decided, among other things, to pursue entering into agreements with the largest Dutch industrial emitters on the basis of the so-called 'bespoke approach'.[291] The State aims to enter into bespoke agreements with large enterprises regarding emissions from the territory of the Dutch State on the basis of reciprocity (meaning that the government is willing to enter into agreements on a contribution to be made by the government, for example in the form of possible financing or acceleration of critical infrastructure), with the aim of supporting and encouraging these enterprises to make their activities more sustainable and to contribute to the circular economy.[292]

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[286] Draft explanatory memorandum to the draft legislative proposal for the Dutch International Corporate Responsibility Act (*Wet internationaal verantwoord ondernemen*), p. 16.

[287] Draft explanatory memorandum to the draft legislative proposal for the Dutch International Corporate Responsibility Act (*Wet internationaal verantwoord ondernemen*), p. 6, 25, 26 and 37. See also no. 47j, final bullet.

[288] *Parliamentary Papers II* 2024/25, 22112, no. 4012, (Letter from Minister of Foreign Affairs Fiche 2: Proposal Omnibus I (CSRD & CSDDD)), p. 11-13. The Dutch legislator has indicated that it considers it important that the obligation to draw up a climate transition plan be retained (*Parliamentary Papers II* 2024/25, no. 2150102, no. 3185 (Annotated agenda for the Council Foreign Affairs Trade), p. 4).

[289] *Parliamentary Papers I* 2024/25, 32813, no. BI, p. 18 and 19.

[290] Appendix to *Aanhangsel Handelingen II*, 2025/26, no. 104, p. 2-3.

[291] Statement of Appeal, no. 3.3.10; and Shell Written Pleading Notes, no. 3.2.3.

[292] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.6. The Dutch government has decided that not all plans drawn up for 2030 in dialogue with enterprises in the context of the bespoke approach will lead to specific project proposals. Consequently, with certain enterprises, including Shell, the 'bespoke' dialogue will not be continued. In this regard, the government has pointed out that these enterprises are "*currently facing very challenging (market) conditions that are putting pressure on their competitive position*" and that "*there* [are] *concerns about whether the necessary preconditions for a sustainable transition will be in place in time.*" Furthermore, the government has pointed out that "[f]*ailure to reach a bespoke agreement* (…) *does not necessarily mean that an enterprise is not contributing to a sustainable development or is not taking measures to improve its impact on the living environment*" and indicated its intention to continue the "targeted individual approach" of the bespoke approach with these enterprises. See the letter from the Minister of Climate Policy and Green Growth dated 30 June 2025, 'Voortgang Maatwerkafspraken Verduurzaming Industrie'.

f. For the proposed implementation of Article 25 RED III (see Section 1.1.2, no. 47l) in the Environmental Management Act (*Wet milieubeheer*), the Dutch legislature has chosen to impose sector-specific emission intensity targets on fuel suppliers.[293] A distinction is made between the different transport sectors (land transport, inland waterways, maritime transport, aviation) so that the pace of becoming more sustainable can be tailored to the characteristics of each sector (for example, the aviation sector is subject to a lower percentage under the ReFuelEU Aviation Regulation than the 14.5% prescribed by RED III, which is compensated for in other transport sectors).[294]

g. Various measures have been announced in the North Sea Gas Extraction Acceleration Plan (*Versnellingsplan gaswinning Noordzee*) to stimulate natural gas exploration and extraction in the North Sea and reduce dependence on foreign gas.[295] These measures aim to improve the investment climate and predictability of gas exploration and extraction in the North Sea.[296] Because gas extraction in the North Sea "*has* [a] *lower CO2-footprint than imported gas*", the government explicitly "*does not* [steer] *towards a reduction of production*".[297] Instead, the government allows for the (accelerated) extraction of gas until (in any event) 2045 whilst limiting its size to the domestic demand for gas.[298] The Minister of Climate Policy and Green Growth and the gas sector have recently made specific agreements to actually accelerate the extraction of gas in the North Sea in the Sector Agreement on Gas Extraction in the Energy Transition (*Sectorakkoord Gaswinning in de Energietransitie*).[299] Additionally, the Dutch government has made further treaty arrangements with Germany about the future extraction in German-Dutch gas fields, with the purpose to warrant "*the security of supply in the Netherlands and our neighbouring countries*" and contribute to "*a stronger European gas market*".[300] Accordingly, in the interest of achieving the climate objectives, the policy of the Dutch government aims for the accelerated extraction of gas in the North Sea until 2045. An MD Reduction Duty is at odds with this policy.

h. By means of the draft legislative proposal for the Act to combat security of energy supply crisis (*Wetsvoorstel bestrijden energieleveringscrisis*), the Dutch government carries out Regulation (EU) 2017/1938 concerning the proper functioning of the gas market in the European Union (see no. 47o above). It recognises the crucial role of gas in the Dutch energy system and aims to safeguard the security of gas supply and prevent the Netherlands from facing a (potential) gas crisis,[301] and the proposal explicitly envisages a role for enterprises.[302]

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293 *Parliamentary Papers II* 2024/25, 36766, no. 3, p. 18-20.
294 *Parliamentary Papers II* 2024/25, 36766, no. 3, p. 15, 20 and 35.
295 *Parliamentary Papers II* 2023/24, 33529, no. 1174; Shell Written Pleading Notes, no. 3.5.3 and 3.5.4; and *Parliamentary Papers II* 2021/22, 33529, no. 1058 (Exhibit S-260).
296 *Parliamentary Papers II* 2023/24, 33529, no. 1174, p. 3.
297 *Parliamentary Papers II* 2022/23, 33529, no. 1150, p. 2-3.
298 *Parliamentary Papers II* 2022/23, 33529, no. 1150, p. 3-4; and *Parliamentary Papers II* 2024/25, 33529, no. 1293, p. 2.
299 *Parliamentary Papers II* 2024/25, 33529, no. 1293.
300 Treaty between the Government of the Kingdom of the Netherlands and the Government of the Federal Republic of Germany concerning the exploitation of cross-border hydrocarbon fields in the North Sea, The Hague, 27 August 2025. See also News item 28 August 2025, 'The Netherlands and Germany sign treaty on joint gas extraction in the North Sea', available at: https://www.rijksoverheid.nl/actueel/nieuws/2025/08/28/nederland-en-duitsland-tekenen-verdrag-over-gezamenlijke-gaswinning-in-noordzee (most recently accessed 30 September 2025).
301 Explanatory memorandum to the legislative proposal for the Act to combat security of energy supply crisis (*Wetsvoorstel bestrijden energieleveringscrisis*), p. 6: "[t]*hat is why a bill aimed at improving the resilience of the Dutch gas system still has added value, even though gas demand is falling: as long as gas continues to play a crucial role in the Dutch energy supply, the Netherlands must be able to cope with periods in which there is a threat of gas supply falling short of demand, regardless of the cause*."
302 Explanatory memorandum to the legislative proposal for the Act to combat security of energy supply crisis (*Wetsvoorstel bestrijden energieleveringscrisis*), p. 123.

87. The Court of Appeal also conducted an incomplete analysis of the considerations, policy and legislative choices, objectives, balancing of interests and methodology underlying European and Dutch energy transition and climate legislation. In addition to, and closely related to, the climate interest, these include energy security and affordability (including the need to consider what is feasible per sector, region and energy source), the promotion of free market competition (including the interest in creating a level playing field), and the international competitive position of the Netherlands and the European Union (including the interest in ensuring an attractive business climate). Against this backdrop, the Court of Appeal failed to recognise that an MD Reduction Duty interferes with, and in any event is inconsistent with, the existing system of policies and regulations and the underlying rationale. Shell has already explained this in subpart 1.1). The same applies to the Dutch legislation and regulations and the underlying objectives.[303]

2.2 Defence in the principal cassation appeal and subpart: the Court of Appeal should have taken into account other interests recognised by the legislature, including energy security and affordability, in reaching its judgment

88. First and foremost: the imposition of an MD Reduction Duty is inconsistent with the restraint that the courts must exercise in relation to the legislative and executive power and would overstep the bounds of substantive and procedural private law, including the bounds of litigation in the public interest (see subparts 5.1 and 5.2 in particular). Inevitably, an MD Reduction Duty is based on general governmental policy considerations and on important choices of a legal policy nature (see subpart 5.1 and Section 5.1.1 in particular). It is also inconsistent with the existing system of the law, is incompatible with, and interferes with, the cases regulated by law, and limits the freedom of the legislature to make policy considerations and choices to counter climate change and in relation to the energy transition. Moreover, the imposition of such a legal duty disrupts choices that have already been made (see (sub)parts 1.1, 2.1 and 5.1 and Sections 5.1.1 and 5.1.2 in particular). Should Shell's point of view, as described in these (sub)parts, not be followed, the Court of Appeal should have taken into account other interests recognised by the legislature in reaching its judgment, including the interests of energy security and affordability. In this regard, Shell argues as follows.

Defence

89. Milieudefensie's complaints in its principal cassation appeal cannot succeed because a consideration of all the interrelated relevant interests in this case (including the climate interest, the interest in energy security and affordability, the interest in free market competition and the international competitive position of the Netherlands and the European Union), either in and of itself or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1, and 2.3-2.9, leads to the conclusion that the general societal standard of care as referred to in article 6:162 DCC does not extend to the imposition of an MD Reduction Duty.

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[303] See no. 84 and 86. See also Statement of Appeal, no. 3.3.1-3.3.10; Shell Written Pleading Notes, Chapter 3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.6, 3.2.7 and 3.2.20-3.2.24; Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 1 of 4, no. 5.1.7 and 6.2.1-6.2.6; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 1.1.4 and 1.1.5. See also the Dutch Climate Plan 2021-2030 (Exhibit RO-266), p. 15 and 54.

Complaints

90. In interpreting the general societal standard of care set out in Article 6:162 DCC in paras. 7.24-7.27 (and in particular in para. 7.25), the Court of Appeal has focused on (the approach to and consequences of) climate change and the rights and obligations that according to the Court of Appeal can be associated with that. In paras. 7.52-7.54 and 7.57, the Court of Appeal has decided that the measures taken by the legislature are not exhaustive and therefore do not in themselves preclude the duty of care based on a societal standard of care for individual enterprises to reduce emissions. The Court of Appeal gave this judgment (in part) in response to Shell's argument that climate change and the energy transition require a balancing of the broader interests involved in the energy transition – in particular, energy security and affordability – that is the prerogative of the legislature. Shell raises the following complaints in respect of these paragraphs:

i) In interpreting the societal standard of care, the Court of Appeal wrongly failed to take into account other interests recognised by the legislature, including energy security and affordability (the interests of the energy trilemma, which are related to various fundamental societal interests), free market competition and the international competitive position of the Netherlands and the European Union. The Court of Appeal failed to recognise that, also in the light of subparts 2.1 and 2.3 and following, the proper balancing of the other interests associated with climate change cannot lead to the conclusion that an MD Reduction Duty is supported by unwritten law. As far as the Court of Appeal in particular in para. 7.25 – by holding that, "[f]*or the Court of Appeal, there is no doubt that the climate problem is the greatest issue of our time*" – has (implicitly) decided that the other relevant interests do not have to be taken into consideration or are in advance subordinated to climate change, the Court of Appeal failed to appreciate that it should have balanced these interests in any event as part of its assessment of the existence of an MD Reduction Duty.[304]

ii) Insofar as the Court of Appeal did not focus exclusively on the climate interest, it failed to appreciate the relative weight of these other interests and/or, also in light of subparts 2.1 and 2.3 and following, that a balancing of the other interests intertwined with climate change cannot lead to the conclusion that an MD Reduction Duty is supported by unwritten law.

iii) The Court of Appeal wrongly and manifestly failed to respond to Shell's substantiated and documented assertions regarding the interests of energy security and affordability, and the related fundamental societal interests.[305]

Explanation of defence and complaints

91. In addition to the climate interest, the broader interests involved in the energy transition – including energy security and affordability, and the related fundamental societal interests of welfare and safety, free market competition and the international competitive position of the Netherlands and the European Union – carry legally relevant weight in the interpretation of the societal standard of care.

[304] Court record of the oral hearing on appeal, p. 13.
[305] Statement of defence, par. 2.1, 2.2.1 and 2.2.3; Statement of Appeal, no. 2.2.1-2.2.9; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.2-1.4.5, 1.5.2-1.5.5 and 1.5.7-1.5.12.

92. The societal interests of energy security and affordability are important interests recognised by the legislature[306] and protected by fundamental rights. Energy plays a vital role in our society. Energy security and access to energy are necessary to maintain and improve the quality of life of the world's population, both in the developed economies and developing countries where Shell supplies oil and gas. Energy is needed in homes, schools, hospitals, factories, shops, passenger and goods transport, sanitation, water systems, agriculture and construction, military, and plays a vital role in the production and delivery of almost all the products and services that modern society takes for granted.[307] Moreover, the world's population is expected to increase from 8 to 10 billion people by 2050 and governments will need to ensure that the global energy supply meets the requirements of energy security and the sustainable development of the growing world population.[308] Access to affordable and reliable energy is one of the Sustainable Development Goals adopted by the United Nations (the "**UN**").[309] Oil and gas will continue to play a vital role in ensuring affordable and reliable energy supplies well beyond 2030. The world's growing demand for energy, and the goals it serves, stand beside and are closely linked to the need to reduce emissions in the coming decades to mitigate climate change. It is thus important to pay attention to these interests, as neglecting them could lead to a decline in public support for the energy transition. An overly one-sided approach could even be counterproductive.[310] In shaping the energy transition, governments aim to address this wider range of multiple and sometimes conflicting interests, which need to be continuously and coherently balanced (the energy trilemma).[311]

93. The above confirms the need for a "*just, orderly and equitable*" energy transition.[312] Reduced use of fossil fuels must be accompanied by an increased availability and use of low-carbon alternatives which are not only cost effective, but also provide an affordable and reliable energy supply. A just, orderly and equitable transition also entails taking into account a very wide range of social, economic and other considerations and interests involved in the energy transition. A transition that does not proceed in an orderly manner would have major implications for society and could entail for instance price shocks, disruptions, shortages and conflicts.[313] The above does not only apply to the Netherlands, but also to the EU and the rest of the world: an MD Reduction Duty would have a global impact, as Shell's operations and investments take place in more than 70 foreign states across the globe.[314] The Court of Appeal has wrongly failed to take this into account in an apparent manner. The Court of Appeal also failed to appreciate the essential role of these interests in generating broader societal support for, and an acceleration of, the energy transition.

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306 Dutch Climate Plan 2021-2030 (Exhibit RO-266), p. 15, 26-28 and 54; EU Governance Regulation, Article 1(2)(a); Regulation (EU) 2021/1119, recital 34 and Article 4(5)(g); Directive (EU) 2023/2413, recital 9 and 44 and Article 22a(3); Directive (EU) 2023/1791 recital 76 and Article 2 preamble and (52); Regulation (EU) 2024/1787, recitals 76 and 77, and Article 29; and Statement of Appeal, no. 3.3.4.

307 Statement of Defence, no. 33 and 429 and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.3.6. See also Section 5.1.3.

308 Statement of Appeal, no. 2.2.4.

309 Statement of Defence, par. 2.2.3.2.

310 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (g); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.5.2; and Statement of Defence par. 2.2.4, no. 75.

311 Statement of Defence, par. 2.2; Statement of Appeal, par. 2.2; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.2-1.4.5.

312 UNFCCC, 13 December 2023, *Outcome of the first global stocktake* (Exhibit S-243), no. 28 under (d). Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, footnote 33.

313 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.1-1.5.6.

314 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.1.

2.3 Defence in the principal cassation appeal and subpart: Articles 2 and 8 ECHR and/or other human rights instruments and case law cited by the Court of Appeal do not support and justify a general legal duty to limit emissions and at least not an MD Reduction Duty

Defence

94. Milieudefensie's complaints fail for lack of interest because the legislation and regulations, instruments and case law on human rights cited by the Court of Appeal in paras. 7.6-7.17 do not support and justify a general legal duty to limit emissions and in any event not an MD Reduction Duty, either in and of themselves or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.2 and 2.4-2.9.

Complaints

95. The legislation and regulations, instruments and case law on human rights cited by the Court of Appeal in paras. 7.6-7.17 do not support and justify a general legal duty to limit emissions, let alone an MD Reduction Duty (cf. paras. 7.24-7.27). Shell raises the following complaints against these paragraphs:

i) The Court of Appeal failed to recognise that the fundamental differences between states and enterprises call for restraint in giving effect (by analogy) to climate related positive obligations based on Articles 2 and 8 ECHR in private horizontal relationships. This complaint will be further explained in Section 2.3.1.

ii) The Court of Appeal's decision evidences an error in law because (a) the Court of Appeal failed to recognise that the imposition of an MD Reduction Duty, following from a general legal duty to limit emissions, impermissibly interferes with the wide margin of appreciation states have in choosing means of climate change mitigation; (b) furthermore, in para. 7.11 in particular, the Court of Appeal failed to appreciate the restraint that courts must exercise in reviewing the *manner in which* the energy transition is shaped (which follows from *Verein Klimaseniorinnen Schweiz et al. v Switzerland*[315] and *Urgenda*).[316] This complaint is further explained in Section 2.3.2.

iii) The Court of Appeal's decision fails to recognise that it follows from the *Bosphorus* doctrine that EU law must be presumed to provide at least equal protection to the ECHR and that this presumption has not been rebutted. Therefore (case law on) the ECHR does not support and justify the imposition of an MD Reduction Duty, which would significantly extend beyond the existing framework of EU law. Therefore, the Court of Appeal's decision is unsustainable as a matter of law and/or insufficiently reasoned. This complaint is further explained in Section 2.3.3.

iv) The Court of Appeal failed to recognise, particularly in para. 7.26, that an indirect effect of

[315] ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).
[316] NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*).

Articles 2 and 8 ECHR cannot provide a basis for legal duties of enterprises towards all, as explained further in Section 2.3.4.

Explanation of defence and complaints

2.3.1 The fundamental differences between states and enterprises call for restraint in giving effect to climate related positive obligations based on human rights in private horizontal relationships

96. The fundamental differences between states and enterprises necessitate restraint in the application in private horizontal relationships of climate related positive obligations based on human rights.[317] This is also in line with the Supreme Court's *Urgenda* judgment[318] and the ECtHR's *Verein Klimaseniorinnen Schweiz et al. v Switzerland*[319] judgment, in which a positive obligation under Article 8 (and in *Urgenda* also under Article 2) ECHR has been accepted for states to limit (at least[320]) their territorial emissions. The outcome in *Urgenda* and *Verein Klimaseniorinnen Schweiz et al. v Switzerland* can be explained by the fact that states (as opposed to enterprises) can exercise control over these territorial emissions and by exercising state power, they can put in place the necessary legal and policy frameworks to reduce emissions from the enterprises and residents subject to the state's jurisdiction. The recent Advisory Opinion of the International Court of Justice on the obligations of states in respect of climate change is in keeping with this approach. According to this Advisory Opinion, states have an obligation to regulate the activities of private actors under its jurisdiction, for example by taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors.[321] This concerns measures on the demand and supply side of fossil fuels.[322]

97. Both judgments, and incidentally also the Advisory Opinion of the ICJ, reflect that states have a primary and central responsibility and role in combatting climate change. The Court of Appeal recognised this central responsibility of states in paras. 7.17 and 7.24. In paras. 7.24-7.27 and 7.55-7.57, the Court of Appeal decided that when answering the question of what societal duty of care entails for enterprises, the possibilities enterprises have for effectively contributing to countering climate change must be taken into account. The Court of Appeal left open what that contribution might entail. The Court of Appeal did not address the possibilities and limitations of enterprises to take meaningful and responsible measures. The Court of Appeal failed to recognise that in the event of an indirect horizontal effect of human rights, the fundamental difference on this point between

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317 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.4.14 under (c). Cf. Statement of Defence, par. 7.6.5. Also the Opinion of A-G Valk prior to NL Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, *NJ* 2020/293 (*IS-uitreizigers*), para. 6.3 in which it is indicated that the indirect effect is certainly not automatic.

318 NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*).

319 ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).

320 ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*) *NJ* 2024/343 with note by Spier points 12-23. It is unclear whether the ECtHR actually took "embedded emissions" into account in its decision. "Embedded emissions" have been interpreted as emissions associated with the import of goods and their consumption, see ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*), para. 280. Spier criticises a possible requirement for "embedded emissions".

321 International Court of Justice, Advisory Opinion of 23 July 2025, Obligations of States in Respect of Climate Change, para. 428. See also the Advisory Opinion, paras. 252, 282, 403.

322 Advisory Opinion, para. 427: "*Failure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State.*" The Dutch government has indicated that this advice clarifies existing international legal obligations of states in the field of climate, but does not create new obligations, and that it has "*an extensive regulatory framework* at EU and national level" with which it implements the obligation to regulate private actors, see Appendix to *Aanhangsel Handelingen II*, 2025/26, no. 104, p. 2-3.

democratically legitimised states and private enterprises limits the influence thereof in interpreting a societal duty of care.

98. Unlike enterprises, states can achieve GHG emissions reductions across the economy as a whole through the exercise of state power and a range of possible legislative and policy measures. It is relevant in this context that governments can, through the legislative and policy measures available to them, address both energy supply and energy demand in tandem across the economy as a whole.[323] Enterprises such as Shell do not have that power, and do not have control over the (national) composition of the energy mix or the choices of end-users about which energy products to consume (see also Section 3.1.1).[324] Therefore, because of these fundamental conceptual differences between a state's powers and functions (on the one hand), and the powers and functions of enterprises such as Shell (on the other hand), any positive obligation on states to protect against climate change cannot logically be transposed through 'indirect horizontal effect' to enterprises like Shell.[325] This applies in particular to reported Scope 3 emissions, given the aforementioned lack of control over choices of end-users. Especially in this respect, there is a fundamental difference between the influence on horizontal relationships of, on the one hand, human rights that are protected by negative treaty obligations (that is the obligation not to interfere with such rights) and, on the other hand, the right to protection from the impacts of climate change that is to be protected, according to the case law of the ECtHR and the Supreme Court, by positive treaty obligations (that is the obligation to actively pursue such rights). After all, the latter category – that of positive human rights obligations to mitigate climate change – depends on state power, policy and the balancing of various fundamental interests.

2.3.2 Urgenda and Verein KlimaSeniorinnen Schweiz et al. v Switzerland allow states freedom in choosing the means of climate mitigation. The imposition of an MD Reduction Duty by the court restricts that freedom, and this case law does therefore not support the existence of such a duty

99. The bedrock of both *Urgenda* and *Verein KlimaSeniorinnen Schweiz et al. v Switzerland* is that the courts can and must provide legal protection against insufficient or inadequate climate goals included in climate policies of states, but that the legislative and executive powers of those states are free to choose the means to achieve these goals.[326] This policy latitude for states to choose the means to achieve adequate reduction targets is only to a very limited extent subject to review by the courts. This case concerns those means: about the choice of a specific instrument (an MD Reduction Duty, for a specific percentage, following from a general legal duty to limit emissions), that would be applied to an individual enterprise in a specific sector (the oil and gas sector) involving specific societal and economic interests (the energy trilemma, and the other interests recognised by the legislator).

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323 Statement of Appeal, no. 1.3.2, 1.6.2, 2.3.15, 2.5.8, 2.5.9 and 2.8.1; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.19-1.5.21 and 1.5.31; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.2.

324 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.2.

325 E.H.P. Brans and M.W. Scheltema, 'Aansprakelijkheid Shell voor klimaatverandering. Een 'carbon major' geconfronteerd met een reductiebevel', *M en R* 2021/80, p. 560; and Asser/Sieburgh 6-IV 2023/48.

326 NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), paras. 5.3.2, 6.6 and 8.3.2; and ECHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*), paras. 538 under (d), 543 and 561. Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 2.2. The recent Advisory Opinion of the ICJ also pays little attention to fossil fuels, and only in general terms, and does not prescribe to states how they should regulate the activities of private actors (Advisory Opinion, paras. 427 and 428).

100. States have freedom as to how they design their climate policies, taking into account all the interests involved. It is a choice of the state having jurisdiction over an enterprise whether or not to opt for the policy instrument of reduction targets for individual enterprises.[327] The imposition of an MD Reduction Duty based in part on an indirect horizontal effect of a human right to protection against the effects of climate change, interferes with the freedom states have to determine the legislative and policy measures they could take to achieve reduction targets in their territory. As has been set out in subparts 1.1 and 2.1, the European and national legislatures have made these determinations in a comprehensive package of legislative and policy measures to achieve reduction targets. As the Supreme Court has held in *Urgenda*, "*it is for government and parliament to decide on the reduction of GHG emissions*" and "*they have a great degree of freedom to make the required political trade-offs*."[328] The restraint to be exercised by the courts with regard to the policy latitude of states limits the possible interpretation of a societal duty of care for enterprises on grounds of unwritten law. Restraint is even more so required if the determination of obligations depends on "*rules or agreements that are not binding in themselves*" ,[329] which the Court of Appeal did apply by relying on various non-binding instruments.

101. The Court of Appeal erred in law by failing to observe this restraint. This also follows from its consideration in para. 7.11 that it need not exercise such restraint where it comes to the protection of the fundamental rights contained in the ECHR. The Court of Appeal's approach at para. 7.11 is incompatible with *Verein KlimaSeniorinnen Schweiz et al. v Switzerland* and *Urgenda* for the reasons explained above as these judgments leave it to government and parliament to decide on the *means* to achieve reduction targets. Therefore, these judgments do not support and justify an 'indirect horizontal effect' of a state's positive obligation to mitigate climate change, in light of the instruments discussed by the Court of Appeal in paras. 7.18 to 7.23 and the other factors mentioned by the Court of Appeal in paras. 7.24 to 7.27.

2.3.3 Under what is referred to as the Bosphorus doctrine, Union law must be presumed to provide at least equal protection as the ECHR. This presumption has not been rebutted. Therefore (case law on) the ECHR cannot support and justify the imposition of an MD Reduction Duty, which would significantly extend beyond the existing framework of EU law

102. The Court of Appeal erred in law. As Shell argued on appeal, it follows from what is referred to as the *Bosphorus* doctrine applied by the ECtHR that European regulations, which Shell must comply with, are presumed to provide a level of protection equivalent to that prescribed by the ECHR. This presumption has not been rebutted in this case. Because the entire EU law framework already provides a sufficient level of protection, no MD Reduction Duty in addition to those European regulations can be based on (an indirect horizontal effect of) Article 8 ECHR (and in part by Article 2 ECHR) and/or other human rights.[330] Shell referred in this context to the European Commission's position in the climate case of *Duarte Agostinho and others v Portugal and other states* at the ECHR.

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[327] Statement of Defence, par. 7.6.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.4.13-6.4.15. In this respect, see also H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 20.

[328] NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 8.3.2.

[329] NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 6.6.

[330] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (d); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.4.6-6.4.12; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 1.2.1.

In that case, the European Commission took the position that "*EU law can be considered to provide for an equivalent level of protection of human rights to that of the Convention in the field of environmental protection. Therefore, Member States of the EU can be presumed not to have departed from the requirements of the Convention when they implement the legal obligations flowing from their membership to the EU.*"[331]

103. The entire economy wide EU law framework, including the legal protection afforded by the preliminary reference proceedings before the Court of Justice, provides the legally enforceable level of legal protection against climate change in respect of member states and the (multinational) enterprises under their jurisdiction. If EU member states act in accordance, or may be forced to comply, with European regulations, the relevant national measures should also be deemed to meet the requirements of the ECHR.[332] It is relevant here that (multinational) enterprises are private legal entities, subject to the state power and jurisdiction of all countries in which they operate. They are therefore under EU and national regulation.

104. The starting point in the Bosphorus presumption is the protection offered by EU law. Extra protection offered by member states in the implementation of EU law, if any, is irrelevant for the application of the Bosphorus doctrine. Member states do not have a relevant 'margin of manoeuvre' in light of the body of EU law instruments mentioned in Part 1, as an MD Reduction Duty interferes with EU law. And if there would be any reasonable doubt about this, questions may be referred to the Court of Justice within the framework of legal protection offered by the preliminary reference proceedings. Legal protection can also be provided by ordering the State, if requested, to pursue a sound climate policy and weigh up the interests necessary to do so (see also Section 5.1.6).

2.3.4 Whereas states may have general positive obligations towards their residents, private parties can have a duty of care only in specific horizontal situations. An indirect effect of Articles 2 and 8 ECHR cannot provide a basis for obligations of enterprises towards all

105. The Court of Appeal erred in law by deciding that the horizontal effect of the human rights obligations of states can provide relevant support for the existence of a 'general' civil-law legal duty and by deciding in particular, at para. 7.26, that "*companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth*". Human rights may, as the Court of Appeal observed in para. 7.18 and following, under certain circumstances be included by the courts in their considerations of horizontal relationships via the open norms of private law. However, this must always involve specific horizontal legal relationships between certain private parties. Human rights cannot provide a basis or support for the existence of a general civil law legal duty towards everyone (see also subpart 2.5, in particular no. 117(iv). The fundamental difference between the position of private parties such as Shell and the contracting states to the ECHR is that the positive obligation for states to protect against climate change accepted by the Supreme Court and the ECtHR, exists by its nature vis-à-vis all residents in their jurisdiction. Furthermore, the positive obligation of states under the ECHR is limited to the protection of residents over whom they have effective control. It is

[331] European Commission, 19 May 2021, *Written Observations of the European Commission - Case: Duarte Agostinho and Others v. Portugal and Others* (Exhibit S-208), no. 72.
[332] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.4.10.

therefore not understandable that enterprises, which, unlike states, have no power over a territory, could nevertheless have an obligation towards all inhabitants of the earth. The Court of Appeal failed to appreciate this in para. 7.26 by deciding that "*companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth.*"

2.4 Defence in the principal cassation appeal and subpart: the UNGP, OECD guidelines and other instruments discussed by the Court of Appeal do not support or justify a general legal duty to limit emissions nor an MD Reduction Duty

Defence

106. Milieudefensie's complaints fail for lack of interest, since the instruments cited by the Court of Appeal in paras. 7.18-7.23 do not support and justify the existence of a general legal duty to limit emissions nor an MD Reduction Duty, either in and of themselves or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.3 and 2.5-2.9.

Complaints

107. In so far as the Court of Appeal's decision in paras. 7.18 to 7.23 and, building on this, in paras. 7.26-7.27 must be understood as meaning that the instruments discussed there by the Court of Appeal support and justify the existence of a general legal duty to limit emissions or an MD Reduction Duty, the Court of Appeal's decision is unsustainable as a matter of law or at least incomprehensible or insufficiently reasoned in light of what Shell has asserted with regard to those instruments:

i) The Court of Appeal's decision in paras. 7.18-7.23 and, building on this, in paras. 7.26 and 7.27 is unsustainable as a matter of law or at least incomprehensible or insufficiently reasoned because it fails to recognise that none of the instruments discussed by the Court of Appeal, considered alone or in conjunction with each other, and also in light of their formation, support base, representativeness, target group, nature, content, purport and/or scope, supports and justifies the existence of a general legal duty to limit emissions, let alone an MD Reduction Duty.

ii) In paras. 7.26 and 7.27 (and the considerations building on them), the Court of Appeal wrongly attributed decisive influence to the instruments discussed by the Court of Appeal in paras. 7.18-7.23 with regard to the obligations of enterprises, in addition to what they are obliged to do under (public law) regulations. In any case, the Court of Appeal did not exercise the restraint that is appropriate when using this type of instrument to interpret the unwritten standard for societal propriety. For that reason, the Court of Appeal's decision is incorrect or at least incomprehensible and/or insufficiently reasoned.

iii) In any event, the Court of Appeal erred in failing to examine in paras. 7.18-7.23 and, building on this, in paras. 7.26 and 7.27, for each of the instruments discussed by the Court of Appeal in paras. 7.18-7.23, whether the instrument expresses a societal consensus prevailing in the Netherlands and, for that reason, supports and justifies the existence of a general legal duty

to limit emissions, let alone an MD Reduction Duty. Also for that reason, the Court of Appeal's decision is incorrect or at least incomprehensible or insufficiently reasoned.

Explanation of defence and complaints

108. In para. 7.26, the Court of Appeal decided that it "*follows from the instruments discussed above, including the OECD guidelines and the UNGP, to which Shell has subscribed*", that the "*companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so*". According to the Court of Appeal, "[t]*hose instruments place responsibility for protection against dangerous climate change also on (large) companies and call on them to take appropriate measures themselves to counter dangerous climate change*."

109. The instruments discussed by the Court of Appeal do not support and justify any (unwritten) legal duties for enterprises, such as an MD Reduction Duty if those duties have no connection, or insufficient connection, to the existing legislation of democratically and constitutionally legitimised institutions. To the extent the principal is also based on these instruments, it fails for lack of interest. To the extent the Court of Appeal decided otherwise, the Court of Appeal erred in law, or at least gave insufficient reasons for its judgment.

110. The instruments discussed by the Court of Appeal in paras. 7.18 to 7.23 were drafted by different types of public and private organisations and differ from each other in terms of their formation, support base, representativeness, target group, nature, content, purport and scope. These are eminently relevant factors for determining whether and to what extent these instruments express a prevailing societal consensus that is capable of supporting the existence of an unwritten civil law obligation under Dutch law.[333] The instruments discussed by the Court of Appeal were, in most cases, not drafted by democratically legitimised entities and they do not comprehensively take into account the broad range of interests and trade-offs engaged by the energy transition. In circumstances where the legislator has expressly referred to those instruments, great weight should be given to how the legislator itself intended these types of instruments to have significance for enterprises' obligations.[334] The European Union has done this, among other things, in the CSDDD and the Dutch legislator in its legislative proposal for the implementation.[335] In light of the above, the courts should exercise restraint in giving weight to such instruments when interpreting the societal standard of care.

111. None of these instruments creates (or aims to create) legally binding obligations for private parties. Nor are they intended or suitable to interpret the civil law obligations of enterprises.[336] These general, non-binding instruments sharply contrast with the specific and legally binding framework of EU and national law. The fact that Shell has supported some of these instruments does not make this different

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333 A.G. Castermans, *De gelede normstelling in het aansprakelijkheids- en schadevergoedingsrecht*, Deventer: Kluwer 2021, p. 72; and K.J.O. Jansen, 'Verkeersopvattingen en private regelgeving', *NTBR* 2020/5, p. 36.

334 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.8. See also Part 1 and subpart 2.1.

335 Directive (EU) 2024/1760, recitals 5-16. See for the current Dutch draft on the Responsible and Sustainable International Business Conduct Act which also implements the CSDDD, no. 86d.

336 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (d); and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 6.2.

as a matter of law.[337] The existence of a general legal duty to limit emissions, let alone an MD Reduction Duty, cannot be inferred from the support of an instrument that expressly does not intend to create legal obligations. As explained in subpart 2.3, in particular Section 2.3.1, human rights protection against climate change to be provided by states via positive obligations cannot, as the Court of Appeal did, support and justify the existence of a general legal duty to limit emissions, let alone an MD Reduction Duty, via these instruments.

112. In para. 7.20, the Court of Appeal addressed the UN Guiding Principles on Business and Human Rights (the "**UNGP**").[338] The nature, structure and function of the UNGP, especially in light of the above, do not provide any basis for legally enforceable civil climate obligations incumbent on individual enterprises. The UNGP (i) make it explicit that they do not create any legally binding duty – "[n]*othing in these Guiding Principles should be read as creating new international law obligations*"; (ii) speak in that context of a general "*responsibility*" of enterprises to respect human rights, stressing that this is "*distinct*" from "*issues of legal liability and enforcement*"; (iii) contrast the "*responsibility*" of enterprises with the *obligation* of states to protect human rights; (iv) provide only a generic policy framework for developing policies and processes to address negative effects of enterprises on human rights; (v) offer no terms of reference with regard to what enterprises must do in terms of emissions reductions, let alone with regard to the assumption of the MD Reduction Duty, and do not specifically address climate change and combating its negative impacts at all; and (vi) are not industry or sector-specific.[339]

113. The same applies for the OECD Guidelines on Multinational Enterprises (the "**OECD guidelines**"), which the Court of Appeal discussed in paras. 7.21 and 7.22. The OECD guidelines contain a set of recommendations for enterprises. According to the OECD guidelines, compliance is "*voluntary and not legally enforceable*". The OECD guidelines itself state that its recommendations "*may go beyond what enterprises are legally required to comply with*" and the recommendation of governments to enterprises to comply with the guidelines is "*distinct from matters of legal liability and enforcement.*"[340] While the OECD guidelines recommend that enterprises adopt emissions reduction targets, they do not prescribe what those targets should be and recognise that setting targets for (Scope 3) emissions will not always be possible.[341] The OECD guidelines are likewise not specific to any one industry or sector, and therefore they do not reflect differences between industries and sectors that affect the pace of emissions reductions. Moreover, the OECD guidelines were updated in 2023 and the final text does not explicitly integrate climate change into the scope of human rights due diligence under the OECD guidelines.

114. In para. 7.23, the Court of Appeal additionally referred to a "*range of other (informal and non-binding) regulations and guidelines*", as addressed further under a up to and including g below. Apart from the UN Global Compact, these instruments have not been supported by Shell. They generally

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337 Shell supports the UNGP, the OECD guidelines and the UN Global Compact.
338 The final version was endorsed by the UN Human Rights Council (not submitted to the General Assembly).
339 Statement of Defence, no. 649 and 650; Statement of Appeal, no. 1.5.1 under (b), 4.3.1, 4.3.7, 4.3.8, 4.3.25 and 7.3.2; Shell Pleading Notes dated 17 December 2020, hearing day 4 – substantive assessment of claims, no. 5.1.13; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.5.3; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.8; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.2 and 6.2.4.
340 OECD guidelines, preface 5 and I.1.
341 Statement of Defence, no. 649, 650 and 663; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.2-6.2.4.

do not specifically address human rights protection against climate change. Differing greatly from each other in background and content, no support can be derived from these instruments for the existence of a general legal duty to limit emissions, let alone an MD Reduction Duty.

a. The UN Global Compact involves voluntary cooperation between the UN and the private sector to advance the values of the UN. It is not intended to be legally binding, nor to take over the obligations of governments in relation to (international) development goals. It also contains no recommendations (or otherwise) for reducing emissions.[342] Therefore, while this instrument is intended to be supported by enterprises, such support cannot entail the creation of binding legal obligations.

b. The *ISO Net Zero Guidelines* is a so called "International Workshop Agreement" – endorsed solely by the participants to the workshop, with guiding principles and recommendations to enable a common, global approach to achieving net zero GHG emissions. It stresses that it does not create legally enforceable obligations, and expressly states that it does not address legal and other obligations relating to climate action. Moreover, no sufficient consensus on the existence of a legal reduction duty can be inferred from the content of this document.[343]

c. The 1.5 °C Business Playbook of the Exponential Roadmap Initiative is a voluntary initiative providing a strategic framework for enterprises on the energy transition. Even according to Milieudefensie's own sources, there is "*little consensus amongst standards and voluntary initiatives*", such as the *Exponential Roadmap Initiative*, "*regarding what constitutes 'Paris-aligned' ambition at the corporate level.*" Therefore, no duty for an enterprise to adhere to the global reduction average of at least 45% reduction by 2030 can be derived from this.[344]

d. The UN Race to Zero initiative invites enterprises to set voluntary targets. It does not specify what those targets must be, nor does it clarify if and to what extent enterprises are obliged to achieve their voluntary targets.[345] Instead, it recognises that there are differences between enterprises and sectors and that "*little consensus*" exists on what a global emissions reduction target means for an individual enterprise.[346]

e. The report from the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities cited by the Court of Appeal contains only very general policy recommendations, with nothing in it about an absolute reduction duty for an individual enterprise, let alone a specific reduction percentage.[347]

f. The Oslo Principles and the subsequent Principles on Climate Obligations of Enterprises, the only source referred to in the relevant context by the UN Special Rapporteur on Human Rights and the Environment in a report cited by Milieudefensie explicitly recognise –

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342 Statement of Defence, no. 658-660; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.5.1, 6.5.2 and 6.5.3 under (c).
343 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (g).
344 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.4.7-7.4.9, citing *NewClimate Institute*, *Oxford Net Zero, Energy & Climate Intelligence Unit and Data-Driven EnviroLab*, Net Zero Stocktake 2023 (Exhibit MD-489), p. 32, which relies on a study of 33 initiatives, including the Exponential Roadmap Initiative.
345 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.4.8.
346 Shell Pleading Notes dated 17 December 2020, hearing day 4 - substantive assessment of claims, no. 35; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.4.3, 7.4.4, 7.4.8 and 7.4.9.
347 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.5 and 6.2.6.

correctly – that no unwritten standard regarding Scope 3 emissions reductions exists, and conclude that the fairest and most workable solution is to attribute fossil fuel emissions to the end-user, rather than to the supplier.[348]

g. The Oxford Report cited by the Court of Appeal provides no basis for the existence of an unwritten legal duty, let alone an MD Reduction Duty in respect of Scope 3 emissions. This seven-page document concerns a survey in which it is not clear who participated, whether the group is representative, how the participants were selected, and what exactly was filled in by the participants in the survey. No peer review took place, as is usual for scientific studies. The document also acknowledges that many questions still exist around Scope 3 targets and how these must be dealt with.[349]

115. The Court of Appeal recognised that while in its view the instruments discussed place a *responsibility* on (large) enterprises and that these enterprises *are called upon to take* appropriate measures (para 7.26), these instruments are not legally binding (paras. 7.20, 7.21 and 7.23). In view of the above, the Court of Appeal could not conclude that these instruments support and justify a legal basis for a general legal duty to limit emissions, let alone an MD Reduction Duty. These instruments indeed do not express a societal consensus prevailing in the Netherlands (and elsewhere) to this extent, as reflected in the choices and considerations of European and national legislators in shaping European and national energy transition and climate legislation (see subparts 1.1 and 2.1)

2.5 Defence in the principal cassation appeal and subpart: the responsibility of enterprises referred to by the Court of Appeal does not support and justify any general civil-law legal duty towards other inhabitants of the earth or residents of the Netherlands and the Wadden Sea region. An unspecified general legal duty to limit emissions cannot as such exist as a civil-law legal duty

Defence

116. Milieudefensie's complaints fail for lack of interest, since the existence of a societal *responsibility* of enterprises does not, either in and of itself or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.4 and 2.6-2.9, justify the step to a civil-law *legal duty* towards the residents of the Netherlands and the Wadden Sea Region. An unspecified general legal duty to limit emissions cannot as such exist. Furthermore, Milieudefensie's claims cannot be awarded because they are at odds with the requirement that the protective scope of the legal duty invoked extends to the interests and persons that Milieudefensie claims to represent in these proceedings. Shell's defences directed at this are set out below in (i) and (v) as complaints.

Complaints

117. The Court of Appeal decided in para. 7.26 that "*everyone has a responsibility*" "[t]*o combat the danger posed by climate change*" and that enterprises like Shell have a duty to do so "*vis-à-vis other*

[348] Statement of Appeal, no. 8.3.21-8.3.23; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (a); and J. Spier (ed.), *Principles on Climate Obligations of Enterprises by the Expert Group on Climate Change.*, (2nd ed.), The Hague: Eleven International Publishing 2020 (selection) (Exhibit S-96), p. 59-61.

[349] Statement of Appeal, no. 8.3.24-8.3.27; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.3-8.4.6.

inhabitants of the earth". In para. 7.27, the Court of Appeal "summarised" "*that companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions in order to counter dangerous climate change*". According to the Court of Appeal, "[c]*ompanies like Shell thus have their own responsibility in the achieving the targets of the Paris Agreement*." With this finding, the Court of Appeal erred in law.

i) The Court of Appeal failed to recognise in paras. 7.24-7.27 that the existence of a societal *responsibility* for enterprises does not, even in conjunction with the other factors mentioned by the Court of Appeal in paras. 7.24 and following, justify the imposition of a civil-law legal duty, let alone an MD Reduction Duty in law. At most, that responsibility can result in a natural obligation (article 6:3 DCC). Establishing the existence of an MD Reduction Duty requires sufficient societal consensus in the Netherlands that such responsibility should be legally enforceable, especially given the choice made in existing climate legislation to pursue climate change mitigation mechanisms that are fundamentally different to an MD Reduction Duty.[350] It must be borne in mind that the question before us in this case is not whether enterprises like Shell could, based on the societal standard of care, be required to contribute to countering climate change in some other meaningful way that fits into the legal system and adequately takes into account the interests set out in Part 1 and subparts 2.1 and 2.2.

ii) The Court of Appeal failed to recognize in paras. 7.24-7.27 and 7.57 that a general legal duty to limit emissions cannot, as such exist, without any specification what the content of this legal duty is and to which specific persons or narrowly defined group of persons it is owed. After all, a legal duty, in order to be able to exist and to be enforceable, has to be based on a subjective right that is capable of being specified and has to require concrete conduct from the persons that have to respect such a legal duty. In fact, the societal standard of care cannot at all form the basis of a prospective legal obligation of a private enterprise, on which Milieudefensie bases its claim in these proceedings, in a multilateral context such as the present one (see subpart 5.2) and without a clear basis in legislation (see subpart 2.1), or in human rights treaties (see subpart 2.3).[351]

iii) The Court of Appeal failed to recognise in paras. 7.26, 7.27 and 7.57 that there is no place in civil law for a general legal duty on enterprises towards other inhabitants of the earth, as civil law is relational in nature and by its very nature regulates essentially bilateral legal relations between a party who is obliged to do something and a party who has a legal right to enforce a failure to fulfil that obligation (see also Section 2.3.4).[352] In Dutch civil law Article 3:296(1) DCC, among others, expresses this relational nature of civil law, in which remedies (that which is enforceable in law) must answer to a legal duty towards certain persons or groups of persons.[353] Article 3:305a DCC is also based on the fundamental starting point, and the

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350 C.J. van Zeben and J.W. du Pon (eds.) with contribution by M.M. Olthof, *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek Boek 6. Algemeen gedeelte van het verbintenissenrecht*, Deventer: Kluwer 1981, p. 616; Statement of Appeal, no. 7.2.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, nos. 5.1.2, 5.1.10 and 5.1.14.

351 Statement of Appeal, no. 7.2.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, nos. 5.1.2, 5.1.10 and 5.1.14. See H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 16-19.

352 Statement of Appeal, no. 9.2.20-9.2.22.

353 Statement of Appeal, no. 9.2.22.

limitation, that in a collective action against a private party like Shell, the interests of individuals are defended on the basis of a bilateral or, in the case of larger scale, multilateral legal relationship. Therefore, no general legal duty towards everyone can exist for an enterprise.[354] A civil-law legal duty for private parties is, by definition, an obligation in a defined legal relationship. Were it otherwise, enterprises like Shell would be exposed to claims from everyone on earth.[355] That is not what liability law is intended for.[356]

iv) The Court of Appeal failed to recognise in paras. 7.26, 7.27 and 7.57 that a general positive obligation of states to provide protection against climate change cannot, through indirect horizontal effect, justify the existence of a general legal duty towards all (see also subpart 2.3). States can, according to the Supreme Court and the ECtHR, be obliged to comply with a general legal duty towards all their residents on the basis of the ECHR, but enterprises can only be subject to civil-law legal duties towards certain persons, who have a legal claim to compliance therewith. This follows from the 'relational' nature of private law, yet is also supported by Article 12 of the General Provisions Act which stipulates that courts cannot "*by means of a general order, decision or regulation*" provide rulings.[357] Therefore, it is neither possible nor useful, as a matter of law, to speak of a 'general duty' incumbent on enterprises like Shell, as the Court of Appeal explicitly did in para. 7.57. A civil-law duty must (be able to) be so specific that compliance therewith can be demanded in court.[358] This is not the case with the general legal duty to which the Court of Appeal refers, and there is no support in unwritten law for an MD Reduction Duty.

v) The Court of Appeal failed to recognise in paras. 7.27 and 7.67 that the Paris Agreement provides no basis for legally enforceable obligations of enterprises. This would also be contrary to the structure of the Paris Agreement, as the imposition of (extra-territorial) civil-law reduction duties of enterprises undermines the primacy of states in setting and implementing emissions reduction targets across society, reflecting their own national circumstances.[359] Both European and Dutch legislators deliberately and consistently chose not to achieve emissions reductions by making individual enterprises legally bound to achieve the goals of the Paris Agreement, and the Dutch legislator has confirmed that with the existing regulatory framework it is complying with its obligation to regulate the activities of private actors.[360] Proposals to include such a legal duty in the law have not been taken up by the legislature.[361] Equally, also outside the EU no state has enacted absolute reduction obligations for individual enterprises (which Milieudefensie has not contested).[362]

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354 Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 2 of 2, nos. 27 and 28.
355 Statement of Defence, nr. 463.
356 Statement of Defence, par. 7.2.4; and Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 41.
357 Opinion of P-G Langemeijer and A-G Wissink prior to NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, NJ 2020/41, with note by J. Spier (Urgenda), par. 5.21.
358 Statement of Appeal, no. 7.2.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, nos. 5.1.2, 5.1.10 and 5.1.14. See H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 19-20.
359 Statement of Appeal, no. 5.1.4-5.1.8.
360 *Aanhangsel Handelingen II*, 2025/26, no. 104, p. 2-3.
361 Shell Written Pleading Notes, no. 3.2.3 and par. 3.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 6.2.4, with reference to Exhibit S-185 (House of Representatives motions by members Van der Lee and Thijssen and by members Teunissen and Van Raan of 4 November 2021 and voting results of November 9 2021) and Exhibit S-186 (Minister of Economic Affairs and Climate, Minister for Climate and Energy & State Secretary for Economic Affairs and Climate, 23 November 2022, *Answers to parliamentary questions in response to budget discussion Economic Affairs and Climate*), p. 36.
362 Statement of Defence, par. 2.7.5; and Statement of Appeal, no. 1.4.2.

vi) The Court of Appeal failed to recognise in paras. 7.26 and 7.27 that a general legal duty to limit emissions and specifically an MD Reduction Duty for individual enterprises like Shell, which aims to protect the interests of the residents of the Netherlands and the Wadden Region while those residents are also contributing to GHG emissions through their own behaviour and energy use, violates the requirement set out in Article 3:296(1) and Article 6:162 DCC that the legal duty whose compliance is demanded extends to the interest in which the claimant is or is likely to be affected. This depends on the purpose and scope of the legal duty, on the basis of which it must be examined to which persons and interests the protection intended by that legal duty extends.[363] The residents whom the unwritten standard of care is intended to protect are thus part of the group that contributes to the accusation put forward against Shell in these proceedings. This precludes the adoption of an unwritten legal duty in collective proceedings brought on the basis of Article 3:305a DCC for all Dutch residents and those of the Wadden Sea Region.[364] This is separate from the unsuitability of Scope 3 emissions reporting to serve as a benchmark for a civil-law legal duty aimed at reducing actual emissions into the atmosphere (about which, see Section 3.1.3).

2.6 Defence in the principal cassation appeal and subpart: the imposition of an MD Reduction Duty is, also in view of its ineffectiveness, disproportionate for Shell and therefore also violates Shell's fundamental rights as a private party

Defence

118. Milieudefensie's complaints fail for lack of interest because the unwritten societal duty of care of Article 6:162 DCC cannot provide a basis for a legal duty that is ineffective or insufficiently effective, such as an MD Reduction Duty, which realistically does not contribute to climate change mitigation. In any event, this kind of legal duty does not exist, considering - and partly in light of its ineffectiveness - its disproportionate effect on the interests of Shell. The legal duty on which Milieudefensie bases its claims thus also infringes Shell's fundamental rights, such as the right to property (Article 1 First Protocol to the ECHR and Article 17 Charter) and the freedom to conduct a business (Article 16 Charter). These circumstances, either in and of themselves or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.5 and 2.7-2.9, stand in the way of the imposition of an MD Reduction Duty.

Complaints

119. In so far as the Court of Appeal's decision in paras. 7.24-7.27 and 7.53-7.57 is to be read as meaning that, in the event of sufficient climate science consensus on a (minimum) reduction percentage applicable to Shell, Shell bears a civil-law legal duty to reduce the absolute emissions it reports by that (minimum) percentage on a date fixed in the future, Shell raises the following cross-appeal

[363] Statement of Defence, no. 572; and Statement of Appeal, nos. 9.2.22 and 9.2.23. See also NL Supreme Court 3 October 2025, ECLI:NL:HR:2025:1435 (*F-35*), para. 4.6.2.

[364] Statement of Defence, par. 7.5 (in particular no. 564-566); and Statement of Appeal, no. 9.2.19-9.2.23. For comparison, see *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552 (Exhibit S-58), paras. 18 and 19. See also K.J.O. Jansen, in: *GS Onrechtmatige daad*, artikel 6:162 BW, aant. 6.1.8 and 7.3.4.2.

complaints against this:

i) The Court of Appeal erred in citing the (in)effectiveness of the reduction order sought by Milieudefensie with respect to the Scope 3 emissions reported by Shell as the sole ground for dismissing those claims for lack of interest in paras. 7.97-7.110. The Court of Appeal was also required to consider this ineffectiveness to actually mitigate climate change when determining whether the societal standard of care gives rise to an unwritten MD Reduction Duty for enterprises like Shell. As a consequence, it failed to recognize that an unwritten duty of care does not exist when the measures that such duty of care entails are not effective.

ii) In any event, the Court of Appeal erred in failing to assess in paras. 7.24-7.27 whether the consequences of imposing an MD Reduction Duty on (enterprises like) Shell are proportionate to the effect sought to be achieved by that duty. By extension, the Court of Appeal erred in failing to assess (a) the extent to which imposition of the unwritten legal duty alleged by Milieudefensie constitutes a disproportionate infringement of fundamental rights, including the right to property (Article 1 First Protocol to the ECHR and Article 17 Charter) and the freedom to conduct a business (Article 16 Charter); and (b) if an MD Reduction Duty would constitute to a disproportionate infringement of fundamental rights, how all fundamental rights at stake should be balanced.[365]

Indeed, Shell argued that (a) an MD Reduction Duty is particularly onerous for Shell (because no such reduction duty is being directly imposed on its competitors, whereas its competitors in other jurisdictions will not be bound by that same obligation);[366] (b) its competitors would necessarily take over Shell's market share in the oil and gas market if Shell were to reduce its oil and gas sales,[367] so that the effects on the reduction of global emissions would likely be negligible, at best minimal and at worst even counterproductive (see also (d)), compared to the significant burden that an MD Reduction Duty would impose on Shell;[368] and this is all the more cogent (c) given that Shell has been investing large amounts in the energy transition for years and is among the very enterprises within the oil and gas industry that already have more ambitious reduction targets than most of its sector peers;[369] (d) Shell is less emission-intensive than an average oil and gas producer;[370] and (e) Shell is one of the leaders in tackling methane emissions from oil and gas extraction.[371]

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365 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1.1 under (d). Also: Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.4.

366 Statement of Appeal, no. 6.1.4, 6.4.3-6.4.4, and 7.5.1 under (b)(i); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3 under (c) and 6.6.1; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 9.4; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 3.1.2. Cf. Also: Statement of Appeal, no. 1.5.1 under (d)(ii); Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.7 under (i); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.7.1 and 10.7.2.

367 Statement of Defence, par. 2.2.4 and no. 532; Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, par. 3.2; Shell Pleading Notes dated 17 December 2020, hearing day 4 - substantive assessment of claims, no. 100; Shell Pleading Notes dated 12 April 2024, hearing day 4 – rejoinder, par. 3.2; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, Chapter 10. Cf. Statement of Appeal, no. 9.2.13 under (a); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1.1 under (b) and 10.8.2, and par. 10.3.

368 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1.1 under (d). Also: Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.7 under (g) and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.1-10.5, 10.7, 10.8.1, 10.8.2 and 11.4.3. Also for Shell's employees: Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.4.3 and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (h).

369 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3 under (c); and Shell Written Pleading Notes, par. 5.1 on ETS '24, more specifically the investments (par. 5.3) and the new Scope 3 reduction ambition (par. 5.1.6).

370 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.5. Also: Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (g).

371 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.30.

The Court of Appeal was required to assess ex Article 25 Dutch Code of Civil Proceedings the extent to which the imposition of the unwritten legal duty alleged by Milieudefensie constitutes a disproportionate infringement of fundamental rights in the face of these assertions. This is especially the case in light of the Court of Appeal's consideration in para. 7.11 that the imposition on Shell of a specific legal duty to counter climate change may equally leave room in the assessment of the means necessary to fulfil that legal duty.

iii) The Court of Appeal decided in paras. 7.24-7.27 and 7.55-7.57, 7.67, 7.79 and 7.99 that, in short, Shell can be required to make an *appropriate* contribution to counter climate change. However, the Court of Appeal subsequently failed to consider in its decision what real possibilities and limitations Shell has, given the regulatory and policy environment in which it operates and also bearing in mind consumer energy demand and the interests involved in running its business (see also subpart 2.9), to contribute to countering climate change by reducing the emissions it reports.[372] Furthermore, the Court of Appeal failed to take into account Shell's targets and actual emissions reductions relative to other enterprises active in the energy sector.[373] The Court of Appeal was indeed required to do this, as a matter of law and in the face of Shell's reasoned and documented assertions.

To the extent that the Court of Appeal in paras. 7.26-7.27 and 7.99 ruled that Shell has it in its power to contribute to countering climate change in isolation and independent from what other parties do, the Court of Appeal's decision is unsustainable as a matter of law or at least incomprehensible or insufficiently reasoned in light of Shell's assertions that it precisely does not have that power and that effectively countering climate change requires the co-operation and actions of many other parties, such as the end-users of its products and competing suppliers.[374]

2.7 Defence in the principal cassation appeal and subpart: the Court of Appeal has ruled that Shell has a special responsibility on incorrect and/or inadequate grounds

Defence

120. The fact that Shell is and has been an "important" or major" player in the oil and gas market cannot in itself support or justify the existence of an MD Reduction Duty. Shell's defences directed at this are set out below in no. 121 as complaints. They stand in the way of the imposition of an MD Reduction Duty, either in and of themselves or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.6 and 2.8-2.9.

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372 Statement of Appeal, no. 8.4.4-8.4.5; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.32; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.4.13-11.4.14; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 10.2.

373 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8 under (g) and 1.5.30; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.5; and Shell Written Pleading Notes, no. 5.1.6 and 5.2.1.

374 Statement of Appeal, no. 3.2.20; and Shell Pleading Notes dated 3 April 2024, hearing day 2 – part 4 of 4, para. 10.

Complaints

121. In paras. 7.26-7.27, 7.55, 7.79 and 7.81, the Court of Appeal considers in various wording that Shell has for a long time been, and still is, an "important" or "major" player in the oil and gas market and that Shell therefore has a "special" responsibility. To the extent that this decision implies that Shell's historical and current position in the oil and gas market supports the existence of a special responsibility for a party to do more than a proportionate share considering its size and actual ability to contribute, or otherwise supports the existence of a general legal duty to reduce emissions, this decision is incorrect or in any case insufficiently reasoned. In that case, the Court of Appeal failed to recognise that the mentioned finding does not, or at least not in itself, support and justify the existence of such a general legal duty, let alone an MD Reduction Duty. Shell raises the following complaints in respect of these paragraphs:

i) To the extent that the Court of Appeal decided in paras. 7.26 and 7.55 that weight must also be given to the historical emissions that the Court of Appeal associates with Shell's past activities, as seems to be suggested in the considerations that "*more can be expected of Shell than of most other companies, as Shell has been a major player in the fossil fuel market for over 100 years and as it continues to occupy a prominent position in that market today*" and that "[e]*specially companies whose products have contributed to the creation of the climate problem are obliged to contribute to combating it*", this decision is unsustainable as a matter of law. Historical emissions cannot support and justify the existence of an MD Reduction Duty (nor a general legal duty to limit emissions to the extent it would support the existence of an MD Reduction Duty (cf. paras. 7.24-7.27)) and an order based thereon for the future.[375] It is important to note that historical emissions associated with an enterprise's activities are not related to the contribution that an enterprise can make in the future to combating climate change. This applies all the more, or at least in any case, to activities that largely took place in a period of time (the Court of Appeal states "*for over 100 years*") in which the instruments cited by the Court of Appeal in paras. 3.14-3.20 and 7.6-7.57 did not yet exist and enterprises were not required (even otherwise) to take into account a general legal duty to limit emissions, the existence of which Shell disputes, let alone an MD Reduction Duty. Added to this, it is also relevant that the production and sale of fossil fuels took place pursuant to permits and/or concessions legally issued by governments, based on which the holder of the permit or concession is not only authorised but also obliged to explore and extract the relevant source.[376] It is also relevant that these activities have been of great importance for fostering prosperity, health and life expectancy, energy supply security and economic growth, not least that of the residents of the Netherlands and the Wadden Sea region that Milieudefensie contends it is defending in this case.[377]

To the extent that it was permissible for the Court of Appeal to have given weight to the historical emissions that it associates with Shell's past activities in the fossil fuel industry in determining the existence of a legal reduction duty for the future, the Court of Appeal has failed to attach weight to all aforementioned relevant circumstances in the past.

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[375] Statement of Defence, no. 194; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 2.1.6.
[376] Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 1.3.1 under (f)(i).
[377] Statement of Defence, no. 33; and Statement of Appeal, para. 2.2.

ii) Firstly, with its judgment in paras 7.55, 7.79 and 7.81 that "*Shell has a special responsibility*" and can "*be expected to make a special effort*", on the finding that Shell is and has been "*a major player in the oil and gas market*", the Court of Appeal failed to recognise that this circumstance cannot carry legally relevant weight without considering the vital role that energy has played and will continue to play in society going forward. Shell has pointed out the crucial role that oil and gas have played (see subpart 2.7 under (i) above) and will continue to play well beyond 2030 in ensuring a stable and affordable energy supply (see subpart 2.2). In determining the existence of a general legal duty to limit emissions, or in any case an MD Reduction Duty, on Shell, the Court of Appeal could not attach importance to the fact that Shell has been and is a major player in the oil and gas market, without also taking the aforementioned into account. This also applies to enterprises in other energy intensive sectors that produce and trade goods necessary to society, such as cement, steel and chemicals, or deliver services necessary to society, such as the shipping industry and road transport.[378]

Secondly, the Court of Appeal has failed to recognise that that being a "*major player*" in the oil and gas market does not answer how Shell, its activities and the emissions reported by Shell relate to other participants in the oil and gas sector and as such is not sufficiently distinctive and/or normative, neither within this sector, nor relative to the enterprises referred to above from other energy intensive sectors. It should be borne in mind that as Shell has emphasised in appeal, (i) the so called 'majors' together account for only about 1/8th of all oil or gas produced worldwide (and Shell only for 1.5 to 2%); (ii) the large state-owned oil and gas enterprises account for more than half of global oil and gas production and more than 60% of oil and gas reserves; and (iii) the rest is produced by a large number of relatively small enterprises.[379] Shell has stressed amongst others that it has more ambitious reduction targets[380] and a lower emission intensity[381] than many other enterprises in the oil and gas sector and that it is as the forefront of tacking methane emissions within its sector.[382] The Court of Appeal also had to take this relevant context into account in its judgment. If being a "*major player*" on the oil and gas market can carry any relevant weight in determining the existence of a reduction obligation, the possibilities that an enterprise, having regard to its market position, has to independently achieve a reduction of global emissions and, also in connection with this, how the (sustainability) performances of that enterprise relate to those of other players in the oil and gas market (and other energy intensive sectors) must in any case also be taken into account.

Thirdly, being "*a major player*" in the oil and gas market leaves impermissible unclarity if and to which extent and under which conditions other enterprises also have "*a special responsibility*" to "*make a special effort*". Therefore, no clear line can be drawn with similar

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[378] Statement of Defence, no. 57; and Shell Pleading Notes dated 15 December 2020, hearing day 3 – judge's law-making role, no. 16; and Statement of Appeal, no. 1.4.3, 2.5.4-2.5.5; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.38-1.5.39; and Shell Pleading Notes dated 12 April 2024, hearing day 4 – rejoinder, no. 6.1.3.

[379] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.26 and 1.5.27, and the graph "The oil and gas industry landscape" from the IEA included there. These statements relate to 2022 and reflect the situation at the time of submitting the Statement of Grievances.

[380] Shell Written Pleading Notes, nr. 5.1.6; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3 under (c)(iii).

[381] Statement of Appeal, no. 3.2.17 and 9.2.8 under (b)(i); Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.5.

[382] Shell Pleading Notes dated 2 April 2024, hearing day – part 1 of 2, no. 1.5.30; and Shell Written Pleading Notes, no. 5.2.1.

cases to which the obligation in question would not apply, or not in the same way (see subpart 2.8).[383]

2.8 Defence in the principal cassation appeal and subpart: an MD Reduction Duty is insufficiently knowable and the principle of legal certainty precludes it

Defence

122. Milieudefensie's complaints fail (partly) for lack of interest because an MD Reduction Duty does not satisfy the requirement of knowability that applies for an unwritten legal duty to be assumed. The court's adoption of an MD Reduction Duty also violates the principle of legal certainty. In this context, it is also important that it is unclear whether and to what extent the same reduction duty applies to other enterprises. This circumstance, also in view of the regulations and other facts and circumstances discussed in subparts 2.1-2.7 and 2.9, stands in the way of the imposition of an MD Reduction Duty.

Complaints

123. In so far as the Court of Appeal's decision in paras. 7.24-7.27 and 7.53-7.57 is to be read as meaning that, in the event of there being sufficient consensus in climate science on a (minimum) emissions reduction percentage which may be applied to Shell, Shell bears a civil-law legal duty to reduce the absolute emissions it reports by that (minimum) percentage by a date fixed in the future, Shell raises the following cross-appeal complaints against this:

i) The Court of Appeal's interpretation of the unwritten standard of care in paras. 7.24-7.27 and 7.53-7.57 is incompatible with, in short, the required knowability and societal evidence, and thus constitutes an error of law.[384]

ii) The Court of Appeal's interpretation of the unwritten standard of care in paras. 7.24-7.27 and 7.53-7.57 violates the principle of legal certainty.[385]

iii) It does not follow from the Court of Appeal's decisions in paras. 7.26, 7.27 and 7.53-7.57 whether, to what extent and under what conditions the MD Reduction Duty also applies to (all) other enterprises. As such, the decision is contrary to the court's obligation to prevent that, in establishing an unwritten legal duty, no clear line can be drawn with similar cases to which the obligation would not apply, or not in the same way.[386]

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383 Statement of Defence, no. 406, NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5215, *NJ* 2011/597 (*TNT postbezorger*), para. 3.6; and NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/598 (*De Rooyse Wissel*), para. 5.4.

384 Statement of Appeal, no. 1.3.5-1.3.7, 3.2.3, 3.2.4, 3.2.9, 3.2.12 under (a), 7.2.2 and 7.2.3; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.10, 5.1.14 and 5.1.15; and C.J. van Zeben and J.W. du Pon (eds.) with contribution by M.M. Olthof, *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek* Boek 6. *Algemeen gedeelte van het verbintenissenrecht*, Deventer: Kluwer 1981, p. 616.

385 Cf. Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.14.

386 Statement of Defence, no. 406; NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5215, *NJ* 2011/597 (*TNT postbezorger*), para. 3.5; and NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/598 (*De Rooyse Wissel*), para. 5.4

Explanation of defence and complaints

124. The lack of societal consensus on this kind of specific reduction obligation is evidenced by the extensive and ongoing discussion, negotiation and regulation at regional, national and international levels (for example the Dutch Climate Law and the Climate Accord, the legislative process for the EU's Fit for 55, and during the various COPs).[387] The landscape of the energy transition is constantly evolving and so these processes involve ongoing consideration of how, and at what pace, emissions will be reduced by different countries, across different sectors and energy sources, and the relative pace at which the use of different fossil fuels is reduced.[388] Unlike what was accepted for the Dutch State by the Supreme Court in *Urgenda* (partly on the basis of the Dutch government's acceptance of a minimum reduction percentage),[389] no meaningful lower limit can be set for enterprises with regard to the absolute emissions reduction they should achieve upon penalty of being held liable at a fixed point in the future.

125. In light of the above, especially against the background of Part 1, and subparts 2.1 and 2.3-2.5, it cannot be said that an MD Reduction Duty has been accepted societally as a standard and is self-evident enough and knowable enough to be enforceable in law.[390] Nor is this the case even if there would be consensus in climate science on a (minimum) reduction percentage applicable to individual enterprises like Shell, which the Court of Appeal rejected.[391] After all, for the (distributional) question of what the societal duty of care of Article 6:162 DCC entails for enterprises like Shell the court must also take into account other interests recognised by the legislator, if the civil court even has a task here at all, given the restraint required of it (about which, see Part 5).

126. Moreover, because the specific legal duty alleged by Milieudefensie is not societally evident and knowable, and has insufficient support in the points of reference discussed by the Court of Appeal, its imposition by the court leads to unpredictability and impermissible legal uncertainty.[392] It should also be noted that it does not follow clearly from the Court of Appeal's decision what is and is not expected of Shell and to what extent the aforementioned MD Reduction Duty is also applicable to other enterprises.

2.9 Defence in the principal cassation appeal and subpart: an MD Reduction Duty is at odds with the obligation of Shell's board to weigh up the various interests involved in Shell's business

Defence

127. Milieudefensie's complaints fail (in part) for lack of interest because the imposition of an MD Reduction Duty is at odds with the obligation of Shell's directors to balance the various interests

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387 As Shell has argued, no reduction duty alleged by Milieudefensie has been imposed in jurisdictions outside the Netherlands, nor is there any indication that courts in relevant competing economies will impose the reduction duty alleged by Milieudefensie on an individual enterprise. Yet even if non-Dutch courts would accept the legal concept of an MD Reduction Duty for individual enterprises, absent government regulations of reduction pathways, this would inevitably subject the enterprises in question to a fragmented set of mutually different standards, which continues to underline the lack of societal consensus on an MD Reduction Duty. See also above no. 61 and references made there.

388 Statement of Appeal, no. 3.2.13.

389 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*), par. 7.3.6.

390 Statement of Appeal, no. 1.3.5, 1.3.6, 3.2.13, 3.2.15 and 7.2.3.

391 Milieudefensie rightly does not dispute in cassation that there is no consensus in climate science on a reduction percentage applicable to individual enterprises such as Shell, see Milieudefensie's statement of claim, no. 3.5.

392 Cf. Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.14.

involved in running an enterprise like Shell, including, but not limited to, the response to climate change. After all, an MD Reduction Duty would potentially oblige Shell to take measures that do not apply to other enterprises, thereby impermissibly limiting the board's freedom of decision and discretion. This circumstance, either in and of itself or in conjunction with the regulations and other facts and circumstances discussed in subparts 2.1-2.8, stands in the way of the imposition of an MD Reduction Duty.

Complaint

128. In so far as the Court of Appeal's decision in paras. 7.26-7.27 and 7.53-7.57 is to be read as meaning that, in the event of sufficient climate science consensus on a (minimum) reduction percentage applicable to Shell, Shell bears or may bear a civil-law legal duty to reduce absolute emissions it reports by that (minimum) percentage by a date fixed in the future, the Court of Appeal errs in law. In that case, the Court of Appeal has overlooked the fact that the board of a legal entity is obliged to weigh the various interests involved in the organisation of that legal entity and to determine the policy of that legal entity and the enterprise driven by it on that basis. Moreover, the Court of Appeal has overlooked the English legal context in which the board of Shell needs to make such decisions (being an entity incorporated in England).[393] In this context, the English *High Court* in 2023 declined to grant the environmental law organisation, *ClientEarth*, judicial leave to challenge Shell's climate strategy through a so-called derivative action under English company law. ClientEarth alleged, *inter alia,* that Shell's directors were improperly discharging their duties by not setting an absolute Scope 3 emission reduction target in the short or medium term. Such claim would, according to the English *High Court*, involve imposing absolute obligations upon directors, whilst that would contravene with the directors' duty to balance the various interests – including, but not limited to, the response to climate change – against the various other interests that play a role in running enterprises such as Shell. The High Court considered that it is not for the court to review decisions of the board or take any action that would require constant supervision.[394] As under Dutch law – by imposing an MD Reduction Duty that interferes to such an extent with Shell's day-to-day operations and broader strategy – the Court of Appeal has inadmissibly interfered with the decision-making of the board in a way in which the unwritten standard of care leaves no room.[395] In this respect, it is relevant that this obligation does not contribute (substantially) to reducing global emissions and is in part for that reason disproportionate for Shell in comparison with its competitors (see subpart 2.6) and that this obligation impermissibly detracts from other interests that have been recognised by the legislator and must be weighed by the directors of Shell (see subpart 2.2).

2.10 Defence in the principal cassation appeal: Milieudefensie's claims cannot be awarded because they focus on conduct by Shell that is not unlawful in all circumstances in the future

129. Milieudefensie's complaints fail (in part) for lack of interest, because a prospective injunction to tie Shell to a minimum reduction percentage as claimed by Milieudefensie can only be awarded under

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393 Considering that Shell qualifies as a plc under English law, see Article 10:118 DCC. Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.4, footnote 86.

394 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.4. *ClientEarth v Shell plc* [2023] EWHC 1137 (Ch) (Exhibit S-233) and *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch) (Exhibit S-234).

395 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.4.

Dutch law if it is established that the future conduct underlying that claimed injunction is unlawful in all circumstances in the future.[396] Yet, the conduct that Milieudefensie seeks to declare prohibited in these proceedings (the continued emitting in excess of a certain percentage of the Scope 1, 2 and 3 emissions that Shell reports) is defined in such a way that it is not, not entirely or not in all circumstances unlawful in the future. Indeed, the answer to the question whether the conduct of Shell that Milieudefensie challenges will be unlawful in the future depends on a very large number and broad range of uncertain extraneous future circumstances and developments that fall outside of Shell's power and are not at Shell's risk.[397] Such circumstances include those relating to (i) the development of legislation and policy on emission reductions and the extent to which this should be achieved by different countries, sectors and energy sources;[398] (ii) the security of supply and affordability of energy in a general sense and the fundamental societal interests served by it (and related geopolitical developments such as wars and trade conflicts);[399] (iii) the global progress of emission reductions in societies across the globe;[400] and (iv) the state of infrastructure and technology.

130. The foregoing is all the more true, or at least applies in any case, because the reduction order sought by Milieudefensie relates to conduct of Shell group entities that are incorporated all over the globe, while it has not been established that such conduct is unlawful in the other countries in which those entities are incorporated. Shell must comply with the legal and licence requirements applicable in all seventy countries in which it operates.[401] In essence, therefore, the reduction order sought by Milieudefensie would hold Shell liable for the lawful conduct of entities in the Shell group.[402] This confirms that (also) prospectively, the condition that Shell's conduct is unlawful in all circumstances is not met.

131. Hence, if it is clear in advance that there is uncertainty as to whether the conduct complained of will be unlawful in the future in all circumstances, such a prospective order cannot be imposed. This is not legally altered by the fact that a prohibition or order may lapse as a result of a change of circumstances or a ground of justification having arisen.[403] That is a separate point. The case law on the possibility of a lapse of a prohibition or order shows this: when it was established that a prohibition or order had been issued on the basis of current unlawful conduct, the prohibition or order could lapse because of a change in circumstances or the emergence of a ground of justification (making the conduct no longer unlawful).[404] Moreover, it is legally wrong to encumber Shell with the burden and uncertainty of a future assessment by the (enforcement) court. The enforcement of an order as claimed by Milieudefensie would require a form of ongoing and permanent judicial review, for example in the form of repeated enforcement disputes. In doing so, the courts would assume the role of regulator and supervisor, constantly monitoring and adjusting the given rules to keep pace

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396 NL Supreme Court 21 December 2001, *NJ* 2002/217 (*Nuclear weapons*), para. 3.3 under (A), 3.6.3 and 3.7.1; Statement of Defence, par. 6.4.2 and 6.4.3; and Statement of Appeal, no. 9.2.3 under (c).
397 Statement of Defence, no. 448.
398 Statement of Appeal, no. 9.2.3 under (c); and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.11. See also Statement of Defence, no. 452-458.
399 Statement of Defence, no. 449 and par. 2.3; Statement of Appeal, par. 2.2; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.11.
400 Statement of Defence, no. 449 and par. 2.2.
401 Statement of Appeal, no. 10.5.17.
402 Statement of Appeal, no. 10.6.4.
403 NL Supreme Court 19 December 1952, *NJ* 1953/642, with note by A.N. Houwing (*Front Stream VII*).
404 NL Supreme Court 19 December 1952, *NJ* 1953/642, with note by A.N. Houwing (*Front Stream VII*); NL Supreme Court 18 November 1983, ECLI:NL:HR:1983:AG4691, *NJ* 1984/272; and NL Supreme Court 27 January 1984, ECLI:NL:HR:1984:AG4744, *NJ* 1984/802.

with each development. This belongs to the public law domain and it is not the role of the enforcement judge or the judge on the merits who, moreover, are not equipped – in contrast to legislators and supervisors – to do so (see also subpart 5.2, in particular no. 241).[405] The importance of effective legal protection, which must be applied in horizontal relations with due regard for Shell's interests and the general interests involved in this matter (see also Section 5.1.6, in particular no. 234), does not affect the foregoing.

2.11 Defence in the principal cassation appeal and subpart: with the order sought by Milieudefensie, Shell plc as a top holding enterprise would be held *de facto* liable for the lawful acts of other entities within the Shell group

Defence

132. Milieudefensie's complaints fail for lack of interest, because the order claimed by Milieudefensie in these proceedings does not correspond to the purported legal duty underlying Milieudefensie's claims. This focuses on Shell's policy as established by Shell plc for the Shell group, which concerns the conduct of the parent enterprise of the Shell group. Such a legal duty is not compatible with an order as claimed by Milieudefensie in these proceedings, which encompasses an obligation (of result) with respect to the actual GHG emissions of the Shell group as a whole. Because that order focuses on the reduction of actual emissions, it in fact seeks to target the behaviour of the more than 1,000 individual enterprises worldwide within the Shell group. The order therefore does not correspond to the legal obligation underlying it.[406]

133. With the order sought by Milieudefensie, Milieudefensie seeks to hold Shell *de facto* liable for the lawful conduct of other enterprises in the Shell group. There is however no reason in these proceedings to make an exception to the general principle that claims must be initiated against the (legal) persons exhibiting the allegedly unlawful conduct: in this case, the actual emissions of CO_2 by each of Shell's individual subsidiaries.[407] Milieudefensie should have either sought an order targeting (the policy of) Shell plc only or should have initiated proceedings against each of the enterprises in the Shell group who report the emissions that Milieudefensie seeks to reduce with the order sought by it. Milieudefensie did neither. For that reason too, Milieudefensie's claims cannot be awarded in these proceedings.

134. If Milieudefensie's claim should be interpreted such that it does not target the policy setting by the parent enterprise of the Shell group but the actual behavior of all individual enterprises within the Shell group, it fails for lack of interest. Milieudefensie has failed to rely on the rules of safety and conduct of the place and time of the event giving rise to the liability, despite Shell repeatedly having directed Milieudefensie to the applicability and content of the rule of Article 17 Rome II Regulation. This is set out below in no. 135 as a complaint.

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405 Statement of Appeal, no. 9.2.24 and following; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.4.5. *ClientEarth v Shell plc* [2023] EWHC 1137 (Ch) (Exhibit S-233) and *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch) (Exhibit S-234).

406 Statement of Appeal, no. 10.6.7. See for example also W. Th. Nuninga, 'Right, duty, order, prohibition', *NTBR* 2018/28, p. 152.

407 Statement of Appeal, no. 10.6. See for example also W. Th. Nuninga, 'Right, duty, order, prohibition', *NTBR* 2018/28, p. 152 and cf. T. Pfeiffer, 'Zivilrechtliche "Klimaklagen" zwischen Recht und Politik', *ZIP* 2025, p. 861.

Complaint

135. In so far as the Court of Appeal decided in paras. 7.26, 7.27 and 7.53-7.57 that an MD Reduction Duty could be imposed on Shell, the Court of Appeal erred in law in light of Shell's grievance on Article 17 Rome II Regulation.[408] Before the Court of Appeal, Shell has complained that the District Court and Milieudefensie wrongly assumed that only Dutch law is applicable. Shell put forward that Milieudefensie has not paid attention to Article 17 Rome II Regulation. Article 17 Rome II Regulation stipulates that in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.[409] In this case, that would be the place and time of the actual GHG emissions emitted by the entities within the Shell group as a whole and end-users of Shell's products.[410] Milieudefensie has not put forward any statements in this regard and has therefore failed to comply with her procedural obligation to establish facts and demonstrate that these foreign rules of safety and conduct do not affect Shell's liability. For that reason, Shell argued that Milieudefensie's claims could not have been awarded in these proceedings.[411] Against this background, the Court of Appeal erred in law or gave an insufficiently reasoned decision in light of Shell's essential statements.

2.12 Subpart: if the Court of Appeal decided that an MD Reduction Duty incumbent on Shell is an obligation of result for the Scope 2 and 3 emissions reported by Shell, that decision is contrary to the prohibition of *reformatio in peius*

Complaints

136. In so far as the Court of Appeal decided in paras. 7.27 and/or 7.53-7.57 that, in the event of sufficient climate science consensus on a reduction pathway relevant to Shell specifically, Shell could be subject to an obligation of result for the Scope 2 and 3 emissions reported by Shell, that decision is unsustainable as a matter of law and/or incomprehensible or insufficiently reasoned. Shell raises the following complaints:

i) The Court of Appeal's decision is at odds with the prohibition of *reformatio in peius*. The District Court decided in paras. 4.1.4, 4.4.24, 4.4.33, 4.4.37, 4.4.39, 4.4.52 and 4.4.55 of its judgment that the reduction obligation it adopted is an obligation of result for Shell's operations and a Significant Best Efforts obligation with respect to the emissions of Shell's business relations, including end-users. Since Milieudefensie did not file a cross-appeal,[412] as the Court of Appeal also found in para. 7.5 and was not contested by Milieudefensie in cassation, this excludes the possibility that an obligation of result can be assumed on appeal for the Scope 2 and 3 emissions reported by Shell. After all, this would bring about a worsening of Shell's position as a result of its own appeal, which is impermissible in light of the prohibition of *reformatio in peius*.

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408 Statement of Appeal, no. 10.5.18.
409 T. Pfeiffer, 'Zivilrechtliche "Klimaklagen" zwischen Recht und Politik', *ZIP* 2025, p. 860.
410 Statement of Appeal, no. 10.5.1.
411 Statement of Appeal, no. 10.5.18.
412 Defence on Appeal, no. 10 and 764.

ii) The Court of Appeal's decision is unsustainable as a matter of law and/or incomprehensible or insufficiently reasoned, partly in light of para. 7.5 in conjunction with 5.3. In para. 7.5, the Court of Appeal decided that it would not accede to Milieudefensie's requests (as presented in para. 5.3) to clarify the judgment, precisely because this would violate the prohibition of *reformatio in peius*. One of the points mentioned in para. 5.3 is the request from Milieudefensie that the Court of Appeal "*consider that Shell's legal obligation should be characterised as an obligation of results, or clarifies that the significant best-efforts obligation does not mean that Shell may make the necessary proactive action to reduce its scope 1, 2 and 3 emissions dependent on customers' action*". In light of this decision, if the Court of Appeal accepted an obligation of results for the Scope 2 and 3 emissions reported by Shell, this decision is unsustainable as a matter of law and/or incomprehensible.

iii) The Court of Appeal's decision is unsustainable as a matter of law since, in view of everything included in this conditional cross appeal, an MD Reduction Duty finds no support in the law.

2.13 Follow-on complaint

137. The success of (one or some of) the complaints raised in this Part also (to the extent that this is not already the case by the success of the respective complaint(s)) invalidates the Court of Appeal's decision in paras. 7.26-7.27, 7.53-7.55, 7.57, 7.67, 7.73, 7.79, 7.81, 7.93, 7.96, 7.99 and/or 7.111, insofar as the Court of Appeal intended to express therein that Shell owes a general legal duty to reduce emissions or an MD Reduction Duty.

PART 3: WITH REGARD TO SCOPE 3 EMISSIONS, THERE ARE ADDITIONAL REASONS WHY AN MD REDUCTION DUTY DOES NOT EXIST

Introduction and summary

138. The Court of Appeal held in paras. 7.1-7.57 that Shell has a "general" duty to reduce emissions. In doing so, the Court of Appeal did not distinguish between Scope 1, 2 and 3 emissions. In para. 7.111, the Court of Appeal held that Shell has duties to reduce the Scope 3 emissions it reports. The Court of Appeal did not specify the content of these duties. It confined itself to answering in the negative the question posed in the conclusion of para. 7.3 as to whether, based on the general standard of care, a legal duty can be assumed for Shell to reduce its CO_2 emissions by a certain percentage. In paras. 7.67-7.96, the Court of Appeal decided that such a legal duty cannot be assumed for Scope 3 emissions, and in paras. 7.97-7.111 the Court of Appeal added the independently supporting ground that a reduction order would also be ineffective.

139. As a result of deciding the case in this way, the Court of Appeal hardly addressed the fundamental question raised by Shell in its appeal of whether an MD Reduction Duty in respect of Scope 3 emissions reported by Shell has any basis in law. Below, Shell explains that there is no such basis. Milieudefensie's Parts 3, 4, 5, 6, 7, 8 therefore fail for lack of interest. Shell raises complaints in the event the Court of Appeal decided that enterprises like Shell are or could be subject to an unwritten MD Reduction Duty for the Scope 3 emissions that they report or at least that Shell's defences referred to in paras. 7.98 and 7.99 do not preclude this. These complaints are raised as an extension of Part 2. That the legally required objective reference points are lacking for an MD Reduction Duty, is even more so in respect of Scope 3 emissions that enterprises like Shell report.

140. In essence, Shell argues the following:

3.1 There is no unwritten MD Reduction Duty for Scope 3 emissions because basic conditions for liability have not been met.

3.2 Existing laws and regulations, human rights and instruments such as the OECD guidelines do not support and justify the imposition of an MD Reduction Duty for Scope 3 emissions.

3.3 Voluntarily set targets and ambitions for reported Scope 3 emissions cannot support and justify an MD Reduction Duty.

3.4 An MD Reduction Duty in respect of Scope 3 emissions, also in view of 3.1 to 3.3, has no basis in a sufficiently knowable and societally self-evident standard and violates the principle of legal certainty.

3.1 Defence in the principal cassation appeal and subpart: no MD Reduction Duty for Scope 3 emissions because basic conditions for liability have not been met

Defence

141. An MD Reduction Duty for Scope 3 emissions has no support in the law because basic conditions for liability have not been met. Shell's defences directed at this are set out below in no. 142 as complaints. They stand in the way of an MD Reduction Duty for Scope 3 emissions. Milieudefensie's Parts 3, 4, 5, 6, 7 and 8 therefore fail for lack of interest.

Complaints

142. To the extent that the Court of Appeal decided in its judgment that enterprises like Shell bear or may bear an unwritten MD Reduction Duty for Scope 3 emissions that they report, or at least that Shell's defences referred to in paras. 7.98 and 7.99 do not preclude this, the Court of Appeal erred in law, or at least rendered an incomprehensible and/or inadequately reasoned decision. Shell raises the following complaints in the conditional cross-appeal:

i) **Section 3.1.1**: The existence of an MD Reduction Duty in respect of reported Scope 3 emissions for enterprises like Shell requires in law that such enterprises have in their power the ability to reduce the actual emissions of their customers and end-users by a (minimum) percentage at a date fixed in the future. Shell does not have that in its power.[413] Furthermore, an MD Reduction Duty with regard to Scope 3 emissions that burdens an individual enterprise with no real foreseeable positive effect on global emissions reduction finds no support in unwritten law and in any event does not meet proportionality requirements. If the Court of Appeal decided otherwise in paras. 7.99 and 7.111 (or elsewhere in the Judgment), that decision is unsustainable as a matter of law, incomprehensible and/or insufficiently reasoned, as explained further in paragraph 3.1.1 sub a and b below.

(1) In so far as the Court of Appeal by rejecting in para. 7.99 Shell's defence[414] that it has no control over its customers' emissions[415] decided that Shell has it in its power to reduce its customers' and end-users' emissions by a (minimum) percentage on a fixed date in the future, this ruling is incomprehensible and/or inadequately reasoned. The Court of Appeal failed to recognise that Shell does not have this power, even if there were any effect on global emissions from a reduction in supply by Shell, which the Court of Appeal correctly rejected in paras. 7.100 and following. If the Court of Appeal decided in para. 7.99 that any influence Shell has on demand-side factors is or may be relevant to the existence and/or effectiveness of an MD Reduction Duty for reported Scope 3 emissions, then the Court of Appeal went beyond the legal debate between the parties in violation of Article 24 DCCP, or this decision is incomprehensible and/or inadequately reasoned in the face of Shell's assertions.[416]

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413 See no. 152 and 153.
414 See for example Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.6-8.2.8, 8.5.4 and 8.5.5.
415 Mentioned by the Court of Appeal in para. 7.98.
416 See the sources in the footnotes to no. 152.

This complaint is further explained in paragraph 3.1.1 sub c below.

(2) Insofar the Court of Appeal decided in para. 7.99 that an MD Reduction Duty with respect to Scope 3 emissions only implies liability for one's own conduct, the court erred in law. After all, the Scope 3 emissions Shell reports represent the Scope 1 emissions of its customers and end-users. A duty to reduce absolute Scope 3 emissions it reports by a (minimum) percentage at a date fixed in the future requires Shell to reduce such emissions, even if its customers' and end-users' Scope 1 emissions do not change because they move to a different supplier. Such duty would effectively amount to (strict) liability for its customers' and end-users' Scope 1 emissions, as explained in paragraph 3.1.1 sub d below.

ii) **Section 3.1.2**: an MD Reduction Duty for reported Scope 3 emissions is incompatible with the lawfulness of customers' and end-users' Scope 1 emissions, with their own responsibility for those emissions not attributable to Shell as supplier and with the requirement laid down in Article 3:296(1) DCC and Article 6:162 DCC that the protective scope of the legal duty invoked extends to the interests and persons that Milieudefensie claims to represent in these proceedings.

(1) According to Milieudefensie, it is the sum total of emissions into the atmosphere from the use of fossil fuels that constitutes a threat of unlawful action that should be averted by a reduction in Shell's supply. The purchase and consumption of fossil fuels is lawful everywhere in the world. If Shell's customers are not acting unlawfully and can lawfully continue buying and using fossil fuels from other suppliers, the sum total of supply to them by Shell, to which an MD Reduction Duty pertains, also cannot be unlawful under unwritten law, as explained in paragraph 3.1.2 sub a below.

(2) The existence of a legal duty to reduce supply is inconsistent with the starting point that end-users are responsible for their own Scope 1 emissions caused by their burning of fossil fuels which Shell also reports as Scope 3 emissions.[417] These customer emissions are not attributable to a supplier like Shell, so that no MD Reduction Duty aimed at reducing supply can be based thereon, as explained in paragraph 3.1.2 sub b below.

(3) An MD Reduction Duty for reported Scope 3 emissions must be denied on grounds of the requirement contained in Article 3:296(1) DCC and Article 6:162 DCC that the legal duty whose compliance is demanded serves to protect the interest in which the claimant is or is likely to be affected.[418] The persons whom Milieudefensie represents are buyers and end-users of fossil fuels. A responsibility of enterprises like Shell to contribute to countering climate change cannot justify an MD Reduction Duty for Scope 3 emissions with respect to them. If any legal duty is in danger of

[417] Statement of Appeal, no. 8.3.2 and 9.2.23.
[418] NL Supreme Court 3 October 2025, ECLI:NL:HR:2025:1435 (*F-35*), para. 4.6.2.

being breached, this legal duty is not aimed at protecting the interests of individuals and enterprises that are themselves responsible for the emissions that Shell reports as Scope 3 emissions, as explained in paragraph 3.1.2 sub c below.

iii) **Section 3.1.3**: the Court of Appeal considered in para. 7.99 that the reporting of Scope 3 emissions is done on the basis of the GHG Protocol. To the extent that the Court of Appeal thereby rejected Shell's assertion that there is no unequivocal way of measuring and reporting Scope 3 emissions and/or that reporting Scope 3 emissions cannot serve as a reference point for a civil-law reduction obligation for Scope 3 emissions, the Court of Appeal erred in law, or at least this decision is insufficiently substantiated in the face of Shell's substantiated assertions. Reported Scope 3 emissions are unsuitable as a benchmark for a legal duty aimed at reducing overall emissions, because (i) they do not correspond to the actual global emissions into the atmosphere, (ii) using reported Scope 3 emissions results in the double counting of emissions (being reported as Scope 1 or Scope 2 by end-users and Scope 3 by Shell,[419] and may also be reported as Scope 3 by other parties in the supply chain) and (iii) the GHG Protocol does not provide a uniform way in which Scope 3 emissions must be reported, leading to material differences between enterprises in how Scope 3 emissions are reported.[420]

Explanation of defence and complaints

3.1.1 Without control over and/or any real foreseeable effect on global emissions there can be no MD Reduction Duty for Scope 3 emissions

a. What enterprises like Shell can and cannot do, and why an MD Reduction Duty for reported Scope 3 emissions does not contribute to the energy transition

143. Individual enterprises like Shell have a role to play in the energy transition. Shell is contributing to the energy transition by reducing emissions from its operations and energy products, offering alternative energy sources that are less emissions intensive to help its customers reduce their emissions and through continued innovation and investment (for example by investing in hydrogen development and investing in EV charging infrastructure), among other things.[421] Shell's oil and gas production is less emission-intensive than the average oil and gas producer and Shell is one of the leaders in tackling methane emissions from oil and gas extraction.[422]

144. The role that enterprises like Shell have, is without prejudice to the fact that only governments have the power to systematically regulate emissions through laws and regulations, addressing both energy supply and energy demand in parallel across the whole global economy. Governments have the democratic legitimacy to make the ongoing national and international political, technological,

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419 Statement of Appeal, no. 8.2.4 and 8.2.5; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no 8.2.4.
420 Statement of Appeal, no. 8.3.8 and 8.3.10-8.3.13.
421 Statement of Appeal, par. 8.5; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.32-1.5.40; Shell Pleading Notes dated 3 April 2024, hearing day 2 – annex, par. 1.7; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.6; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 3.1.5 under (b).
422 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.5; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.30.

economic and social trade-offs required to reduce emissions, as these decisions have distributional impacts across all parts of the economy and society.[423] Governments also have the authority and means to monitor and enforce compliance, thus effectively achieving emission reductions and maintaining a level playing field.[424] Private enterprises like Shell are fundamentally different from governments because they do not have the legislative powers to dictate or force society through laws to use less or even no fossil fuels at all.[425]

145. The fact is that emissions from end-users will only fall if their demand for, and use of, fossil fuels decreases, or those emissions are captured and stored.[426] Measures aimed at this and at strengthening energy infrastructure for low-carbon alternatives must make these alternatives economically competitive and incentivize society to actually use them. A change in customer and end-user behaviour and the development of technology and infrastructure are necessary for fundamental changes in the energy system.[427] This requires ambitious public policies that enable enterprises like Shell to, together with governments and customers, contribute to an orderly and sustainable energy transition.[428] Shell therefore advocates for policies, incentives and regulations that are needed to support the development of critical technologies and infrastructure, and encourage customers to choose low-carbon alternatives.[429]

146. The steps Shell can take to help its customers make choices that reduce their emissions should be contrasted with imposing an MD Reduction Duty on (enterprises like) Shell for Scope 3 emissions, that is: a duty to reduce reported Scope 3 emissions by a specific (minimum) percentage at a fixed moment in the future. In this case, the central question is whether (enterprises like) Shell could be subject to such a legally enforceable MD Reduction Duty. As set out in Part 2, there is no basis for a general legal duty to reduce emissions, and this legal duty cannot exist without specification either. There is no alternative interpretation of the general societal duty of care set out in Article 6:162 DCC before the court in this case.

b. Without control or any real foreseeable effect on global emissions there is no basis in Dutch unwritten law for an MD Reduction Duty

147. The Scope 3 emissions reported by Shell consist largely of emissions from the use of products sold, but not necessarily produced, by Shell.[430] Shell has neither control over the supply of other suppliers nor over the actions and choices of customers and end-users, including their choice to buy the products Shell provides from other suppliers. It is those actions and choices by customers and end-users all over the world that lead to emissions into the atmosphere. It is those emissions into the atmosphere that an MD Reduction Duty is targeting with respect to the Scope 3 emissions Shell

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423 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.3.1, and 3.2.4-3.2.5.
424 Defence on Appeal, 3.1.2 under (c); Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.8; and Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 2 of 2, no. 2.3.1.
425 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.3.1 under (b).
426 Statement of Appeal, no. 3.2.20; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.7, 8.3.2 under (a) and 8.4.4.
427 Statement of Appeal, par. 2.5, 8.4.3; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, par. 1.5; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.2.3 and 10.6.2.
428 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.7; J. Spier, 'SDGs: tussen droom en daad: een processie van Echternach', *TvOB* 2021-6, p. 180; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 10.2.3.
429 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 10.2.3; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 2.1.4.
430 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.2 and 8.2.3.

reports. These emissions will, or at the very least are likely to, continue to occur notwithstanding a reduction in sales by Shell. Indeed, if Shell sells fewer products, the emissions it reports as Scope 3 will go down.[431] This does not mean that its customers' use of energy products or the emissions resulting therefrom will decrease.[432] Nor does it mean that total global emissions will decrease – rather, it is simply that those emissions previously reported by Shell will now be reported by another supplier.[433] This is one reason why reported Scope 3 emissions cannot provide a basis for an MD Reduction Duty.

148. Furthermore, absent control over the actual emissions of customers and end-users, an MD Reduction Duty for reported Scope 3 emissions with a minimum percentage is both meaningless and "hugely onerous".[434] It is meaningless because without control the enterprise subject to such a duty cannot steer emissions of customers and end-users towards a specified reduction percentage. At the same time such a legal duty is hugely onerous because that enterprise would be obliged to limit its sales regardless of the actual contribution to reducing global emissions. This is certainly the case in the absence of a legal standards framework at the relevant geographical (international) and sectoral level for individual absolute reduction obligations of enterprises and simultaneous regulation of the demand side (see subpart 3.2). Therefore, an MD Reduction Duty for reported Scope 3 emissions cannot be based on Dutch unwritten law.

149. Part 6 in the principal appeal argues that the Court of Appeal erred in its assessment in para. 7.100 and following of the displacement effect in the context of Article 3:303 DCC by failing to take into account that Shell, like the State according to the *Urgenda* judgment, also has an obligation to reduce emissions independently of the actions of others. This complaint does not detract from the fact that without control over the actual emissions from end-users, enterprises like Shell cannot be required to reduce the Scope 3 emissions they report by a specific (minimum) percentage in the future via a limitation on supply. In this respect, enterprises are fundamentally different from states, which do have control over emissions within their territory and the ability to reduce them. States are the exclusive regulators of behaviour within their territory. This means that the emission reductions states achieve via regulation cannot be reversed by other public authorities, because no other regulatory authorities exist within that same territory.

150. Moreover, the existence of a reduction duty under the unwritten societal duty of care set out in Article 6:162 DCC requires sufficient plausibility that such duty is effective (see subpart 2.6). An MD Reduction Duty for reported Scope 3 emissions does not satisfy this.[435] On the basis of the debate between the parties in the fact-finding instances, the starting point must be that it is at least highly uncertain whether Shell's (former) customers or indeed any end-users will reduce their emissions to any relevant extent following reductions in Shell's supply.[436] Specifically, Milieudefensie asserts that

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[431] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.2.

[432] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.6; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.3.1 under (c); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.4. See also no. 150 and the sources in the footnotes to no. 150.

[433] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, par. 10.5. See also no. 150 and the sources in the footnotes to no. 150.

[434] J. Spier, 'SDGs: tussen droom en daad: een processie van Echternach', *TvOB* 2021-6, p. 186.

[435] J. Spier, 'Milieudefensie v. Shell: een sirenenzang? Suggesties voor een beter alternatief', in: W.M.J. van Veen et al., *De klimaatzaak tegen Shell (ZIFO-reeks no. 35)*, Deventer: Kluwer 2022, p. 50.

[436] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.1-10.3.6. 10.4.2, 10.4.2.3, 10.5.1 and 10.5.2; R. Druce, 15 December 2023, *Expert Report of Richard Druce from NERA Economic Consulting* (Exhibit S-122), no. 26-36, 49-85, 105 and 120-123; and Statement of Defence, no. 8.

end-users may choose to purchase alternatives to oil and gas in response to an increase in price of oil and gas, and that it is "plausible" an increase in such prices would result from a reduction in supply by Shell.[437] However, Shell has adduced expert evidence showing that a reduction in sales by Shell is unlikely to affect aggregate supply of oil and gas, and will thus not increase prices or reduce customer use of oil and gas.[438] Incidentally, this also applies to a reduction in the production of fossil fuels by Shell.[439] In light of the debate between the parties, it is clear that, even if a hypothetical MD Reduction Duty for Scope 3 emissions imposed on Shell would have any effect, its effect is at the very least highly uncertain and therefore that obligation cannot be accepted as a matter of unwritten law.

151. In any case, the existence of a reduction duty under the unwritten societal duty of care set out in Article 6:162 DCC requires that such duty is proportionate. The defence and the complaint in subpart 2.6 – that the Court of Appeal was required to assess the extent to which an MD Reduction Duty is disproportionate for Shell, also given its ineffectiveness – applies in particular to an MD Reduction Duty for reported Scope 3 emissions. Even if it were presumptively assumed that Parts 6-8 of the principal appeal would be successful – which they are not – and the Supreme Court cannot rule out the possibility that an MD Reduction Duty for Scope 3 emissions might have some effectiveness, Shell's interests would be disproportionately harmed by an MD Reduction Duty given its ineffectiveness or – at best – very limited effectiveness.

c. Milieudefensie's claim has always been premised on Shell selling less oil and gas

152. The starting point in cassation is that Shell would only be able to satisfy an MD Reduction Duty for Scope 3 emissions by reducing the size of its business by selling less oil and gas (change to the supply side).[440] This is not contested by Milieudefensie. According to Milieudefensie, Shell must "*pursuant to the judgment, become a smaller oil and gas company by reducing its emissions*."[441] Again, Milieudefensie states that the key point here is "*that Shell needs to sell less oil and gas*"[442] and it has pointed to the possibilities of implementing the reduction order via the supply side.[443] Milieudefensie did not base its reduction claim on the fact that Shell can satisfy an MD Reduction Duty for Scope 3 emissions in another way.[444] The Initiating Document confirms this.[445] According to Milieudefensie, such a reduction in supply would result, directly or indirectly, in a higher price for oil and gas, and thus lower demand and consumption, which would lead to lower global emissions.[446] The complaint in the Initiating Document that Shell can meet an MD Reduction Duty for Scope 3 emissions by

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437 Statement of Defence, no. 915-917.

438 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.1-10.3.6. 10.4.2, 10.4.3, 10.5.1 and 10.5.2; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 10.3.1-10.3.6. 10.4.2, 10.4.3, 10.5.1 and 10.5.2; and R. Druce, 15 December 2023, *Expert Report of Richard Druce from NERA Economic Consulting* (Exhibit S-122), no. 26-36, 49-85, 105 and 120-123.

439 Shell Pleading Notes, dated 3 April 2024, hearing day 2 - par 4 of 4, no. 10.3.1-10.3.6, 10.4.2, 10.4.3, 10.5.1 and 10.5.2; and R. Druce, 15 December 2023, *Expert Report of Richard Druce from NERA Economic Consulting* (Exhibit S-122), no. 26-36, 49-123.

440 Statement of Defence, no. 84, 88 and 91; Shell Pleading Notes dated 1 December 2020, hearing day 1 - part 1 of 2, no. 76; Shell Pleading Notes dated 17 December 2020, hearing day 4 - substantive assessment of claims, no. 100; Statement of Appeal, par. 8.4; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.32 and 1.5.33; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - rejoinder, no. 3.1.3.

441 Court record of the oral hearing on appeal, p. 39. See also Document Initiating Supreme Court Proceedings Milieudefensie, no. 1.8 under (iv), 6.15 under (i) and 6.17, and, for example Defence on Appeal, no. 878.

442 Milieudefensie Pleading Notes dated 12 April 2024, hearing day 4 - Milieudefensie answers to questions from the Court of Appeal, question 1.

443 Document Initiating Supreme Court Proceedings Milieudefensie, no. 6.15.

444 While Milieudefensie has argued that Shell can do things other than sell less fossil fuels and that it is plausible that the reduction order would lead to that (for example Defence on Appeal, no. 932), it has nowhere argued that Shell must or can comply with the reduction order in such a way (other than through supply-side reduction).

445 Document Initiating Supreme Court Proceedings Milieudefensie, no. 1.8(iv), 6.9, 6.15(i) and 6.17.

446 Defence on Appeal, par. 8.3 and 8.5.

"exerting its influence on the demand side",[447] is based not on Milieudefensie's own previous assertions, but on an incorrect reading of the Court of Appeal's para. 7.99 on Shell's influence on the demand side, as explained below.

153. After all, in its response to Shell's lack of control defence in para. 7.99 and its decision that Shell does have 'some' influence over its customers' emissions, the Court of Appeal apparently decided that Shell's influence is not such that Shell has control, in the sense that Shell has the power to reduce the use of energy products of customers and end-users and the resulting emissions by a (minimum) percentage on a fixed date in the future. Based on this factual finding, (enterprises like) Shell cannot be subject to an MD Reduction Duty for these emissions. If the Court of Appeal decided otherwise, the Court of Appeal has, with that decision, strayed outside the bounds of the legal debate and that decision is unsustainable as a matter of law, incomprehensible and/or insufficiently reasoned. The abstract "influence" that Shell has on "demand-side factors" according to Milieudefensie does not alter that even according to Milieudefensie's own assertions in the fact-finding instances, the reduction envisaged by an MD Reduction Duty is to be achieved via a restriction on supply. Therefore, the (some) influence that Shell has on demand-side factors referred to by the Court of Appeal in paras. 7.97, 7.98 and 7.99 cannot lead to the award of what Milieudefensie has sought, namely a specific (minimum) reduction of the absolute Scope 3 emissions reported by Shell in 2030.

d. An MD Reduction Duty does not merely constitute liability for one's own conduct

154. If the Court of Appeal decided in para. 7.99 that an MD Reduction Duty does not imply liability for the actions of others, but liability for one's own conduct, that decision is unsustainable as a matter of law. As noted, an MD Reduction Duty with respect to Scope 3 emissions pertains to activities by Shell's customers and end-users that Shell does not control. This implies Shell would in fact be held (strictly) liable for the emissions of customers and end-users.[448] Liability for the emissions of others can only be established by legislation in the formal sense and not by a rule of unwritten law.[449]

3.1.2 An MD Reduction Duty for reported Scope 3 emissions is incompatible with the lawfulness of customers' and end-users' Scope 1 emissions, with their own responsibility for those emissions not attributable to Shell as supplier and with the requirement that the legal duty invoked extends to the interests and persons that Milieudefensie claims to represent in these proceedings

a. Shell cannot act unlawfully if its customers and end-users act lawfully

155. Without an express statutory provision to the contrary, a (legal) person can only be liable in tort for the actions of a third party if the third party itself acts unlawfully. It is established in cassation that the supply, purchase and consumption of fossil fuels is lawful in all jurisdictions in which Shell operates.[450] Governments regulate fossil fuel consumption through CO_2 pricing, 'cap-and-trade'

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[447] Document Initiating Supreme Court Proceedings Milieudefensie, no. 6.10.

[448] See also M. Sinninghe Damsté e.a., 'De implementatie van het civielrechtelijke aansprakelijkheidsregime onder de CSDDD', *Ondernemingsrecht* 2025/29, par. 3 and 4, who note that if enterprises were to be held liable as a matter of civil law for the conduct of their business partners too quickly, such liability would resemble strict liability.

[449] Statement of Appeal, no. 8.3.3 and 10.6.8; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, par. 6.3; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.5.1.

[450] Statement of Appeal, no. 8.3.5 and 10.6.3.

systems, excise taxes, renewable fuel blending mandates, subsidies and sectoral regulation, among others, and enterprises like Shell are bound by those rules.[451] An MD Reduction Duty for reported Scope 3 emissions that limits Shell's global supply of oil and gas in anticipation of a highly uncertain reduction in demand finds no basis in the unlawfulness of end-user emissions, while it is a given that there are societally necessary benefits associated with fossil fuel consumption.[452] An MD Reduction Duty which is aimed at restricting supply cannot, assuming the lawfulness of end-user emissions, exist as a matter of law.

b. The actions of Shell's customers and end-users are not attributable to Shell

156. In addition, the basic legal principle that everyone is in principle responsible for their own actions opposes civil-law liability for others' emissions. The Court of Appeal decided in para. 7.26 that "[t]*o combat the danger posed by climate change, everyone has a responsibility*", and that "*companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth*". Such a responsibility does not support and justify an MD Reduction Duty, enforceable under civil law, imposed on an individual enterprise for reported Scope 3 emissions in respect of end-users. At most, that responsibility can result in a natural obligation.

157. Customers' choices and behaviour can lead to emissions from fossil fuel consumption. Enterprises and end-users which purchase energy products from Shell can take steps to reduce these emissions – if options are available and affordable – for example by using energy-efficient technologies, switching to less carbon intensive fuels, or by using electricity generated from renewable sources, which Shell is also working to do in various of its own operations. An MD Reduction Duty for Scope 3 emissions would be tantamount to holding Shell responsible not only for its Scope 1 emissions (and related Scope 2 emissions), but also for the Scope 1 emissions of the end-users of its products, while it is decisively the behaviour of the end-users themselves that results in the Scope 3 emissions reported by Shell.[453] The incorrect and unworkable end result of Milieudefensie's argument would be that everyone could assert a tort claim against every (sizeable) enterprise with (significant) reported Scope 3 emissions (which does not decrease these emissions with a certain (minimum) percentage)[454], creating significant legal uncertainty as to which enterprises could be subjected to such a tort claim.[455]

158. It is consistent with the Court of Appeal's starting point that everyone bears their own responsibility "[t]*o combat the danger posed by climate change*" to place responsibilities for emissions on emitters themselves and to not also impose on specific fossil fuel producers and sellers like Shell a civil-law legal duty to take responsibility for reducing customers' emissions. Moreover, emissions should be attributed to the factual emitters, who are capable or in any event best placed to achieve emissions

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451 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.3.7; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.9.

452 Statement of Defence, no. 482; Statement of Appeal, no. 3.3.15 under (b), 8.3.4, 8.3.5, 10.2.16, 10.5.16 and 10.6.4; Shell Pleading Notes dated 2 April 2024, hearing day 2 - part 1 of 2, no. 1.3.7; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.5.5.

453 Statement of Appeal, no. 9.2.23.

454 Statement of Defence, no. 486.

455 NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/598 (*De Rooyse Wissel*), para. 5.4.

reductions.[456] Besides, if demand falls, for example because end-users take steps to alter their behaviour and hence reduce their own emissions, supply will follow of its own accord.[457] The same is not true of an obligation which limits a single enterprise's oil and gas sales, in circumstances where other suppliers are not so constrained. If an end-user of oil and gas is required (for example by regulation) or incentivised (for example by an emissions trading system) to switch to a lower emissions energy source, that will reduce emissions into the atmosphere; but if the same end-user decides to obtain the same oil and gas product from another supplier – emissions will not reduce. The Principles of Climate Obligations, ambitious international principles that aim to help enterprises make informed decisions about what action to take, also conclude that the fairest and most workable solution is to attribute fossil fuel emissions to the end-user of those fossil fuels and not to an earlier link in the production chain.[458]

c. An MD Reduction Duty is at odds with the requirement of Article 3:296 DCC and Article 6:162 DCC that the legal duty invoked extends to the interests and persons that Milieudefensie claims to represent in these proceedings

159. By extension, an MD Reduction Duty for reported Scope 3 emissions should also be denied on grounds of the requirement of Article 3:296(1) and Article 6:163 DCC that the legal duty whose compliance is demanded serves to protect the interest in which the claimant is or is likely to be affected. The starting point of end-users' own responsibility for Scope 1 emissions associated with products supplied by Shell means that an MD Reduction Duty aimed at restricting supply falls outside the protective scope of the standard that "everyone must do their part". The starting point here is that, as the Court of Appeal decided in para. 7.99, Shell's responsibility applies only to its own actions and Shell cannot be held liable for the actions of third parties. The supporters behind Milieudefensie consume the fossil fuels that enterprises like Shell supply to them and they will continue doing so even if Shell supplies less oil and gas (thus reducing the Scope 3 emissions it reports). Milieudefensie cannot, under Article 3:305a DCC, demand compliance from Shell, as a private party, with a legal duty that does not serve to protect the interests of its supporters and of which its supporters themselves cannot claim performance from Shell.

3.1.3 Reported Scope 3 emissions are unsuitable as a benchmark for a civil-law legal duty aimed at reducing actual emissions

160. As explained in subpart 2.8, an MD Reduction Duty must be accepted societally as a standard and be self-evident and knowable enough to be enforceable in law. If not, acceptance of such an obligation by the courts would lead to unpredictability and impermissible legal uncertainty. The previous parts of this Statement of Defence show why a legal duty for enterprises like Shell to reduce the Scope 3 emissions they report by a specific percentage is not a useful and non-arbitrary instrument for its intended purpose of reducing actual emissions. Therefore, it is not sufficiently self-evident and

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[456] J. Spier, 'SDGs: tussen droom en daad: een processie van Echternach', *TvOB* 2021-6, p. 180; J. Spier, 'Milieudefensie v. Shell: een sirenenzang? Suggesties voor een beter alternatief', in: W.M.J. van Veen et al., *De klimaatzaak tegen Shell (ZIFO-reeks no. 35)*, Deventer: Kluwer 2022, p. 61; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.2; and J. Spier, *Climate litigation in a changing world*, The Hague: Eleven 2022 (Exhibit S-280), p. 48.

[457] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.7; and J. Spier, 'Milieudefensie v. Shell: een sirenenzang? Suggesties voor een beter alternatief', in: W.M.J. van Veen et al., *De klimaatzaak tegen Shell (ZIFO-reeks no. 35)*, Deventer: Kluwer 2022, p. 55.

[458] Statement of Appeal, no. 8.3.21 and 8.3.22.

knowable.[459] Reported emissions cannot be used to determine what can be required of an enterprise, nor to check whether that legal duty is effective and efficient. For that reason alone, Milieudefensie's claims in respect of the Scope 3 emissions reported by Shell are not awardable.

161. As the Court of Appeal recognised in para. 7.75, there is not necessarily a link between the Scope 3 emissions reported by Shell and actual emissions into the atmosphere (which Milieudefensie asserts gives rise to a threat of harm for which protection is justified). If Shell reports higher Scope 3 emissions, actual emissions to the atmosphere may remain the same or even decrease. This is the case, for example, when Shell starts supplying gas to a steel plant switching from using coal to less carbon-intensive gas in its operations.[460] According to the same principle, an enterprise reducing the Scope 3 emissions it reports via a reduction in its supply does not affect the fact that the actual emissions into the atmosphere will remain the same (and might even increase) due to continued demand and substitution of supply by other suppliers to meet that demand.

162. This is a fundamental difference from a positive obligation for the reduction of territorial emissions of a State as was accepted in *Urgenda*. A positive obligation for the Dutch State to reduce emissions within its territory will lead to a reduction of emissions into the atmosphere without the risk of displacement within that territory.

163. Using Scope 3 emissions reported by individual enterprises like Shell as a benchmark for fulfilling an individual reduction obligation also results in double counting. Scope 3 emissions reported by an enterprise overlap with emissions reported by other enterprises and/or end-users.[461] Thus, the Scope 3 emissions reported by Shell are the Scope 1 emissions of the end-users of the products Shell supplies (and may also be reported as Scope 3 emissions by other parties in the supply chain).[462] The sum of these emissions reported by enterprises and customers is thus much larger than, and must be distinguished from, the actual amount of global emissions into the atmosphere.[463] The Scope 3 emissions that an enterprise reports cannot therefore form an acceptable basis for a legal duty aimed at reducing emissions into the atmosphere.[464]

164. Moreover, there is no uniform method for the measurement and reporting of Scope 3 emissions by individual enterprises like Shell. Shell reports based on the GHG Protocol, but enterprises can decide under the GHG Protocol which Scope 3 categories they report on (and the GHG Protocol does not introduce obligations to reduce reported Scope 3 emissions), which creates material differences in how Scope 3 emissions are reported and reporting also varies otherwise.[465] The lack of consensus on reporting and the associated legal uncertainty, which makes it impossible to make a pure and transparent comparison between enterprises,[466] confirms that no unwritten civil-law legal duty exists with regard to Scope 3 emissions reported by an enterprise.[467]

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459 Statement of Appeal, no. 8.1.1 under (a), (iii) and (iv), 8.3.6, 8.3.10 and 8.4; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3 under (b); and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.3.
460 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.3.
461 Statement of Appeal, no. 8.3.10-8.3.16.
462 Statement of Appeal, no. 8.3.2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.4.
463 Statement of Appeal, no. 8.3.13.
464 Statement of Appeal, no. 8.3.10-8.3.16; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.2.4 and 8.2.5.
465 Statement of Appeal, no. 8.3.8.
466 Cf. Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (f), referring to the remark in the GHGP Corporate Reporting Standard that Scope 3 emissions "*may not lend itself well to comparisons across companies.*"
467 Statement of Appeal, no. 8.3.6-8.3.9; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (c).

165. Against the background of the foregoing, the GHG Protocol falls short as a benchmark for an MD Reduction Duty for Scope 3 emissions, as also explained in paragraph 3.2.2 sub c below.[468]

3.2 Defence in the principal cassation appeal and subpart: laws and regulations, human rights and other instruments do not support and justify the imposition of an MD Reduction Duty for reported Scope 3 emissions

Defence

166. An MD Reduction Duty for reported Scope 3 emissions finds no support in the laws and regulations cited by the Court of Appeal in para. 7.99, is not in keeping with the legal system, does not align with the cases that are provided for by law and interferes with these and with the interests underlying the legal system. All that has been argued in Part 1 and subpart 2.1 applies in particular to an MD Reduction Duty for reported Scope 3 emissions. In any event, there must be unambiguous legal reference points to support and justify such an unwritten legal duty. No such reference points exist.

167. Similarly, the indirect horizontal effect of Articles 2 and 8 ECHR and/or other human rights instruments discussed by the Court of Appeal in paras. 7.18 up to and including 7.27 and 7.55 up to and including 7.57 do not support and justify any MD Reduction Duty for reported Scope 3 emissions. The very diverse (informal and non-binding) instruments cited by the Court of Appeal in para. 7.99 are not intended to create binding obligations and do not support and justify an MD Reduction Duty for the Scope 3 emissions reported by enterprises like Shell. They do not reflect a widespread societal consensus that is required for the existence of such a legal duty. Also in view of the subparts 2.1, 2.3 and 2.4, this defence stands in the way of an MD Reduction Duty for reported Scope 3 emissions. Milieudefensie's Parts 3, 4, 5, 6, 7, and 8 therefore fail for lack of interest.

Complaints

168. Shell raises the following complaints in the conditional cross-appeal.

i) **Section 3.2.1**: to the extent that the Court of Appeal decided in para. 7.99 that the laws and regulations cited there (including ETS2, CSRD, CSDDD) and the various laws and regulations discussed earlier in the Judgment support the existence of an MD Reduction Duty for Scope 3 emissions or that an MD Reduction Duty does not impermissibly interfere with that, the Court of Appeal erred in law, also in light of Part 1 and subpart 2.1, or at least this decision is insufficiently reasoned, in the face of Shell's substantiated assertions.[469] This is elaborated in Section 3.2.1 below.

ii) **Section 3.2.2**: to the extent that the Court of Appeal decided in paras. 7.18 up to and including 7.27 and 7.55 up to and including 7.57 that an indirect horizontal effect of human rights

[468] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (f).

[469] Statement of Defence, no. 7.6.7; Shell Pleading Notes dated 17 December 2020, hearing day 4 – substantive assessment of claims, par. 5.4; Statement of Appeal, par. 4.3; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, par. 6.5; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.4; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, question 6.

supports and justifies the existence of an MD Reduction Duty for reported Scope 3 emissions, the Court of Appeal erred in law also in view of (i) subparts 2.3 and 2.5 and (ii) the even greater weight the arguments against such indirect horizontal effect have in relation to an MD Reduction Duty for reported Scope 3 emissions. This is elaborated in paragraph 3.2.2 sub a below.

iii) **Section 3.2.2**: to the extent that the Court of Appeal decided in para. 7.99 that (informal and non-binding) instruments, including the OECD guidelines and the various other instruments discussed earlier in the Judgment, support and justify the existence of an MD Reduction Duty for Scope 3 emissions, the Court of Appeal erred in law or gave an incomprehensible and/or insufficiently reasoned decision in the face of Shell's substantiated assertions.[470] This is elaborated in paragraph 3.2.2 sub b below.

iv) **Section 3.2.2**: to the extent that the Court of Appeal expressed, by its reference in para. 7.99 to the GHG Protocol and other instruments such as the ISO Net Zero Guidelines and the 1.5°C Business Playbook, that it follows from the aforementioned instruments that Shell has it in its power to reduce its customers' emissions by a (minimum) percentage on a fixed date in the future, the Court of Appeal's decision is incomprehensible and following on from subpart 2.4 insufficiently reasoned in the face of Shell's assertions about these instruments.[471] This is elaborated in paragraph 3.2.2 sub c below.

3.2.1 Existing laws and regulations do not support and justify the imposition of an MD Reduction Duty for reported Scope 3 emissions

169. In defences and subparts 1.1, under no. 46 and 47, and 2.1, under no. 86, Shell explained that the Dutch and European energy transition and climate legislation do not contain any, let alone sufficient, concrete reference points that support and justify an MD Reduction Duty. These defences and subparts, like the Court of Appeal in paras. 7.50 up to and including 7.57, do not distinguish between Scope 1, 2 and 3 emissions. In particular, they oppose such a substantially new and particularly far-reaching legal duty like an MD Reduction Duty in respect of reported Scope 3 emissions.

170. In para. 7.99, the Court of Appeal considered that various regulations discussed earlier by the Court of Appeal, including ETS2, the CSRD and the CSDDD, assume a responsibility on the part of enterprises even with regard to Scope 3 emissions and that Shell therefore has some influence on Scope 3 emissions on the demand side. However, these regulations do not provide any support for the existence of an unwritten MD Reduction Duty in respect of reported Scope 3 emissions. Shell limits itself here for brevity's sake to the regulations mentioned by the Court of Appeal in para. 7.99. As set out in subparts 1.1 and 2.1, however, the broad European and national regulations are relevant to whether an MD Reduction Duty exists for reported Scope 3 emissions.

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[470] Statement of Defence, par. 7.6.7; Shell Pleading Notes dated 17 December 2020, hearing day 4 - substantive assessment of claims, par. 5.4; Statement of Appeal, par. 4.3; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, par. 6.5; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, par. 8.4; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, question 6.

[471] Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.4.7-7.4.9; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (f) and (g).

171. In Section 1.1.2 under no. 47a it was explained that ETS2 does not underpin the idea that suppliers like Shell have a responsibility, let alone a legal duty, to reduce the Scope 3 emissions they report. ETS2 covers sectors with a large number of small emitters. This makes it impossible to establish the point of regulation at the level of the individual entities that directly emit GHGs. Due to technical feasibility and administrative efficiency, the point of regulation is established further upstream in the supply chain whereby the costs of the emission rights are passed on to the actual emitters by the suppliers.[472] An MD Reduction Duty for reported Scope 3 emissions runs counter to the ETS2 system. Since it does not affect the ETS2 emissions cap, any emissions reductions achieved as a result of the MD Reduction Duty would only result in additional allowances becoming available to other enterprises supplying fuels that might even have a higher carbon intensity. In addition, an obligation on an individual enterprise to reduce Scope 3 emissions undermines the level playing field pursued by the European emissions trading system for all parties covered by this 'cap-and-trade' system (see Section 1.1.3 under d).

172. As Shell has explained in Section 1.1.2 under no. 47l, RED III establishes differentiated sectoral targets for the share of renewable energy in each Member State's energy mix. With respect to the transport sector, member states have the option to adopt either (i) a target for the renewable energy share of the end-use of energy in the transport sector or (ii) a GHG intensity reduction target in that sector, requiring suppliers to reduce the average GHG emissions per unit of energy they supply. Thus, while RED III contributes indirectly to GHG reductions, it achieves this by creating incentives to increase the share of renewables in the energy mix (rather than requirements to reduce absolute GHG emissions). In doing so, the European legislator aims to provide certainty to investors and encourage the development of renewable fuels.[473] Consistent with this approach, the Dutch legislator has elected to implement RED III by requiring fuel suppliers in the transport sector to reduce the GHG emissions per unit of energy they supply.[474] The Dutch legislator aims to reduce emissions throughout the entire fuel chain instead of only at the source.[475] The intensity-based obligation incentivises reductions throughout the fuel chain by influencing end-user behaviour through pricing signals. This choice is consistent with the premise laid down in the Climate Accord that the emitting entity should be financially responsible for its own sustainability, rather than the supplier.[476] An MD Reduction Duty, requiring an individual enterprise to reduce absolute reported Scope 3 emissions in blanket terms without ensuring that emissions are actually reduced throughout the supply chain, is not consistent

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[472] Directive (EU) 2023/959, recital 77, where the following is stated: "*Due to the very large number of small emitters in the buildings, road transport and additional sectors, it is not possible to establish the point of regulation at the level of entities directly emitting greenhouse gases, as is the case for stationary installations and aviation. Therefore, for reasons of technical feasibility and administrative efficiency, it is more appropriate to establish the point of regulation further upstream in the supply chain.*"

[473] M. Dieperink and A. Hendrix, 'Wat is dan wel de emissiereductienorm voor individuele bedrijven?', *NJB* 2025/65, par. 5.1 and 6; Directive (EU) 2018/2001, recitals 83 and 85 and Article 25, as amended by Directive (EU) 2023/2413. Directive (EU) 2018/2001, recital 83 includes: "[a]*n obligation on Member States to require fuel suppliers to deliver an overall share of fuels from renewable sources can provide certainty for investors and encourage the continuous development of alternative renewable transport fuels including advanced biofuels, renewable liquid and gaseous transport fuels of non-biological origin, and renewable electricity in the transport sector. Since renewable alternatives might not be available or cost-efficient to all fuel suppliers, it is appropriate to allow Member States to distinguish between fuel suppliers and to exempt, if necessary, particular types of fuel supplier from the obligation*." See also Explanatory Memorandum to the 'Decree Amending the Decree on Energy Transport REDIII', par. 2.2; and *Parliamentary Papers II* 2024/25, 36766, no. 3, p. 49.

[474] *Parliamentary Papers II,* 2023/24, 32813, no. 1383, par. 1, 3 and 4.

[475] *Parliamentary Papers II,* 2023/24, 32813, no. 1383, par. 2 and 3, containing a clear preference for emission reductions in the entire chain: "*Already during the implementation of RED-II, the House requested that the Netherlands switch to a system that rewards chain emission reductions when implementing RED-III. Chain emissions refer to the greenhouse gas emissions associated with an energy carrier, from source to point of use.*"

[476] Explanatory Memorandum to the 'Decree Amending the Decree on Energy Transport REDIII', par. 1: "[t]*he Climate Accord agreed that CO2 chain emission reduction would be the primary focus in the Netherlands (CO2 chain approach). The premise of the Climate Agreement, namely that the emitting entity is held financially responsible for its own sustainability, has been translated into the form of transport sector-specific obligations on fuel suppliers (sector approach).*"

with the method the legislator has chosen for incentivising the transition to renewables across the value chain.

173. The CSRD and the CSDDD discussed in Section 1.1.2 under no. 47h and 47j and subpart 2.1 under no. 86 also do not support a civil-law MD Reduction Duty for reported Scope 3 emissions, as further elaborated below.

174. The fact that an enterprise reports on Scope 3 emissions and/or is now required to report under the CSRD mentioned by the Court of Appeal in para. 7.99 does not mean that that enterprise has a responsibility, let alone a civil-law legal duty towards others, to reduce reported absolute Scope 3 emissions by a certain (minimum) percentage at a fixed date in the future. The directive is intended to increase transparent reporting on the emissions policies of reporting enterprises to enable market participants to take such information into account in the choices they make.[477] This also follows from the *European Sustainability Reporting Standards* (ESRS), adopted as a delegated regulation elaborating the CSRD.[478] It does not follow from the CSRD that, as the Court of Appeal seems to decide in para. 7.99, the enterprise reporting Scope 3 emissions has control over end-users' actual emissions.

175. The obligation in Article 22 CSDDD for certain enterprises to include emissions reduction targets (also) for Scope 3 emissions in their climate transition plans does not support the existence of an MD Reduction Duty for reported Scope 3 emissions. As outlined in Section 1.1.2 under no. 47j and subpart 2.1, the CSDDD requires enterprises to set Scope 3 emissions targets "where appropriate", has opted for a best-effort obligation, does not prescribe specific reduction percentages, and explicitly opts for administrative enforcement. The possibility that circumstances could lead to it being "no longer reasonable" to hold enterprises to their self-imposed targets has been explicitly addressed.[479] The activities of the customers of an enterprise's products are exempted from the obligation to exercise due diligence.[480] It was also recognised that the CSDDD cannot require enterprises to guarantee in all circumstances that negative impacts will never occur in the activities of their direct and indirect business partners or that those impacts will be discontinued.[481] Several circumstances must be taken into account, including the enterprise's ability to influence the business partner in question.[482] Neither Article 22 CSDDD on the climate transition plan nor the separate obligation to apply due diligence supports and justifies a legal duty for an enterprise to reduce the Scope 3 emissions it reports by a certain (minimum) percentage at a date fixed in the future.

176. The Court of Appeal did not apparently, let alone expressly, decide in para. 7.99 that Shell has control over Scope 3 emissions, nor did it patently base this finding on the regulations discussed by the Court

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477 Shell Written Pleading Notes, no. 2.5.2; and Directive (EU) 2022/2464, recitals 9 and 14, where it is mentioned that market participants "*would be adequately informed and therefore able to better engage in social dialogue*", while in the absence of sustainability reporting policies "*they are unable to take sufficient account of sustainability-related risks and opportunities in their investment decisions.*" and "*are less able to hold undertakings accountable for their impacts on people and the environment.*"

478 Appendix E to ESRS 1 notes "*ESRS set disclosure requirements, not behavioral requirements*". Paragraphs 62 and 72 of ESRS 2 recognize the possibility that an enterprise has not adopted policies, measures and/or targets with reference to the specific sustainability matter, in which case it must disclose this accompanied by the reasons why it has not done so.

479 Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, par. 5.2. Directive (EU) 2024/1760, recital 73.

480 Directive (EU) 2024/1760, Article 3(1)(g).

481 Directive (EU) 2024/1760, recital 19.

482 Directive (EU) 2024/1760, recital 19, and Articles 11 and 12.

of Appeal in para. 7.99. If the Court of Appeal's decision should be read in this way, the Court of Appeal erred in law with respect to those regulatory instruments or gave insufficient reasons for its decision. These regulations provide no support for this decision. As follows from what is set out above under no. 170 up to and including 175, these regulations are rather founded on the idea that enterprises precisely do not have such control, so that they cannot serve as a de facto indication of the existence of such control either.

3.2.2 Human rights and other instruments cited by the Court of Appeal do not support and justify the imposition of an MD Reduction Duty for reported Scope 3 emissions

a. In particular with respect to Scope 3 emissions, there is no room to impose an MD Reduction Duty through the indirect horizontal application of human rights

177. In subparts 2.3 and 2.5, Shell has set out why an indirect horizontal effect of the human rights instruments mentioned by the Court of Appeal does not support and justify an MD Reduction Duty. These complaints, which do not distinguish between Scope 1, 2 and 3 emissions, apply in particular to an MD Reduction Duty for Scope 3 emissions, because the fundamental differences between states and enterprises are even larger in respect of reported Scope 3-emissions. In the *Urgenda* and *KlimaSeniorinnen* cases, the Supreme Court and the ECtHR have ruled that human rights oblige states to reduce emissions within their territory by a certain percentage, where they have jurisdiction, but Shell does not have control over the actions underlying the Scope 3 emissions it reports. Additionally, these cases do not address the legal duties of states to reduce 'Scope 3' emissions, as states do not have emissions connected to their products or services. Consequently, there is no precedent for such a legal duty. For both these reasons, existing case law on human rights cannot provide a basis for an MD Reduction Duty for Scope 3 emissions.

b. The OECD guidelines and other (informal and non-binding) instruments contain no objective reference points in support of an MD Reduction Duty in respect of Scope 3 emissions

178. In para. 7.99, the Court of Appeal considered that various (informal and non-binding) instruments discussed earlier by the Court of Appeal assume responsibility on the part of enterprises even with regard to Scope 3 emissions. With this, the Court of Appeal did not apparently, let alone expressly, decide that the responsibility of enterprises derived by the Court of Appeal from these instruments supports and justifies the existence of an MD Reduction Duty in respect of Scope 3 emissions. The thrust of the defence and the complaint behind (iii), put forward in case the Court of Appeal did indeed intend to decide this, is that this is incorrect.

179. In subpart 2.4, Shell has set out why the (informal and non-binding) instruments mentioned by the Court of Appeal in para. 7.99 do not support and justify the existence of an MD Reduction Duty. These complaints of subpart 2.4, which do not distinguish between Scope 1, 2 and 3 emissions, apply in particular to such a substantially new and particularly far-reaching legal duty like an MD Reduction Duty for reported Scope 3 emissions. In particular for such a legal duty, there have to at least exist unambiguous objective reference points that support and justify that legal duty. This is all the more true if such a legal duty is not in keeping with the legal system and does not align with the

cases indeed provided for in that system and interferes with this legal system and the interests underlying it. This is the case here, as follows from subparts 1.1, 2.1 and the preceding Section 3.2.1.

180. Regarding the OECD guidelines specifically mentioned by the Court of Appeal in para. 7.99, Shell notes the following. The OECD guidelines contain a set of recommendations for enterprises, including the recommendation in Chapter IV (Environment) that enterprises set reduction targets. The OECD guidelines do not prescribe what those targets should be. Specifically with regard to *Scope 3 emissions*, it is explicitly recognised that setting targets will not always be possible.[483] The OECD also recognises that "systems-wide transformative action" and "major scaling-up of low-carbon technology deployment and related investments" are needed, while "most of the necessary technologies are at demonstration phase or early stages of commercialization".[484] The OECD guidelines are voluntary, not legally enforceable, stress that they must be distinguished from issues of civil liability and enforcement, and do not focus on any particular industry or sector.[485] Therefore, the OECD guidelines do not support the existence of a responsibility or legal duty for an enterprise to reduce absolute Scope 3 emissions by a certain (minimum) percentage by a date fixed in the future.

c. It cannot be inferred from the GHG Protocol and other (informal and non-binding) instruments that individual enterprises have control over Scope 3 emissions

181. The GHG Protocol, also mentioned by the Court of Appeal, is a voluntary *reporting* standard, designed to enable the comparison of emissions over the years.[486] The standard does not aim to create any legal (reduction) obligations with regard to Scope 3 emissions reported by an enterprise, nor does it contain any indication to that end.[487] It cannot be inferred from the obligation to report on Scope 3 emissions that an enterprise has it in its power to reduce those Scope 3 emissions (the Scope 1 emissions of its customers and business partners) into the atmosphere, and thus has control with regard to those Scope 3 emissions. Nor can this be inferred from the fact that non-binding initiatives/recommendations such as the ISO Net Zero Guidelines[488] and the 1.5°C Business Playbook[489] can be helpful in influencing the choices made by the customers of an enterprise. This is because they do not reflect consensus on legal reduction obligations, let alone support and justify an MD Reduction Duty for reported Scope 3 emissions, so that the Court of Appeal did not give sufficient reasons for its decision for that reason too (for more on this, see subpart 2.4).

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483 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023 (Exhibit MD-492), p. 37 (no. 77); and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.4.

484 See OECD website, available at https://www.oecd.org/en/topics/climate-mitigation-and-net-zero-transition.html (most recently accessed 28 March 2025).

485 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023 (Exhibit MD-492), p. 10 (no. 5), p. 37 (no. 77); and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 6.2.2-6.2.4.

486 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (f). See also Defence on Appeal, no. 824.

487 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (f).

488 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (g).

489 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.4.7-7.4.9.

3.3 Defence in the principal cassation appeal and subpart: voluntarily set targets and ambitions for reported Scope 3 emissions cannot support and justify an MD Reduction Duty

Defence

182. The Court of Appeal inferred partly from the fact that Shell has formulated targets and an ambition for Scope 3 emissions it reports that Shell has some influence over reported Scope 3 emissions. The formulation by enterprises of voluntary targets and ambitions in relation to reported Scope 3 emissions does not support and justify the existence of a civil-law legal duty to reduce reported Scope 3 emissions by a minimum percentage at a date fixed in the future. This is because voluntary Scope 3 targets and ambitions are different in character to legal obligations, including because they are forward-looking statements and take into account external factors which are not within an enterprise's control.[490] Enterprises must be able to set reduction targets and ambitions without these translating into obligations binding under civil law. This defence, also in view of Part 2 and the other complaints of this Part 3, precludes an MD Reduction Duty for Scope 3 emissions and therefore Milieudefensie's Parts 3, 4, 5, 6, 7 and 8 fail for lack of interest.

Complaints

183. The Court of Appeal discusses the voluntary targets and ambition set by Shell as part of its rejection of Shell's argument that it cannot exert control over its customers and uses these targets and ambition to conclude that Shell has some influence over Scope 3 emissions. To the extent that the Court of Appeal thereby expressed the view that, partly because of the formulation of voluntary targets and ambition, Shell (and other enterprises) has control over Scope 3 emissions and that this control could serve as an objective reference point for a civil-law reduction obligation in respect of those emissions, the Court of Appeal erred in law or gave an incomprehensible and/or inadequately reasoned decision.

184. To the extent that the Court of Appeal assumed a causal connection between the formulation of voluntary targets and ambition(s) for Scope 3 emissions by Shell (and other enterprises) and a reduction in demand for oil and gas, the Court of Appeal failed to recognise that Shell has set targets and an ambition for Scope 3 emissions that are outside Shell's control.[491]

Explanation of defence and complaints

185. As the Court of Appeal found in paras. 3.33 and 3.34, Shell has a target to reduce the net CO_2 intensity of the Scope 1, 2 and 3 emissions it reports by 100% by 2050 compared to 2016.[492] Shell also has a

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[490] Statement of Appeal, no. 8.5; and Court record of the oral hearing on appeal, p. 10.

[491] Cf. Shell plc, 14 March 2024, *Energy Transition Strategy 2024* (Exhibit S-288), p. 46: "*In the short and medium term, we have set climate targets for emissions that we are able to control, namely our Scope 1 and 2 emissions, methane emissions, and flaring. We have also set climate targets and ambitions for emissions that are outside our control. These include our ambition to reduce the Scope 3, Category 11 customer emissions from the use of our oil products, and our target to reduce the net carbon intensity of all the energy products we sell.*"

[492] Shell's operating plan and outlook are forecasted for a three-year period and ten-year period, respectively, and are updated every year. They reflect the current economic environment and what Shell can reasonably expect to see over the next three and ten years. Accordingly, the outlook reflects Shell's Scope 1, Scope 2 and Net Carbon Intensity targets over the next ten years. However, Shell's operating plan and outlook cannot reflect its 2050 net-zero emissions target, as this target is outside its planning period. Such future operating plans and outlooks could include changes to Shell's portfolio, efficiency improvements and the use of carbon capture and storage and carbon credits. In the future, as society moves towards net-zero emissions, Shell's operating plans and outlooks are expected to reflect this movement. However, if society is not net zero in 2050, as of today, there would be significant risk that Shell may not meet this target.

target to reduce the net carbon intensity (NCI) of the energy products it sells by 15-20% by 2030 (compared to 2016)[493] and an ambition to reduce customer emissions from the use of Shell's oil products by 15-20% by 2030 (compared to 2021)[494] (paras. 3.39 and 3.41).[495] Shell aims to increase the sales of and demand for low-carbon products, which is the biggest driver for reducing Shell's NCI. Further, achieving Shell's ambition will mean reducing sales of oil products, such as gasoline and diesel.[496] While Shell could not set a target or ambition without having a reasonable basis to genuinely believe that it can meet it,[497] the fact that Shell has targets and an ambition which include Scope 3 emissions does not mean that Shell has control over end-user emissions from the products it supplies or that those emissions are attributable to it.[498] Rather, targets are forward-looking statements of an organisation's plans and objectives for such organisation to pursue.

186. Shell's Scope 3 targets and ambition by their nature take into account external circumstances of a regulatory, economic and technical nature, among others.[499] For society to achieve net-zero emissions by 2050, the investments, innovations and infrastructure facilities will have to be significantly scaled up and accelerated in order to bring the necessary technologies to market and also change demand-side behaviour in a timely manner.[500] This is also what Shell communicated when setting its targets and ambition for Scope 3 emissions it reports. Shell has chosen to call its metric with respect to its oil products an ambition, to reflect the fact that it does not control Scope 3 emissions: it cannot control the pace of customer demand or the introduction of regulatory support by governments.[501]

187. Indeed, there is not a direct relationship between the Scope 3 emissions that Shell reports (on one hand) and the emissions into the atmosphere by end-users (on the other hand), as explained above under no. 161. This means that the act of formulating a target and/or ambition is irrelevant to establishing the existence of control over end-user emissions from the use of energy products. The Court of Appeal could not, therefore, infer the existence of control on the part of Shell on 'demand-side factors' from the setting of these targets and ambition. These kinds of reduction targets and ambition are focused on Shell's own product or service offerings and do not relate to, or necessarily lead to, a reduction in customer and end-user emissions or an overall reduction in emissions into the atmosphere. This is regardless of whether the specific emissions of Shell's energy products are reduced, given the possibility of displacement and the freedom of choice of customers and end-users to act as they see fit.[502]

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493 Shell's "net carbon intensity" (NCI) includes Shell's carbon emissions from the production of its energy products, its suppliers' carbon emissions in supplying energy for that production and its customers' carbon emissions associated with their use of the energy products it sells. Shell's NCI also includes the emissions associated with the production and use of energy products produced by others which Shell purchases for resale. Shell only controls its own emissions. The use of the terms Shell's "net carbon intensity" or NCI is for convenience only and not intended to suggest these emissions are those of Shell plc or its subsidiaries.

494 Customer emissions from the use of Shell's oil products (Scope 3, Category 11) were 517 million tonnes carbon dioxide equivalent (CO 2e) in 2023 and 569 million tonnes CO 2e in 2021.

495 Shell Written Pleading Notes, no. 5.1.6 and 5.1.7. See also Shell Pleading Notes dated 3 April 2024, hearing day 2 – annex, par. 1.7.

496 Shell Pleading Notes dated 3 April 2024, hearing day 2 – annex, no. 1.7.

497 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.2.4.

498 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (c).

499 Court record of the oral hearing on appeal, p. 10.

500 Statement of Appeal, no. 1.3.3; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 10.2.3.

501 Court record of the oral hearing on appeal, p. 10; and Shell Pleading Notes dated 12 April 2024, hearing day 4 - Shell answers to questions of the Court of Appeal, no. 10.2.3.

502 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.5.3(b)(iii). Nor can Shell's goal of reducing the net carbon intensity of the Scope 1, 2 and 3 emissions it reports by 15-20% be of legal relevance to an MD Reduction Duty for Scope 3 emissions. After all, an MD Reduction Duty is aimed at an absolute reduction in the amount of emissions reported, independent of net carbon intensity, while Shell's target is aimed at a decrease in the relative amount of emissions (a reduction in net carbon intensity), with which the total amount of emissions may increase. See Statement of Appeal, no. 2.2.12 and 2.3.12-2.3.16.

188. The external environment affecting the achievement of targets and ambitions is uncertain and dynamic. In those circumstances, it is desirable for enterprises to be able to continue to set targets and ambitions – without those targets and ambitions providing the basis for obligations binding under civil-law which an enterprise cannot control on its own. In addition to being illogical (for the reasons described above), using the fact that an enterprise has set targets and ambitions to establish the existence of control over emissions subject to those targets would also have a counterproductive effect on climate change mitigation. It would dissuade enterprises from adopting emissions reduction targets. This applies *a fortiori* if such a far-reaching civil law obligation like an MD Reduction Duty for Scope 3 emissions were to be based on the existence of voluntarily set and externally dependent targets and ambitions. A possible effect of this would be that enterprises would abandon voluntary Scope 3 targets and ambitions to avoid being legally bound to a standard for emissions over which they ultimately have no control.[503] The MD Reduction Duty sought in respect of Scope 3 emissions would moreover go far beyond Shell's targets and ambition.

3.4 Defence in the principal cassation appeal and subpart: an MD Reduction Duty in respect of reported Scope 3 emissions has no basis in a sufficiently knowable and societally self-evident standard and is at odds with the principle of legal certainty

Defence

189. The logical inference from the foregoing complaints of this Part 3 is that an MD Reduction Duty for reported Scope 3 emissions is not sufficiently self-evident and knowable to be adopted as a concrete and enforceable legal duty.[504] There are no sufficient objective reference points for such a legal duty in laws, regulations or other (informal and non-binding) instruments, let alone sufficiently clear and useable ones.[505] As detailed in Part 5, it goes beyond the court's law-making function in those circumstances to impose such an unwritten legal duty on enterprises like Shell. These defences, also in view of Part 2 and the other complaints of this Part 3, stand in the way of being able to adopt an MD Reduction Duty for Scope 3 emissions, so that for this reason the Parts in the principal cassation appeal 3, 4, 5, 6, 7 and 8 fail for lack of interest.

Complaint

190. To the extent that the Court of Appeal decided in paras. 7.99, 7.111 or elsewhere in the Judgment that this defence does not preclude an MD Reduction Duty for Scope 3 emissions, the Court of Appeal erred in law.

Explanation of defence and complaint

191. Shell has explained in subpart 2.8 that an MD Reduction Duty is incompatible with the requirements that the interpretation of the societal standard of care be knowable and self-evident. This complaint,

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503 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 8.4.7 under (c).
504 Statement of Appeal, no. 1.3.5-1.3.7, 3.2.3, 3.2.4, 3.2.9, 3.2.12 under (a), 7.2.2 and 7.2.3; Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, no. 5.1.10, 5.1.14 and 5.1.15; and C.J. van Zeben and J.W. du Pon (eds.) with contribution by M.M. Olthof, *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek Boek 6. Algemeen gedeelte van het verbintenissenrecht*, Deventer: Kluwer 1981, p. 616.
505 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 1 of 4, par. 5.1.

also in light of the preceding subparts of this Part 3, applies in particular to such a substantially new and particularly far-reaching legal duty like an MD Reduction Duty with respect to reported Scope 3 emissions.

192. There is no precedent worldwide for an MD Reduction Duty in respect of Scope 3 emissions reported by an individual enterprise.[506] Nor are there sufficiently clear objective reference points for this. Enterprises measure and report Scope 3 emissions in different ways, if they do this at all (Section 3.1.3 above). Existing laws and regulations contain no obligations for enterprises to reduce absolute Scope 3 emissions by a certain (minimum) percentage by a date fixed in the future. Such an obligation on an enterprise is at odds with basic principles of Dutch liability law (Sections 3.1.1 and 3.1.2) and no sufficiently concrete reference points for such an obligation can be found in those laws and regulations either (Section 3.2.1 above). Nor do other (informal and non-binding) instruments, in so far as they can affect the interpretation of an unwritten legal duty at all, contain any such reference points (Section 3.2.2 above).

193. Thus, there is no foreseeable and sufficiently knowable standard of unwritten law on the basis of which it is clear to enterprises what they ought to do, which standard can then be enforced in court. Adopting an MD Reduction Duty for reported Scope 3 emissions leads to unpredictability and unacceptable legal uncertainty. In this respect, whilst the concept of an MD Reduction Duty has not been accepted in other jurisdictions in the first place, this subpart 3.4 confirms once more that even if it would be, this would inevitably lead to a fragmented, inconsistent and incoherent set of mutually different standards and reduction percentages across enterprises and jurisdictions.

[506] Statement of Appeal, no. 1.4.2.

PART 4: THE COURT OF APPEAL'S DECISION ON A SOCIETAL DUTY OF CARE WITH REGARD TO INVESTMENTS IN FOSSIL FUEL PRODUCTION IS PROCEDURALLY INADMISSIBLE

Introduction and summary

194. The Court of Appeal devoted some considerations in paras. 7.58-7.62 to investments in new oil and gas fields and Scope 3 emissions. The Court of Appeal decided in para. 7.61 that it does not, in these proceedings, have to answer the question of whether Shell's proposed investments in new oil and gas fields are in breach of a societal duty of care. Its considerations in paras. 7.58-7.62 do not result in the award of any part of the relief sought (para. 7.62). Milieudefensie was right not to raise any complaints against that conclusion.

195. The Court of Appeal's considerations are superfluous considerations that do not support the operative part of the Judgment and have no force of *res judicata* between the parties. Nevertheless, Milieudefensie relies on these *obiter* considerations from the Court of Appeal in several places in its Initiating Document.[507] As Shell will explain in more detail in its written submissions, the complaints based on these considerations of the Court of Appeal fail because these considerations cannot have any significance for the awardability of Milieudefensie's claims and the Court of Appeal therefore rightly did not give them any significance in the remainder of its judgment.

196. Since Milieudefensie bases its cassation appeal in part on the Court of Appeal's considerations in paras. 7.58-7.62, for the sake of certainty Shell raises complaints in the conditional cross-appeal. These complaints aim to make sure that the said considerations of the Court of Appeal, which were provided outside the legal debate in the appeal, are indeed *obiter dicta*, that they have no significance in the Judgment and do not have any *res judicata* effect between the parties. Should it be decided otherwise, however, the Court of Appeal's considerations were procedurally inadmissible because they are outside the bounds of the legal debate in the appeal (subpart 4.1). Moreover, no proper debate took place between the parties concerning the fundamental issue of whether the Dutch courts should be allowed to impose restrictions on the investments in new oil and gas field on (enterprises like) Shell on the basis of the societal standard of care (subpart 4.2).

4.1 The Court of Appeal's considerations in paras. 7.58 to 7.62 are procedurally inadmissible because they are outside the bounds of the legal debate in the appeal

Complaints

197. To the extent that the considerations of the Court of Appeal in paras. 7.58 to 7.62 are not *obiter dicta* and/or in fact have some significance in the judgment, these considerations are procedurally inadmissible because the Court of Appeal went beyond the bounds of the legal debate in the appeal. Shell puts forward the following complaints:

i) In view of Articles 23 and 24 DCCP, the Court of Appeal was not entitled to give the

[507] Document Initiating Supreme Court Proceedings Milieudefensie, no. 1.30, 3.47, 3.48, 3.50, 4.31, 5.6, 6.8, and 6.14.

considerations in paras. 7.58 to 7.62. By doing so, the Court of Appeal went beyond its role as dispute adjudicator of the claims submitted to it.

ii) The Court of Appeal's considerations in paras. 7.58 to 7.62 are at odds with the system of grounds of appeal and the prohibition of *reformatio in peius*.

iii) The Court of Appeal's decision in paras. 7.58-7.62 is incorrect and incomprehensible in light of paras. 7.5 and 7.101. In these paragraphs, the Court of Appeal (a) decided that Milieudefensie did not raise any grounds for appeal or make a change of claim and (b) interpreted the District Court's judgment to mean that it gave Shell freedom to determine how to comply with the obligation imposed by the District Court.

Explanation

198. Pursuant to Article 23 DCCP, the Court of Appeal had to give a decision on everything that the parties claimed. Further, pursuant to Article 24 DCCP, the Court of Appeal had to decide only on what the parties posited as the basis for their claims and defence. Milieudefensie did not bring a claim to the effect that Shell should be restricted from making investments in new oil and gas fields, as the Court of Appeal correctly decided in para. 7.62. Milieudefensie did not dispute this finding in cassation. Therefore, the Court of Appeal should have refrained from the considerations in paras. 7.58 – 7.62. By indeed stating those considerations, including a general consideration of the duty of care of oil and gas enterprises, the Judgment does not sit well with the prohibition of Article 12 of the General Provisions Act (*Wet Algemene Bepalingen*). After all, the court may not, independently of the case before it, act as if it were the legislature: "*No court of law may rule on matters subject to its decision by way of general order, disposition or regulation*" (see also Section 5.1.1).[508]

199. At first instance, the District Court imposed on Shell a net 45% reduction obligation, which was not specified any further to Shell's detriment. The dictum, read in conjunction with the body of the District Court's judgment, shows that the District Court left Shell freedom to comply with the reduction obligation imposed by the District Court in the way it saw fit, and to shape the corporate policy of the Shell group at its own discretion (para. 4.4.54). The District Court exclusively ruled on the claims filed by Milieudefensie that aimed at imposing a reduction order on Shell. In that context the District Court considered that "*a consequence of this significant obligation may be that RDS will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources*" (para. 4.4.39) and that "*RDS' planned investments in new explorations are not compatible with the reduction target to be met*" (para. 4.5.2). The District Court did not give any ruling to the effect that Shell is under a duty of care to limit investments in new oil and gas fields.

200. Milieudefensie did not raise any grounds for appeal or change of claim against the District Court's decision. It is established in cassation that Milieudefensie did not institute cross-appeal proceedings, as the Court of Appeal found in para. 7.5 and Milieudefensie does not dispute in cassation. The Court of Appeal also decided in para. 7.101 that it is of importance that it follows from the District Court's

[508] Opinion of P-G Langemeijer and A-G Wissink prior to NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*), par. 5.21.

judgment that Shell is free to determine for itself the manner in which it fulfils the obligation imposed by the District Court and that Milieudefensie did not direct any ground for appeal against this decision.

201. Against this background, the Court of Appeal's decision in paras. 7.58 to 7.62 is at odds with the system of grounds of appeal and the prohibition of *reformatio in peius*. Without Milieudefensie raising grounds for appeal or changing its claim, the Court of Appeal was not permitted to arrive at a decision that was more onerous for Shell. According to the Court of Appeal, the societal duty of care in relation to oil and gas enterprises entails that they (i) take their responsibility for limiting the supply of fossil fuels; and (ii) are expected to take into account the negative consequences for the energy transition when investing in new oil and gas fields as these investments will expand the supply of fossil fuels. Relative to (the operative part of the judgment in) the first instance, this decision, if it were to be given any procedural significance, constitutes an impermissible worsening of Shell's position as a result of its own appeal.

202. Furthermore, the Court of Appeal's considerations in paras. 7.58-7.62 are also incorrect and incomprehensible in light of paras. 7.5 and 7.101. As stated above, paras. 7.5 and 7.101 show that the Court of Appeal ruled that Milieudefensie did not put forward any grievances or change its claim and that the Court of Appeal interpreted the judgment of the District Court as meaning that the District Court left Shell free to determine how it would comply with the obligation imposed by the District Court. In that light, it is legally incorrect and incomprehensible that the Court of Appeal, in paras. 7.58-7.62, arrived at a more burdensome judgment for Shell regarding the duty of care of oil and gas enterprises with regard to investments in new oil and gas fields.

4.2 The Court of Appeal's considerations in paras. 7.58 to 7.62 are procedurally inadmissible because they violate the principle of hearing both sides (Article 19 DCCP, Article 47 EU Charter and Article 6 ECHR)

Complaint

203. To the extent that the considerations of the Court of Appeal in paras. 7.58 to 7.62 are not *obiter dicta* and/or in fact have some significance in the judgment, the Court of Appeal's considerations are in breach of the principle of hearing both sides ex Article 19 DCCP, Article 47 EU Charter and Article 6 ECHR and give a decision that Shell could not reasonably have expected.

Explanation

204. Because (i) Milieudefensie did not institute an appeal (as decided in paras. 7.5 and 7.101)[509]; (ii) Milieudefensie did not submit a claim to the effect that Shell has a societal duty of care that requires it to, when investing in the production of fossil fuels, take into account the negative impact on the energy transition of further expanding the supply of fossil fuels; and (iii) the Court of Appeal's decision on this point is not related to the claims that Milieudefensie has submitted (as the Court of Appeal also decided itself in paras. 7.58-7.62), Shell could not and/or need not have anticipated the

[509] See also Defence on Appeal, no. 10 and 764.

Court of Appeal's considerations in paras. 7.58-7.62. The Court of Appeal should have given Shell the opportunity to respond to this. Since the Court of Appeal did not do that, this constitutes a breach of the principle of hearing both sides as anchored in Article 19 DCCP, Article 47 EU Charter and Article 6 ECHR.

PART 5: THE IMPOSITION OF AN MD REDUCTION DUTY OVERSTEPS THE BOUNDS OF JUDICIAL LAWMAKING AND THE BOUNDS OF SUBSTANTIVE AND PROCEDURAL CIVIL LAW

Introduction and summary

205. The Court of Appeal issued decisions on the civil obligations of Shell (and enterprises like it) to counter climate change in paras. 7.26, 7.27, 7.53 and 7.55, as well as in paras. 7.57, 7.79, 7.81, 7.96 and/or 7.111 (which build upon them). In para. 7.53, and earlier in paras. 6.8, 7.11 and 7.17, the Court of Appeal held that an unwritten legal duty on enterprises such as Shell to reduce emissions did not impermissibly encroach on political and policy matters reserved to the legislature.

206. Milieudefensie's Initiating Document relies on the premise that the Dutch courts can impose an MD Reduction Duty on individual enterprises such as Shell. This premise is incorrect. In summary, Shell's argument is as follows:

a) The imposition by the courts of an MD Reduction Duty on enterprises such as Shell oversteps the bounds of their lawmaking task and fails to exercise the restraint courts should observe under the system of government in respect of the political domain (**subpart 5.1**).

b) The imposition by the courts of an MD Reduction Duty on enterprises such as Shell oversteps the bounds of substantive and procedural private law, including the bounds of litigation in the public interest (**subpart 5.2**).

As Shell has argued in Part 2, a general legal duty to reduce emissions finds no support in law and cannot, without specification of its content, legally exist or be enforceable. These subparts are targeted at the specific legal duty that Milieudefensie defends in this case, the MD Reduction Duty.

207. The issue in these civil proceedings is whether Shell, as a private enterprise, owes a duty of care to Dutch citizens requiring Shell to reduce the global emissions it reports by a certain percentage at a specific point in the future. Parts 1 to 3 explain why such an MD Reduction Duty is incompatible with EU law and has no basis in Dutch law. In addition, it has been made clear the extent to which an MD Reduction Duty interferes with the balance of interests that the EU, Dutch, and foreign governments have made or are yet to make. What Milieudefensie is seeking in these civil proceedings amounts to a particularly far-reaching judicial regulation of the global activities of an individual enterprise. This requires the courts in this case to intervene in the political considerations of how the global energy transition should take shape.

208. The question of whether individual enterprises such as Shell (should) have civil law reduction obligations, and the content and scope of such obligations, requires complex policy judgements, prioritisations and trade-offs (which have been made, and which must be continually reconsidered) about the roles and responsibilities of different countries, sectors and actors. Those trade-offs and policy judgements have to be made in the face of constantly evolving technology and science and a dynamic geopolitical landscape, in which regard account must also be taken of the impact of such changes on society. Only governments have the status and the power to create policies and enact

legislation and can align their climate policies on an international or regional level. The outcome of these legal and policy considerations, which can only be undertaken by governments in the Netherlands, the European Union and other countries, cannot be unilaterally determined by the Dutch courts. For this reason, as explained in particular in Part 1 and subparts 2.1, 2.2 and 3.2, the intervention in the political domain is too great and the existing legal framework does not provide sufficient points of reference and sufficient legitimation for the particularly far-reaching judicial intervention that an MD Reduction Duty entails.

5.1 Defence in the principal cassation appeal and subpart: imposing an MD Reduction Duty on enterprises such as Shell oversteps the bounds of judicial lawmaking and impermissibly encroaches on the political domain

Defence

209. The imposition by the courts of an unwritten MD Reduction Duty oversteps the bounds of their lawmaking task and impermissibly encroaches on the political domain. The restraint that the courts must exercise means that an unwritten MD Reduction Duty cannot be accepted. Accordingly, Milieudefensie's complaint cannot succeed.

Complaints

210. To the extent that the Court of Appeal has decided, particularly in paras. 7.11, 7.17, 7.26-7.27, 7.52-7.53, 7.67 and 7.82-7.96, that the imposition by the courts of an MD Reduction Duty on enterprises such as Shell does not overstep the bounds of their judicial task and does not impermissibly encroach on the political domain, that decision is unsustainable as a matter of law. The Court of Appeal erred in law, because the following points compel the civil courts to exercise restraint and prevent them from imposing an MD Reduction Duty on enterprises such as Shell. These points are further developed and explained in Sections 5.1.1 to 5.1.6.

a) An MD Reduction Duty interferes with how individual states shape and implement their own climate policy and energy transition. Inevitably, such policies are based on general governmental policy considerations and on important choices of a legal political nature. An MD Reduction Duty even if it were based on climate science and underlying integrated assessment models ("**IAMs**"), would still limit the freedom of the national legislature to make policy considerations and choices to address climate change and the energy transition (see hereafter no. 216). This case therefore differs substantially from cases targeting states' reduction targets (Section 5.1.1).

b) An MD Reduction Duty derogates from the deliberate choice made by the European and Dutch legislatures not to introduce a reduction obligation for individual enterprises such as Shell. It is inconsistent with the existing system of the law, is incompatible with, and interferes with, the cases regulated by law and there is a lack of sufficient societal consensus as to whether enterprises such as Shell should be bound by an MD Reduction Duty (Section 5.1.2).

c) An MD Reduction Duty aimed at limiting the supply of fossil fuels may have consequences for the security and foreign policy of the Netherlands and affects the interests of other sovereign states (including the member states of the European Union). For these reasons, courts should exercise additional restraint in regulating the availability of fossil fuels through a societal standard of care (Section 5.1.3).

d) The instruments of international law that Milieudefensie invokes are not binding on enterprises like Shell as a corporate entity. This constitutes a fundamental difference from cases against states in which the courts are required to give effect to international law instruments in the domestic legal order (Section 5.1.4).

e) The creation of foreseeable, very significant distortions in the European and global level playing field for enterprises like Shell opposes the imposition of an unwritten MD Reduction Duty (Section 5.1.5).

f) The general right to effective legal protection cannot, in horizontal relationships, justify the civil courts encroaching on the balancing of interests reserved for the political domain at the expense of the fundamental rights of private enterprises such as Shell (Section 5.1.6).

Explanation of defence and complaints

5.1.1 An MD Reduction Duty interferes with the way in which states shape and implement their climate policy and energy transition. The imposition of an MD Reduction Duty is necessarily based on general governmental policy considerations and important choices of a legal policy nature. A court-imposed MD Reduction Duty limits the freedom of legislatures to make ongoing policy considerations and choices to address climate change and the energy transition

211. This case involves a distribution issue at the systemic level for which the legislature created economy-wide regulations (see subparts 1.1 and 2.1). As recognised by the Paris Agreement, this distribution issue concerns the world's scarce capacity for GHG emissions. It is caused by the acts and omissions of states, enterprises and citizens. To determine the pace of emissions reductions across different sectors and the availability and use of energy sources within its territory, the legislature of each state must continuously take decisions in respect of this distribution issue and adjust to changing circumstances. The key question in the energy transition is how climate goals can best be pursued, considering all the fundamental interests involved, and which societal impacts are considered acceptable and unacceptable within a range of political, economic, societal, security, environmental and broader policy considerations.

212. The present case against Shell is fundamentally different from *Urgenda* v. the State[510] and *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland* before the European Court of Human Rights, because in these instances, the State retained freedom in determining the mitigation measures and policies to shape the energy transition.[511] The rulings in these cases do not support the idea that civil courts can

[510] NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*).
[511] ECtHR 9 April 2024, ECLI:CE:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).

intervene in the way states shape their climate policies and energy transitions in the context of a claim against a private enterprise. On the contrary, the rulings in both cases suggest that courts should exercise restraint in this regard. As the State has remarked in pending proceedings, this applies even more so because unlike during the Urgenda proceedings, there is currently legislation at both the national and European level with clear choices for the way in which the achievement of the objectives of the Paris Agreement is ensured.[512]

213. In *Urgenda*, the courts held the state to the minimum climate targets that were deemed necessary. The courts monitored the relationship between the legislative and executive powers, giving the State freedom to choose the measures to achieve a 25% reduction in emissions in the Netherlands by 2020.[513] The Supreme Court emphasised that in the Dutch constitutional system, the decision to reduce GHG emissions lies with the government and parliament, and that they have a great deal of freedom to weigh up the political considerations involved.[514] It follows from *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland* that the contracting states have '*a wide margin of appreciation*' in their choice of means of climate mitigation for achieving adequate reduction targets.[515]

214. The present case is about the way in which emissions should be reduced: about the choice of a specific instrument (an MD Reduction Duty) that would be applied to an individual enterprise in a specific sector (the oil and gas sector) involving specific societal and economic interests (the energy trilemma, and the other interests recognised by the legislature). An MD Reduction Duty is the consequence of a judicial decision, whereas these types of decisions not only require technical expertise and political decision-making, but also a weighing of societal interests (as explained in Part 1 and subparts 2.1 and 2.2). As a static finding, it lacks the necessary adaptability to changing circumstances (see for example no. 223 below).[516] Whereas the judiciary lacks both the necessary overview and the investigative tools to assess the impacts of an MD Reduction Duty on various interests, the legislature and the executive power, which engage with foreign jurisdictions on climate policy and security of supply, are suited and authorised to do so.[517]

215. During the oral pleadings on appeal, Shell referred to various sources – of the IPCC, the Council of State and the National Energy Plan – which show that the energy transition requires political decisions and considerations.[518] Shell also provided a number of examples. Germany, for example, has decided to close its nuclear power plants and intends to reduce the use of coal for electricity generation to zero by 2030, while simultaneously relying on natural gas as a transition fuel.[519] Governments must also be able to make choices to respond to acute shortages. This was the case

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[512] This concerns the proceedings brought by Greenpeace Netherlands against the State, the oral hearing of which took place at the District Court of The Hague on 7 and 8 October 2025. See State's Statement of Defence, para. 10.45 and 15.145.

[513] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.2.1 under (a) and 2.2.1 under (b). See also Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.2.

[514] NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*), para. 8.3.2.

[515] ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*), para. 543.

[516] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.5 and 3.2.11.

[517] Cf. also T. Pfeiffer, 'Zivilrechtliche "Klimaklagen" zwischen Recht und Politik', *ZIP* 2025, p. 859-864 and H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 10-11: "*not only are courts badly placed to weigh competing interests in order to come up with specific behavioral rules (in this case: emissions reductions rules for a specific company), in a democracy they also lack the legitimacy to do so.* (…) *It would undermine democracy and the balance of powers if a political system allowed courts to take this type of decision.*"

[518] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.4-3.2.7.

[519] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.2 under (a).

when Japan temporarily closed all its nuclear power plants after the 2011 tsunami and had to import much more LNG for several years.[520] A similar situation arose after Russia's invasion of Ukraine, when the EU decided to rapidly reduce the amount of Russian natural gas in its energy system, for which the EU had to look for other gas suppliers.[521] Recently, the European legislature has urged member states to lower energy costs in order to ensure that enterprises continue to be established within the EU not only for preserving jobs and welfare, but also to help combat climate change.[522] Indeed, if industrial enterprises move their production to countries outside the EU, the EU would lose regulatory control over them.

216. These examples illustrate that the imposition by the courts of an MD Reduction Duty on individual enterprises such as Shell necessarily involves general considerations of government policy and important choices of a legal policy nature.[523] Such judgment involves a decision about the extent to which the availability and use of oil and gas should be permitted during the energy transition. It also involves a decision about the extent to which more restrictive rules are imposed on a national level in an area of shared competences with the European legislator (cf. Part 1). Civil courts should exercise restraint in such cases. The scope for legal development through open standards, such as the societal duty of care of Article 6:162 DCC, is limited by this 'political domain'. This is particularly the case if the legislature's freedom to make political considerations and choices would thereby be restricted in situations in which several solutions are conceivable.[524]

217. It is even more the case, if these considerations and choices are dependent on, and have to be adapted to, changing circumstances that may require renewed trade-offs. There are for instance a range of possible ways of achieving the economy wide emissions reductions required to meet the goals of the Paris Agreement. The Paris Agreement expressly provides States with the flexibility to shape the energy transition in their territories according to their capabilities and constraints, and communicate these efforts through NDCs. States therefore determine on their own which measures they will take to contribute to the GHG emissions reductions required in order to achieve the goals of the Paris Agreement.[525]

218. As Shell has asserted, states have various options for achieving societal reductions through legislation and policy.[526] Governments can deploy policy and legislation aimed at reducing demand for particular services and products. They can, as in Europe and other parts of the world, put a price on emissions, incentivise changes in customer and end-user behaviour, stimulate innovation, provide

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520 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.4.
521 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.4.
522 See for example European Commission, 26 February 2025, *The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation*, COM(2025) 85, p. 2-4 and European Commission 26 February 2025, *Action Plan for Affordable Energy*, COM(2025) 79, p. 3 and 4.
523 J.L. Smeehuijzen, 'Milieudefensie tegen Shell in hoger beroep. Energietransitie te complex voor reductiebevel', *NJB* 2025/32, p. 2671-2672: "*The open standard of what is societally acceptable forces the judge to make an assessment of effectiveness that he is not capable of making. Even if he had been able to foresee the actual implications of his judgment, the essentially political weighing of the interests involved would still have to follow, with all the legitimacy problems that this entails. The way forward for climate cases therefore seems to be (European) legislation that formulates specific obligations.*". See also H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 11: "(…) *such decisions are political to the bone, at their core.*"
524 Cf. NL Supreme Court 12 May 1999, ECLI:NL:HR:1999:AA2756, *NJ* 2000/170, with note by A.R. Bloembergen (*Arbeidskostenforfait*); NL Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*); NL Supreme Court 18 May 2018, ECLI:NL:HR:2018:729, *NJ* 2018/376, with note by K.F. Haak (*Binnenvaartschip*); NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*); NL Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, *NJ* 2020/293 (*IS-uitreizigers*); and NL Supreme Court 24 December 2021, ECLI:NL:HR:2021:1963 (*Box 3 en artikel 1 EP EVRM*). Also Opinion of A-G Snijders for NL Supreme Court 12 July 2024, ECLI:NL:HR:2024:944, para. 3.41 – 3.48 and Shell Pleading Notes in appeal, hearing day 1 - part 2 of 2, no. 3.2.19 and 3.2.20.
525 The EU determines the NDC for the EU and its Member States as a whole.
526 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.4.

investment certainty, regulate production and trade more strictly, provide funding for emissions reductions in developing countries, and so on. Imposing an MD Reduction Duty on enterprises such as Shell is a policy choice, and there are alternatives. The civil courts should minimise the constraints on policy considerations from the outset and allow the legislative and executive branches sufficient latitude to make those policy considerations based on the specific circumstances of the case, which cannot be foreseen at this time.[527] An individual, static MD Reduction Duty on enterprises, imposed by the courts and fixed at some point in the future, wrongly leaves no or insufficient room for such policy considerations.

219. The above carries additional weight because, although the requested MD Reduction Duty is only formally binding on Shell as Milieudefensie's opponent in the proceedings, the Judgment is also potentially of great importance to other enterprises. In paras. 7.26, 7.27, 7.53, 7.55, 7.57 and 7.79, the Court of Appeal made general rulings on the obligations of enterprises (such as Shell) to contribute to countering climate change and to limit emissions. From the perspective of equality before the law, an MD Reduction Duty accepted by the Court of Appeal is also relevant to enterprises other than Shell. This brings us to the prohibition in Article 12 of the General Provisions Act: Milieudefensie is, after all, trying to get the courts to establish unwritten law that applies not only to Shell, but also to the 29 other enterprises it has summoned.[528]

220. Finally, as far as the Court of Appeal in paras. 7.67 and 7.82-7.96 (in particular, in paras. 7.91-7.96) has held that – if there would be a consensus in climate science about specific reduction standards that could apply to enterprises like Shell in order for it to fulfil the aforementioned responsibility – such a reduction standard could be imposed on Shell, the Court of Appeal has acted contrary to the restraint that courts should exercise. The Court of Appeal has failed to appreciate that scientific reports, and the IAMs they are based on, are (i) not intended to be applied directly to enterprises (both parties agree on this);[529] and (ii) not capable of providing a normative or scientific answer to the pace of emissions reductions for any given country, sector or energy source, much less an individual enterprise. That is because IAMs rely on numerous assumptions and value judgments about how emissions reductions could be allocated between different parts of the economy and the energy system. And these assumptions about *how* reductions could and should be achieved in the real world for different countries, sectors, and energy sources entail political and distributional questions which should be left to the legislature (see also Section 5.1.5). [530]

5.1.2 An MD Reduction Duty derogates from the choice made by the legislature not to introduce a reduction duty for enterprises such as Shell and is inconsistent with the existing system of laws and regulations, even though some legislation is still under development, and there is a lack of sufficient societal consensus as to whether enterprises should be bound by an MD Reduction Duty

221. In situations not specifically regulated by statute, the courts should adhere to the existing system of laws and regulations and the situations they do regulate.[531] This rule ensures the fundamental division

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527 NL Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217 (*Kernwapens*), para. 3.3 under (c).
528 This provision reads: "[n]*o court of law may rule on matters subject to its decision by way of general order, disposition or regulation.*"
529 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.2.3 and 7.2.4.
530 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 2 of 4, no. 7.2.3 and 7.2.4.
531 NL Supreme Court 30 January 1959, ECLI:NL:HR:1959:AI1600, *NJ* 1959/548 (*Quint/Te Poel*).

of tasks between the legislative and judicial branches of government. It serves, among other things, to prevent the considerations and decisions underlying the legal system from being too drastically affected and to prevent legal uncertainty as a result of unclarity as to which litigants and cases are covered by the court's decision and which are not.[532]

222. An MD Reduction Duty is inconsistent with the existing system of European and Dutch energy transition and climate legislation and the underlying policy choices.[533] There is, in short, no situation where there is a need for "the courts [to] clean up what the legislature has left undone".[534] As explained in subparts 1.1 and 2.1, the European and Dutch legislatures deliberately chose not to impose individual time-bound absolute reduction standards on enterprises. Motions and proposals to impose such reduction obligations on enterprises have been revoked and/or rejected by the House of Representatives and the Dutch government.[535] The European legislature passed 48 laws and administrative measures prior to and under the European Climate Law,[536] while not opting to impose such reduction obligations on enterprises.[537] The European and Dutch legislatures have established climate regulations for the economy as a whole, consciously opting for other legislative and policy instruments (such as carbon pricing, 'cap-and-trade' systems, sectoral regulation and the regulatory obligation to prepare a climate transition plan). An MD Reduction Duty is inconsistent with and even detracts from the deliberate choices made by the European and Dutch legislatures.[538] Therefore, imposing an MD Reduction Duty goes beyond a court's task to find the law and requires it to inadmissibly make the law.[539]

223. As explained in subparts 1.1 and 2.1, national and European legislation is constantly evolving, mainly to adapt to changing political, geopolitical, economic and societal circumstances. The *Clean Industrial Deal* and the Omnibus Revision presented by the European Commission in February 2025 are illustrative of this, as is the Dutch Government's position on the proposed amendments to the CSDDD (see no. 47j above). The legislature attaches great importance to maintaining and strengthening the competitiveness of the EU, to the internal market and to creating a level playing field for enterprises operating in the EU, which is why it is pushing for maximum harmonisation of the CSDDD and to avoid more stringent national provisions by individual member states.[540] By contrast, a national court imposing an MD Reduction Duty based on unwritten law would result in exactly that: a "national add-on". In short, national and European legislatures are constantly working to shape climate policy and the energy transition, while remaining committed to their climate targets under the EU Climate Law taking changing circumstances into account. Prior to introducing new legislation, they conduct thorough research on the expected impacts of the legislation or policies and adjustments are made when, for example, energy security or other interests necessitate it. EU regulations for instance typically have a proportionality and subsidiarity test that assess if the same

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532 NL Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/2107 (*De Rooyse Wissel*), para. 5.4.
533 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.23.
534 Cf. Opinion of P-G Langemeijer and A-G Wissink prior to NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*), footnote 542.
535 See further Part 1 and subpart 2.1 on this subject.
536 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.2.3.
537 See further Part 1 and subpart 2.1 on this subject.
538 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.23.
539 Statement of Appeal, no. 10.9.1 and 10.9.2; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.1.3 and 1.4.5; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, Chapter 3.
540 *Parliamentary Papers II* 2024/25, 22112, no. 4012 (Letter from Minister of Foreign Affairs Fiche: Proposal Omnibus I (CSRD & CSDDD)). See also the explanatory memorandum accompanying the draft Dutch implementation of the CSDDD, which repeatedly references the need to avoid "national add-ons" (see. p. 26 and 98).

objectives can be accomplished through more balanced and effective measures. Given the current state of play, it is appropriate for civil courts to exercise restraint in interpreting the standard of care owed to society in a way that the legislature did not foresee and, indeed, rejected.[541]

224. Judicial restraint is also called for because there is no societal consensus on how to interpret the unwritten standard of care in the manner advocated by Milieudefensie. This consensus is even more necessary given that national and European legislatures have opted for other means and mechanisms to implement the objectives of the Paris Agreement. Even if there were a legal gap, given the choices made, the courts should be reluctant to fill it in the absence of a (clear) societal consensus in an area characterised by differing societal views on the various interests. As explained in Parts 2 and 3, there is a lack of sufficient societal consensus on the existence of an MD Reduction Duty under unwritten law. This is true of an MD Reduction Duty for Scope 1 and 2 emissions, and even more so for reported Scope 3 emissions. The lack of societal consensus on whether an MD Reduction Duty should be imposed on enterprises such as Shell forces the civil courts to exercise restraint in encroaching on the political domain.

5.1.3 An MD Reduction Duty aimed at limiting the supply of fossil fuels may have consequences for the security and foreign policy of the Netherlands also in view of the extraterritorial effects of a court order based on such legal duty. For this reason, courts should exercise special restraint in regulating the availability of fossil fuels through a societal standard of care

225. In this case, *special* restraint is required, because the measure that Milieudefensie is asking the courts to impose could have foreseeable and unforeseeable far-reaching consequences for Dutch national security and foreign policy. The areas of (national and international) security and foreign policy are the exclusive prerogative of government and parliament who have a wide margin of policy discretion and appreciation in respect of these matters. The State's policy in these areas depends to a large extent on political and other policy considerations related to the circumstances of the case.[542] This means that it is not for the courts to weigh these considerations and that they must exercise special restraint in relation to the considerations weighed by the European and national governments.[543] The security and foreign policy interests are intrinsically connected to energy security.[544] These interests underline the necessity that governments ensure an orderly transition in which, as Shell stated in its appeal, the availability of oil and gas will continue to play an important role.[545]

226. As Shell has argued on appeal, an MD Reduction Duty for enterprises such as Shell can have major consequences for energy security[546], because , by its nature, it fails to ensure that changes to supply

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[541] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.22.

[542] NL Supreme Court 6 February 2004, ECLI:NL:HR:2004:AN8071, *NJ* 2004/329; and NL Supreme Court 3 October 2025, ECLI:NL:HR:2025:1435 (*F-35*), para. 4.8.2.

[543] NL Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, *NJ* 2020/293 (*IS-uitreizigers*).

[544] Statement of defence, no. 429.

[545] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, par. 1.5; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.3. See also D. Yergin, 29 February 2024, 'The return of energy security. Ensuring energy security is a high priority for the energy transition', in S&P Global (Exhibit S-247) as referenced in Shell's Deed for the submission of additional exhibits of 5 March 2024; IEA, 2021, *India Energy Outlook 2021* (Exhibit S-28), p. 133-139, referenced in Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.14, on the importance of gas as transition fuel in India; and J. van den Beukel & L. van Geuns, november 2023, 'Olie en gas tijdens de energietransitie', *The Hague Centre for Strategic Studies* (Exhibit S-154), p. 8, 9, 20 and 25, as referenced in Shell's Deed for the submission of additional exhibits of 19 December 2023.

[546] Statement of Defence, par. 2.2.1 and 2.2.3.2, and no. 403, 408 and 414; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.4.2-1.4.5 and 1.5.7-1.5.12; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.3.

and demand go hand in hand.[547] Specifically with respect to Shell, this is illustrated by the fact that various European countries, such as the Netherlands and Germany, have asked Shell to supply significantly more LNG in the context of the EU-efforts referred to in no. 215 to reduce the amount of Russian natural gas in its energy system. The German government has therefore started to invest in new LNG import infrastructure, recognising that LNG imports are essential for Germany's energy security.[548] Restricting supply by imposing an MD Reduction Duty on an enterprise by the courts, without taking into account the development or fluctuating nature of demand, can exert pressure on security at home and abroad. Given the challenges of the energy transition and the geopolitical environment, energy security is of utmost importance and needs to be safeguarded by governments, who need to have flexibility with respect to their countries' energy mix and supply chains. Governments such as the EU explicitly recognize the role of oil and gas to protect essential security interests.[549]

> This was illustrated on appeal by reference to Shell's role in supplying fuel to the Central Europe Pipeline System, the largest NATO-pipeline system.[550] The fuels supplied via this system to military bases of the NATO are critical for the NATO's military capabilities, flexibility and deterrence. The direct effect of Milieudefensie's intended aim, an MD Reduction Duty that applies to all enterprises like Shell including all large fossil fuel producers, could be to constrain NATO's military capabilities which could pose a potential threat to national, European and international security.

227. An MD Reduction Duty for multinationals like Shell may also affect international relations. As Shell has asserted on appeal, an MD Reduction Duty would affect Shell's operations and investments in more than 70 foreign states across the globe.[551] The speed at which these foreign states want to and are able to implement emission reductions depends on amongst others the political and geopolitical situation, and the means chosen by those states will depend on their existing energy mix and available options (cf. Articles 192(2)(c) and 194(2) TFEU).

> Shell has illustrated this on appeal by referring to the example of Germany's decision to close nuclear power plants and its intention to phase out the use of coal for electricity generation by 2030, relying instead on natural gas as a transition fuel (in the end switching to hydrogen between 2035-2040), as already mentioned in no. 215 above.[552]

States may freely shape their reduction pathways to a net zero economy according to their own national interests.[553] This is also reflected in the Paris Agreement, in which states have explicitly reserved the right to determine their own reduction pathways and exploit their natural resources (Article 3 and 4(2)), as well as in the accepted principle of *common but differentiated responsibilities*

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547 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.19 and following.
548 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 1 of 2, no. 1.5.11; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.4.
549 See with respect to oil Directive (EU) 2009/119, recital 8, with respect to gas Directive (EU) 2024/1788, recital 108; Regulation (EU) 2024/1789, recitals 57 and 60; and M. Draghi, *The future of European Competitiveness. Part A: A competitiveness strategy for Europe*, Luxembourg: Publications Office of the European Union 2025, p. 50.
550 Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 3 of 4, no. 9.3.6.
551 Statement of Defence, no. 388 and 421-426; and Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.1-3.3.3.
552 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.2 under (a).
553 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.3.2; and Shell Pleading Notes dated 3 April 2024, hearing day 2 - part 4 of 4, no. 11.4.9 under (c) as read out.

and respective capabilities (Article 3).[554]

228. In the case at hand, the imposition and execution of an MD Reduction Duty may potentially interfere with matters reserved for foreign states. If the courts would impose an MD Reduction Duty on enterprises such as Shell, they would potentially affect decisions and choices in the context of the energy trilemma not only for the Netherlands, but also for all other states in which those enterprises operate. Imposing an exterritorial MD Reduction Duty on international enterprises such as Shell may therefore affect the distribution of wealth, economic order, international independence, and security interests of other states, which is their prerogative. It may also restrict states in the way they exploit their natural resources, while every state – as was noted above and as Shell has asserted in fact-finding instances –has the right to exploit its own resources according to its own environmental and development policies.[555] An MD Reduction Duty limits the ability of Shell (and other enterprises subject to the reduction duty) to respond to the considerations and choices made by other states. The implications of this are particularly clear if, as Milieudefensie proposes, an MD Reduction Duty for Shell would have to be implemented by reducing the local production of Shell subsidiaries abroad.[556]

229. If it were for the Netherlands to encroach upon such matters, it is for the Dutch legislative and executive powers, and not for the courts, to decide so. That holds for any interference by the courts with foreign policy considerations without a firm basis in binding laws and regulations. It is even more so if compliance with a Dutch court order having extraterritorial effects would result in an infringement of the sovereign rights of foreign states and potentially compromise the European Union both internally and at the global level (cf. Part 1). Public international law opposes measures that impermissibly encroach on matters left to the sovereignty of foreign states. States should refrain from measures that interfere with sovereignty and respect the *regulatory sphere* of other states, based on the principles of non-interference and sovereign equality of states.[557] Although any actual infringement of foreign sovereign interest might only be assessed if a court order would be imposed and complied with, accepting the *possibility* of such interference falls within the prerogative of government and parliament.

5.1.4 The instruments invoked by Milieudefensie are not binding on Shell, which is a fundamental difference from cases against the State, where the courts are obliged to apply these instruments of international law in the domestic legal order

230. The instruments of international law invoked by Milieudefensie (human rights treaties and other conventions such as the Paris Agreement) are not binding on Shell, even if Shell, as a private enterprise, chooses to respect or support the various instruments.[558] This fundamentally distinguishes the present case from existing case law on the climate obligations of states. In contrast to the present case, in *Urgenda* (i) the existence of the State's partial responsibility, (ii) the concretisation of this responsibility in a specific reduction norm and (iii) the imposition of a reduction order on the State were based on treaty obligations directly binding on the Dutch State, which the courts were obliged

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554 Statement of Defence, no. 39, 40, 268, 269 and 424-426. Shell Pleading Notes dated 15 December 2020, hearing day 3 - law-making role of the courts, no. 10.
555 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.4.
556 Cf. Defence on Appeal, no. 889.
557 As recognized in the 1970 Declaration on Principles of International Law.
558 Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 2.2.4.

to apply in the domestic legal order.[559] The Supreme Court's decision in *Urgenda* was, in all essential respects, based on norms arising from a higher order of law (such as the European Convention on Human Rights, the UNFCCC and the Paris Agreement). The same is true of other rulings that have addressed the boundary between the political and legal domains, such as *Arbeidskostenforfait*,[560] *Vrouwenstandpunt SGP*,[561] *Box 3 heffing*[562] and *Stichting v. Aruba and Curaçao*.[563] These were cases against government authorities in which the Supreme Court decided that there was no inadmissible interference in the political domain, precisely because the courts were obliged to apply treaties binding on the State. This is fundamentally different from a case against a private enterprise, where the courts are not constitutionally legitimised to encroach on the political domain on the basis of directly applicable treaty law.

5.1.5 The foreseeable and far-reaching distortions to the European and global level playing field on which enterprises such as Shell operate requires the Dutch courts to exercise restraint and leave the necessary balancing of interests to the legislature

231. The consequences of the imposition of an MD Reduction Duty can be particularly significant and far-reaching. Courts should be reluctant to take such a drastic step, also in view of the above. The Netherlands would be the only country in the world to introduce a civilly enforceable time-bound absolute reduction obligation for individual enterprises such as Shell. This will foreseeably lead to far-reaching distortions of the European and global *level playing field* for enterprises such as Shell. As explained in more detail in Part 1, this is one of the reasons why European law does not allow the imposition of an MD Reduction Duty by member states individually, with the Dutch legislature also stressing the great importance of maintaining and promoting a level playing field in the internal market. Even if EU law did allow it, it would not be consistent with the Dutch constitutional system for the civil courts to make such far-reaching decisions based on unwritten law with such major consequences for the entire economy and society, assuming that an MD Reduction Duty would be effective, which the Court of Appeal rightfully rejected.

5.1.6 The general right to effective legal protection cannot, in horizontal relationships, justify the civil courts encroaching on the balancing of interests reserved for the political domain at the expense of the fundamental rights of private enterprises such as Shell

232. The right to effective legal protection, which Milieudefensie emphasises in the Initiating Document, does not justify the courts' intervention in the balancing of interests reserved for the political domain, such as how climate policy and energy transition should be shaped. As explained in the Parts 1 to 3, there is no unwritten MD Reduction Duty for which the courts must ensure effective protection. Moreover, the meaning of effective legal protection has a fundamentally different meaning in this case against a private enterprise than it did in *Urgenda* (and in the other cases against the Dutch State mentioned in Section 5.1.4).

233. The position of the Dutch State is fundamentally different from that of private enterprises such as

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559 NL Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with note by J. Spier (*Urgenda*), paras. 5.5.3, 5.7.9, 6.4 and 8.3.3.
560 NL Supreme Court 12 May 1999, ECLI:NL:HR:1999:AA2756, *NJ* 2000/170, with note by A.R. Bloembergen (*Arbeidskostenforfait*).
561 NL Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (*Vrouwenstandpunt SGP*).
562 NL Supreme Court 24 December 2021, ECLI:NL:HR:2021:1963 (*Box 3 en artikel 1 EP EVRM*).
563 NL Supreme Court 12 July 2024, ECLI:NL:HR:2024:977-8.

Shell. The state is obliged to ensure the protection of human rights for all those under its jurisdiction.[564] Unlike the state, Shell has no treaty obligation to do so. Moreover, the state is able to provide legal protection to those under its jurisdiction. It has jurisdiction over Dutch territory and can make and enforce rules. Shell does not have this power: Shell does not regulate, but is subject to government regulation, as are other enterprises and citizens. Shell is not a state and, as a private party, can claim legal protection, the state's compliance with the principle of legality and the requirement that a standard of unwritten law be sufficiently recognisable.[565]

234. The right to effective legal protection does not justify the Dutch courts' intervention in the political domain, as legal protection is already provided in other ways. The Dutch and European legal frameworks regulate emissions and implement the goals of the Paris Agreement. An MD Reduction Duty does not provide any relevant additional legal protection if these normative European and Dutch legal frameworks are respected. If so required, the Dutch courts can provide effective legal protection by ordering the state to pursue sound climate policy and weigh the interests at stake. By concentrating decision-making on the organisation of the energy transition (the question of *how*) with the legislative and executive powers, the principles of separation and balance of powers are respected. Where there are different regulatory options and competing interests, in vertical relationships and a fortiori in horizontal relationships with enterprises under the jurisdiction of the state, the right to effective legal protection does not justify encroachment on the political domain.[566]

235. In conclusion: the right to effective legal protection cannot justify the imposition on a private enterprise of a measure that will have little or no effect (see also subpart 2.6). The same therefore applies to the reduction order sought by Milieudefensie, which the Court of Appeal rightly concluded would be ineffective (paras. 7.97-7.110). It is furthermore unlikely, as Shell has asserted, that courts in other relevant jurisdictions would impose an MD Reduction Duty on enterprises such as Shell.[567] Also in this respect, the situation is fundamentally different from that where states are obliged to adopt and implement adequate climate policies, for example on the basis of the ECHR. This is because, in such cases, the courts that compel the state to fulfil its treaty obligation to "do its part" can nevertheless expect other states to fulfil their obligations.

5.2 Defence in the principal cassation appeal and subpart: the imposition by the courts of an MD Reduction Duty on enterprises such as Shell oversteps the bounds of substantive and procedural private law, including the bounds of litigation in the public interest. Accordingly, Milieudefensie's claims are inadmissible

Defence

236. The principal appeal in cassation fails for lack of interest. The imposition by the courts of an MD Reduction Duty on enterprises such as Shell oversteps the bounds of substantive and procedural private law, including the bounds of litigation in the public interest. Accordingly, Milieudefensie's

564 Cf. Article 1 ECHR and NL Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, *NJ* 2020/293 (*IS-uitreizigers*).
565 See also subpart 2.8. Cf. T. Hartlief, 'Kennen wij het ongeschreven recht?', *NJB* 2021/1711.
566 See among others NL Supreme Court 12 July 2024, ECLI:NL:HR:2024:977-8 and HR 24 December 2021, ECLI:NL:HR:2021:1963 (*Box 3 en art. 1 EP EVRM*).
567 International legal rulings and opinions such as the Advisory Opinion of the ICJ do not bring about any foreseeable change in this regard. This opinion barely addresses the question of how states should shape their climate policy, taking into account the energy trilemma, and seems to be well aware of the need to regulate both the demand and supply sides of fossil fuels (see Advisory Opinion, para. 427).

claims are inadmissible.

Complaints

237. By its decisions in paras. 7.11, 7.17, 7.26, 7.27, 7.52 and 7.53, the Court of Appeal failed to appreciate that the question of whether an enterprise has an MD Reduction Duty by virtue of unwritten law is a question of distribution and organisation that is ideally suited to the legislature and on which judges cannot decide in advance. The resolution of this issue goes beyond the boundaries of civil procedural law. It cannot be understood or effectively resolved in terms of the civil rights and mutual obligations of citizens and enterprises, which would have to be effectuated in bilateral proceedings such as the one at issue against an individual enterprise. The interests at stake are too diverse and cannot be reduced exclusively to the climate interest represented by Milieudefensie.

238. With its judgment in paras. 6.1-6.9, and 6.8 in particular, the Court of Appeal failed to recognise that claims such as those brought by Milieudefensie go beyond the limits of a collective general interest action. The Court of Appeal should have declared Milieudefensie's claims inadmissible because they concern political issues, the decision-making on which is reserved for the legislature. In para. 6.8, the Court of Appeal failed to appreciate that Milieudefensie's mere reliance on Shell having a legal duty to reduce the emissions it reports does not render its claims admissible. The Court of Appeal's decision – that if such a legal duty can be established, the political nature of the decisions to be taken, and the fact that not everyone will agree on those choices, do not obstruct the admissibility of a class action – is unsustainable as a matter of law.

Explanation of defence and complaints

239. A civil action, such as the one at hand, is not a suitable forum for a thorough balancing of wide-ranging interests beyond those of the litigants due to the bilateral nature of civil litigation. However, that is required in a case like this, in which the court's decision has repercussions for the organisation and relative distribution in society of the emission reduction task in the energy system transformation.[568] The courts apply bilateral standards that are ill-suited to the essentially multilateral, national and international balancing of interests that the imposition of an MD Reduction Duty requires of the courts. This is clearly demonstrated by the Judgment, which does not take any discernible account of interests other than the climate interest, in particular the interests of energy security and affordability and the fundamental societal interests they serve (see, among others, subpart 2.2). As a result, in civil proceedings, other (that is third party) interests are not heard, or are heard insufficiently, and there is no guarantee, or insufficient guarantee, that these interests and different perspectives will be taken into account in a decision that is of direct importance to third parties, and on whom it could have a direct and significant impact.[569] In the present case, the same applies to the interests of other enterprises, which are affected by the Judgment.

240. The Court of Appeal failed to appreciate this in para. 6.8 and, in particular, overlooked the fact that

[568] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 3.2.12. And, if the civil action would be a suitable forum for a thorough balancing of wide-ranging interests beyond those of the litigants, the Court of Appeal should have done so, see above subpart 2.2.

[569] J.L. Smeehuijzen, 'Milieudefensie tegen Shell in hoger beroep. Energietransitie te complex voor reductiebevel', *NJB* 2025/32, p. 2672. See also H. de Wulf, 'The Shell climate litigation before the court of appeal', *Financial Law Institute Working Paper* 2025-04, p. 11.

the courts are already encroaching on the political domain when they answer the question of whether unwritten law imposes an MD Reduction Duty on enterprises such as Shell. The Court of Appeal should not have reduced the public interest (that Milieudefensie claimed to represent) to a climate interest alone, while ignoring all the other interests that were inextricably also at stake.[570] As Shell asserted on appeal, the very fact that various, partly conflicting public interests are involved in a claim based on an unwritten MD Reduction Duty is beyond the scope of a general interest action. This means that either the requirement of sufficiently similar interests has not been met, or that an interest group such as Milieudefensie cannot adequately represent the diverse interests of its support base – the entire population of the Netherlands and the Wadden Region. In this respect, there is a significant difference to the claims of an interest group against the state, where a very large group of people (the Dutch population), despite their differences, can legally demand that the State fulfil a categorical legal duty (such as the prohibition of discrimination in *Clara Wichmann v. the State*). In vertical relationships, this legal duty differs substantially from the heterogeneous duty of care of a private enterprise towards others, which is based on the societal standard of care and therefore depends on the circumstances of the case.

241. Civil proceedings such as those in the present case are, moreover, inappropriate because the means available to the courts are inadequate to supervise the implementation of a reduction order that, by its very nature, is irrevocable and static and cannot, or at least cannot effectively, be adapted to constantly changing circumstances (see principal defence 2.10). In the present case, there is a specific claim that focuses on what Shell should do in the future. The civil courts are not regulators and have neither the role nor the means to effectively monitor compliance with an MD Reduction Duty. Neither the enforcement judge nor the court of first instance has the ability in practice to exercise permanent judicial supervision.[571] Moreover, the courts cannot modify a forward-looking obligation imposed on a party on the basis of changed circumstances.

5.3 Follow-on complaints

242. The success of (one or some of) the complaints raised in subparts 5.1 and 5.2, also (to the extent that this is not already the case by the success of the respective complaint(s)) invalidates the ground for the Court of Appeal's decision in paras. 7.26-7.27, 7.53-7.55, 7.57, 7.67, 7.73, 7.79, 7.81, 7.93, 7.96, 7.99 and/or 7.111, insofar as the Court of Appeal intended to express therein that Shell bears or can bear an MD Reduction Duty, and/or that Shell bears a general legal duty to reduce emissions to the extent it would support the existence of an MD Reduction Duty.

243. If the complaint set out in subpart 5.2 no. 238 is upheld, the decision of the Court of Appeal in paras. 6.9 to 7.111 will also be invalidated.

Word count according to MS Word's word count function (including footnotes, excluding case and party designations, table of contents, and this text): 69,138.

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[570] Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, no. 4.1.2.

[571] Statement of Appeal, no. 9.2.24 and further; Shell Pleading Notes dated 2 April 2024, hearing day 1 - part 2 of 2, par. 3.4; and *ClientEarth v Shell plc* [2023] EWHC 1137 (Ch) (Exhibit S-233) and *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch) (Exhibit S-234).