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Potential Health Effects of Exposure to Electromagnetic Field that was adopted on 27 January 2015 by the Scientific Committee on Emerging and Newly Identified Health Risks of the European Commission.

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G. The Netherlands

(1) Introduction

Achieving international climate change mitigation goals has been high on the political agenda in the Netherlands for several years. In this country report, we focus on two topics that dominated the debate in 2018. First, we discuss the *Urgenda* judgment that was delivered on 9 October, in which the Hague Court of Appeal decided to uphold the 2015 court decision. We look back on the reasoning of the court in 2015 and point out the most relevant legal elements of the judgment of the Court of Appeal. Second, we focus on a new proposal for a dedicated Dutch Climate Act. In our country report in 2016, we discussed the previous proposal for a Climate Act that was submitted to the House of Representatives. The legislative process of this first proposal was put on hold due to elections. In 2017, the leaders of four parties in Parliament (VVD, CDA, D66, and the Christian Union) presented their new coalition agreement, Confidence in the Future. The current national strategy to reach the climate goals consist of two pillars: (i) there will be a new national climate and energy agreement and (ii) the main points concerning climate and energy of the coalition agreement will be laid down in a Climate Act (Confidence in the Future, Coalition Agreement 2017–21, 41). In June, seven political parties reached a political agreement and presented to the press ‘the most ambitious Climate Act in the World.’ In this report, we give an outline of the proposed Climate Act and explain its role in the process of reaching climate goals in the Netherlands.

(2) *Urgenda*

(A) *Looking Back at the District Court’s Decision in June 2015*

As is well known around the world, on 24 June 2015, the civil section of District Court of The Hague ruled that the Netherlands had breached the standard of due care by implementing a policy that would lead to a reduction of carbon dioxide

emissions by 2020 of less than 25 percent compared with 1990 emissions (*Urgenda v The Netherlands*, Doc. ECLI:NL:RBDHA:2015:7196). Any such policy of the Netherlands was seen by the court as being insufficient to avoid dangerous climate change and, therefore, was unlawful towards the Urgenda Foundation, a citizen's platform that instituted the proceedings, partly on behalf of 886 Dutch individuals. The court ordered the state to cut carbon dioxide emissions by 25 percent by 2020 against a baseline of 1990 emissions. Besides the fact that the District Court found that there was a sufficient causal link between the actions of the Netherlands and the possibility of dangerous climate change, the reasoning of the court in 2015 was interesting for at least two reasons.

First, there is the question of the legal obligation that was allegedly breached by government. The court argued that there was no specific written legal obligation of the state to do more than it was already doing. After concluding that Urgenda could derive no legal obligation of the state from international or European law, the relevant question was whether the actions of the Netherlands were, in fact, in breach of the standard of due care mentioned in Article 162 of Book 6 of the Dutch Civil Code. A doctrinal challenge for the court was how it could establish the actual scope of the duty of care of the Netherlands towards Urgenda as a matter of Dutch law. The court established from certain elements of the case law of the Dutch Supreme Court on negligent endangerment (or hazardous negligence) the factors for determining the scope of the duty of care owed by the state: (i) the nature and extent of climate change damage; (ii) the foreseeability of such damage; (iii) the chance that hazardous climate change will occur; (iv) the nature of the acts or omissions of the state; (v) the onerousness of taking precautionary measures; and (vi) the extent of the discretionary powers of the state, with due regard to public law principles. Somewhat remarkable was the court's ruling that international agreements are also relevant to establish the scope of the duty of care. Using international agreements to establish the unwritten standard of due care of the state in this particular case is not the only argument for the court's decision, but it is a remarkable one since the fact that these are concluded between states and the Dutch Constitution does not provide citizens with rights *vis-à-vis* the state on the basis of such agreements. As it had been established that the current government policy regarding mitigation of greenhouse gases did not comply with the standards deemed necessary by science and international climate policies to avoid dangerous climate change, the state was found to be in breach of its duty of care and, therefore, of acting unlawfully towards Urgenda.

Urgenda had also argued that, under Articles 2 and 8 of the European Convention on Human Rights (ECHR), the state has a positive obligation to take protective measures towards its citizens. Urgenda claimed that the state had been acting contrary to Articles 2 and 8 of the ECHR and that those actions constituted a violation of a personal right of each of the claimants in the sense of Article 162 of Book 6 of the Dutch Civil Code on liability for tort (unlawful

acts). The court, however, found that the Urgenda Foundation itself did not have the status of a potential victim within the sense of Article 34 of the ECHR and, therefore, could not rely on these provisions. Urgenda, therefore, was refused a judgment on human rights grounds.

Second, setting mitigation targets and finding efficient and effective instruments to achieve those targets is generally considered a matter of policy. Therefore, the argument goes, the Dutch system of separation of powers between the legislator and the judiciary does not allow for the order given by the court. The court was aware that its judgment might be perceived as encroaching on the powers of government. It held that Dutch law does not have a full separation of powers but, rather, a balanced system between the powers of state, with the court's role understood in the following terms: 'Separate from any political agenda, the court has to limit itself to its own domain, which is the application of law' (*Urgenda v The Netherlands*, 4.95).

(B) Judgment of the Court of Appeal in October 2018

Although both Urgenda and the state agreed that the emission of greenhouse gases, such as carbon dioxide, entails serious risks for life on Earth, the state lodged an appeal against the judgment of the district court. The same legal questions that were at the heart of the court's judgment on the *Urgenda* case in 2015 were, of course, relevant in the judgment of the Hague Court of Appeal on 9 October 2018 (Doc. ECLI:NL:GHDHA:2018:2610, *Urgenda* appeal). Surprisingly to many in the Netherlands, the Hague Court of Appeal confirmed the District Court's ruling. Moreover, the Court of Appeal seems to have found a stronger legal basis for its judgment, allowing Urgenda to proceed with its claim based on the violation of the human rights guaranteed by the ECHR. The court was not impressed with the constitutional arguments that the court order should be considered rewriting the constitutional system of checks and balances and that the court had overstepped its powers by giving the order.

The first relevant issue was the question of whether Urgenda itself could, indeed, claim violation of human rights (on behalf of Dutch citizens). Different from the District Court, the Court of Appeal ruled that Article 34 of the ECHR does not stand in the way of such a claim being made by Urgenda. The court argued that Article 34 only stipulates who has access to the proceedings before the ECHR and does not provide a binding indication of parties that are allowed to claim the violation of a human right guaranteed by the convention. Furthermore, it argued that Urgenda represents a generation of Dutch citizens that could be—in the words of Article 34 of the ECHR—the victim of a violation by one of the high contracting parties of the rights set forth in the convention.

A second relevant aspect of the ruling by the Court of Appeal is the question that concerns the legal grounds for upholding the judgment in the first instance. The Court of Appeal did not rule that the state was in breach of an unwritten standard of due care but, instead, blamed the state for breaching its human rights

obligations as guaranteed by the ECHR. The judgment states that the current actions of the state to combat climate change are insufficient in light of the state's human rights obligations; more precisely, they are a violation of Articles 2 and 8 of the ECHR, guaranteeing the right to life and to private and family life respectively. In fact, the court interprets these human rights in such a way that the resulting positive obligation for the government to combat dangerous life-threatening climate change is violated in the event that the government relies on a less ambitious carbon dioxide reduction target by the end of 2020 than the goal the Netherlands has as an Annex I country (under the Kyoto Protocol to the United Nations Framework Convention on Climate Change). This target is, on the basis of climate science arguments, a minimum reduction of 25 percent by 2020 (*Urgenda* appeal, para. 72).

It is noteworthy that the reasoning of the Court of Appeal expressly mentions the precautionary principle and accepts this principle as a 'generally accepted principle of international law' (*Urgenda* appeal, para. 63). The government, of course, has discretion to choose between (legislative) measures to give substance to the positive obligation. However, according to the court, the precautionary principle entails that the state cannot opt for measures for which there is a real chance that the reduction will be lower than 25 percent in 2020. In short, the human rights guaranteed in the ECHR force the state to do more against climate change than the 19–27 percent carbon dioxide emission reduction that is expected when the current policy measures are carried out.

Since all other relevant grounds for the appeal of the state were unfounded, the judgment of the Court of First Instance was confirmed on 9 October. The state quickly decided to appeal to the Supreme Court in the Netherlands. The government, however, has also stated consistently since June 2015 that it will implement the *Urgenda* decision (see, for example, the next section on the proposed Dutch Climate Act). The judgment of the Supreme Court will be based on matters of law (and not fact) and will be relevant in the opinion of the Dutch government because society needs an answer to the question of whether the order given by the court is an unauthorized judicial interference in the political domain or simply—as the appeals court argued—a violation of human rights by the state. In that regard, the Court of Appeal argued that the plea from *Urgenda* that the order by the district court could not be considered an unlawful order to issue new (better) legislation was unsuccessfully refuted by the state. The Court of Appeal stated that the court order could also be met without issuing new legislation (para. 68). It explicitly mentioned the example of concluding a Climate Agreement; this idea has become a reality since three hundred organizations, lobby groups, and private individuals presented, after nine months of taking part in roundtable climate talks, a report of more than two hundred pages outlining the ways in which the Netherlands can cut carbon dioxide emissions (see <<http://www.klimaataakkoord.nl>>). Whatever the Supreme Court rules on the question of whether the court order is lawful, the *Urgenda*

Foundation has successfully put the fight against climate change on the political, as well as the legal, agenda in the Netherlands and abroad.

(3) Proposed Dutch Climate Act

On 20 December, the House of Representatives adopted, by a large majority, the proposal for a Climate Act (Parliamentary Papers II 2018-2019, 34 534, A). The next step in the legislative process is the assessment of the proposal by the Senate of the Dutch Parliament.

(A) Outline of the Proposed Dutch Climate Act

The proposed Dutch Climate Act consists of ten provisions and qualifies as a framework act. It determines the long-term policy goals and contains the procedures of policy-making, accountability, and participation. The Act itself does not include any substantive standards or concrete measures to reach the climate goals.

What goals have been stipulated in the Act? The main goal is a greenhouse gas reduction target of 95 percent by 2050 compared to 1990 emissions (Article 2(1)). For the interim period, no binding climate targets are set: only a target to strive for a reduction of emissions in 2030 by 49 percent and the goal to strive for carbon dioxide neutral electricity production by 2050 (Article 2(2)). The national goal concerns the emissions in the whole of the Netherlands, including those from installations subject to the European Union (EU) Emissions Trading Scheme (EU ETS) (Parliamentary Papers II 2017–2018, 34 534, No. 10, 17). For making policy, this means that the economy must be seen as a whole. At the same time, the government has to take into account the European requirements stipulated in EU Regulation 2018/842 on Binding Annual Greenhouse Gas Emission Reductions by Member States from 2021 to 2030. This regulation imposes an obligation on the Netherlands to reduce greenhouse gas emissions in 2030 in non-ETS sectors by 36 percent in relation to their 2005 levels. Important to note is that the goals have no intended legal status. The explanatory memorandum of the proposal explains that the goals are solely guidance for the government's policy. The wording of the provision makes absolutely certain that the target of 95 percent by 2050 is not legally enforceable in court. Only Parliament can hold the government to account for reaching the goal (Parliamentary Papers II 2017–2018, 34 534, No. 10, 7).

The so-called Climate Plan is the primary instrument for the government to shape climate policy. This plan should set out the main lines of the policy measures for the next ten years and aim at achieving the climate targets (Article 3). The Climate Plan must contain the measures that must be taken to reach the goals as well as the measures to stimulate the share of renewable energy and the saving on primary energy use. In addition to the measures, the plan must include an assessment of, among other things, the impact of climate policy on the financial position of households, businesses, and governments,

employment development of the economy, and a just energy transition. The Ministry of Economic Affairs and Climate shall adopt the Climate Plan at least once every five years (Article 4). Every two years after the adoption of the climate plan, the progress of the implementation is reported, and, if the report gives reason to have doubt about the progress concerning the objectives of the Climate Act, measures shall be taken. This procedure of drawing up a Climate Plan is intended to be in line with the cycle of the so-called Integrated National Climate and Energy Plan, which all EU member states must draw up on the basis of EU Regulation 2018/1999 on the Governance of the Energy Union and Climate Action that came into force on 24 December.

Since climate policy is the responsibility of various departments, the Climate Plan must be in accordance with the opinion of the entire ministerial council (Article 5). The involvement of parliament is guaranteed by the requirement that the plan must be submitted to both chambers of Dutch parliament. Participation is also guaranteed because the preparatory procedure of section 3.4 of the General Administrative Law Act applies to the Climate Plan. Everyone is allowed to submit his or her point of view about the draft of the new Climate Plan. However, there is no legal protection against the Climate Plan—no judicial review. According to the explanatory memorandum, the plan does not intend to have a binding, external effect (it is only addressed to government) and, therefore, does not consist of a decision within the meaning of Article 1:3 of the General Administrative Law Act.

In regard to accountability, the Environmental Assessment Agency (Planbureau voor de Leefomgeving) publishes a neutral scientific report every year on the effects and the consequences of the climate policy (Article 6). This report—the so-called Climate and Energy Exploration—must at least contain numbers on the emissions of greenhouse gases, the emissions per sector, and the developments and measures that have influenced these emissions. The minister will send this report to both chambers of the Dutch Parliament every year on the fourth Thursday of October (Article 7). The actual presentation of the state of affairs offers Parliament the opportunity to review and check the government's policy. For the minister, it may be a reason to decide whether additional measures are necessary, when these measures are taken, and how this is achieved. This is expressed by the minister in a so-called Climate Memorandum. This Climate Memorandum must (among other things) include a representation of the consequences of the climate policy on the departmental budget as well as of the financial consequences for households, companies, and governments of significant developments in the policy that deviate from the Climate Plan and the way in which the Climate and Energy Exploration is involved in the next revision or evaluation of the progress of the Climate Plan.

The Advisory Division of the Dutch Council of State is designated to give a critical review on the government's policy. The Advisory Division provides the government with independent expert advice on the Climate Plan (Article 5(3)) and the Climate Memorandum (Article 7(4)). It concerns a general review by

looking at administrative, legal, and financial-economic considerations of the government. The Climate Act contains a specific provision on participation (Article 8). It stipulates that the minister will consult with administrative bodies of provinces, water boards, municipalities, and other relevant parties in order to implement the Climate Act and achieve the goals. The progress concerning the implementation of the Climate Plan and the proposals for (legislative) measures will be discussed by the Advisory Division. Also, the minister must promote concluding Climate Agreements aimed at achieving the climate goals.

(B) Role of the Dutch Climate Act in Reaching Climate Goals

The added value of the Dutch Climate Act is primarily that it stipulates the goals in a legislative act and that the procedure to draw up climate policy and present it to Parliament is regulated. It provides the possibility of holding government accountable for climate policy. Comparing the primary goals of the Act with those in other climate acts reveals that the claim of introducing ‘the most ambitious climate act in the world’ is simply not true. The Swedish Climate Act is far more ambitious since it aims to neutralize its greenhouse gas emissions by 2045, and the target is to cut territorial emissions by at least 85 percent (from 1990 levels) and offset the rest by investing in overseas green projects. Interesting to note is that the goal of this latest Dutch proposal is less ambitious compared to the previous proposed Climate Act of the Netherlands. The interim target has been revised downwards (from 55 percent by 2030 to 49 percent) and is now explicitly formulated as a value ‘to strive for.’ The reason for this is that the government needs flexibility to realize an effective and efficient transition (Parliamentary Papers II 2017–2018, 34 534, No. 10, 9).

The Netherlands is starting the transition towards a sustainable society. However, the Dutch Climate Act gives no direction or pathway to reach the reduction target of 95 percent by 2050. The national climate policy that will be included in the Climate Plan will largely be determined by the so-called Climate Agreement. The Climate Act does not include any regulation of the process of establishing a Climate Agreement. However, there is a website that gives some information on the process, the planning, and results (<<http://www.klimaatakkoord.nl>>). A draft of the National Climate Agreement was presented in December and is expected to be concluded in the first half of 2019. It contains a package of agreements, measures, and instruments to reduce carbon dioxide emissions in the Netherlands by at least 49 percent in 2030. In order to actually implement measures, other legislation or financial frameworks will be necessary. Which legislation that will be, and whether it may be necessary to change current legislation, depends on the concrete measure being implemented. Certainly, the future Environment and Planning Act (discussed in previous reports) will play an important role.

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9. East, Central, and Southern Europe

B. Poland

(1) Multilateral Developments

(A) Ratified International Instruments

On 28 September, approval of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) was granted, although the act agreeing to the ratification of the Doha Amendment was issued by the Sejm (the lower house of the Polish Parliament) in February and signed by the president in March.

(B) Signed International Instruments:

No international instruments were signed.

(C) International Instruments in Force since 2018

No new international instruments, except the above-mentioned amendment, entered into force.

On 2–14 December, the United Nations (UN) Climate Change Conference took place in Katowice. The conference included the twenty-fourth Conference of the Parties to the UNFCCC (COP-24), the fourteenth Meeting of the Parties to the Kyoto Protocol (MOP-14), and the third Meeting of the Parties to the Paris Agreement. The conference's main goal and challenge was preparing a set of rules for the implementation of the Paris Agreement, which was achieved by adoption of the Katowice Rulebook.

Among other successes, the Polish presidency mentions the adoption of other declarations, such as the Declaration on Fair Transition, supported by more than fifty-five countries and the European Union (EU), and the Forest For Climate Declaration, supported by seventy countries. Another document, the Katowice Partnership for Electromobility, was signed by thirty-eight countries and more than 1,200 companies associated with 1,500 cities and regions.