**CASE T-330/18**

**ARMANDO FERRÃO CARVALHO and others**

**Applicants**

**- and -**

**THE EUROPEAN PARLIAMENT**
**THE COUNCIL**

**Defendants**

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**APPLICANTS' REPLY TO**
**THE DEFENDANTS' PLEAS OF INADMISSIBILITY**

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## A. INTRODUCTION

1. Never before has climate science stressed the need for ambitious action as clearly as the new IPCC Special Report, which finds as follows with "high confidence":[1]

> "Impacts on natural and human systems from global warming have already been observed (*high confidence*). Many land and ocean ecosystems and some of the services they provide have already changed due to global warming (*high confidence*). Human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels [...]. Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate. (A.1)" [**Annex C.1 p. 10**]
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> "Limiting global warming to1.5°C compared to 2°C is projected to lower the impacts on terrestrial, freshwater and coastal ecosystems and to retain more of their services to humans (*high confidence*). (B.3)" [**Annex C.1 p.14**]
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> "Future climate-related risks depend on the rate, peak and duration of warming (A.3.2)." [**Annex C.1 p.11**]
>
> "Credible 1,5°C pathways "can only be achieved if globalCO2 emissions start to decline well before 2030 (*high confidence*). (D.1)." [**Annex C.1 p.24**]

2. With regard to the adequacy of current reduction targets, the IPCC states that such current climate targets (which include the EU's 40% target) are only "broadly consistent with cost-effective pathways that result in a global warming of about 3°C by 2100, with warming continuing afterwards." (D.1.1) [**Annex C.1 p.24**]

3. It is difficult to conceive of a more urgent and dramatic risk for human life in general and for the Applicants in particular. It is therefore disappointing that the Defendant institutions have reacted to the Application with narrow arguments on admissibility, and baseless insinuations as to the Applicants' *bona fides*, rather than meeting their substantive complaints. The Defendants seek to confine the

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[1] Intergovernmental Panel on Climate Change, Global warming of 1.5°C - An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, Summary for Policymakers, October 2018. [Annex C1, p. 1 ff.].

Application to the territory of admissibility, shielding the Union from judicial scrutiny of the legal sufficiency of its emission reduction targets. In the thicket of *locus standi* doctrine they lose sight of the plain promise of Article 47 ChFR which is that:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

4. These rights are those guaranteed by the Union, not those granted by Members States or under the European Convention of Human Rights. It is these fundamental rights under Union law that determine (along with other higher-rank norms) whether the Union institutions are acting lawfully. Access to this Court must be available in a situation like the present where many individuals are or have already been exposed to serious damage or risk of damage, and where there is no time to lose with fragmented court procedures in national courts of the Member States.

5. The essence of the Defendants' arguments on admissibility is that the threat of climate change is so pervasive and common to all persons, and caused by such a diversity of activities, that a legal response is unavailable in this Court. It cannot be correct, however, that if everyone is concerned no one is concerned, and because everyone is to blame no one is responsible. As to responsibility, the Union has since 2009 assumed full responsibility for determining the emissions targets and thus emissions levels of the EU. This must be mirrored in corresponding judicial scrutiny.

6. Of course the judiciary must not displace policy judgments by their own decisions, but the Applicants here ask for no more than the faithful application of the law. Compelling evidence from the most authoritative sources and the Defendants' own actions establish the legal grounds on which the Application is brought. The question that the Defendants' pleas of inadmissibility therefore raise is whether these legal grounds will receive a hearing within the procedures of this Court. The Applicants contend that the provisions of the TFEU and the Charter confer rights on them to be heard by this Court. The Applicants submit that this case calls for the Court to return to those constitutional provisions, rather than invoke the (often too-narrow) case law on admissibility favoured by the Defendants – case law which emanates from an earlier time and a much sparser legal landscape.

7. The Court has in this case the opportunity to avoid the unnecessary procedural shackles that frustrate the protection of legal rights and can undermine the rule of law itself, which has occurred in other legal systems. As Judge Alfred T Goodwin of the US Court of Appeals has said of that country's legal system:

> "The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits .... [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. ... The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.]"[2]

## B. TIMING AND PROCEDURE FOR DETERMINATION OF PLEAS OF INADMISSIBILITY

8. As developed below, the Applicants dispute the Defendants' pleas of inadmissibility.

9. The Applicants' primary position, however, is that it is premature for the Court to move to determine the pleas raised by the Defendants. Rather, the Court should exercise its discretion under Article 130(7) of

[2] Alfred T. Goodwin, A Wake-Up Call for Judges, 2015 Wisconsin Law Review, 785, 785-86, 788 (2015), Annex omitted.

the Rules of Procedure to reserve its decision on the admissibility of the Application until it rules on the substance of the case. The Court has a broad discretion in this respect[3] and there are compelling factors favouring these issues being reserved.

10. The context for deciding on the correct stage at which to determine the pleas of inadmissibility is as follows. For the Defendants' pleas to be accepted and the Application dismissed on inadmissibility grounds (for one or more applicants), the Defendants must establish that the applications brought by each Applicant for annulment, and invoking the non-contractual liability of the Union, are inadmissible. If they cannot do so, then the Application cannot be dismissed at this stage. As set out below, the Defendants face real difficulties in establishing the inadmissibility of both aspects of the Application.

11. If the Application is not entirely dismissed at this stage in relation to both aspects of the case brought by all the applicants, then the Court will in any event hear full argument on the key points of the merits. This follows from the Court's case law, which is that for "reasons of procedural economy, if the same decision is challenged by several applicants and it is established that one of them has locus standi, there is no need to examine the other applicants' standing to bring proceedings".[4]

12. Considering and determining the Defendants' pleas of inadmissibility now would therefore yield no procedural efficiency and would rather lead to the Court spending additional time and resources on an unnecessary preamble to considering the merits.

13. There are, moreover, key points material to the pleas of inadmissibility that require factual inquiries that will be conducted at stage at which the substance of the case is considered. The Applicants note the following in particular.

14. The Parliament contends that the application invoking the non-contractual liability of the Union on the basis of Art. 340 TFEU should be dismissed on the basis of an absence of a sufficient causal link between the Union's act and the damage complained of (Parliament pleading, paras 60-69). Questions of legal causation essentially require consideration of the facts, assessed in light of legal policy. The Applicants contest the Parliament's criticism (as set out below) but note that these are relatively complex questions that will be considered in full at the merits stage and cannot fairly be determined in isolation from the facts and without hearing full argument on them.

15. The Defendants contend that the applicants are not "*individually concerned*" given purported similarities between their positions. The Council, for example, contends that it is "obviously absurd" for the Applicants to argue that the position of a farmer whose land is flooded is different from that of a farmer affected by drought (paras 25-26). Assessment of this claim will necessarily require reference to the facts concerning the individual positions of the applicants, including families whose lands have been affected by drought, fire and inundation, or will be in the future.

16. It is also said that the Applicants are abusing their rights by invoking the non-contractual liability of the Union (Parliament pleading, paras 51-52). As set out below, this is a baseless allegation; the Applicants include individuals already affected by *inter alia* drought, high temperatures and devastating fires. From a procedural point of view, however, it is difficult to see how it can be fairly determined in isolation from the substance, considering the facts relating to the Applicants, particularly those complaining of actual physical and economic loss (and producing evidence in support).

17. For these reasons, the Applicants submit that the Court should exercise its discretion and reserve consideration of the pleas of inadmissibility until it rules on the substance of the case. In the alternative,

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[3] See Case C-666/16 P (*Lysoform)* ECLI:EU:C:2017:569 para 36.

[4] Case T-135/13 (*Hitachi Chemical Europe v ECHEA*) ECLI:EU:T:2015:253, para 39.

given the factual and legal complexity of the matters on which the questions of inadmissibility will turn, the Applicants request that the oral procedure is opened.

18. Without prejudice to these submissions, the Applicants respond below to the arguments of inadmissibility, addressing in turn the pleas relating to the application for annulment (under Article 263 TFEU) and the application invoking the non-contractual liability of the Union (under Article 340 TFEU).

## C. APPLICATION UNDER ARTICLE 263

### *1. The correct overall approach to admissibility*

19. The starting point for assessing the Defendants' objections to the admissibility of the application for annulment should be the relevant text of Article 263 itself:

> "The Court of Justice of the European Union shall review the legality of legislative acts…"
>
> "Any natural or legal person may… institute proceedings against an act … which is of direct and individual concern to them…"

20. The text of this provision is clear and unambiguous and so should first be interpreted by reference to its language rather than by reference to case law.[5] It directs the Court to review legislative acts for legality, and permits proceedings to be brought by persons who are directly and individually concerned by the act in question. The plain language establishes a standard that the Applicants meet here:

    a. They are *directly* concerned by the GHG Emissions Acts[6] because those Acts permit the emission of GHGs that will, according to any basic climate science and to the causal mechanism accepted by the EU itself, contribute to aggravating climate change damaging the Applicants and infringing their rights;

    b. They are *individually* concerned because each Applicant has an individual interest that is adversely affected by the emission of GHGs as permitted by the GHG Emissions Acts.

21. The Defendants do not engage with the language of the Treaty, resorting directly to the case law on the subject (addressed below). To the extent that the language of Article 263 is ambiguous and calls for interpretation it is appropriate to consider the need for Article 263 to be *effective*,[7] to realise the *purposes* it pursues[8] and the *consequences*[9] of adopting one interpretation over another. These factors all point towards an interpretation broad enough for this Application to be admissible: the Applicants complain of an infringement of fundamental rights and of damage arising from the Union's acts permitting the emission of GHGs. In such a critical area of policy it is essential that this Court is open to individuals to challenge Union measures for compliance with the law, including the guarantee of fundamental rights under the Charter.

22. The alternative would be that no effective judicial mechanism would be available to review legal acts concerning complex matters, and the Court cannot discharge the duty conferred by Article 263, to: "*review the legality of legislative acts*".

### *2. National remedies, Article 47, Charter of Fundamental Rights and Article 19, TEU*

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[5] On textual interpretation see as an example Case C-582/08 (*Commission v UK)*, para 51.

[6] As defined in para. 2 of the Application of 2nd July 2018.

[7] For an example of effectiveness as a method of interpretation see Case C-439/08 (*VEBIC)*, para 64.

[8] For an instance of purposive interpretation see Case C-101/01 (*Lindqvist)*, para 50.

[9] See Case 6/64 *Costa v ENEL* [1965] ECR 585, at 594, as an instance of consequentialist reasoning.

23. The Applicants argue (Application, para 96) that a narrow construction of "direct and individual concern", if applied to the present case without further reflection, breaches the guarantee of legal protection afforded by Article 47 which, as set out above, is that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy*".

24. The Defendants' response is that the Applicants' "remedy" would be in actions before national courts (Parliament para 40; Council para 29). This is an extraordinary and self-serving submission for the Defendants to advance. It is manifestly inadequate to meet the clear guarantee of an effective remedy, as follows:

    a. Redress before national courts is unreal and impractical in the circumstances of this case. The Applicants complain that the total emissions that would be permitted from the EU under the GHG Emissions Acts clearly exceeds the limits of higher rank law. To obtain relief in national courts sufficient to reduce total EU emissions to a level consistent with the law, each applicant would be required to maintain proceedings before the courts of all Member States. This would be prohibitively costly and slow (when the luxury of time to arrest the concentration of greenhouse gases in the atmosphere is not available). It would also be wasteful and risk inconsistent outcomes. The fundamental objection is that it is not necessary given that this Court is available to offer a single, effective remedy.

    b. The diversity of national legal procedures and remedies makes it practically certain that effective redress in this case would be impossible. Only few Member States have had a practice of formally fixing emission reduction targets that could be challenged by actions for annulment. Few Member States provide injunctive or declaratory relief through which the responsible authorities could be ordered to fix such targets (considering in particular the case of a target set by a national legislature). Some Member States even prohibit national governments from going further than EU law requires in the field of environmental legislation. If specific emission reduction measures were applied for, in all likelihood many Member States' courts would favour a policy of judicial restraint. While the burden is on the Defendants to show that national courts offer (as they assert) an effective remedy, the Applicants offer to conduct and provide an in-depth comparative analysis should the Court find this relevant.

    c. An action before a national court hearing a challenge to the emissions reductions measures of a particular Member State could not produce an appropriately framed reference to the Court of Justice challenging the GHG Emissions Acts. Even if the national court were inclined to make a reference (which cannot be assumed given the current practice of widespread reluctance of even last instance courts to referrals) the action before a national court would contend that a Member State was obliged to make deeper reductions than calculated for that State under the GHG Emissions Acts. Any obligation to make deeper reductions, would necessarily be based on national law. It would not be open to the national court to refer a question based on national law to the Court of Justice, nor would it be open to the Court of Justice to consider it.

25. It seems plain, in fact, that the defendants have not actually considered the practicalities of how the GHG emission limits set by the EU for 2030 as a whole could ever be the topic of a referral by a Member State Court.

26. The serious obstacles confronting the use of national courts to enforce EU fundamental rights in the sphere of climate protection is illustrated by the recent Netherlands decision by the Appelate Court (Gerechtshof) Den Haag in the Urgenda case **[Annex C.2].** The case is notable as an unusual but important instance of reduction targets being ruled inadequate. The way the court did so is critical: it upheld the rights of the applicants from Articles 2 and 8 of the ECHR. The court, while referring to the

EU ETS and ESR targets, did not even consider submitting a preliminary question to the ECJ asking if the EU targets (in that case, those for 2020) were compatible with EU primary law, and in particular the EU fundamental rights.[10] EU human rights protection was effectively discarded. It is highly doubtful that recourse to the ECHR is sufficient to meet the full legal protection guaranteed by Art. 47 ChfR and the ambition of the ECJ to be the sole arbiter of EU fundamental rights. In a similar vein, the English High Court when considering whether the UK emission reduction target might breach fundamental rights only referred to Art. 2 and 8 ECHR and Art. 1 of the First Additional Protocol and did not even allude to the EU targets let alone to the possibility of a preliminary reference procedure **[Annex C.3]**.[11]

27. A broader constitutional objection would arise if the Applicants were referred to national legal protection. The frequent recourse before national court to the ECHR (as illustrated by these two examples) would challenge the role of the Court of Justice as the main warden and sole arbiter of EU fundamental rights. If the current Court and/or the Court of Justice denies direct access needed to conduct its own review of the EU targets, two competing systems of fundamental rights norms might emerge: one defined by EU institutions, guided by EU fundamental rights and reviewed by the CJEU, and one defined by individual Member States, guided by ECHR fundamental rights and reviewed by the ECtHR. This would be precisely the situation of competing and possibly conflicting fundamental rights systems deplored by the Court in its Opinion on the accession of the EU to the ECHR.[12]

28. The Council also refers to Article 19 para 1 sub-para 2 TEU in support of its reliance on national legal protection (Council, para 29). This is misplaced. The Article may oblige Member States to establish legal protection for climate change victims, who claim that the EU targets are <u>not</u> met,[13] as well as legal protection for GHG emitters, who claim that the targets are <u>too strict</u>. By contrast, the guarantee of effective judicial protection does not entail any obligation for Member States to introduce deeper cuts and related access to courts. Such measures are in the competence of the Member States, be it by explicit provision of the relevant GHG Emissions Acts or as an implication of the principle of conferral of powers (under Art. 5 TEU).

29. The Applicants therefore submit that the Defendants' emphasis on national courts is misguided. Both the wording of Article 263 TFEU and Article 47 of the Charter make clear their right to submit the Application before this Court, and that these provisions should be kept firmly in mind in assessing the Defendants' challenges to admissibility. The Applicants next respond to the specific points made by the Defendants in their pleadings on admissibility, taking direct and then individual concern in turn.

### 3. ***<u>Direct concern</u>*** (Parliament, paras 23-28; Council, paras 16-24)

#### *3.1 Direct legal concern*

30. While the Applicants stress that the wording of Article 263 does not actually require a "legal concern", such a concern has previously been required by the Court. Invoking this case law, the Defendants contend that the GHG Emissions Acts do not directly affect <u>the legal situation</u> of the applicants (Parliament paras 23-25; Council paras 16-18). The Parliament essentially argues that the acts in

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[10] The Hague Court of Appeal, Case 200.178.245/01 (The State of the Netherlands v URGENDA Foundation e.a.) ECLI:NL:GHDHA:2018:2610, paras 16-18, [**Annex C.2, p. 33, 43 ff]**.

[11] *Plan B Earth v Secretary of State for Business, Energy and Climate Change* [2018] EWHC 1892 (Admin), paras 48-49 (High Court of Justice, Queen's Bench Division, Administrative Court) **[Annex C.3, p. 53 ff.]**.

[12] ECJ Opinion 2/13 of 18.12.2014, Case C-2/13 (*Accession of the EU to the ECHR*) ECLI:EU:2014:2425. See also Application, para 91.

[13] Cf. ECJ Cases C-165/09 to C-167/09 (*Stichting Natuuren Milieu v College van Gedeputeerde Staten van Zuid-Holland*) ECLI:EU:C:2011:348, para 103.

question are distinct from the emissions that cause the climate change affecting the Applicants (para 25). The Council's argument is not clearly explained although it contends that the Applicants have only sought to demonstrate that their "factual situation" rather than their legal situation has been affected (para 18). These contentions are essentially variations on the proposition that the GHG Emissions Acts do not authorise the emission of GHGs, but rather require the reduction of GHG emissions at a certain rate. These arguments are misconceived for the following reasons.

31. First, and contrary to the Defendants' case, the Application is correct to characterise the GHG Emissions Acts as authorising the emission of GHGs: see Application, paras 72-73. As set out there, the Acts speak explicitly of the "allocation" of emissions. The ETS Directive refers explicitly to the allocation of emissions: recital 6, Article 9. Similarly, the ESR refers to quantities allocated to the Member States, that are then subjected to reduction requirements: Article 1. The LULUCF Regulation in effect allows GHG emissions that exceed the quantity removed by sinks: Article 4. This textual and functional analysis is confirmed by obvious practical considerations. The EU has acted to assume control over the level of emissions in the EU, within the international context assigning responsibility for emissions to national governments. The regulation adopted by the EU determines the level of emissions and in any realistic sense the EU authorises those emissions to occur. The Parliament's suggestion (para 25) that Member States could go further does not alter the basic reality that the EU has authorised the emissions; whether a Member State may or may not unilaterally seek to limit a fraction of those emissions is immaterial.

32. With this in mind, the Defendants' contention that the contested legal acts do not directly affect the legal situation of the applicants (Parliament paras 23-25; Council paras 16-18) invites consideration of the relationship between the GHG Emissions Acts and the norms defining and protecting the Applicants' legal situation. The GHG Emissions Acts (which could be described as the 'active norms') provide that the implementing institutions and final actors shall be entitled to emit certain quantities of greenhouse gases (quantities the Applicants deem to be unlawfully excessive). By implication this entitlement is a burden on the Applicants. In legal terms it obliges the Applicants to accept the resulting damage and constitutes an interference with the enjoyment of their fundamental rights (which could be seen as the 'receiving norms').

33. The GHG Emissions Acts address the majority if not almost all of the GHG emissions originating from activities in the EU (with aviation being an exception as addressed in the application, para 52 *et. Seq.*). Assuming this is near to 100% of the Union's emissions, the burden on the Applicants becomes clearer if one distinguishes between three parts of the GHG emissions and consider these graphically (see figure below):

    a. the *prohibited part*, that the GHG Emissions Acts provide cannot be emitted, being the emission volume above the line between the 80% level in 2020 and the 60% level in 2030;

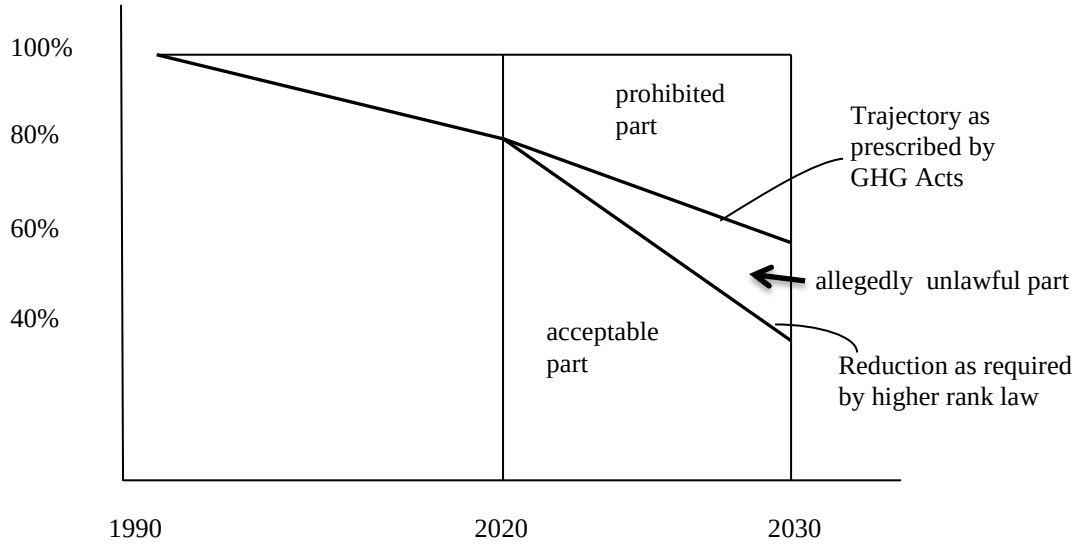
    b. the *acceptable part*, that is a justifiable interference with the fundamental rights of the Applicants, being the emission volume below the line between the 80% level in 2020 and 40% in 2030; and

    c. the *allegedly unlawful part* that the Applicants contend is in breach of higher rank law, being the delta of emission volume between the two lines: the line from the 80% level in 2020 and the 60% level in 2030, and the line from the 80% level in 2020 to the 40% in 2030.

34. By 2030, the unlawful burden placed on the Applicants would thus be 20% of 1990 emissions, which is calculated on the basis that technical and economic capacity would allow the EU to reduce emissions by 60%, rather than only 40% as targeted by the three GHG Emissions Acts. This part, which the EU

has failed to curtail, unlawfully interferes with the Applicants' rights and thus constitutes a direct effect on their legal situation.

**Trajectories of greenhouse gas emissions from 1990 via 2020 to 2030, as prescribed by the three GHG Emissions Acts and required by higher rank law**




35. The Council argues that "for such rights to be potentially affected, the emissions must first happen" (para 25). This is misconceived. The fundamental right is already affected if a law *entitles* an actor to act, and not only when the actor *commits* the act. This point can be illustrated with simple examples:

    a. A comparable situation would be where a permit to construct an industrial installation is issued by a competent administrative body. Neighbours expecting pollution from the installation have a right to bring an action against the administrative body even if it is not clear if the operator will in fact make use of the permit. They are not required to wait and seek legal protection against the operator only once he has erected the installation. Their rights are considered to be affected already by the entitlement offered by the permit. There are sound practical reasons for this approach: it makes sense for legal rights to be clarified and enforced at an early stage, before damage is unlawfully inflicted.

    b. Another parallel can be drawn from EU subsidy law: Assume that enterprise A applies for annulment of a Commission authorisation for a Member State subsidy for enterprise B, alleging distortion of competition. The competitive disadvantage for A arising from the subsidy only actually arises if the Member State transfers the sum of money. It certainly does not follow, however, that enterprise A's concern in the Commission authorisation is indirect. The entitlement of the Member State to provide the subsidy is already regarded as direct concern.

*3.2 No discretion in implementation*

36. The Defendants then also suggest that the GHG Emissions Acts afford discretion to the addressees responsible for implementation of the GHG Emissions Acts and contend that "application of contested provisions is thus subject to intermediate measures" (Parliament para. 27 last sentence). The Council also argues that Member States are permitted by the Acts to go further than those acts require, and to make more ambitious reductions (paras 20-23). These arguments are, likewise, incorrect.

37. It should first be noted that neither the Parliament nor the Council suggest that the Member States have any discretion to relax the reduction targets; that is, to allow more emissions than allocated to them in the ETS, ESR and LULUCF regimes. Moreover, neither Defendant denies that the Member States have no discretion to tighten the targets set by the three GHG Emissions Acts, by changing the overall 40% target for the EU (or the sector targets of 43%, 30% and 0%, respectively) to 60% or anything else. The Member States would not be competent to do so.

38. The Council however alleges that the Member States have discretion because they may reduce emissions further than required by EU law (Council paras 20 - 23).

39. It is submitted that this is irrelevant to the admissibility of the application because the application challenges EU legal acts, not omissions of the Member States. If there are obligations of Member States to go further, they are all based on national law, which it is not in the competence of the CJEU to assess, and which the Applicants do not seek.

40. The Council also refers to Art.193 TFEU, but this likewise does not show an absence of a direct concern in the sense of Article 263 para. 4 TFEU. Were the Council correct, no EU legal act based on Art. 192 TFEU could be challenged before the General Court. Another example may illustrate this point. Let it be assumed that the Commission decides not to include substance A into Annex XIV of the REACH Regulation (1907/2006) while it did do so with regard to a very similar substance B. The producer of substance B challenges the Commission decision for an erroneous risk assessment, unequal treatment, and so on. Producer B could certainly not be denied standing because his Member State might under Art. 193 TFEU be competent to restrict the manufacture and/or bringing on the market of substance A.

41. In the alternative, if the discretion of Member States to go further is relevant, it is submitted that the existence of the discretion does not alter the fact that the Member State is entitled to make use of the entire quantity allocated to it, including the part that the Applicants claim to be unlawful. This entitlement is real, applies through all stages of the regulatory regime, and finally reaches the applicants, affecting their legal rights. Even if the Member States are not obliged to make full use of their emissions budget the applicants must reckon with the entitlement of the Member States to exploit them in full. It is this very entitlement which is challenged by the Applicants.

42. It may be that, in light of the Member States' capacity to go further than required, the Court would wish to consider the probability that the entitlement here will be used. The Defendants make no effort to show that Member States would in fact go materially further than required. The high probability is that the entitlement will be used in full, including the unlawful part. The three GHG Emissions Acts have been adopted after long and intensive political debates between the EU institutions and the Member States. It is highly improbable that the Member States will be inclined to go further individually and without an assurance of fair effort sharing with the other Member States (which is of course the very purpose of Union level law-making), or if they do so, to reduce overall EU emissions by anything like as much as is required by higher rank law (the 50-60% reduction requested by the Application).

43. In the alternative, if the Court is not inclined to accept the Applicants' reasoning that the GHG Emissions Acts create entitlements, the Acts should be construed as failing, in breach of the Union's positive obligations, to regulate those emissions that exceed the limits allowed by higher rank law:

a. As set out in paras 112 - 118 of the Application, the CJEU[14] has acknowledged the existence of positive obligations as a corollary of the basic freedoms but there is no reason why they should not also exist as a corollary of fundamental rights. This would correspond to settled jurisprudence of the ECtHR[15] which must be respected by the CJEU in accordance with Art. 53 ChFR.

b. That said, the implications of a breach of fundamental obligations by omission for Article 263 para 4 TFEU are not yet well developed. It is submitted that "acts" in the sense of this provision embrace inaction, that direct concern for the legal situation of applicants arises from the very breach of the obligation to act, and that "discretion" does not exist if the obligation gives precise directions on what to do. By analogy with the Applicants' arguments made on the basis that the Acts create "entitlements", it is submitted that those conditions are fulfilled in the present case. In particular, the direction to act in the present case is sufficiently precise, in the sense that further action is needed given that it is clear that the EU's reduction target of overall 40% does interfere with fundamental rights and legal norms and cannot be justified.

44. These questions cannot be separated from the merits of the case and can more appropriately be discussed if the proceeding went on under reservation of the decision on admissibility.

45. In summary, the EU has assumed responsibility for setting emissions reductions targets. It has negotiated on behalf of the Member States with the international community in reaching the Paris Agreement and other international measures. In fact, there are effectively no individual commitments by Member States to the international climate regime any longer. Yet the emissions levels it has authorised breach its commitments and higher rank rules. It makes no sense to suggest that this does not have direct legal effects because other legal actors (the Member States) might possibly (to put it no higher) pick up some of the slack.

4. ***Individual concern*** (Parliament, paras 29-41; Council, paras 25-30)

46. The Applicants' case on the individual concern limb was set out in detail at paras 79-99 of the Application. The Applicants regret that the Parliament and the Council advance submissions based on a narrow reading of the Treaty and the case law. Neither of them engages with the Applicants' submissions on applying the question of individual concern to the urgent problem of climate change, which presents legal issues unlike those considered in the previous cases.

*First submission: the Application is consistent with the 'Plaumann' approach*

47. The Applicants' case is that, within the framework of the Court's judgment in the *Plaumann* case, they satisfy the requirement of "individual concern". This is because, in summary, while climate change affects all people, it does so in different ways depending on their circumstances. It also bears emphasis that the Applicants complain of infringements of their *individual* rights. Each person holds and enjoys their human rights individually, protecting that individual in all their personal circumstances. Each of them is affected by "certain attributes which are peculiar to them". The infringement of a right is therefore individual and idiosyncratic and the *Plaumann* standard is met (Application, paras 80-82).

48. To illustrate the point by reference to the Applicants here:

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[14] ECJ decision of 9 December 1997, Case C-265/95 (Commission v France),ECLI:EU:C:1997:595, paras 31-32, ECJ decision of 12 June 2003, Case C-112/00 (Schmidtberger), ECLI:EU:C:2003:333, para. 59.

[15] ECtHR decision of 9 November 2010, Application no. 2345/06 (CASE OF DEÉS v. HUNGARY), para. 21; ECtHR decision of 27 January 2009, Application no. 67021/01 (CASE OF TĂTAR v. ROMANIA), para. 87

a. Mr Carvalho suffered significant economic loss in the destruction of his forest holding, buildings, and equipment in catastrophic fires in central Portugal in 2017 (fires that the Portuguese government attributed to climate change) (Application paras 24-25).

b. The Conceicao family also live in central Portugal. They are also affected by higher temperatures and extreme weather but in a different way. These conditions have led not to the destruction of property but to the collapse of yields from their beehives and has already necessitated spending to maintain the bees (Application paras 26-27).

c. The Sendim family own a farm in southern Portugal engaged in raising and cultivating livestock, pasture, etc. Higher temperatures and lower rainfall have caused mortality in crops (Application paras 28-29). The Caixeiro family are also affected but as but as members of the cooperative working for and profiting from the Sendim farm.

49. While these Applicants are indeed from a similar area, and all engage in activities based on the use of the land, and are all affected by higher temperatures, lower rainfall, and extreme weather, it is quite clear that the consequences are very different for each of them. Even within the same family, the particular consequences will differ.

50. The Defendants deny that each Applicant is affected distinctly by climate change (Parliament para 34, Council para 25) but have simply refused to engage with the facts set out in detail in Annexes A.15-A.24. Rather:

a. the Parliament simply denies that the Applicants have any "***genuinely distinguishing features***" (para 35); and

b. the Council argues that it is "***obviously absurd***" for the Applicants to contend that a farmer who is affected by drought is in a different position from a farmer whose land is flooded (para 26).

51. It is astonishing to find the Defendants adopting such a dismissive and ignorant approach. It is inappropriate for these institutions to dismiss all the Applicants – who include many EU citizens – as essentially indistinguishable. It is all the more unfortunate that they have done so without even attempting to engage with the factual annexes, which set out the concerns individually based on i) the individual circumstances of each of them and ii) scientific facts.

52. The Defendants are in any event misguided on the law. The case law relates to quite different (perhaps more prosaic) circumstances, but can be instructive. In Case C-309/89 (*Codorníu)* the Court of Justice considered the "individual concern" limb in relation to a legislative measure reserving the use of the term "*crémant*" to sparkling wines produced in a specific region and by a specific method in two Member States. The applicant company (Codorníu) was a manufacturer of sparkling wines outside this region who had marketed its products as "crémant".

53. The legislative measure had self-evidently been adopted because a significant number of undertakings located outside that region had been marketing wines as "crémant" (giving rise to a perceived need to protect producers in the specified region). Yet even then, the applicant company was held to be "individually concerned". The basis of this reasoning was that it held a trade mark (paras 19, 21):

> *"Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.*
>
> *"Codorniu registered the graphic trade mark 'Gran Cremant de Codorniu' in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the*

*term 'cremant' to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark."*

54. The Court's reasoning was that although many traders may market wines as "crémant" and would be affected by the legislative act, Codorníu held an individual legal right to market its wines. By analogy, the Applicants here complain of an infringement of each of their individual rights, to life, to property, to an occupation, and so on.

55. The Applicants therefore assert both individual legal rights and complain of being affected in their own individual circumstances.

*Second argument: Transforming 'Plaumann'*

56. The Applicants recall their alternative submission in paragraphs 82 to 99 of the Application that the 55 year old *Plaumann* formula should be re-orientated towards an updated understanding of "individual concern". The Defendants do not submit any arguments refuting this alternative submission.[16]

57. The Applicants reiterate their main point: the Court's criterion that "individual concern" requires an applicant to be distinguished from all other persons does not sufficiently take account of interferences with fundamental rights, and must be read in conjunction with Article 47 of the Charter of Fundamental Rights (see Section C.2 above).

58. The Council has sought to rely on the observation of the General Court in Case T-16/04 *Arcelor*, where while the Court acknowledged that legislative acts must accord respect to fundamental rights, a claim that a measure infringes such rights creates a "risk of rendering the requirements of the fourth paragraph of Article 230 EC [now Article 263 TFEU] meaningless".[17]

59. As to the specific criticism articulated in *Arcelor*, the Applicants respond as follows:

a. First, the General Court's analysis risks confusing the requirements of Article 263 TFEU with the requirements that have been developed by the case law. Nothing in the language of Article 263 TFEU itself provides that an individual applicant must be individually distinguished "just as in the case of an addressee of a measure". As set out in Section C.1 above, the text requires no such interpretation.

b. Second, the interpretation propounded in *Plaumann* and *Arcelor* is at odds with the purpose and effectiveness of Article 263 TFEU and would effectively bar access to the Courts in the most serious cases of violations of fundamental rights: namely, those instances where rights violations are severe and widespread. (See Section C.1 and C.2 above).

60. The arbitrariness of the *Plaumann* formulation as applied in *Arcelor* can be illustrated by examples:

a. Assume, for instance, an EU legislative act removes all existing patent rights in certain inventions (considering them to hinder scientific progress): should the patent holders be refused legal protection because there are many of them?

b. Assume an EU legislative act orders that cars consuming more than 4 litre fuel per 100 km must be put out of use by a certain date (to reduce GHG emissions): should the car owners be prevented from access to the courts because there are many of them?

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[16] It is also worth noting that, while the Aarhus Convention does not apply to legislative acts, it is clear that the *Plaumann* standard is not consistent with that Convention as it unduly restrict access to justice in environmental matters, as found by the Convention Compliance Committee in its decision of 17 March 2017: ACCC/C/2008/32.

[17] GC Case T-16/04 (*Arcelor*) ECLI:EU:T:2010:54, para 103, also cited by the Council (para 27).

c. In the circumstances of this case: assume (as the Application contends) that the rise of the sea level floods the entire island where the Applicants Recktenwald and Petero live thus destroying their houses and making life on the island impossible. Are they barred from the Court because they do not live alone on that island?

61. The broader policy concern raised by the General Court in *Arcelor* can be accommodated by adopting a distinction between different categories of encroachments of rights. The Applicants submit that standing would be established where the character of the fundamental rights at issue is more serious (such as rights to life as opposed to rights of economic enterprises) and the encroachment is more grave (significant risks as opposed to moderate disturbances). The Applicants would rely on the Opinion of Advocate General Jacobs in Case C-50/00 (*Unión de Pequeños Agricultores*),[18] which proposes a test of standing based on the degree of the infringement (at paras 59-60):

> *"There are no compelling reasons to read into that notion a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. On that reading, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however to my mind a positive reason for accepting a direct challenge by one or more of those individuals.*
>
> *"In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, **a substantial adverse effect on his interests**."*

62. In sum, the Applicants submit that requiring an applicant to show a serious or substantial encroachment should satisfy the requirement of "individual concern", regardless of the extent to which others may also be affected.

63. The Court may take notice of the Statement by the UN Special Rapporteur on human rights and the environment [**Annex C.4**][19]. While the Applicants support this statement they point to the fact that in the present case there is no need to establish a right to climate protection. EU law already provides substantive protections and responses to climate change through rights to health, occupation, property and children's welfare, provided that access to Court is available.

### *5.* The *Saminuorra*

64. The Parliament contests the *locus standi* of the Saminuorra (Parliament, para 41), making the unsupported and unexplained assertion that it fulfils none of the conditions for an association to make an admissible application.

65. This submission should be rejected. The Parliament accepts that an association will have standing where, "the association represents the interests of its members which themselves have *locus standi*". The Saminuorra meets this requirement precisely. Neither Defendant has offered any basis for doubting the pleading establishing the basis for the Saminuorra's standing (see Application, paras 45-49, 100, 102; and Annex A.24 to the Application), which explain as follows:

a. First, climate change has caused and continues to cause the Arctic region to warm. This in particular results in the so-called rain on snow pattern (ROS) in Northern Scandinavia, which is

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[18] Also adopted by the General Court in Case T-17/01 (*Jégo-Quéré)*.

[19] Statement on the human rights obligations related to climate change, with a particular focus on the right to life, David R. Boyd, UN Special Rapporteur on Human Rights and Environment, October 25, 2018 [Annex C.4, pp. 69 ff.]

predicted to occur more frequently. ROS damages the food resources and food accessibility for reindeer.[20]

b. Second, the majority of the members of the Saminuorra (either themselves or their families) own and/or herd reindeer. They have already suffered and will increasingly incur costs from dealing with ROS and other climate change effects. This causes them economic loss from reduced volumes and quality of reindeer produce (such as hides and antlers) and the profitability of tourism services, and also causes an incremental loss of an essential part of their cultural heritage.[21]

### *6. Non-severability of the application for partial annulment*

66. The Parliament contends that the partial annulment of the three GHG Emissions Acts is not severable from the remainder of those Acts (Parliament, paras 42-47) and so that part of the Application is inadmissible.

67. The legal basis for this submission is the case law of the Court, to ensure that the relief ordered by the Court does not leave in place a legal act that would (if annulled only in part) have effects materially different from those intended. The question of severability should not be applied rigidly; it is appropriate to apply it with sufficient flexibility to allow the Court to discharge its function of review for legality under the Treaty.

68. This approach was followed in one of the foundational cases in the field of severance, Case 17/74 (*Transocean Marine Paint Association)* – which is cited in the case law relied on by the Parliament. There, the applicants challenged a condition of an exemption granted to them by the Commission under Art. 85(3) of the EEC Treaty from the requirements of Art. 85(1). The condition (requiring the applicants to furnish the Commission with information) was shown to have been imposed contrary to law. The condition was, however, regarded by the Commission as an important basis for its decision to grant any exemption, given the facts (see para 10). The Court agreed (see para 21), noting "the importance of the subject matter of this part of the decision". Although the condition was of key importance to the exemption, it was nevertheless annulled and the exemption (without the condition) was then left in place. Clearly, this materially changed the effect of the legal act (since the Commission was doubtful that an exemption would have been appropriate without such a condition). The Court granted the partial annulment, however, because:

a. It would also at the same time remit the matter to the Commission "to reach a fresh decision on this point" (para 20); and

b. Severance and annulment was "justified by the fact that, taken as a whole, the decision is favourable to the interests of the undertakings concerned" (para 21).

69. The Applicants would respectfully invite the Court to apply this approach here. Clearly, the machinery in the GHG Emissions Acts for setting and promulgating emissions reductions is "favourable to the interests" of the Applicants. What is then also needed is a remittal to the legislature of the extent of those reductions; that is, "a fresh decision on this point".

70. In considering the Parliament's objection it is essential to be precise as to the Applicants' case on the effect of the GHG Emissions Acts and the matters they seek to have annulled. As set out in detail, the GHG Emissions Acts, while setting sectoral reduction targets, must be characterised as also setting an

[20] See for scientific proof of changes Annexes to the Application A.24.3, p. 2597 et seq., A. 24.4, p. 2618 et seq., A.24.5, p. 2632 et seq, A.24.6, p. 2635, A. 24.7, p. 2641 et seq.; for the corresponding perception of the reindeer herders see Annex A.24.8, p. 2654; for the combination of climate change and other factors as causes of the difficulties of reindeer herders see Annex A.24.9, p. 2666.

[21] See Annex A.24, p. 2572.

allowable emission level, creating an entitlement for the Member States. The Applicants do not challenge the Acts' effort to reduce emissions by 40%. Their complaint is that the Acts still allow the emission of GHGs at 60% of 1990 levels.

71. The rationale (noted above) for the Court declining to annul a non-severable part of an act is that it would leave in force a decision materially different from that adopted. This concern is less significant if the annulment is granted before the start of the period 2021-2030 and the determination of the reduction targets can be re-set. In the alternative, if the decision of the Court comes later, the relief set out in the Application invites a qualified annulment, i.e. annulment combined with the provisional maintenance of the reduction/allowance target in force, pursuant to Art. 264 para 2 TFEU.

72. The specific contention made by the Parliament is that the partial annulment of the reduction/allowance target would disturb the interdependence between the targets and the implementation procedures in the GHG Emissions Acts, as well as the internal balance of the three Acts (paras 46, 47). This concern is misplaced. There would be no need to reorganize either the implementation tools or the implementation procedures or the internal balance of the three Acts:

a. The procedures for implementing decisions of the Commission and the Member States would remain the same. It is the quantity of emission allowances allocated to the Member States would have to be recalculated.

b. The tools foreseen by the Acts for reductions and allocations by Member States would also remain the same; only their intensity and time scales will change, but that is a matter of discretion of the Member States.

c. The internal balance of the three Acts also remains at it stands. Even the relative weight between the three sectors, i.e. 43 % for the ETS, 30 % for the ESR system and 0 % for the LULUCF sector can be kept as it stands, if each sector is committed to reduce emissions by further 10 to 20%.

73. These measures constituted by the GHG Emissions Acts can all remain in place. All that is required is what was ordered in *Transocean Marine Paint*: a fresh decision made in accordance with the law. In this regard it bears emphasis that the Application for annulment under Article 263 does not propose that the Court itself makes this decision. Rather, it would be for the Defendant institutions, in accordance with the demands of higher rank law, to derive new targets from both a top down analysis of available emission budgets and a bottom up analysis of what is technically and economically feasible, which they have failed to do (as set out in paras 215-221 of the Application).

## D. APPLICATION UNDER ARTICLE 340

74. The Applicants contend that they raise an admissible action to invoke the non-contractual liability of the Union (see Application at paragraphs 104-105), as they have pleaded and sufficiently substantiated the elements for establishing such a claim and seek an available remedy. They respond to each of the points raised by the Defendants in turn below.

### *1. Parliament's argument on the causal link*

75. The Parliament contends that the application under Article 340 is inadmissible because the action is bound to fail on the basis of a lack of a "*direct and precise link*" between the conduct of the Union's legislator and the damage complained of (Parliament, paras 60-69).

76. For the reasons set out below, the Parliament's contention that the Applicants are bound to fail to establish causation is misconceived. Before addressing the specific points the Applicants would reiterate the overall structure of their case on causation:

a. First, damage arising from climate change has already occurred in many instances based on the current ca. 1 C° global warming and resulting regional changes caused by, inter alia, emissions from the EU (as set out in the Application);

b. Second, that damage will be aggravated, and further damage caused, as emissions continue to be added to and accumulate in the atmosphere;

c. Third, emissions from the EU will contribute to the accumulation of GHGs and contribute to the aggravation of existing damage and the causation of further damage.

77. These steps in the causation analysis were each substantiated in detail in the Application and supporting Annexes, relating to *inter alia* the scientific and diplomatic consensus on climate change, the effect of emissions reductions in mitigating climate damage, and the specific circumstances of the Applicants. The Defendants have simply failed to engage with this evidence, which the Applicants reiterate. The Applicants make the following further observations in response to the points raised by the Defendants.

78. **The Parliament's resolution** The link between the need for deeper emissions targets in the EU and broader international cooperation to abate climate change and avoid or mitigate its destructive effects has been recognised by the Parliament itself. The Parliament resolved (by convincing majorities) on 25 October 2018 to support deeper emissions reductions targets by the EU and for it to conduct international negotiations at the 2018 Conference of Parties (COP24) of the UN Framework Convention on Climate Change on that basis [**Annex C.5**]:[22]

a. The Parliament first acknowledges the severe dangers of climate change and the need for international cooperation and solidarity (para 1 – underlining added):

"Recalls that climate change, as a cause and multiplier of other risks, is one of the most pressing challenges facing humanity, and that all states and players worldwide need to do their utmost to fight it through strong individual action;…" [**Annex C.5, p.86]**

b. It accepts that the impact of a 2°C rise in global temperatures would lead to profound and likely irreversible effects, and severe more damage than under a 1,5° scenario, reiterating the IPCC's finding **[Annex C.5, p.86]**, and emphasises the findings of the World Health Organisation that climate change affects the basic determinants of human health and risks resulting in hundreds of thousands of deaths each year **[p.87].**

c. The Parliament's resolution stresses the need for the EU to maintain credible international leadership and to adhere to the Paris Agreement **[Annex C.5, p.88]**:

"Stresses the importance of an ambitious climate policy for the EU to act as a credible and reliable partner globally, of maintaining the EU's global climate leadership, and of adherence to the Paris Agreement"

d. Having stressed the need for EU leadership and adherence to the Paris Agreement, the Parliament continues, acknowledging the emissions reduction targets already set (and which are the subject of these Applications) but resolving that this target should be increased [**Annex C.5, p.88]**::

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[22] See European Parliament, Motion for a Resolution, B8-0477/2018 [**Annex C.5, pp. 82 ff.**].

"supports an update of the Union's NDC with an economy-wide target of 55 % domestic GHG emission reductions by 2030 compared with 1990 levels"

79. Given this emphatic commitment to deeper emissions reductions, and acknowledgment of the connection between such reductions by the EU and mitigating or abating the damage caused by climate change, it is very difficult to see how the Parliament can before this Court credibly contend that there is an insufficient causal link for this Application to be brought, and particularly to make this contention and the admissibility stage. The causal link is the very basis for EU policy. The applicants would in fact call on the Parliament to step out of its formal role as defendant and support the plaintiffs in their call for adequate climate protection.

80. **IPCC Report** The causal link between effective and early action on a national level and the mitigation of serious climate damage is also underpinned by the most recent IPCC report on the 1.5°C target [**Annex C.1].** It revealed that climate change and its damageable effects have already been caused at the present appr. 1 C° degree of warming and will be more severe at a degree of 1.5°C which must be expected to be reached in a few years if measures are not taken of the sort stipulated by the present application. Increased emission reductions and thus a lower level of allowed emissions is necessary to reach both the "well below" 2°C and the 1.5°C targets, which is exactly why the EP has declared its support for increasing the EU target. Throughout the IPCC Special Report it is abundantly clear that there is a direct link between emission levels and the scale of impacts on natural and human systems, and thus on the applicant's assets and rights as described in Annexes A15-A.24 to the Application.

81. **EU case law** The Parliament cites the decision in Case T-197/17 *Marc Abel v Commission* as establishing that the causal link cannot be drawn. The Judgment, however, shows that the Court was concerned both with a significant degree of uncertainty in assessing how the Commission's alleged failure to apply pollution standards would affect air quality overall (para 30) and also an inability by the Applicants to establish the real and certain nature of any damage (para 33). This case is very different: the Union itself expressly acknowledges the causal link between its own emissions reductions targets and broader international action on climate change, and damage caused by climate change (see **Annex C.5**). Moreover, a number of the Applicants in this case have already suffered real and tangible damage; the evidence that all of the Applicants are at real risk of harm is compelling.

82. **Extent of responsibility attributed to the Union** The Parliament contends that the Union is being asked to "bear responsibility for all the impacts of climate change" (para 65). This is not correct and is based on flawed logic and a misreading of the Applicants' case. The Applicants

a. as set out above, complain of the Union's emissions, which materially contribute to the accumulation of dangerous concentrations of GHGs in the atmosphere and undermine broader international efforts to cooperate to limit emissions; and

b. seek only that the Union acts in accordance with its legal obligations, by adopting reductions targets that will fulfil its obligations under higher-rank norms. In particular, the Applicants submit only that the Union should set targets in line with the EU's share of the emissions budget calculated under the Paris Agreement, and to use no more than that share; they do not submit that the EU is obliged to take steps to cut emissions beyond this.

83. Indeed, the Applicants' case is generous to the EU in this respect. As the Application notes, the EU's share is calculated prospectively, without requiring the EU to bear the burden of its higher historical emissions. They are also calculated *pro rata* by population, when the EU could (given its wealth and technological resources) bear a significantly higher share than other countries; it could well be said that the EU's common but differentiated responsibility under the UNFCCC would be to do significantly more than other states. The Applicants do not require this.

84. The Defendants' approach would essentially invite the court to find the causal link with respect to the causes and impacts of climate change to be too complex for judicial determination. This is untrue and the logic of the Applicants' case on causation has already been accepted by an appellate level German court in proceedings against the electricity utility RWE AG, the largest single CO2 emitter in the EU [**Annex C.6 and C.7**]:

a. The argument that human emissions cause changes in the natural environment and thus present a risk to property (in that case, arising from glacial melting in the Peruvian Andes) was accepted as well-founded;

b. The plaintiff sought a judgment requiring *pro rata* compensation of expenses for protective measures taken to benefit his property. The Court rejected RWE's argument that a *pro rata* compensation order would not sufficiently address the interference with the plaintiff's rights. It said:

> "the fact that multiple parties have caused the interference ('disturbers') does not necessarily mean that eliminating that interference would be impossible. On the contrary, the established interpretation is that, in the case of multiple 'disturbers', each participant must eliminate its own contribution…"[23]

85. It is notable that in the RWE case, extensive reasoning on the *merits* of the claim (including on theories of causation) has led to the opening of the evidentiary phase, now ongoing, which aims to determine the level of RWE's contribution to the risk of a glacial outburst flood.[24] This illustrates that determining questions of causation is not suited for determination at the admissibility stage but for consideration on the merits. In any event, the Applicants in this case seek relief through the injunction on exactly the same logic: the EU would eliminate its own (unlawful) contribution.

86. Climate change is not non-justiciable, as the defendants essentially wish the court to hold. In the eyes of the Applicants, this belief is inspired largely by ignorance of climate science.

### *2. Availability of injunctive relief*

87. The Council touches on the admissibility of the Article 340 application only very briefly, focussing on the remedy sought (paras 31-33).

88. Notably, neither Defendant has suggested that the Court is not permitted to grant an injunction where appropriate.

89. The Council has sought to distinguish the *Galileo* case and has relied in turn on *Amicus Therapeutics*. However, *Amicus Therapeutics* deals with an application for annulment of an EU act (*in casus*: a Commission decision).[25] The Applicants do not dispute that the remedy available under Art. 263 para 4 TFEU does not allow the Court to issue directions to EU institutions (discussed further below). This case law is not applicable, however, to the question of an injunction in an application under Art. 340.

### *3. Parliament's allegation of an abuse of process*

90. The Parliament pleads that the Applicants abuse proceedings (paras 51-54). It alleges that there is a direct and inextricable link between the two actions under Art. 263 and 340 sec. 2 TFEU because they

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[23] OLG Hamm, Order of 01.02.2018, I-5 U 15/17, 5 U 15/17, [**Annex C.6, p 100 at p. 103]** (non-official English translation)

[24] OLG Hamm, Order of 30.11.2018, I-5 U 15/17, 5 U 15/17, [**Annex C.7. p.106],** (non-official English translation) with questions for the evidentiary phase on pp. 108 f.

[25] GC Case T-13/77, EU:T:2018 :595, para 19 and 20.

allegedly aim at the same verdict. In consequence, if the action for annulment is inadmissible the action under Art. 340 para 2 TFEU be equally inadmissible.

91. The claim of an abuse of proceedings is a very serious one to allege. The Parliament has done so with no evidence. It is inappropriate for the Parliament to have made such a wild allegation in this way. This is the reaction of applicant Mr. Armando Carvalho when he heard about the allegation of misuse of remedies:

> "I am disappointed in the way the Parliament and Council react to our application. Especially that they accuse us of misusing the process is inexplicable to me. In what way am I misusing a process when my forest has burned down already, climate change makes this more frequent and more severe, and I am only asking the court to check whether my rights are protected?"

92. Ms Sanna Vannar, the chair of Saminuorra, said:

> "It is unfair – they are not taking our plight seriously. When they say that we misuse the process we as youth lose our trust in the EU – we don't want that."

93. The Parliament misunderstands the concept of abuse of proceedings. The Parliament rightly accepts that applications for annulment and for damages have different functions and that the inadmissibility of an application for annulment does not render the damages action inadmissible (para 50). It contends, however, that the prohibition on abuse of the proceedings means that an applicant for damages may not seek to secure an outcome similar to annulment where an action for annulment is inadmissible (para 51).

94. The case law on abuse of proceedings (including that cited by the Parliament) makes clear that the concept applies only exceptionally and in a tiny number of situations. It requires (*inter alia*):

a. that the applicant for compensation has the same end (typically, a financial end) in view as could have been obtained in an annulment action.[26] This has in practice required that the applicant seeks compensation in precisely the same amount as it had been required to pay under the measure in question, and so effectively seeking the annulment of the measure;[27] and

b. that the applicant has failed to bring an application for the annulment of the measure.[28]

95. These criteria are not met here. First, the applicants have submitted an application for annulment in time.

96. Second, the relief sought under the applications for annulment and invoking the non-contractual liability are not identical:

a. Had the Applicants sought financial compensation there would be no question that the two actions were separate and outside the scope of the abuse of proceedings principle.

b. The Applicants have in lieu of compensation sought an injunction, but it does not follow that the relief sought is therefore the same as under the annulment procedure. The relief sought is different in important respects:

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[26] Case 59/65 (*Schreckenberg)* [1966] ECR 543, at 550.

[27] Case 175/84 (*Krohn)* para 33; Case T-279/11 *T&L Sugars*, para 104.

[28] Case T-279/11 (*T&L Sugars)*, paras 104-105; Case 175/84 (*Krohn)*, paras 30, 33; Case 59/65 (*Schreckenberg)* [1966] ECR 543, 549.

i. The basis for the injunction is to protect the applicants' individual interests and is brought *inter partes*. It seeks to restrain the Union from committing acts that would unlawfully cause loss to the applicants as private parties and would direct the Union institutions as to the emissions reductions required. It happens that the injunction would produce benefits for the public at large (because of the nature of the climate system) but that is irrelevant to the Applicants' case for an injunction.

ii. The application for annulment has as its object the annulment with effect *erga omnes* and does not order any further action. If the annulment is granted the Applicants trust that the legislator will then react in accordance to the reasoning of the Court, but the law is quite clear that the relief is limited to the declaration of annulment.

97. The argument of abuse of process is completely without merit. It would, in any case, be inappropriate for the allegation of procedural misuse to be determined separately in an admissibility hearing from the merits. The Applicants have brought their claims in good faith because they are directly threatened by the effects of climate change, and have already suffered damage. They are entitled to respond to the Parliament's allegation of an abuse of proceedings at a full hearing on the merits where they can properly explain and substantiate the very real damage that they have suffered and will sustain.

## E. ORDER SOUGHT

98. The Applicants therefore seek the following orders:

a. That a decision on the Defendants' pleas of inadmissibility is reserved until the Court rules on the substance of the case pursuant to Article 130(7) of the Rules of Procedure;

b. In the alternative to (a), that the Court opens the oral procedure in relation to the Defendants' pleas of inadmissibility;

c. In the further alternative to (a), and regardless of whether the Court opens the oral procedure, that the Defendants' pleas of inadmissibility are dismissed.

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**10 DECEMBER 2018**

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