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THE FRENCH GOVERNMENT IS REQUIRED TO TAKE MEASURES TO COMPENSATE FOR ECOLOGICAL DAMAGE FOR WHICH IT IS RESPONSIBLE

To Our Clients and Friends:

In a judgment dated 14 October 2021 related to the so-called “Case of the Century”, the Paris Administrative Court (the Court) ordered the State to make good the consequences of its failure to reduce greenhouse gas (GHG) emissions. In this respect, the Court ordered that the excess of the GHG emissions cap set by the first carbon budget be offset by 31 December 2022 at the latest. The French Government remains free to choose the appropriate measures to achieve this result.

I. Background to the Judgment

In March 2019, four non-profit organizations had filed petitions before the Court to have the French State's failure to combat climate change recognized, to obtain its condemnation to compensate not only their moral prejudice but also the ecological prejudice and to put an end to the State's failures to meet its obligations.

In a judgment dated February 3, 2021, the Court ruled that the State should compensate for the ecological damage caused by the failure to comply with the objectives set by France in terms of reducing GHG emissions and, more specifically, the objectives contained in the carbon budget for the period 2015-2019. As a reminder, France has defined a National Low-Carbon Strategy, which describes both a trajectory for reducing GHG emissions until 2050 and short- and medium-term objectives. These latter, called carbon budgets, are emission ceilings expressed as an annual average per five-year period, that must not be exceeded. The Court also ordered a further investigation before ruling on the evaluation and concrete methods of compensation for this damage (please see Gibson Dunn's previous client alert).

In the separate *Grande Synthe* case, the Council of State - France's highest administrative court - on 1 July 2021 enjoined the Prime Minister to take all appropriate measures to curb the curve of GHG emissions produced on national territory to ensure its compatibility with the 2030 GHG emission reduction targets set out in Article L. 100-4 of the Energy Code and Annex I of Regulation (EU) 2018/842 of 30 May 2018 before 31 March 2022.

II. The steps in the reasoning followed by the Tribunal

First, the Court considers that it is dealing solely with a dispute seeking compensation for the environmental damage caused by the exceeding of the first carbon budget and the prevention or cessation of the damage found and that it is for the Court to ascertain, at the date of its judgment, whether that damage is still continuing and whether it has already been the subject of remedial measures.

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On the other hand, the Court considers that it is not for it to rule on the sufficiency of the measures likely to make it possible to achieve the objective of reducing GHGs by 40% by 2030 compared to their 1990 level, which is a matter for the litigation brought before the Council of State.

Second, the Court considers that it can take into account, as compensation for damage and prevention of its aggravation, the very significant reduction in GHG emissions linked to the Covid 19 crisis and not to the action of the State.

However, the Court finds that the data relating to the reduction of GHG emissions for the first quarter of 2021 do not make it possible to consider as certain, in the state of the investigation, that this reduction would make it possible to repair the damage and prevent it from worsening. It concludes that the injury continues to be 15 Mt CO₂eq.

Third, the Court considers that it can apply articles 1246, 1249 and 1252 of the Civil Code, which give it the power to order an injunction in order to put an end to an ongoing injury and prevent its aggravation.

The State argued in its defense that the injunction issued by the Council of State in its decision of 1 July, 2021 already made it possible to repair the ecological damage observed. The Court nevertheless considers that the injunction issued by the Conseil d'Etat aims to ensure compliance with the overall objective of a 40% reduction in GHG emissions in 2030 compared to their 1990 level and that it does not specifically address the compensation of the quantum of the damage associated with exceeding the first carbon budget. Since the injunction sought from the Court is specifically intended to put an end to the damage and prevent it from worsening, the Court considers that it is still useful and that the non-profit organizations are entitled to request that it be granted.

Fourth, the Court indicated that "*the ecological damage arising from a surplus of GHG emissions is continuous and cumulative in nature since the failure to comply with the first carbon budget has resulted in additional GHG emissions, which will be added to the previous ones and will produce effects throughout the lifetime of these gases in the atmosphere, i.e. approximately 100 years. Consequently, the measures ordered by the judge in the context of his powers of injunction must be taken within a sufficiently short period of time to allow, where possible, the damage to be made good and to prevent or put an end to the damage observed.*

As the State failed to demonstrate that the measures to be taken pursuant to the Climate Act of 20 August 2021 will fully compensate for the damage observed, the Court then ordered "*the Prime Minister and the competent ministers to take all appropriate sectoral measures to compensate for the damage up to the amount of the uncompensated share of GHG emissions under the first carbon budget, i.e. 15 Mt CO₂eq, and subject to an adjustment in the light of the estimated data of the [Technical Reference Centre for Atmospheric Pollution and Climate Change] known as of 31 January 2022, which make it possible to ensure a mechanism for monitoring GHG emissions".*

In view of (i) the cumulative effect of the harm linked to the persistence of GHGs in the atmosphere and the damage likely to result therefrom, and (ii) the absence of information making it possible to quantify such harm, the Court orders that the abovementioned measures be adopted within a period sufficiently short to prevent their aggravation.

Finally, he adds that:

- (i) "the concrete measures to make reparation for the injury may take various forms and therefore express choices which are within the free discretion of the Government";
- (ii) repair must be effective by 31 December 2022, which means that measures must be taken quickly to achieve this objective;
- (iii) that no penalty be imposed in addition to the injunction.

III. The aftermath of the Judgment

The Government has two months in which to appeal against the Judgment. If the Judgment is appealed, the application for enforcement will have to be submitted to the Administrative Court of Appeal in Paris.

If the Government decides not to contest the Judgment, it will have to take the necessary measures for each of the sectors identified in the SNBC (transport, agriculture, construction, industry, energy, waste), which will probably mean imposing new standards on economic actors and individuals.

If, on December 31, 2022, the non-profit organizations consider that the Judgment has not been properly executed, i.e., if the measures taken by the Government have not made it possible to repair the damage up to the amount of 15 Mt CO₂eq, they will be able to refer the matter to the Tribunal so that it may order, after investigation, a measure to execute the Judgment, which will most likely be a penalty payment.

As a reminder, in a decision of August 4, 2021, the Council of State condemned the State to pay the sum of 10 million euros to various organizations involved in the fight against air pollution for not having fully implemented its previous decisions regarding its failure to improve air quality in several areas in France.



The following Gibson Dunn attorneys assisted in preparing this client update: Nicolas Autet and Grégory Marson.

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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