

February 26, 2021

THE CASE OF THE CENTURY – THE FRENCH ADMINISTRATIVE COURT ISSUES A GROUNDBREAKING RULING ON STATE RESPONSIBILITY FOR CLIMATE CHANGE

To Our Clients and Friends:

In response to a claim brought by several environmental advocacy groups (the Associations), which sought to obtain the recognition of the French State's failure to act in response to climate change, the Administrative Court of Paris (the Court) ruled, for the first time in French law, in a judgment of February 3, 2021, that such a liability action against the State was admissible, that the ecological damage alleged by the Associations was established and that the French State was partially responsible for it. The Court ordered a further investigation in order to determine the measures that it could enjoin the French State to adopt to repair the highlighted damage and prevent its aggravation.

I. Context of the ruling rendered by the Court

The Court's ruling comes in the wake of several rulings by the Conseil d'Etat, the French highest Administrative Court, which reveal an intensification of control and compliance with the State's obligations in environmental matters in general, and in connection with climate change in particular.

In a ruling of July 10, 2020, the Conseil d'Etat found that the Government had not taken the measures requested to reduce air pollution in 8 areas in France, as the judge had ordered in a decision of July 12, 2017. To compel it to do so, the Conseil d'Etat imposed a penalty payment of 10 million euros for each semester of delay, the highest amount ever imposed to force the State to enforce a judgement taken by the Administrative judge (CE, Ass., 10 July 2020, *Les Amis de la Terre*, no. 428409).

In a *Grande Synthe* ruling of November 19, 2020, the Conseil d'Etat ruled for the first time on a case concerning compliance with commitments to reduce greenhouse gas emissions. Indeed, the city of Grande-Synthe referred the matter to the Conseil d'Etat after the refusal of the Government to comply with its request for additional measures to be taken to meet the goals resulting from the Paris Agreement. The Conseil d'Etat first ruled that the request of the city, a coastal city particularly exposed to the effects of climate change, was admissible. On the merits, the Conseil d'Etat noted, firstly, that although France has committed to reducing its emissions by 40% by 2030, in recent years it has regularly exceeded the emission ceilings it had set itself and, secondly, that the decree of April 21, 2020 postponed most of the reduction efforts beyond 2020. According to the High Administrative Court, it is not necessary to wait until the 2030 deadline to exercise control over the State's actions since the control of the trajectory that the State has set itself is relevant in ecological matters. Before ruling definitively on the request, the Conseil d'Etat asked the Government to justify, within three months, that its refusal to take additional measures is compatible with compliance with the reduction trajectory chosen to achieve the objectives

set for 2030. If the justifications provided by the Government are not sufficient, the Conseil d'Etat may then grant the municipality's request and cancel the refusal to take additional measures to comply with the planned trajectory to achieve the -40% target by 2030 (EC, November 19, 2020, *Commune de Grande-Synthe et al.*, no. 427301), or even impose obligations on the French State. According to the information provided by representatives of the Conseil d'Etat, the decision could be taken before Summer 2021.

Moreover, in a ruling of January 29, 2021, the Versailles Administrative Court of Appeal referred a question to the Court of Justice of the European Union to determine whether the rules of the European Union law should be interpreted as opening up to individuals, in the event of a sufficiently serious breach by a European Union Member State of the obligations resulting therefrom, a right to obtain from the Member State in question compensation for damage affecting their health that has a direct and certain causal link with the deterioration of air quality (CAA Versailles, January 29, 2021, no. 18VE01431).

II. Reasoning steps followed by the Court

First, the Court ruled on the admissibility of the action for compensation for ecological damage brought by the Associations against the French State. In order to recognize the Associations' status as victims, the Court had to acknowledge the existence of a fault, damage and a causal link between the fault and the damage.

First of all, it recalled that in application of article 1246 of the French Civil Code "*Any person responsible for ecological damage is required to repair it*". Implicitly, the Court considered that this provision is applicable to the State. Article 1248 of the French Civil Code provides that "*The action for compensation for ecological damage is open to any person having the capacity and interest to act, [such as] associations approved or created for at least five years at the date of the institution of proceedings which have as their purpose the protection of nature and the defense of the environment*". After having examined the purpose in the Associations' by-laws, which mention the environment protection and sometimes explicitly the fight against climate change, the Court considered that their liability action was admissible.

Second, the Court had to rule on the existence of ecological damage, bearing in mind that such damage consists of "*a non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by mankind from the environment*" (Article 1247 of the French Civil Code). In this respect, it should be emphasized that the Conseil Constitutionnel considered that the legislature could validly exclude from the set-up compensation mechanism, the compensation for negligible damage to the elements, functions and collective benefits derived by mankind from the environment (Decision no. 2020-881 QPC of February 5, 2021). Consequently, it is up to the courts to determine, on a case-by-case basis, according to the facts of the case, what the notion of "non-negligible damage" covers.

In order to characterize the existence of non-negligible damage, the Court first relied on the work of the Intergovernmental Panel on Climate Change (IPCC), from which it concluded "*that the constant increase in the average global temperature of the Earth, which has now reached 1°C compared to the pre-industrial era, is due mainly to greenhouse gas emissions [resulting from human activity]. This*

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increase, responsible for a modification of the atmosphere and its ecological functions, has already caused, among other things, the accelerated melting of continental ice and permafrost and the warming of the oceans, resulting in an accelerating rise in sea level”.

It also drew on the work of the National Observatory on the Effects of Global Warming, a body attached to the Ministry of Ecological Transition and responsible in particular for describing, through a certain number of indicators, the state of the climate and its impacts on the entire national territory. The Court found that *“in France, the increase in average temperature, which for the 2000-2009 decade amounts to 1.14°C compared to the 1960-1990 period, is causing an acceleration in the loss of glacier mass, particularly since 2003, the aggravation of coastal erosion, which affects a quarter of French coasts, and the risk of submersion, which poses serious threats to the biodiversity of glaciers and the coastline, is leading to an increase in extreme climatic phenomena, such as heat waves, droughts, forest fires, extreme rainfalls, floods and hurricanes, which are risks to which 62% of the French population is highly exposed, and is contributing to the increase in ozone pollution and the spread of insects that are vectors of infectious agents such as dengue fever or chikungunya”.*

In light of all these elements, the Court considered that the ecological damage claimed by the Associations had to be considered as established.

Third, the Court had to identify the obligations of the States in responding to climate change in order to, in a second stage, rule on possible breaches in relation to these obligations.

The Court considered that it arose in particular from the provisions of the Paris Agreement of December 12, 2015, as well as from European and national standards relating to the reduction of greenhouse gas emissions, that the French State had committed to take effective action against climate change in order to limit its causes and mitigate its harmful consequences. From this perspective, the Court recalled that the French State had chosen to exercise *“its regulatory power, in particular by conducting a public policy to reduce greenhouse gas emissions emitted from the national territory, by which it undertook to achieve, at specific and successive deadlines, a certain number of objectives in this area”.*

The Court then examined compliance with the greenhouse gas emission reduction trajectories that the State had set itself in order to determine whether it had failed to meet its obligations. To do so, it relied in particular on the annual reports published in June 2019 and July 2020 by the High Council for the Climate, an independent body whose mission is to issue opinions and recommendations on the implementation of public policies and measures to reduce greenhouse gas emissions of France. In its two reports, the High Council for the Climate noted that *“the actions of France are not yet commensurate with the challenges and objectives it has set itself”* and noted the lack of substantial reduction in all the economic sectors concerned, particularly in transportation, agriculture, construction and industry sectors.

The Court concluded that the French State should be regarded as having failed to carry out the actions that it had itself recognized as likely to reduce greenhouse gas emissions. The guilty failure to meet its commitments was thus characterized, as was the causal link between that failure and the ecological

damage previously identified. The Court therefore considered that part of that damage was attributable to the failure of the French State to act.

Fourth, the Court had to rule on the modalities of reparation of the ecological damage. Under the terms of the law, this was to be carried out primarily in kind. It is only in the event of impossibility or inadequacy of the reparation measures that the judge sentences the liable person to pay damages to the plaintiff, such damage being allocated to the reparation of the environment.

The Court considered that in the state of the investigation of the case, it was not in a position to determine the measures “*that must be ordered to the State*” to repair the observed damage or to prevent its future aggravation. He therefore prescribed a further two-month investigation in order to identify the measures in question.

Fifth, it sentenced the State to pay each of the Associations a symbolic sum of one euro as compensation for the moral prejudice it had caused them by not respecting the goals of reducing greenhouse gas emissions.

III. Follow-up to the Court’s ruling

The Court’s ruling, which sentences the State for not having implemented the necessary measures to achieve the greenhouse gas emission reduction targets, is a landmark decision in French law.

The second ruling that will be rendered following the two-month additional investigation ordered by the Court could constitute another historic decision if the Court were to enjoin the State - as the terms of the Ruling seem to imply - to implement a number of specific measures aimed at achieving the expected reduction targets, if necessary within a set timeframe. When this judgment comes into effect, possibly before the 2021 Summer, it will then be necessary to examine the impact of the measures that would thus be ordered on the economic sectors and companies likely to be affected.

At this stage of the proceedings, it is not possible to determine whether or not the French State will decide to appeal the ruling rendered by the Court to the Administrative Court of Appeal of Paris. If the latter were to uphold the ruling, the French State could then appeal to the Conseil d’Etat. A final decision on the issue at stake in this case could thus only be made in several years’ time.

The Court’s ruling could also have the immediate effect of modifying the provisions of the “*Bill to combat climate change and strengthen resilience to its effects*” which will be debated in the French Parliament from the end of March 2021. During the discussion, parliamentarians in favor of strengthening the provisions of this law could rely on the Court's ruling to motivate and justify their position.



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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following lawyers in Paris by phone (+33 1 56 43 13 00) or by email:

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