

Shell Climate Case Judgment

On 26 May 2021, the District Court of The Hague issued a ground-breaking [judgment](#) in the class action case filed against Royal Dutch Shell plc (RDS) by Milieudefensie (Friends of the Earth Netherlands) *et al.* The Court ordered RDS to reduce the CO₂ emissions of the Shell group by net 45% in 2030.

Summary

The Court rules that RDS has a reduction obligation ensuing from the unwritten standard of care laid down in Article 6:162 of the Dutch Civil Code, which provides that it is unlawful to act in conflict with what is generally accepted according to unwritten law (*'hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt'*). The Court came to its decision on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and widespread international consensus that human rights offer protection against the impacts of dangerous climate change and companies must respect human rights.

The Court concludes that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 (relative to 2019) through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all its emissions (Scope 1, 2 and 3). It is up to RDS to determine how to implement and execute the reduction obligation, taking into account its current obligations and other relevant circumstances.

The reduction obligation is a binding (result) obligation in respect of the activities of the Shell group, with respect to which RDS may be expected to ensure that CO2 emissions are properly reduced.

In addition, RDS has a significant best-efforts obligation with respect to the business relations of the Shell group, including end-users, as RDS may be expected to take necessary steps to remove or prevent serious risks ensuing from CO2 emissions generated by its business relations, and to use its influence to limit any lasting consequences as much as possible.

Key aspects

Below are certain key elements of the judgment:

Admissibility of class actions

The claims of Milieudefensie et al. are public interest class actions. The Court declares these collective claims allowable in respect of current and future generations of Dutch residents and inhabitants of the Wadden Sea region.

Applicable law

The Court rules that Dutch law can be applied to the claims, as The Netherlands is the 'country in which the event giving rise to the damage occurred' (within the meaning of Article 7 of the of the Rome II Regulation). In addition, the Court -superfluously- considers that Dutch law is also applicable because The Netherlands is the country in which the relevant damage occurs (Article 4(1) of the Rome II Regulation).

The reduction obligation of RDS

The Court bases its interpretation of the unwritten standard of care for RDS on, *inter alia*, the following considerations:

Human Rights

- ▶ The serious and irreversible consequences of dangerous climate change in the Netherlands pose a threat to the human rights of Dutch residents, in particular the right to life and the right to respect for private and family life as enshrined in Articles 2 and 8 of the [ECHR](#) and Articles 6 and 17 of the [ICCPR](#).
- ▶ Human rights apply in relationships between states and citizens, but due to their fundamental interest and value for society as a whole human rights also play a role in the relationship between RDS and Milieudefensie et al.
- ▶ The responsibility of business enterprises to respect human rights, as formulated in the [UN Guiding Principles](#), is a global standard of expected conduct for all business enterprises wherever they operate. Companies have an individual responsibility and cannot just monitor developments and follow the measures taken by states.

Policy-making position of RDS

- ▶ The Court is of the opinion that much may be expected of RDS as head and policy-maker of the Shell group, which is a major player on the worldwide market of fossil fuels and responsible for significant CO2 emissions, which exceed the emissions of many states.
- ▶ The responsibility of RDS is defined by the influence and control it can exercise over the Scope 1, 2 and 3 emissions of the Shell group.
- ▶ Through the energy package offered by the Shell group, RDS controls and influences the Scope 3 emissions of the end-users of the products produced and sold by the Shell group.

- ▶ There is an internationally endorsed need for companies to genuinely take responsibility for Scope 3 emissions. This need is more keenly felt where these emissions form the majority of a company's CO2 emissions, as is the case for companies that produce and sell fossil fuels. Approximately 85% of the emissions of the Shell group are Scope 3 emissions.

The responsibility of RDS to respect human rights encompasses the company's entire value chain, including its emissions as categorized on the basis of the [GHG Protocol](#):

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

Reduction pathways

- ▶ The non-binding goals of the [Paris Agreement](#) represent a universally accepted standard for preventing dangerous climate change: global warming must be kept well below 2°C in 2100, and a temperature rise of under 1.5°C should be strived for.
- ▶ The Court refers to the [SR15 report](#) and considers that there is a widely endorsed consensus that in order to limit global warming to 1.5°C, reduction pathways should be chosen that reduce CO2 emissions by net 45% in 2030 and by net 100% in 2050.

CCS and EU ETS

- ▶ The reduction pathways contain net goals, which leave room for the compensation of CO2 emissions, *i.e.* negative emissions (processes that extract greenhouse gases from the atmosphere, such as Carbon Capture and Storage - CCS). These negative emissions may be subtracted from the greenhouse gas emissions.

- ▶ The EU ETS and other 'cap and trade' emission schemes elsewhere in the world have an indemnifying effect for RDS, but only up to the reduction percentage they aim to achieve. If this is lower than the obligation of RDS (-45% by 2030 relative to 2019), RDS has to do more.
- ▶ Permits and current obligations of the Shell group, such as the obligations ensuing from long-term concessions for oil and gas extraction, do not have any indemnifying effect and therefore do not subtract from RDS' reduction obligation (*i.e.* these are a given which RDS has to take into account in meeting its reduction obligation).

Impact on Shell's growth and energy package

- ▶ The Court acknowledges that the reduction obligation will have far-reaching consequences for RDS and the Shell group. It requires a change of policy and an adjustment of the Shell group's energy package, which could curb the potential growth of the Shell group. However, the Court rules that the interests served with the reduction obligation outweigh the Shell group's commercial interests. According to the Court, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change.
- ▶ RDS has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion. With due observance of its current obligations (contractual obligations as well as obligations ensuing from long-term concessions) RDS is free to decide not to make new investments in explorations and fossil fuels and to change the energy package offered by the Shell group.

Judgment

The Court does not imply that the Shell group's CO2 emissions are currently unlawful. However, in the Court's view, RDS' policy, intentions and ambitions for the Shell group largely amount to rather intangible, undefined and non-binding plans for the long-term. This is incompatible with the reduction obligation of RDS and implies an imminent violation of RDS' reduction obligation, in view of which the claimed order for compliance with this legal obligation is granted.

The Court orders RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO₂ emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.

RDS may lodge an appeal, but pending such appeal RDS should still observe the order, as the Court declares its judgment provisionally enforceable.

Relevance for other parties

The considerations of the Court may have consequences for other companies and situations as well. Measures to reduce scope 2 and 3 emissions may entail effects (and opportunities) for business relations and customers.

In addition, public interest groups may try to use the judgment to take legal action against other companies in respect of their CO₂ emissions (or other types of alleged environmental pollution or human rights infringements). In this respect, the following should be noted:

- ▶ RDS is a public limited company (plc) under the laws of England and Wales with its head office in The Hague, The Netherlands. For other cases, it may also be relevant in which country a company has its head office.
- ▶ Dutch courts might also assume jurisdiction on the basis of *locus delicti* (the place where the harmful event occurred or may occur, cf. Article 7(2) of the [Brussels I-bis Regulation](#)): the *locus actus* (the place where the event giving rise to the damage occurred) or the *locus damni* (the place where the relevant damage occurs). In this respect, it is interesting that in the Shell case, the Court ruled (in respect of applicable law) that both the *locus actus* and the *locus damni* are in The Netherlands.
- ▶ In determining the reduction obligation of RDS, the Court emphasized the policy-setting position of RDS as head of the Shell group and the influence and control it can exercise over the Scope 1, 2 and 3 emissions of the Shell group.

- ▶ The Court ruled that the means through which a company meets its responsibility to respect human rights will be proportional to, *inter alia*, its size.
- ▶ In this respect, the Court considered that the Shell group (with 1,100 companies operating in 160 countries all over the world) is a major player on the global fossil fuel market and its emissions exceed that of many states.

These factors may of course be different for non-Dutch companies and companies operating in other market sectors.

The above is a high-level summary of the judgment of the District Court of The Hague of 26 May 2021. This document does not constitute legal advice nor does it state any legal opinion.

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