

TAKING FLAWED NATIONAL ENERGY AND CLIMATE PLANS TO COURT

LESSONS LEARNED
FROM PREVIOUS CASES

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Executive summary

National Energy and Climate Plans (NECPs) can be a powerful tool to put European countries on track to stay within the critical 1.5°C global warming threshold in order to avoid the worst consequences of climate change. Those plans will be revised by EU Member States by June 2024, and assessments of the draft revised NECPs have pointed out concerning findings. Against this background, and if Member States do not fix these major gaps when delivering the final version of their NECP, these plans could be challenged before courts and tribunals.

Since the entry into force of the EU Governance Regulation in 2018, legal cases focusing on NECPs have already been filed to several jurisdictions. This includes a request from an Italian NGO to the Aarhus Convention Compliance Committee, requests leading to two judgements from the Spanish Supreme Court and the case of *Klimaatzaak* in Belgium. These cases either focus directly on failings relating to a certain country's NECP (e.g. lack of public consultation during the preparation of the plan) or on a country's overall climate ambition, using the NECP as key evidence to demonstrate related failings.

This briefing extensively analyses these cases, as they offer valuable insights for local organisations or citizens willing to start judicial proceedings on their country's revised NECP. In particular, four lessons can be learned and applied in the future.

1. Use NECPs in Court. Judges can and should be called to intervene if states do not comply with their legal obligations.
2. Make your own NECP recipe. There is not only one way in which NECPs can be used in a courtroom. Each applicant, depending on the national framework, the content and the particulars of the plan, should make its own NECP recipe.
3. Courts and review mechanisms may be shy to rule on public participation while consultations can still take place.
4. Recycle legal arguments. There is no need to reinvent the wheel. The Aarhus Convention and EU law apply to all EU Member States. While facts are country dependent and should be carefully compiled and assessed, the legal arguments used in previous legal cases can be strategically replicated to target similar issues.

Other pending and decided cases against national governments and public authorities referring to issues related to NECPs have been filed in the Czech Republic, Estonia, Italy, Portugal and Romania (as of March 2024), although NECPs are not the main focus of the legal dispute.

TABLE OF CONTENTS

01 Introduction Pg. 01

02 Lessons learned from past NECPs legal cases Pg. 05

03 Case studies Pg. 06

- A. A Sud Ecologia e Cooperazione Odv ETS v Italy
- B. The “Klimaatzaak”
- C. Juicio por el Clima I.0
- D. Juicio por el Clima II.0

04 Resources Pg. 18

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National Energy and Climate Plans (NECPs) can be a powerful tool to put European countries on track to stay within the critical 1.5°C global warming threshold in order to avoid the worst consequences of climate change. These plans, required under EU law, oblige EU Member States to describe, in an integrated manner, their climate and energy objectives and targets – as well as the policies and measures to achieve them until 2030 (with an outlook to 2040 and the longer term).

NECPs covering the period 2020-2030 were first adopted in 2019 and are being updated in 2023-2024, as required by the EU Governance Regulation [1]. The deadline for Member States to submit the draft updated plans was in June 2023. The European Commission has published an assessment of these drafts and made recommendations to Member States in December 2023 and February 2024. Each country must now take due account of these recommendations and provide the final versions of the plans by the end of June 2024.

Assessments of the draft revised NECPs undertaken by civil society [2], research institutes [3] and the European Commission itself [4] have all pointed out concerning findings. On the substance, the draft plans are collectively falling short of all EU 2030 binding climate targets and energy contributions. Individually, some Member States are backtracking on previous commitments (e.g. delaying coal phaseout) and failing to include a timeline to end national fossil fuel subsidies. The absence of a solid assessment of investment needs and financing sources has also been highlighted.

On the procedural side, there was significant delay in the submission of several draft plans, and most Member States did not organise proper public consultation processes in line with EU law [5] or the Aarhus Convention [6]. Several Member States also did not comply with the obligation to set up Multi Level Climate and Energy Dialogues gathering a wide range of stakeholders (local authorities, civil society, business representatives, investors and the general public) to discuss different scenarios for climate and energy policies [7].

[1] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

[2] Climate Action Network Europe, [Time to step up national climate action - An assessment of the draft National Energy and Climate Plans updates](#), October 2023.

[3] European Climate Neutrality Observatory, [Net zero risk in European climate planning: A snapshot of the transparency and internal consistency of Member States' NECPs](#), January 2024.

[4] European Commission, [EU wide assessment of the draft updated National Energy and Climate Plans - An important step towards the more ambitious 2030 energy and climate objectives under the European Green Deal and RePowerEU](#), December 2023.

[5] Article 10 of the Governance Regulation.

[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The EU and all 27 Member States are Parties to the Aarhus Convention.

[7] Article 11 of the Governance Regulation

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Against this background, and if Member States do not fix these major gaps when delivering the final version of their NECP, these plans could be challenged before courts and tribunals. The European Commission itself announced in December 2023 that it sent a letter of formal notice to Bulgaria, Austria and Poland for failing to submit their draft revised NECP by the deadline [8]. This is the first step of the so-called infringement procedure, which could be followed up by the Commission taking those Member States to EU court if they continue violating the law. This could ultimately result in a penalty payment imposed on those states.

Alongside judicial proceedings at the European level, local organisations and the public could also rely on national courts to force their governments to comply with their legal obligations. Climate litigation can indeed affect the outcome and ambition of overall climate governance [9]. Potential applicants could use several legal instruments to support their claim, such as breaches of EU law, the Aarhus Convention and human rights.

Since the entry into force of the EU Governance Regulation in 2018, legal cases focusing on NECPs have emerged in several countries. These cases either focus directly on failings relating to a certain country's NECP (e.g. lack of public consultation during the preparation of the plan) or on a country's overall climate ambition, using the NECP as key evidence to demonstrate related failings. These cases offer valuable insights for local organisations or citizens willing to start judicial proceedings on their country's revised NECP.

The aim of this briefing is to analyse these past legal cases in which NECPs played a key role and draw lessons that could be applied in future cases. This document identifies several practical, forward looking lessons (section II). An extensive analysis of several key legal cases focusing on NECPs is then provided (section III). These cases include:

- In Italy: the legal complaint of A Sud Ecologia e Cooperazione Odv ETS v Italy, before the Aarhus Convention Compliance Committee (ACCC)
- In Spain: the legal cases of Juicio por el Clima (I.O and II.O), before the Spanish Supreme Court
- In Belgium: the legal case of Klimaatzaak v Belgium, before the Brussels Court of First Instance and the Brussels Court of Appeal

Another aim of this briefing is to offer a complementary approach to the Legal Intervention Guidelines on EU National Energy and Climate Plans published by the Climate Litigation Network [10].

[8] European Commission, '[December infringement package – key decisions on energy](#)', 21 December 2023.

[9] IPCC, '[National and sub-national policies and institutions](#)', Chapter 13 in Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

[10] April Williamson and Filippo P. Fantozzi, '[Legal Intervention Guidelines: EU National Climate and Energy Plans](#)', December 2023.

This document aims to provide national organisations in the EU with information about legal intervention options that could be used for challenges related to the revision of NECPs and the timeframes for legal action. The Guidelines highlight the aspects of the NECP revision process that can potentially be challenged, namely (i) public participation and consultation; (ii) the content of the NECP and (iii) its implementation. The aim of this briefing is to offer an approach complementing the Guidelines, by analysing legal cases to provide practical examples and lessons of how NECPs have been incorporated into cases so far.

NECPs in domestic litigation

The three above-mentioned cases have a strong focus on NECPs and are therefore the object of an extensive analysis in this briefing (see part III). It is also worth mentioning other pending and decided cases filed against national governments and public authorities referring to issues related to NECPs, although they are not the main focus of the legal dispute. This includes cases in the Czech Republic, Estonia, Italy, Portugal and Romania (as of March 2024).

In particular, plaintiffs have relied on NECPs as a component of their evidence to support claims relating to the State's insufficient climate mitigation efforts. For example, in *Último Recurso vs Portugal* (pending), the plaintiffs labelled the 2019 Portuguese NECP as “the main instrument of national energy and climate policy with a view to carbon neutrality” [11]. The claimants flagged shortcomings identified by the Organisation for Economic Development and Cooperation (OECD) concerning the level of transparency and the adequacy of the policies identified in the 2019 NECP, which led the OECD to conclude that “it is not yet clear how Portugal will deliver on its 2030 targets” [12]. The claimants relied on this analysis as evidence of the State's projected failure to meet its 2030 climate mitigation objectives [13].

Similarly, in the Italian case *A Sud et al v Italy* (2024), the plaintiffs described the Italian NECP as “the founding document of the response strategies of the Italian State” [14]. The summons heavily rely on the planned policies under the 2019 NECP to demonstrate Italy's projected failure to do its part to keep the long-term temperature limit of the Paris Agreement within reach [15]. Moreover, some of the plaintiffs participated in the consultation phase of the preparation of the Italian 2019 NECP, submitting written observations and highlighting the NECP's overall inconsistency with limiting global temperature rise to 1.5 °C. As such, they argued that, by ignoring the concerns and shortcomings they flagged, the State violated its duty to act in good faith in the decision-making process leading to

[11] Central Civil Court of Lisbon, *Associação Último Recurso et al. vs the Portuguese State* (pending) quote from the summons, page 8, para. 26 [automated translation].

[12] *Ibid.*, pages 21 and 22, paras. 78 – 79; also see OECD, OECD Environmental Performance Reviews: Portugal 2023, section 2.1.2.

[13] *Ibid.*, pages 21 and 22, paras. 78-79.

[14] Civil Court of Rome, *A SUD et al. vs Italy* (pending) quote from the summons, page 37, para.III.10 [automated translation].

[15] *Ibid.*, page 38, para. III.13.

the adoption of the NECP. This conduct further contributed to the Italian State's alleged negligence (mainly based on the provisions of the Civil Code) in the fight against dangerous climate change [16].

In addition, various rulings from courts in the Czech Republic, Estonia, and Romania reference NECPs in different ways, although without significant implications for the outcome of the case. In *Declic et al. vs. the Romanian Government* (2023, on appeal), the Court of Appeal of Cluj relied in part on the adoption of the 2019 NECP as evidence to show that the State did not show “manifest disinterest” in the achievement of its “environmental objectives” pertaining to climate mitigation [17]. In *Fridays for Future Estonia v. City of Narva-Jõesuu* (2023), the Estonian Supreme Court alluded to the legal status of the 2019 Estonian NECP as a “communication” directed towards the European Commission – rather than a “strategic development document” – recalling that the 2019 NECP did not include new mitigation objectives but merely reiterated the existing domestic targets adopted in 2017 [18]. In *Klimatická žaloba* (2023, on appeal), the Czech Supreme Administrative Court only referred to the Czech Republic’s obligation to submit a NECP but did not elaborate further on its legal status [19].

[16] *Ibid.*, pages 89-96, paras.VI.19-VI.28, also with reference to Article 1(1) of the Governance Regulation. The plaintiffs relied on this argument in a subsidiary request, alleging the State’s liability for “qualified social contact” under the Italian Civil Code.

[17] Court of Appeal of Cluj (Administrative and Tax Litigation Section III), *Declic et al. vs. the Romanian Government* (06 June 2023 (On appeal), page 35 [automated translation].

[18] Estonian Supreme Court (Court of Cassation), *MTÜ Loodusvõlu (Fridays for Future Estonia) v. City of Narva-Jõesuu* (11 October 2023), pages 16-17, para. 26 [automated translation].

[19] Supreme Administrative Court, *Klimatická žaloba ČR, z.s. vs. the Government of the Czech Republic; the Ministry of the Environment; the Ministry of Trade; the Ministry of Agriculture; and the Ministry of Transport* (20 February 2023), 9 As 116/2022, page 183, para. 128 [automated translation].

02 LESSONS LEARNED FROM PAST NECPS LEGAL CASES

1. USE NECPS IN COURTS

NECPs are an essential document common to all EU Member States. Adopting an NECP in line with European law and international commitments, following participatory processes, is not a choice - it is a legal duty. Judges can and should be called to intervene if states do not comply with this duty.

2. MAKE YOUR OWN NECP RECIPE

In some Member States, the NECP may be the main or only document setting out national emissions reduction targets up to 2030 and the key policies that will be used to achieve these targets. In other Member States, there may be parallel national legislation containing national climate planning processes. This means that there is not only one way in which NECPs can be used in a courtroom. Each applicant, depending on the national framework, the content and the particulars of the plan, should make its own NECP recipe. Even if the NECP is not at the centre of a legal case, using it as an element of evidence can substantiate the main claims - especially in climate ambition related cases where NECPs can be a strong evidential basis to show that targets and policies are not sufficient to limit global temperature rise to 1.5°C (as exemplified in *Klimaatzaak*).

3. COURTS AND REVIEW MECHANISMS MAY BE SHY TO RULE ON PUBLIC PARTICIPATION WHILE CONSULTATIONS CAN STILL TAKE PLACE

For any legal request aiming to redress public participation failures in the preparation of (updated) NECPs, it may be preferable to wait until the end of the final process to avoid the request being deemed inadmissible. This is what happened in the case of *A Sud Ecologia e Cooperazione Odv ETS v Italy* before the Aarhus Convention Compliance Committee.

4. RECYCLE LEGAL ARGUMENTS

There is no need to reinvent the wheel. The Aarhus Convention and EU law apply to all EU Member States. While facts are country dependent and should be carefully compiled and assessed, the legal arguments used in previous legal cases can be strategically replicated to target similar issues - for example on public participation and access to information before the Aarhus Compliance Committee, where the case of *A Sud Ecologia e Cooperazione Odv ETS v Italy* offers strong legal argumentation that can be replicated towards other countries.

03 CASE STUDIES

A

A Sud Ecologia e Cooperazione Odv ETS v Italy

*Public information and participation in the case of the
Italian NECP updating process*

Jurisdiction

Aarhus Convention Compliance Committee (ACCC) pursuant to chapter VI of the Decision of the meeting of the Parties n. 1/7 of 21-23 October 2002

Summary of the case

On 5 August 2023, the Italian NGO A Sud submitted to the ACCC the communication No. PRE/ACCC/C/2023/205, alleging the failure of the Ministry of Environment and Energy Security (MASE) to ensure early and effective public information and participation in the early stage of the consultation process for the adoption of the Italian draft updated NECP.

The Communication is based on Articles 3, 5, 6 and 7 of the Aarhus Convention in conjunction with Articles 9, 10, 11 and 14 of the Regulation (EU) 2018/1999. On the one hand, the public could not consult the updated NECP draft before its submission to the European Commission on 30 June 2023, losing its opportunity to participate in the planning of the draft. On the other hand, the Ministry did not set up a website exclusively dedicated to the NECP to ensure adequate and timely public information.

The objective of the communication was to establish the violation of the provisions of the Convention to urge Italy to take action to ensure public information and participation. On 20 September 2023, the Committee deemed the communication inadmissible, *inter alia*, considering the public consultation process for the adoption of the final updated NECP still open. On 19 December 2023, A Sud sent a request for reconsideration of the Committee's decision arguing the fact that the Strategic Environmental Assessment (SEA) and consultation procedure for the adoption of the final updated NECP were still open did not preclude the violation of the public's right to information and participation at an early stage of the consultation process for the adoption of the draft updated NECP. Inadmissibility was confirmed on 19 February 2024 in accordance with the procedure set out at paragraph 114 of the Guide to the Compliance Committee.

The problematic aspects of the NECPs

The duty to ensure public information and participation in the early stage of the NECP update process and well before the adoption of the draft updated plan - The Ministry opened the public consultation process on Italy's NECP on May the 8th and concluded it on May the 23rd 2023. It submitted the draft to the European Commission on 30 June 2023, while the publication of the updated NECP draft took place on 19 July 2023, on the website of the MASE, when the early phase of the public consultation process for the adoption of the draft updated plan was already closed. Therefore, during the consultation process in May and before the submission of the draft on 30 June 2023, the public never had access to a draft of the new plan. As a result, the public could not adequately and timely participate in the early phase of the consultation process. In fact, the public was not allowed to comment on or influence the content of the draft at an early stage of the consultation process. On the contrary, the public had only the possibility to fill in a multiple-choice questionnaire, in itself a limiting instrument to facilitate participation, made available in a very tight timeframe 8-26 May 2023, without access to an early draft of the NECP.

The obligation of Italy to set up a dedicated section or website where information on the NECP shall be published in an appropriate and timely manner – Italy failed to set up a dedicated website or section entirely dedicated to the NECP in which to publish all the information related to the plan in a timely and adequate manner. Specifically, during the early stage of the NECP update process, the Ministry of the Environment and Energy Security (MASE) published different relevant information on its general website, such as the news concerning the beginning of the public consultation process and the public's opportunity to fill out an online form, published in the press releases section. Other information about the plan is published in a section entitled "Energy and Climate 2030". This conduct fails to establish and maintain a clear, transparent, and consistent framework to ensure the collection and dissemination of information related to the Italian NECP.

Legal arguments used in the case

1. The duty to ensure public access to all relevant information during the early stage of the consultation process, including the updated draft NECP in order to allow public participation in a timely and appropriate manner, so that the public authority can adequately take into account the observations expressed by the public well before the submission of the draft to the European Commission on 30 June 2023 (article 9(4), 10, 11 and 14 of the Regulation (EU) 2018/1999 and articles 6 and 7 of the Aarhus Convention);
2. The duty to set up a website or a dedicated section to ensure public information in a transparent and clear framework (Articles 10 and 11 of Regulation (EU) 2018/1999 and Articles 3(1); 5(2)(b)(i), (3)(c), and (5)(a) of the Aarhus Convention);
3. To set out the conduct of the MASE, A Sud referred to the acts adopted by the Ministry and published on its online website. Furthermore, A Sud referred to principles laid out by the ACCC in its case-law and to the guidelines of the European Commission to describe the above legal framework (Notice on the Guidance to Member States for the update of the 2021-2030 NECP(2022/C 495/02), paragraph 3.2; Assessment of the draft updated NECP of Italy {C(2023) 9607 final, 18 December 2023}, paragraph 2.2). To corroborate these factual and legal arguments A Sud also referred to some reports published by authoritative NGOs (CAN-Europe, Public participation in National Energy and Climate Plans: Evidence of weak & uneven compliance in Member States, 20 April 2023).

Outcome of the case

The pre-admissibility of the case shows that, in principle, the Committee can be seized with regard to public information and participation during the NECP consultation process. Furthermore, the case has brought the committee into the fold of possible climate rights cases on the grounds of articles 6 and 7 of the Aarhus Convention. If successful, the case could have allowed the Committee to clarify certain obligations that states are required to fulfil to ensure public information and participation during the consultation process for updating the NECPs. Nevertheless, at present, first the Compliance Committee deemed the communication to be inadmissible in accordance with para. 20 (d) of the annex to decision I/7 of the Meeting of the Parties to the Convention, since the adoption of the final updated NECP had not yet been completed and the SEA was still open. Finally, this decision was confirmed on 19 February 2024 in accordance with the procedure set out at paragraph 114 of the Guide to the Compliance Committee.

Regardless, through the relationship of interpretation between provisions of Regulation (EU) 2018/1999 and Aarhus Convention, the communication turned the spotlight on the relevance of rights to information and participation in the context of climate decision-making procedures, as in the case of NECPs' upgrading consultation process. The political and judicial relevance of the case may depend on the decision of the Committee on the merit. Nevertheless, it is the first case on this topic before the Committee, confirming the innovative quality of the communication and does not exclude future communications. The case is reported in the [website](#) of the ACCC, on the [Climate Case Chart](#) of the Sabin Center for Climate Change and in Climate Litigation Network's [Legal Intervention Guidelines](#) on NECPs. Furthermore, the possible new principles developed by the Committee as well as legal arguments advanced by A Sud in the case can be strategically replicated in other proceedings concerning the conduct of Member States, including after the end of NECPs' update processes.

The role played by A Sud

In parallel to the "[Last Judgment](#)" case, the first climate rights' litigation in Italy against the Italian State, the association A Sud devoted time and energy to compile relevant documents and legal arguments in order to submit a communication before the Aarhus Convention Compliance Committee (ACCC) concerning the lack of public information and participation in the early stage of the NECP updating process. This is the first case brought at the European level about this topic. The low cost of the procedure, its relative rapidity, and its competence with respect to the specific violations are positive aspects facilitating the use of communications to ACCC. The main difficulty was related to the absence of an up-to-date commentary on the provisions of the Aarhus Convention that considered the body's most recent case law and principles. A risk related to eventual final negative decision from the ACCC is that Italy makes no further effort in public information and participation in climate decision-making processes.

Latest update

A Sud sent a request for reconsideration of the Committee's decision on December the 19th 2023 as in the organisation's view, to be in a drafting phase does not preclude the due implementation of early and informed public information and participation. The request for reconsideration has been rejected. In the meantime, on February 26th, MASE has released a second questionnaire which reflects the final phase of Italy NECP's consultation, providing again a very narrowed participation modality in a very limited timeframe of 34 days. On that date, the information on the consultation process was not published in the section "Energy and Climate 2030" which supposedly should gather all information on Italy NECP.

B

The “Klimaatzaak”

VZW Klimaatzaak v. Kingdom of Belgium & Others

Jurisdiction

First Instance Court of Brussels (2021); Court of Appeal of Brussels (2023)

Summary of the case

In 2015, Klimaatzaak, a Belgian NGO, filed a case against Belgian authorities (the Belgian State, the Walloon Region, the Flemish Region, and the Brussels-Capital Region) over their failure to adequately reduce GHG emissions and protect human rights from dangerous climate change. The plaintiffs claimed that the defendants were acting unlawfully under human rights law (Art. 2, right to life; and Art. 8, right to private and family life under the European Convention of Human Rights) and civil liability rules (articles 1382 and 1383 of the (former) Civil Code) by failing to do their part to mitigate climate change. During the legal proceedings, more than 58,000 individual co-plaintiffs formally joined the lawsuit. In June 2021, the First Instance Court of Brussels established, for the first time, the negligence of Belgian public authorities in relation to their insufficient climate mitigation efforts [20]. In its judgment, the Court recognized that the NGO Klimaatzaak, as well as the over 58,000 co-plaintiffs, are at risk of harm because of the ongoing climate emergency. The Court concluded that the federal State and three regional governments were jointly and individually responsible for protecting their citizens from negative climate impacts, and found that they had violated their legal obligations, but did not order them to increase their mitigation efforts. In November 2023, the Court of Appeal of Brussels [21] confirmed that the federal State and two regional public authorities had acted unlawfully by not pursuing sufficient emission reduction efforts by 2020 and by 2030 [22]. In particular, it confirmed the findings of breaches of human rights and civil liability rules established by the First Instance Court in 2021. The Court of Appeal also issued an injunctive relief (a mandatory order), ordering the three defendants to reduce the overall level of Belgian territorial GHG emissions by at least 55% by 2030 compared to 1990 levels [23].

The problematic aspects of the NECP and how it was used in Court

In Klimaatzaak, Belgian courts were required to address one key question: whether Belgian public authorities' failure to adequately reduce GHG emissions by 2020 and by 2030 is compatible with their positive obligations to protect human rights and exercise due diligence under civil law. As such, shortcomings in the approval phase and implementation process of Belgium's NECP were not the main focus of the case. However, compliance with NECP-related legal requirements is one of the key elements that Belgian courts took into account to establish that the defendants' conduct was unlawful.

[20] Court of First Instance of Brussels, *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021]. Unofficial translation of the judgment available here: <https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/>

[21] Court of Appeal of Brussels, *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023]. Unofficial translation of the judgment available here: <https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/>

[22] The Court of Appeal exonerated the Walloon Region, finding that the Region has done enough in terms of its climate mitigation policies.

[23] Court of Appeal of Brussels, *Klimaatzaak* (2023), p. 158. .

The First Instance Court of Brussels (2021) highlighted Belgium's shortcomings and failures to comply with EU legal requirements in respect of the development, adoption and implementation of Belgium's NECP. In particular, the Court highlighted the criticisms flagged by the European Commission ('the Commission') in its 2020 assessment of Belgium's final NECP (2019), and recalled two main shortcomings identified by the Commission:

- **Substantive failures:** The Commission found that Belgium was not on track to meet its own 2030 target, despite *"the numerous additional measures announced in the NECP"* [24]; The Commission noted a *"lack of clear correspondence"* between Belgium's 2030 mitigation target and the measures indicated in the NECP to achieve it. It also found that *"the NECP does not include any data on emissions in the LULUCF sectors"* [25] and that the Belgian NECP's approach to renewable energy, energy efficiency and energy supply were *"unambitious"*, *"too low"* and *"lacking clear targets"* [26].
- **Lack of coordination between the federal and regional governments:** The Commission considered that the NECP was *"not yet an integrated and coherent plan based on a common vision"* and encouraged Belgium *"to ensure greater coordination and integration of regional plans in order to achieve synergies between the different measures"* [27].

Overall, the First Instance Court relied on *"the mixed results in terms of figures"*, *"the lack of good climate governance"*, and the *"repeated warnings from the European Union"* as elements of evidence to establish the defendants' liability under the (former) civil code and the European Convention on Human Rights.

The Court of Appeal of Brussels (2023) expanded on the lower court's findings – also with respect to the draft of Belgium's updated NECP – and flagged three main shortcomings:

- **Procedural failures:** The Court found that Belgium did not submit the draft of its new NECP to the European Commission by the June 2023 deadline, *"despite the urgent request to this effect sent in February 2023 by the country's various strategic councils"* [28].
- **Substantive failures:** The Court established that the execution of the existing NECP – *"criticized by both the European Commission and all the country's strategic councils"* – is not expected to meet Belgium's existing mitigation targets for 2030 [29]. The Court also found that, while Belgium had pledged to update its NECP to reflect the EU's overall mitigation objective of a 55% reduction by 2030 compared to 1990 levels, *"this was still not the case"* [30].
- **Lack of coordination:** the Court also found that the defendants did not diligently collaborate in the process aimed at negotiating and adopting Belgium's NECP, finding that: *"The NECPs that have been negotiated are no more than the sum of the policies pursued individually by each entity, and lack a cross-cutting, integrated vision of the measures to be implemented at national level, illustrating the shortcomings of cooperation between the federal state and the various regions"* [31].

[24] First Instance Court of Brussels, Klimaatzaak (2021), p. 41.

[25] Ibid.

[26] Ibid. p. 42.

[27] Ibid. p. 41.

[28] Court of Appeal of Brussels, Klimaatzaak (2023), para [206].

[29] Ibid.

[30] Ibid.

[31] Para [248].

Overall, the Court of Appeal found that these NECP-related shortcomings are incompatible with the need to achieve adequate GHG emissions reductions to prevent dangerous climate change (and thus harm to people in Belgium to whom the authorities owe legal duties) [32], and took some of these findings as evidence of the defendants' fault [33]. Ultimately, the Court ordered the federal State and two regional governments to ensure that Belgium's GHG emissions are reduced by at least 55% by 2030 compared to 1990 levels.

The Court decided to postpone its ruling on the plaintiffs' request for penalty payments aimed at 1) ensuring compliance with the judgment; and 2) ensuring that Belgium produces a "*GHG emissions report for the year 2030*" [34]. The Court decided to only hold hearings on penalty payments once it will receive communication of 1) official figures of Belgium's GHG emissions for the years 2022 to 2024; and 2) "*the latest updated NECP available at that time*", thus confirming the relevance of Belgium's NECP as a crucial tool to help assess the lawfulness of the defendants' conduct.

Outcome of the case

With more than 80 framework climate cases filed globally against national governments – many of them still pending as of 2023 [35] – the recent *Klimaatzaak* decision of the Court of Appeal of Brussels is likely to be a highly influential precedent, especially in Europe.

First, following the *Urgenda* climate case (Dutch Supreme Court, 2019) [36], *Klimaatzaak* is the second case ever where a national court recognised that: 1) public authorities bear positive obligations to protect human rights under Art. 2 and 8 of the European Convention on Human Rights; and that 2) faced with the risks posed by dangerous climate change, public authorities are required to act with diligence on the basis of tort law, and must increase the ambition of their GHG emission reduction targets.

Second, after *Urgenda* and the *Neubauer* climate case (German Constitutional Court, 2021) [37], *Klimaatzaak* is the third case globally where a national court has determined that existing emissions reduction targets are unlawful in light of best available science, and ordered the government to adopt amendments to legislation or policy. In *Neubauer*, the Government was ordered to amend its climate legislation to ensure that constitutional rights were protected, while in *Urgenda* and *Klimaatzaak* the courts identified minimum GHG emissions reductions that needed to be met.

Third, the impact of *Klimaatzaak* is also particularly visible in the context of EU climate governance. For the first time, a national court has taken into account data on procedural and substantive shortcomings in the approval and implementation process of a Member State's NECP, to assess whether public authorities are acting unlawfully.

[32] Para [244]: "Without a new direction soon, and without updating the NECP to take account of the new European objectives, the policies currently being implemented are clearly not likely to achieve a sufficient reduction in GHG emissions by 2030 to meet the climate emergency that has become increasingly urgent."

[33] Ibid: "At this stage, the Court confines itself to identifying a fault insofar as the upward revision of Belgium's climate ambitions for the 2021-2030 commitment period was late and, to date, the policies actually implemented are clearly not likely to achieve the target of reducing GHG emissions by minus 55% by 2030."

[34] Court of Appeal of Brussels, *Klimaatzaak* (2023), p. 159-160.

[35] Excluding litigation in the US. See Setzer J and Higham C (2023) 'Global Trends in Climate Change Litigation: 2023 Snapshot.' London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 3.

[36] Supreme Court of the Netherlands, *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (2019) ECLI:NL:HR:2019:2007 (official translation).

[37] German Federal Constitutional Court, *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (official translation).

The Belgian courts' focus on a wide range of NECP-related failures shows that, even when an NECP is not at the core of the legal dispute, plaintiffs can nevertheless rely on them as evidence of inadequate conduct in the context of climate action. This approach could thus be replicated to support claims in litigation targeting a Member State's overall ambition and/or implementation gaps in their mitigation efforts.

Moreover, *Klimaatzaak* also embodies a successful example of citizens' mobilisation in the face of widespread climate inaction. The case had 58.000 individual co-plaintiffs [38] – a global record in the context of climate litigation. Through coordinated advocacy efforts highlighting Belgium's insufficient climate action [39], the case managed to gather significant visibility [40] and support from different segments of Belgian society [41].

[38] The Court of Appeal confirmed that individual plaintiffs have standing in the proceedings, and that the fact that other people may also be affected by worsening climate impacts does not diminish their interest in this litigation. See *Klimaatzaak* (2023) at para. [131].

[39] All the advocacy initiatives and communications in support of the claims brought by *Klimaatzaak* are available on the campaign website: <https://www.klimaatzaak.eu/nl>

[40] For example, see: The Guardian, 'Belgian court orders 55% emissions cut from 1990 levels', 1 December 2023 at <https://www.theguardian.com/world/2023/dec/01/belgian-court-orders-faster-emissions-cuts-as-countrys-climate-targets-insufficient>

[41] *Klimaatzaak* published a series of videos and witness statements featuring citizens from all over Belgium concerned by public authorities' inadequate climate action: <https://affaire-climat.be/fr/witness>

C

Juicio por el Clima I.0

Greenpeace España, Ecologistas en Acción y Oxfam Intermón v. Government of Spain

Jurisdiction

Spain (contentious-administrative jurisdiction) Supreme Court

Summary of the case

On September 14, 2020, Greenpeace España, Ecologistas en Acción and Oxfam Intermón filed the case before the Spanish Supreme Court. The case challenged the **climate inaction** of the Government of Spain which failed to duly approve (before the end of 2019) the Integrated NECP 2021-2030 ("PNIEC" as per its Spanish acronym) as provided by Regulation (EU) 2018/1999.

The plaintiffs requested the approval of a NECP. However, the NECP needed to be *"in line with the commitments made with the ratification of the Paris Agreement and the scientific recommendations of the Intergovernmental Panel on Climate Change (IPCC) not to exceed a global temperature increase of 1.5°C, in no case less than 55% of greenhouse gas emissions reduction in 2030 compared to 1990 levels, guaranteeing in this respect human rights and the right to an adequate environment for present and future generations"*.

That is why, while on March 16, 2021, the NECP 2021-2030 was approved, the case was not dismissed since the newly passed NECP established a 23% emissions reduction target (far from the pretended 55%). Thus, the mere approval of the NECP did not imply full compliance with the plaintiffs' claim.

Nonetheless, the case was dismissed by the Supreme Court on two main grounds: (1) the separation of powers argument, and (2) the fact that the 23% NECP target did not breach the EU-approved effort-sharing (Article 4(3) and Annex I of Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States between 2021 and 2030) or any binding determination of the Paris Agreement.

How the NECP was used in court

The Spanish NECP was the central aspect of the case since at the time of the filing, it had not yet been approved, despite the expiry of the deadline of Regulation (EU) 2018/842. Thus, the central claim of the case was to comply with their EU obligations under the Paris Agreement and the adoption of an NECP setting an ambitious emission reduction target in guarantee of the human rights of present and future generations. Additionally, it was the binding effect of the IPCC and the Paris Agreement, and their incidence that had to be considered by the Supreme Court when analysing the NECP.

Legal sources used in the case

National

- Article 29 of Law 29/1998, of July 13, 1998, regulating the Contentious-Administrative Jurisdiction.
- Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the governance of the Energy Union and Climate Action (Governance Regulation).
- Article 4 of Law 7/2021, of May 20, on Climate Change and Energy Transition.
- Articles 22 and ss. of Law 27/2006 of 18 July 2006 regulating the rights of access to information, public participation and access to justice in environmental matters and transposing Directives 2003/4/EC and 2003/35/EC.

International

- United Nations Framework Convention on Climate Change of 1992.
- Paris Agreement
- Reliance on European Court of Human Rights judgements.

Legal arguments used in the case

The main legal argument was that the Government of Spain failed to comply with its obligations under the Paris Agreement and the Governance Regulation (EU) 2018/1999 by not duly approving a NECP in accordance with IPCC science.

Subsequently, after the NECP approval, it was argued that the established 23 % emissions reduction was not satisfactory to achieve climate neutrality in order to guarantee the right to an adequate environment for present and future generations.

Outcome of the case

The lawsuit was dismissed mainly on the ground that neither the Paris Convention nor the IPCC reports allow Courts to impose a specific mitigation target on the government, whose setting is within the discretionary power of Governments, under the principle of separation of powers.

Regarding the extrajudicial effects: the case had a discreet follow-up by the media and a limited capacity for social mobilisation. However, the revision of the NECP currently in the process foresees an increase in the climate mitigation target from 23% (as foreseen in the original NECP) to 31%.

Main obstacles faced

For the main difficulties faced, we could highlight the procedural complexity of the case, its processing during the exceptional post-COVID situation as well as certain political pressures from the political parties that made up the government in those years.

D

Juicio por el Clima II.0

Greenpeace España, Ecologistas en Acción-CODA, Oxfam Intermón, la Coordinadora de ONGS para el desarrollo and 5 individuals from Fridays for Future v. Government of Spain

Jurisdiction

Spain (contentious-administrative jurisdiction) Supreme Court

Summary of the case

On February 2022, Greenpeace España, Ecologistas en Acción-CODA, Oxfam Intermón, la Coordinadora de ONGS para el desarrollo and 5 individuals from Fridays for Future filed the case against the NECP 2021-2030 before the Spanish Supreme Court.

The objective of this second climate case was to challenge the approved NECP 2021-2023 due to its defects both on formal and substantial aspects. The main claim was structured as follows:

- A claim to order the Spanish Government to revise the mitigation targets set out in the NECP 2021-2030 in line with the commitments made with the ratification of the Paris Agreement and the scientific recommendations of the Intergovernmental Panel on Climate Change (IPCC) not to exceed 1.5°C of global temperature increase, in no case less than 55% of greenhouse gas emissions reduction in 2030 compared to 1990 levels, guaranteeing in this respect human rights and the right to an adequate environment for present and future generations, or
- Subsidiarily, declare the annulment of the NECP 2021-2021 and its implementation acts.

In this regard, the appellants considered a 23 % greenhouse gas emissions reduction compared to 1990 as insufficient, in accordance with (i) the need to duly guarantee human rights, (ii) the right to an adequate environment for present and future generations in the face of climate risks and (iii) with the fulfilment of binding international commitments.

The case was dismissed by the Supreme Court on July 24, 2023.

How the NECP was in court

The NECP was at the heart of the legal request. As aforementioned, the applicants challenged the NECP 2021-2030 from both (i) a formal, and (ii) substantive perspectives.

(i) Regarding the formal aspects of the NECP 2021-2030

These were all linked to deficiencies in the environmental evaluation proceeding:

- No alternatives were considered in the processing and environmental assessment of the NECP, as the analysis of alternatives in the Strategic Environmental Assessment (SEA) had only considered two alternatives in relation to greenhouse gas (GHG) reduction, the zero alternative (“doing nothing”) or the one contained in the approved NECP of 23%.

- The obligation to submit the NECP to its strategic environmental assessment at an 'early stage' when all options are opened to dialogue was breached. The assessment only took place when "the most relevant decisional content of the Integrated National Energy and Climate Plan had already been validated by the European Commission.
 - There was no multi-level dialogue on energy and climate in the NECP process, as required by the Governance Regulation, but only a mere consultation and public information process.
 - The outcome of the public participation and strategic environmental assessment was not considered in the approval of the NECP, given that after the environmental assessment and public participation phase the NECP was not later modified - despite a large number of allegations and responses to the consultations formulated in the public information and environmental assessment process to which the document was submitted between January and June 2020.
- (ii) On the substance of the NECP 2021-2030: as already introduced, it was denounced that the climate ambition of the NECP was below the Spanish international obligations.

It was relevant in the national context, since the current (and former) governments are - in principle- the most "climate progressive" governments in the democratic history of Spain.

Legal sources used in the case

The legal norms used were the same as those noted in *Juicio por el Clima I*. That said, considering the involvement of 5 Fridays for Future members, there was a greater focus on human rights (including future generations) and also, on environmental rights under the UN framework.

Outcome of the case

On NECP substance, the lawsuit was dismissed on the grounds that neither the Paris Agreement nor the IPCC reports allow courts of law to impose a specific mitigation target on the government, the setting of which is discretionary on the part of the government under the principle of separation of powers. In particular noting that the Government "*cannot replace, by its decision, the discretion and flexibility that [the Paris Agreement, systematically referred to as the Paris Convention] attributes to the States Parties in the elaboration of the nationally determined contributions, for which it does not establish any qualitative or quantitative content in relation to the measures to be taken.*"

On the formal arguments for NECP nullity, the Court dismissed all of them.

- With regard to the time at which the Environmental Study was issued: "*once the processing was advanced, it is true that it was issued before the approval of the Plan and nothing would have prevented it from considering the information that is proper to it, and therefore it cannot be considered an irregularity of sufficient importance to lead to the requested nullity.*"
- With regard to the fact that no options other than the reduction of GHG emissions were considered, the Court noted that the environmental requirements noted in the environmental assessment of the NECP could not dictate its content. "*While being true that the Strategic Environmental Assessment must contain the circumstances of the Plan to be approved and provide the information that is most appropriate from an environmental point of view, it does not control the planning power in terms of its purpose. The Environmental Study may propose other measures to achieve that emission percentage, but to alter that percentage was to*

distort the purpose of the report because it was to alter the object of the assessment".

- As for the integration of the Strategic Environmental Assessment in the definitive version of the approved Plan, the Court considered there was no need to integrate any legal consideration on the initial proposal.
- Finally, the Court excused the failure to hold a multilevel dialogue in the approval of the NECP because, given the tight deadlines imposed by the Governance Regulation for the approval of the first cycle of the NECPs, *"those first Plans could not have been approved in time"*.

04 RESOURCES

Case law relating to NEPCs

A Sud Ecologia e Cooperazione Odv ETS v Italy

- A Sud Ecologia e Cooperazione Odv ETS v Italy before the Aarhus Convention Compliance Committee (2023). Available in [Sabin Center for Climate change law](#) and [UNECE](#) website.

Klimaatzaak

- Court of First Instance of Brussels, VZW Klimaatzaak v Kingdom of Belgium & Others (2021). Unofficial translation of the judgment available in [Sabin Center for Climate change law](#).
- Court of Appeal of Brussels, VZW Klimaatzaak v Kingdom of Belgium & Others (2023). Unofficial translation of the judgment available in [Sabin Center for Climate change law](#).

Juicio por el Clima I.0 and II.0

- Greenpeace España, Ecologistas en Acción y Oxfam Intermón v. Government of Spain (2021). Available in [Sabin Center for Climate change law](#).
- Greenpeace España, Ecologistas en Acción-CODA, Oxfam Intermón, la Coordinadora de ONGS para el desarrollo and 5 individuals from Fridays for Future v. Government of Spain (2023). Available in [Sabin Center for Climate change law](#).

General reports or legal sources useful for the NECPs upgrading process

- A. Andrusevych & S. Kern, [Case Law of the Aarhus Convention Compliance Committee \(2004- 2014\)](#), 3rd Edition, RACSE, Lviv 2016.
- A. Williamson and F. P. Fantozzi, [Legal Intervention Guidelines: EU National Climate and Energy Plans](#), December 2023.
- Climate Action Network Europe, [Public participation in national energy and climate plans. Evidence of weak & uneven compliance in Member States](#), April 2023.
- Climate Action Network Europe, [Time to step up national climate action - An assessment of the draft National Energy and Climate Plans updates](#), October 2023.
- European Climate Neutrality Observatory, [Net zero risk in European climate planning: A snapshot of the transparency and internal consistency of Member States' NECPs](#), January 2024.
- European Commission, [notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans \(2022/C 495/02\)](#), December 2022.
- European Commission, [EU wide assessment of the draft updated National Energy and Climate Plans - An important step towards the more ambitious 2030 energy and climate objectives under the European Green Deal and RePowerEU](#), December 2023.

- European Commission, [Country specific recommendations & assessment of Member States draft updated NECPs](#).
- European Environmental Bureau (EEB), [Legal obligations for public participation during the updating of the National Energy and Climate Plans](#), February 2023.
- European Environmental Bureau (EEB), [An assessment of nine updated draft National Energy and Climate Plans \(NECPs\)](#), October 2023.
- European Environmental Bureau (EEB), [EEB demands for the European Commission's recommendations for Member States' draft NECPs](#), October 2023.
- European Environmental Bureau (EEB), [Public participation and the updating of NECPs: towards more meaningful dialogue and deliberation](#), October 2023.
- ECCO, [Strategy for public participation and multi-level dialogue in the Integrated National Energy and Climate Plan \(NECP\)](#), June 2023.
- A. Hough and C. Brennan, [Legal obligations for public participation during the 2023 updating of National Energy and Climate Plans \(NECPs\)](#), EJNI Briefing Paper, March 2023.
- UNECE, [Case law related to the Aarhus Convention](#).