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| **District Court of The Hague** |
| Case number:Session: | C/09/571932 2019/37901 December 2020 | **NOTES ON ORAL ARGUMENTS 4****Permits** |
|  |  | in the matter of:1. **Vereniging Milieudefensie** both on its own behalf, and in its capacity of representative ad litem and representative of the co-complainants who are listed on **Annex A**, which annex is attached to the summons and forms part thereof, having its registered office in Amsterdam, the Netherlands;
2. **Stichting Greenpeace Nederland**,

having its registered office in Amsterdam, the Netherlands;Landelijke Vereniging tot Behoud van de Waddenzee, having its registered office in Harlingen, the Netherlands;Stichting ter bevordering van de Fossielvrij-beweging, having its registered office in Amsterdam, the Netherlands;1. **Stichting Both ENDS**, having its registered office in Amsterdam, the Netherlands;
2. **Jongeren Milieu Actief**, having its registered office in Amsterdam, the Netherlands;
3. **Stichting ActionAid**, having its registered office in Amsterdam, the Netherlands.

Claimants Hereinafter also called: “Milieudefensie et al.” |
|  |  | Counsel: mr. R.H.J. Cox, mr. D.M.J. Dexters, mr. A.J.M. van Diem, mr. S.J. Keuls |
| Versus |
| **Royal Dutch Shell plc**Having its registered office in The Hague, the Netherlands DefendantCounsel: mr. D. Horeman, mr. J. de Bie Leuveling Tjeenk, mr. N.H. van den Biggelaar  |

Your Honours,

**Introduction**

1. Milieudefensie et al.'s claim seeks to have RDS reduce the CO2 emissions which it is causing and over which it has control, in line with the global climate objective of the Paris Agreement. In the remaining days of these multi-day oral arguments we will come to speak of the merits of this claim. RDS is presenting several defences in this respect. One of these defences entails that RDS believes that the permits of its subsidiaries have an exculpatory effect and that it cannot be acting wrongfully when it has obtained permits to carry out its activities. This is the defence I will come to discuss in a moment. Mr Cox will then address later today the question whether this District Court should apply restraint in the assessment of the case. Later, on day 3 of these multi-day oral arguments, other aspects relevant for the awarding of the claim will be addressed. I will now first address RDS’ ‘permit defence’.
2. RDS asserts in its statement of defence[[1]](#footnote-1) that its activities within the European Union which cause CO2 emissions are expressly permitted and consequently cannot be wrongful. It refers in this respect to permits which give it the right under the European Emissions Trading System (hereinafter called: “ETS”) to emit CO2. According to RDS there furthermore cannot be wrongfulness in so far as its activities are covered by a permit or are otherwise allowed in the future. According to RDS, the activities outside of the European Union cannot be wrongful either, in so far as these are covered by a permit or are otherwise permitted on the basis of the regulations applicable at the location in question at this time or will be in the future.[[2]](#footnote-2)
3. As explained in detail in the opening arguments, RDS annually spends millions in lobby activities to combat, delay or water down effective climate regulations. Until now RDS has also turned out to be successful in protecting its fossil fuel business model and growth plans in this manner. Against this background it is quite wry to note that in this case RDS is hiding behind flawed or even absent regulations of the government. In the opinion of Milieudefensie et al. this defence cannot succeed. I will explain this. I will first pay attention to RDS’ general defence that there cannot be wrongful act in so far as its activities now or in the future are covered by a permit or are otherwise allowed. Then I will specifically address the ETS.

**RDS disregards the doctrine of tort and human rights law as such**

1. RDS asserts with its general defence that there is not only an exculpatory effect in the event of permits which specifically regulate the emission of CO2, but that its activities also cannot be wrongful if they are otherwise allowed and – as Milieudefensie et al. understands the defence – when governments thus do not take any action to curtail its activities.
2. It is evident *a priori* that the doctrine relating to the exculpatory effect of permits, such as determined, inter alia, in the Vermeulen/Lekkerkerker case,[[3]](#footnote-3) does not have such a far-reaching purport. It ensues from this judgment that possession of a permit does not automatically entail indemnification against liability. However, this jurisprudence cannot be invoked when there is no permit at all, but only other forms of regulation or non-regulation.
3. More importantly, with this defence RDS disregards the doctrine of tort itself. RDS implies with its defence that, as long as it complies with all regulations and as long as the government permits its activities, it cannot be acting wrongfully. On the basis of Article 6:162 of the Dutch Civil Code, however, not only is an act or omission in contravention of a statutory duty wrongful, but so is the infringing of a right and acting contrary to the societal duty of care. In this respect a consideration must be made, in which the presence of government measures such as permit systems can also play a role.
4. The outcome of this consideration is, however, not only determined by such government measures, but also by other relevant facts, such as RDS’ awareness of the dangers of climate change, RDS’ share in causing climate change, the goals of the UN Climate Convention and the Paris Agreement, the chance of dangerous climate change in the event the reproached conduct continues and the burden for RDS to adapt the reproached conduct. These and other relevant facts and circumstances together determine which actions the societal duty of care demands in a specific case.
5. An assessment must be made of what all relevant facts and circumstances must have as a consequence for RDS acting in a socially responsible manner now and in the future.
6. In this respect I would like to point out that nowhere in literature, conventions or other sources is it argued that the Paris goal will be achieved, if the big fossil producers continue their activities ‘business as usual’ and continue investing in fossil fuels, as long as they adhere to the conditions of permits which have been obtained and to the rules of the various countries where they develop their activities worldwide. On the contrary: the achieving of the Paris goal will become impossible when big players like RDS do not take action in addition to the government measures.
7. On the basis of the jurisprudence of the Netherlands Supreme Court, RDS’ defence that it cannot be acting wrongfully as long as its activities as such are permitted, cannot be accepted.
8. The Netherlands Supreme Court has introduced far-reaching duties of care for private parties on the basis of unwritten law with regard to various subjects, when there has been a lack of relevant and adequate government regulation. A logical parallel which can be drawn in this respect is the comparison with the asbestos problem.
9. The risks which accompanied the use of asbestos were indisputably established at the latest at the beginning of the 1960s. The government fell short in its duty to provide protection and in the end did not prohibit the use of asbestos until 1993. The societal impact of this failure was enormous. For example, a prohibition on the use of asbestos in 1965, instead of in 1993, would have saved 34,000 victims and 41 billion guilders in costs in the Netherlands alone.[[4]](#footnote-4) Although significant and extraordinarily serious, this impact is negligible when compared to the consequences of dangerous climate change. I refer to the writ of summons in this respect.
10. It is also interesting that the government, in the context of the asbestos problem, was influenced to a great degree by the industry when it came to the regulatory process. Important strategies of the asbestos industry were (1) writing crucial passages in advice reports for the government from official ‘independent’ advisory bodies, (2) sowing doubt in the scientific and societal debate, (3) emphasising the economic significance of asbestos and (4) influencing public opinion.[[5]](#footnote-5)
11. These strategies will no doubt be familiar to you in relation to the climate problem and perhaps in relation to some of the defences presented by RDS. With regard to the approach to be applied, the government opted for the Dutch ‘polder model’: the well-known political model of long consultation between all parties involved with the societal problem, whereby the government seeks the support of market parties and does not introduce legislation, until a more or less collective position has been agreed upon between these parties. The result was that the industry had a big influence on the legislator. This is also known as “regulatory capture”, in which the legislator is in the grip of the persons it should really be regulating. The strategy of the industry, in combination with this polder model of the Dutch government, led to ineffective measures and a delay in a prohibition by dozens of years.[[6]](#footnote-6)
12. In the meantime, however, the number of asbestos victims kept rising and these victims also initiated civil lawsuits. In these cases the employers and asbestos producers defended themselves, in addition to sowing doubt about the science involved and by denying the dangers of asbestos, with the argument that asbestos was not prohibited, that there had been compliance with all regulations, that the Labour Inspectorate had not prescribed or recommended any further-reaching measures and that the use of asbestos was even prescribed by the government and was propagated as such.
13. The Netherlands Supreme Court held that all these circumstances did not detract from the fact that what the employers and asbestos producers knew or should have known regarding the dangers of asbestos, should have caused them to take measures. In this case, law on the liability of employers and producers of harmful products like asbestos, the following legal rules were developed, which are also relevant for this case:[[7]](#footnote-7)
* The fact that regulations relating to a risk are lacking or are insufficiently fleshed out, does not affect the fact that on the basis of unwritten law an actor may be subject to an obligation to take security measures;[[8]](#footnote-8)
* Even a small chance of serious damage may already lead to an obligation to take precautionary measures;[[9]](#footnote-9)
* In general, it can be expected of an actor to have a great degree of knowledge regarding the risks which accompany his business activities. Actors must proactively research possible risks which accompany their actions;[[10]](#footnote-10)
* Uncertainty about a risk is in fact a reason to carry out an investigation;[[11]](#footnote-11)
* In the case of serious risks, no or less weight shall be given to the costs or burden of the measures to be taken;
* The fact that the risky conduct is accepted by society or even encouraged by the government, does not (automatically) make this conduct lawful;[[12]](#footnote-12)
* The fact that the risky conduct is common in the industry and that other actors are also failing to demonstrate the necessary care, does not alter the fact that an actor can be called to account for his wrongful conduct.[[13]](#footnote-13)
1. It can be sufficiently determined from the foregoing that RDS’ argument that its activities (categorically) cannot be wrongful, as long as governments permit its activities, must fail.
2. Lastly, the defence presented by RDS is contrary to human rights law. In the Urgenda case[[14]](#footnote-14) the Netherlands Supreme Court held that climate change constitutes a threat to human rights, more specifically the right to life and the right to a peaceful family life, as laid down in Articles 2 and 8 of the European Convention on Human Rights. These articles oblige the taking of measures which are genuinely appropriate to avert the imminent danger as much as is reasonably possible. Article 13 of the European Convention on Human Rights then requires that domestic law must offer an effective legal remedy to combat a violation or likely violation of the rights guaranteed by the European Convention on Human Rights. This entails that the domestic court must be able to provide effective legal protection.
3. In the opinion of Milieudefensie et al., it would be contrary to these principles for RDS to hide behind inadequate, faulty or even absent climate regulations, if it were to be held that RDS and its inadequate climate policy is guilty of endangerment and/or a violation of Article 2 and Article 8 of the European Convention on Human Rights.
4. In view of this, RDS cannot derive any exculpatory effect from public law regulations, whether future or otherwise, that regulates its activities.

**RDS’ permits are only relevant for a very limited part of Milieudefensie et al.’s claim**

1. I will now address the permits of the subsidiaries of RDS and the ETS. Milieudefensie et al. believe that RDS cannot hide behind these permits, when it is called to account for its endangering and wrongful concern policy.
2. It must first of all be noted that the permits of the subsidiaries which RDS is invoking can only be relevant in its defence with regard to a very limited part of Milieudefensie et al.’s claim.
3. Milieudefensie et al.’s claim encompasses that RDS should not only reduce the direct emissions of its installations, but inter alia also its scope 3 emissions. These are the emissions which are the result of the consumption by third parties of the fossil fuels which Shell produces and puts on the market. These are, for example, the emissions by the cars of people who fill up at Shell. Such emissions have the biggest share in the total emissions, connected with the business activities and the energy-based products sold by Shell. Over 85% of the collective annual volume of the CO2 emissions connected with Shell are scope 3 emissions.[[15]](#footnote-15)
4. The ETS and the permits granted pursuant to the ETS relate to the greenhouse gas emissions of Shell installations. These permits do not relate to scope 3 emissions. In view of this, RDS cannot exculpate itself with reference to these permits and legislation from Milieudefensie et al.’s claim, in so far as the claim relates to scope 3 emission. This means that the permits of RDS subsidiaries are not relevant for the greater part – more than 85% - of Milieudefensie et al.’s claim.
5. RDS furthermore only refers with regard to its claim of exculpatory permits specifically to the European ETS. Milieudefensie et al.’s claim relates, however, to the global CO2 emissions connected with RDS and its Shell Group. The permits cited by RDS are consequently in any event not relevant for the assessing of the claim, in so far as it relates to Shell’s emissions outside of Europe.
6. RDS asserts that the activities and installations of the Shell Group in other countries are also subject to regulation but does not substantiate this further. RDS’ comments on the way in which various countries around the world take measures to a greater or lesser degree to implement the Paris Agreement, can in any event not lead to the adoption of an exculpatory effect. It does not ensue from these general comments by RDS that its subsidiaries in these other countries possess permits with an exculpatory effect on the basis of the criteria of the Vermeulen/Lekkerkerker case.
7. RDS’ invoking of the permits of its subsidiaries and the ETS can therefore not have any consequences for the greater part of Milieudefensie et al.’s claim, due to the global character of this claim and the large role which scope 3 emissions play in this respect.
8. For what part of Milieudefensie et al.’s claim is this reliance on exculpatory permits relevant? It ensues from the CDP report of RDS that in 2018, 19% of the total scope 1 emissions of RDS were covered by the ETS.[[16]](#footnote-16) As the scope 1 and 2 emissions of RDS together form a small 15% of RDS’ total emissions and the scope 1 emissions form approx. a 7/8 part of this 15%, it can then be calculated that only a small 2.5% of the RDS emissions are covered by the ETS.[[17]](#footnote-17)
9. Despite this very limited relevance, it is good to discuss the permits of the RDS subsidiaries and the ETS. Even if it is only to illustrate that such permit systems will not readily lead to an exculpatory effect. In this respect I will first briefly discuss the doctrine relating to the exculpatory effect that permits can have.

**The reference framework**

1. On the basis of the Vermeulen/Lekkerkerker case cited by RDS, for the assessment of the exculpatory effect of a permit one must look at (1) the nature of the permit in question, (2) the interests to be protected by the regulation on which the permit is based and (3) other matters in connection with the circumstances of the case. From the fact that these three factors must be reviewed and weighed, it already follows that acting with a permit is not automatically lawful and that a permit does not automatically have an exculpatory effect.
2. Most jurisprudence on this topic relates to nuisance cases and not to a case like this one. This jurisprudence shows that, even when the type of nuisance on which the civil claim is based can play a role in the framework of the weighing of interests which is carried out when the permit is granted, this far from establishes that the permit plays a decisive role in the assessment of the civil liability. The exculpatory effect of a permit comes nearer as the questions which have been answered in the sphere of administrative law, correspond more closely with the questions which the civil court has to answer. Jurisprudence shows, however, that it cannot be easily assumed that the administrative consideration aligns to such extent with the assessment which the civil court has to make, that the permit is decisive for the civil court’s verdict.[[18]](#footnote-18)
3. It ensues from both the Vermeulen/Lekkerkerker case and the Ludlage/Van Paradijs case[[19]](#footnote-19) that the civil court, in its assessment of a civil claim, will not quickly come to the conclusion that the consideration to be made was already sufficiently discussed in the framework of the granting of the permit.
4. In both cases, the public law framework offered options for the injured party to have his interests assessed during the permit-granting procedure and to obtain protection. In the Vermeulen/Lekkerkerker case this was because of the very broad protective objective and the related broad reference framework of the then applicable Nuisance Act.[[20]](#footnote-20) In the Ludlage/Van Paradijs case because the relevant zoning plan offered the possibility of setting additional requirements for the building permit, to prevent an unnecessarily detrimental change to the level of natural light on adjacent structures. The later civil law discussion in this case was focused for a great part on the loss of natural light (in addition to a loss of view) due to the construction.
5. The Netherlands Supreme Court nevertheless held in Vermeulen/Lekkerkerker that the broad protective scope of the Nuisance Act (quote) *“does not entail that consequently the scope of the rights of the owners of neighbouring plots would be limited in such sense that these owners would have to tolerate damage or nuisance of such nature, which in general they do not have to tolerate, from someone who had obtained a permit under the Nuisance Act for the actions which caused said damage or nuisance”*.
6. In Ludlage/Van Paradijs the Netherlands Supreme Court held that despite the possibility of protection which the zoning plan offered (quote) “*the (private) interests of (third parties like) Van Paradijs et al. had not already been taken into account in (the context of the adoption of) the zoning plan”.* In view of this, the building permit did not stand in the way of liability in tort, due to (inter alia) a loss of natural light.
7. In summary, it can be concluded that the mere fact that the same (kind of) interests are served by a statutory regulation and a permit based thereon as the interests which are at stake in the civil law proceedings, is in itself insufficient to accept exculpation. The exculpatory effect of a permit will only come into play when in the framework of the permit granting, the same interests were actually weighed as those which the civil court must take into account in the assessment of the civil law claim.
8. I will now explain that the permits of the RDS subsidiaries and the ETS as such do not have an exculpatory effect.

**Assessment against the criteria from Vermeulen/Lekkerkerker – no weighing of interests comparable to the present case**

1. Bearing in mind the assessment framework just discussed, it is first of all important that in the process for granting permits there was no possibility of a weighing of interests comparable with the consideration which your Court must make in this case.
2. In this case RDS is being called to account at the level of its concern policy, including its climate and transition policy and the related investment policy and portfolio policy. Milieudefensie et al. is claiming a reduction in the scope of the total annual volume of Shell’s CO2 emissions worldwide over time. Milieudefensie et al. believes in this respect that RDS satisfies all key criteria which are relevant to determine a duty of care and tort liability in relation to the global climate problem.
3. By granting permits to the subsidiaries of RDS, under the ETS they are given permission to emit CO2, as long as they can trade emission credits for these emissions.
4. The mere fact that the matter concerns the granting of a permit at the level of a subsidiary entails that the relevant weighing of interests is by its very nature different and necessarily much more limited than the assessment of the RDS concern policy on the grounds of the societal duty of care and human rights as are at issue in this case. A comprehensive assessment of the RDS policy and the effects thereof are by definition lacking – in terms of scope – when granting a permit to a subsidiary.
5. The whole is also more than the sum of its parts. The fact that an individual subsidiary has been granted a permit does not mean that making use of all individual permits of the subsidiaries of RDS simultaneously, bearing in mind the effects thereof on the climate, is actually permitted. RDS will still have to prudently deal with its emissions, its permits and with new permit applications.
6. The weighing of interests in the permit granting thus by its very nature by definition does not cover the considerations to be made in this case with regard to RDS’ policy choices to continue investing in fossil infrastructure and to continue emitting CO2 to an extent that jeopardises the Paris goal and impermissibly increases the risk of dangerous climate change.
7. In view of this, RDS cannot derive any exculpatory effect from the permits of its subsidiaries, nor from the ETS as such. It is pointed out that there is also no jurisprudence where (whether or not by analogy) a comparable situation has occurred, and the conclusion was nevertheless drawn that there was an exculpatory effect.
8. In the event that the foregoing position of Milieudefensie et al. would not be followed, I will – alternatively – go into the permits of the RDS subsidiaries and the ETS in more detail.

**Assessment against the criteria from Vermeulen/Lekkerkerker – the permits do not have an exculpatory effect**

1. It is relevant that, when granting the permits invoked by RDS, there is no weighing of interests at all with regard to the permitted amount of emitted greenhouse gases. I will explain this.
2. Pursuant to Article 16.5 of the Dutch Environmental Management Act it is prohibited, without a permit from the emissions authority, to operate a greenhouse gas installation. Companies whose installations fall under the ETS, must therefore apply for an emissions permit. The most important part of the emissions permit is the monitoring plan, as drawn up by the company itself and approved by the emissions authority. This monitoring plan substantiates how the company monitors its emissions. When granting the emissions permit, there is no further weighing of interests nor are requirements set with regard to the amount of permitted emissions. As long as a company can trade its carbon credits for its emissions, it is allowed to emit. Companies obtain these carbon credits through allocation, auction sales and market trading.
3. In addition to this emissions permit, a company that operates a greenhouse gas installation also needs an environmental permit, pursuant to the Dutch Environmental Licensing (General Provisions) Act. Pursuant to Article 5.12 of the Environmental Law Decree, no rules may be attached to these environmental permits with regard to emission threshold values and to promote low energy consumption in the facility.[[21]](#footnote-21)
4. It ensues from this that neither in the granting of the emissions permit, nor in the granting of an environmental permit is there room for a weighing of interests relating to the permitted amount of emissions. When it comes to greenhouse gas emissions due to an installation and activity which falls under the ETS, with regard to this aspect there is thus a ‘non-discretionary decision’, which makes a weighing of interests at the level of the authority issuing the permit impossible.
5. In view of the non-discretionary decision which this permit granting entails, it cannot be said that the government, in the framework of granting the permit weighed, or was able to weigh, the same interests, as are at issue in this civil suit. No exculpatory effect can therefore be derived from the permit ‘in se’.
6. I will repeat again in this respect that this case has a much wider scope than the granting of a permit to a subsidiary of RDS. This case is about RDS’ duty of care in relation to the climate problem and how this duty of care should be reflected in the policy and investment choices of RDS at the concern level. What is more, this case also relates to the responsibility of RDS for its scope 3 emissions, which in any event cannot be regulated by permits.
7. It will subsequently have to be assessed whether an exculpatory effect can be derived from the ETS, on which the emissions permits are based.

**Assessment against the criteria from Vermeulen/Lekkerkerker – the ETS does not have an exculpatory effect**

1. There is an essential difference between assuming an exculpatory effect on the basis of a permit and assuming an exculpatory effect on the basis of regulations ‘in se’. The justification for the exculpatory effect ensues with regard to a permit from the discretionary power which the competent authority normally – true enough not in this specific case – tends to have to weigh the interests and provide a tailored solution. This tailored solution option does not exist with regulations ‘in se’. By their very nature, regulations will (virtually) never entail a weighing of interests geared to the specific circumstances of the case.
2. Milieudefensie et al. believes that for this reason alone there cannot be such a weighing of interests encompassed within the ETS, that it no longer leaves any room for civil law claims. Consequently, the ETS cannot have an exculpatory effect.
3. In this respect it should furthermore be realised that assuming an exculpatory effect of the ETS would be very far-reaching. In that case it would have to be assessed that public law regulations – without a weighing of interests geared to the circumstances of the case – completely stands in the way of exercising a fundamental right of citizens. I.e., the right to bring action on the grounds of wrongful act to prevent damage. There could really only be cause for such a far-reaching opinion if it is guaranteed that the public law regulations in question also fully prevent the potential damage or fully compensate this damage. There must thus be a clear exhaustive effect, which covers the civil claim and the related interests and (impending) damage.
4. If there is no such exhaustive effect, in the event of exculpation there would be an impermissible infringement of citizens’ rights, as neither the public law regulations cover their interests, nor is there a civil law safety net. This is all the more true in this case, as this is about preventing and remedying a violation of human rights.
5. In practice, legislation with such an exhaustive, exculpatory effect is not likely to occur. It has not occurred here either. I will explain this.

*The ETS does not have as its objective an exhaustive, exculpatory effect*

1. It is relevant that neither the ETS Directive, nor the implementing legislation of this directive, at any point mention a possible exculpatory effect of the ETS, the ETS standing in the way of civil law claims, or an otherwise exhaustive effect under civil law. The ETS simply does not have such an objective, nor did such a thought enter into the creation of the ETS.
2. When legislation is meant to be exhaustive, this generally explicitly follows from the history of its creation. A (rare) example of legislation with an exhaustive effect is the Nuclear Energy Act. This statute, together with the permits based thereon, forms an integral scheme for protection against the negative consequences of the activities it covers for public health and the environment. This also ensues from paragraph 2 of the explanatory memorandum with the Nuclear Energy Act, in which it is considered that the Nuclear Energy Act *“must be deemed an integral arrangement in such sense that it purports to protect all interests involved in the storage of fissile materials and radioactive substances”*. This is the reason why it is not possible to impose the obligation on a permit holder, via a civil suit, to observe more and other rules in its activities than have been laid down in the permit.[[22]](#footnote-22)
3. An example of a judgment of the Netherlands Supreme Court in which it was considered that a statutory framework did not encompass an exhaustive arrangement, is the judgment of 26 November 1993 (damage from noise pollution at the Soesterberg military airfield).[[23]](#footnote-23) It was held in this judgment, inter alia on the basis of the parliamentary history, that a compensation obligation under the Dutch Aviation Act is not intended to exclude the possibility of an order to pay compensation due to noise pollution on the basis of Article 6:162 of the Dutch Civil Code.
4. The history of the establishing of the ETS does not provide any leads for an exhaustive effect under civil law. There are leads for the contrary position, however. For example, a general duty of care with regard to the environment has been laid down in Article 1.1a of the Dutch Environmental Management Act – the statute in which the ETS was implemented in the Netherlands. This provision serves as a safety net, so that action can also be taken against environmental contamination if there is no specific statutory provision therefor.
The third paragraph of this article makes it clear that this administrative law safety net does not affect the liability ensuing from civil law and it is thus also possible to take civil action. There is thus explicitly no exhaustive civil law effect for the statute in which the ETS is implemented in the Netherlands.
5. By analogy with the Vermeulen/Lekkerkerker case it can be stated that the ETS in any event does not entail that the scope of the rights of Milieudefensie et al. is limited in such sense that Milieudefensie et al. should have to tolerate endangerment and (impending) damage from RDS, which it does not have to tolerate in general, because the activities of some of the subsidiaries of RDS are covered by the ETS. There thus cannot be an exculpatory effect.

*The reduction targets implemented in the ETS are inadequate*

1. Milieudefensie et al. believes that in this respect it is also relevant – alternatively – that the actual reduction targets laid down in the ETS are inadequate to – with regard to the ETS sector – achieve the Paris goal, let alone to fully prevent dangerous climate change.
2. This is also acknowledged by the European legislator in the history of the adaptation of the ETS Directive in 2009. In this respect, by way of example, reference is made to recital 1.2 and recital 6.5 of the Opinion of the European Economic and Social Committee (hereinafter: the “EESC”) on the Proposal amending the ETS Directive of 3 February 2009:[[24]](#footnote-24)

*“1.2 The ETS must be seen to stimulate a low-carbon economy and encourage climate protection, adaptation and mitigation.”* [underlining added by counsel]
and,

*“6.5 The EESC has therefore paid particular attention to the role of the ETS in delivering equitable and sustainable impact on global GHG reduction. Does it demonstrate that European action is both credible and effective? In this context it has to be stated that the EU target of a 20 % reduction in GHG emissions by 2020 compared to 1990 levels (which underlies the ETS and the burden sharing proposals) is lower than the 25-40 % reduction range for industrialised nations which was supported by the EU at the Bali Climate Change Conference in December 2007. The Commission starts from the targets as agreed in the European Spring Council 2007 leaving undiscussed whether this level of reduction is really sufficient to achieve global objectives or whether it is just the maximum reduction that may conceivably be accepted, given the balance of short-term political and economically motivated interests of Member States. The EESC concludes that accumulating evidence on climate change demands the re-setting of targets to achieve greater GHG emission reductions.”* [underlining added by counsel]
3. After the amendment of 2009 the ETS Directive was amended a few more times. For example, on 23 and 24 October 2014 the European Council committed the ETS sector to bring about an emissions reduction in 2030 of 43% compared to 2005. This new goal was implemented on 14 March 2018 in the ETS Directive with the entry into force of Directive 2018/410. However, even this new goal is insufficient to achieve the Paris goal. The fact that the Paris Agreement had already been concluded prior to the creation of Directive 2018/410 did not, however, lead to the strengthening of the goals.
4. Thus, the adaptations of the ETS after 2009 do not ensure that the reduction target of the ETS Directive is in line with the Paris goal or that – with regard to the share of the ETS sector – dangerous climate change is fully prevented.
5. It is good news in this respect that on 17 September 2020 the European Commission proposed an EU target of at least a 55% reduction in 2030 compared to 1990 in all sectors.[[25]](#footnote-25) The European Council discussed this increased target on 15 October and intends during its meeting in December to come back to this point in order to determine a new emissions reduction target for 2030 before the end of the year.[[26]](#footnote-26) If the proposal were to be accepted in December, which is not certain yet, this will then have to be translated into concrete legislation. Whether ultimately the ETS will align with the Paris goal is still uncertain at this time.
6. If in time the Paris goal were to be implemented in the ETS – which Milieudefensie et al. would applaud – this does not mean that the ETS consequently acquires an exhaustive, exculpatory effect. It is still the case that such an effect was not what was intended by the European legislator. There will still not be a situation where Milieudefensie et al. should tolerate the endangerment and (impending) damage, caused by RDS’ company policy, which it does not have to tolerate in general, because the activities of a few European subsidiaries fall under the ETS.

*The ETS is not exhaustive and is not the only climate measure which applies for the ETS sector*

1. According to Milieudefensie et al. it is furthermore relevant here that the ETS, just like other CO2 pricing systems and aside from its reduction target, functions poorly and is inadequate to – in itself and with regard to the sectors falling under its scope – mitigate dangerous climate change. The EU and the Member States realise this and apply several other climate measures which have an influence on the industry falling under the ETS. In this respect too there is no exhaustive effect. I will explain this.
2. Various (present or former) European Member States are taking additional measures in the form of, for example, the introduction of a carbon tax. The United Kingdom, among others, has proceeded to do so and the Netherlands is also planning to do so with the Industry Carbon Tax Act.[[27]](#footnote-27) The related bill has been passed by the Dutch House of Representatives and is now before the Dutch Senate. The Dutch tax will (just like in the United Kingdom) be designed as a minimum price.
3. As reason for this national carbon tax the explanatory memorandum with the ‘Industry Carbon Tax Act’ bill indicates that the current form of the ETS is inadequate to achieve the Paris goal (quote):

*“The carbon tax is explicitly intended as a guarantee mechanism for realising CO2 reduction and achieving the reduction target. The tax is in addition to the European emissions trading system EU-ETS and is closely aligned with it. (…) The current form of the EU-ETS is insufficient to achieve the goals of the Paris Agreement. That is why the Netherlands has set a more ambitious national reduction target.”[[28]](#footnote-28)*
4. In addition to the introduction of the carbon tax by various Member States, various other climate measures are being taken in Europe, which have an effect on the ETS sector. In the past few years, the most obvious example has been the gradual phasing out of the coal industry. Coal-fired power stations cause very high emissions and are also covered by the ETS. In addition, at EU level there are various additional measures in addition to the ETS, some of which are explicitly geared to reducing greenhouse gas emissions. Other measures are directed at achieving objectives such as the use of renewable energy sources and increasing energy efficiency, but also affect the ETS sector.[[29]](#footnote-29) After all, the more sustainable energy that is added to the electricity grid, the less use is made of power stations which run on fossil fuels, which are covered by the ETS.
5. All of this shows that the ETS is one of the European means of combating climate change, but that it does not have an exhaustive effect and is also insufficient in itself, even with regard to the sectors covered by the ETS, to achieve this goal.
6. In addition, various studies have shown in this respect that various carbon pricing measures have been introduced or are planned worldwide, but that the prices within these systems are far too low to have an impact. Scientific reports show that as of 2020 this would require achieving a price of a minimum of 40-80 USD per ton of CO2, increasing to a minimum of 50-100 USD in 2030 (converted this is 34-68 euros and 42-84 euros respectively).
7. The ETS is far from achieving this necessary price. For example, in March 2020 the emissions price fell from approx. 25 euros to approx. 16 euros per ton of CO2. Research also shows that carbon pricing alone is insufficient to achieve the Paris goal. Several complementary measures are necessary in this respect. It is also necessary, for example, to phase out the subsidies and tax advantages geared to the production of fossil fuels, as these usually work as reverse carbon pricing and thus negate the carbon pricing in whole or in part.[[30]](#footnote-30)

*Conclusion*

1. It in no way follows from the history, the objective and the functioning of the ETS that the (European) legislator can be deemed to have already weighed the interests, as presented within this civil suit by Milieudefensie et al., or that there is otherwise an exhaustive effect. The European legislator acknowledges the importance of preventing dangerous climate change and acknowledges the limited purport and scope of the ETS. RDS’ business strategy and activities are jeopardising the attaining of the Paris goal. RDS cannot exculpate itself in this case with a reference to the ETS.
2. It is lastly pointed out in this respect that the State presented the defence in the Urgenda case that the ETS was exhaustive in such sense that this system, with regard to the ETS sector, supposedly impedes the taking of measures to further reduce greenhouse gas emissions. This defence was rejected.[[31]](#footnote-31)

**The exculpatory effect of permits is corrected by the societal duty of care**

1. Even if your Court, despite all of the foregoing, on the basis of the criteria in Vermeulen/Lekkerkerker, were in principle to come to the conclusion that the ETS has an exculpatory effect between private parties, in this case this exculpatory effect cannot apply. The jurisprudence regarding the exculpatory effect of permits provides clear indications that the societal duty of care can stand in the way of accepting exculpation.
2. In their note with the Kalimijnen case[[32]](#footnote-32), Schultsz and Nieuwenhuis consider that a permit holder cannot derive any exculpatory effect from the permit, if he, in view of his advanced knowledge, must understand that he, even when he complies with the rules laid down in the permit, is nevertheless causing serious damage to the environment. According to the annotators this even applies when the permit-granting agency (the government) holds the permit holder to account. This particularly applies when a claim based on tort is filed by a third party, who was not part of the permit-granting process and who did not create any legitimate expectation on the part of the permit holder through the granting of the permit.
3. In the EZH/Bailey I case[[33]](#footnote-33) it was furthermore considered that a permit holder may not act in conformity with his permit (quote):

*“in a case in which the circumstances are such that it must have been clear to the permit holder that the Minister, when weighing the relevant interests with an eye on a likely disadvantage to specific interests, could not reasonably have made his decision as laid down in the permit, in which case the duty of care which is appropriate in societal transactions can entail that the permit holder does not make use of the permit or when making use thereof makes greater allowances for those interests than are prescribed by the conditions of the permit”*.
4. Finally, in the judgment of the Netherlands Supreme Court of 16 June 2017,[[34]](#footnote-34) with reference to, inter alia, the Ludlage/Van Paradijs judgment, it was held that the possession of or, on the contrary, the lack of a permit required under public law, is not immediately decisive for the answer to the question whether with regard to a specific third party there has been wrongful conduct. Nor did the Netherlands Supreme Court deem it automatically decisive for whether or not there had been a wrongful act, whether there was compliance with public law regulations. The party against whom action had been brought with regard to odour pollution asserted that the Court of Appeal should have reviewed the case against the former public law framework which was in force at the time of the asserted odour pollution, which he allegedly complied with. The Court of Appeal had based its finding of wrongful conduct on the report of an expert, in which the *de facto* odour pollution level was assessed on the basis of objective criteria in accordance with recent insights and reference frameworks. The Netherlands Supreme Court held that the Court of Appeal was indeed allowed to base its views on the recent insights and reference frameworks, in part in view of the fact that the legislative history showed that the previously applicable regulations were already considered insufficient at the time in terms of preventing odour pollution.
5. In this case it was thus held on the basis of recent insights and new regulations that there had been a wrongful act, regardless of whether the party against whom action had been brought, had in fact complied with the regulations in force at the time of the wrongful act.
6. It follows from the aforementioned jurisprudence that in the context of a discussion on the exculpatory effect of permits or legislation, an inadequate public law framework cannot provide exculpatory effect. When the permit holder knows that when using the permit he is nevertheless causing serious damage to the environment or that the government in its weighing of interests did not attribute certain interests sufficient weight, there cannot be exculpation. The permit holder thus always retains his own individual responsibility.
7. I would like to point out that the above-discussed jurisprudence brings to mind the previously discussed legal rules of the asbestos case law, in which it was determined that inadequate regulation or even encouragement on the part of the government does not stand in the way of the assumption of wrongfulness.
8. That the government systematically does not attribute the interest of preventing dangerous climate change sufficient weight, should be deemed as sufficiently demonstrated by the decision of this Court in the Urgenda case of 2015. In addition, it is evident that the measures which governments are taking worldwide are insufficient to prevent dangerous climate change and that the help of non-state actors like RDS is necessary.
9. It has furthermore been explained in detail in the summons that RDS is aware of the risks of dangerous climate change like no other. RDS has nevertheless opted to follow a business policy that unlawfully increases the risk of dangerous climate change.
10. The aforementioned circumstances mean that RDS can in any event not derive any exculpatory effect from permit systems and regulation by governments worldwide. The foregoing particularly applies when human rights are at issue, as is the case in this matter.
11. Even in the exceptional case that your Court, on the basis of the criteria laid down in Vermeulen/Lekkerkerker, were thus to hold that in principle there is an exculpatory effect, Milieudefensie et al. believes that there are good grounds for accepting an exception on the basis of the societal duty of care in this case.

**Conclusion and Article 17 Rome II**

1. For all of the above-discussed reasons, neither the permits of the subsidiaries of RDS, nor current and future government regulations and measures stand in the way of accepting civil law liability.
2. This morning, when discussing applicable law, it was already explained that Article 17 of the Rome II Regulation does not oblige your Court to take into account in its assessment of the case the permits, as these apply in other countries to RDS and its subsidiaries. On the basis of this article only factual and appropriate account must be taken of the safety regulations and conduct rules which are in effect at the time and the place of the event which causes the liability. The ‘place of the event giving rise to the liability’ is the Netherlands.
3. Moreover, Article 17 of the Rome II Regulation only requires ‘taking into account’ the foreign permits and not the actual application of the law of the country associated with these permits. Article 17 of the Rome II Regulation thus does not entail that greater weight must be attributed to these permits, than would be the case for a comparable Dutch permit. Nor should the consequences of these permits be assessed according to the status and the legal consequences which these permits have abroad with regard to the question of unlawfulness.[[35]](#footnote-35)
4. Pursuant to Article 17 of the Rome II Regulation, your Court is consequently free to itself determine what weight is attributed to such permits. Aside from the circumstance that RDS has not presented sufficient facts and evidence with regard to its foreign permits, the above conclusion, that there cannot be an exculpatory effect, applies equally to these permits in the opinion of Milieudefensie et al.
5. Even if Article 17 of the Rome II Regulation does not in itself require including foreign permit systems in the assessment, the broad assessment framework of the societal duty of care naturally does offer possibilities in this respect.
6. However, the final conclusion always remains the same. RDS cannot derive any exculpatory effect from the permits of its subsidiaries, in the Netherlands or in the rest of the world, nor can an exculpatory effect be derived from other current or future government regulations or measures. With this conclusion I close my argument.
7. I will now let Mr Cox take over, who will explain why the particular aspects of this case, including the dual challenge of climate change and energy supply cited by RDS, do not require a reserved assessment by your Court.

Counsel

1. Paragraphs 481 through 484 of RDS’ statement of defence. [↑](#footnote-ref-1)
2. Paragraph 519 of RDS’ statement of defence. [↑](#footnote-ref-2)
3. Netherlands Supreme Court 10 March 1972, NJ 1972, 278 (Vermeulen/Lekkerkerker), ECLI:NL:HR:1972:AC1311. [↑](#footnote-ref-3)
4. In comparison to the 52,600 victims and 67 billion guilders in expected costs over the period 1969-2030. See: P. Harremoës et al., Late lessons from early warnings: the precautionary principle 1896–2000, EEA 2000, p. 58. [↑](#footnote-ref-4)
5. R.F. Ruers, ‘Macht en tegenmacht in de Nederlandse asbestregulering, Boom Juridische uitgevers, March 2012, p. 461. [↑](#footnote-ref-5)
6. See for a good overview of this history: R.F. Ruers, ‘Macht en tegenmacht in de Nederlandse asbestregulering, Boom Juridische uitgevers, March 2012, paras. 7.1 and 7.2. [↑](#footnote-ref-6)
7. See in this respect: E.R. de Jong, ‘Legitimiteitsperspectieven op rechterlijke participatie bij vermeend overheidsfalen’, TGMA, 2017/3 and L. Enneking & E. de Jong ‘Regulering van onzekere risico’s via public interest litigation?’, NJB 2014/23. [↑](#footnote-ref-7)
8. See e.g. Netherlands Supreme Court 6 April 1990, ECLI:NL:HR:1990:AB9376, para. 3.4, NJ 1990/573, with notes by P.A. Stein (Janssen/Nefabas); Netherlands Supreme Court 25 June 1993, ECLI:NL:HR:1993:AD1907, para. 3.8.4, NJ 1993/686, with notes by P.A. Stein (Cijsouw I). [↑](#footnote-ref-8)
9. See C.C. van Dam, European Tort Law, Oxford: University Press 2013, nos. 805 and 806; Netherlands Supreme Court 8 January 1982, ECLI:NL:HR:1982:AG4306, NJ 1982/614, with notes by C.J.H. Brunner (Natronloog); Netherlands Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, NJ 2006/147, with notes by C.J.H. Brunner (Hertel/Van der Lugt); Netherlands Supreme Court 25 November 2005, ECLI:NL:HR:2005:AT8782, NJ 2009/103, with notes by I. Giesen (Eternit/Horsting). [↑](#footnote-ref-9)
10. See: E.R. De Jong, ‘Voorzorgverplichtingen, Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico’s’, Boom juridisch 2016, para. 10.2.4; K.J.O. Jansen, ‘Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht’, Kluwer 2012, pp. 380-381; and e.g. Netherlands Supreme Court 6 April 1990, ECLI:NL:HR:1990:AB9376, para. 3.4, NJ 1990/573, with notes by P.A. Stein (Janssen/Nefabas). [↑](#footnote-ref-10)
11. E.R. De Jong, ‘Voorzorgverplichtingen, Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico’s’, Boom juridisch 2016; C.C. van Dam, ‘Taxus revisited. Een kleine taxonomie van het kennisvereiste’, *MvV* 2015, vol. 7-8, pp. 229-234. [↑](#footnote-ref-11)
12. Netherlands Supreme Court 2 October 1998, ECLI:NL:HR:ZC2721, para. 3.3.2, NJ 1999/683, with notes by J.B.M. Vranken (Cijsouw II). [↑](#footnote-ref-12)
13. Netherlands Supreme Court 2 October 1998, ECLI:NL:HR:ZC2721, para. 3.3.2, NJ 1999/683, with notes by J.B.M. Vranken (Cijsouw II); Netherlands Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, NJ 2006/147, para. 3.8, with notes by C.J.H. Brunner (Hertel/Van der Lugt). [↑](#footnote-ref-13)
14. Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, e.g. paras. 5.5.2, 5.6.2 and 5.7.9. [↑](#footnote-ref-14)
15. Paragraph 99 of the statement of defence and <https://reports.shell.com/sustainability-report/2019/our-performance-data/environmental-data.html>. [↑](#footnote-ref-15)
16. Exhibit 315, p. 154. [↑](#footnote-ref-16)
17. Approx. (7/8 part of 15% = ) 13.125% of RDS’ total emissions are scope 1 emissions. Consequently only (19% of 13.125% =) 2.5% of RDS’ total emissions are covered by the ETS. [↑](#footnote-ref-17)
18. See: J.H.A. van der Grinten, ‘Vermeulen/Lekkerkerker: een springlevend uitgangspunt’, in: Jurisprudentie Milieurecht, October 2007, vol. 9. [↑](#footnote-ref-18)
19. Netherlands Supreme Court 21 October 2005, NJ 2006, 418 (Ludlage / Van Paradijs), ECLI:NL:HR:2005:AT8823. [↑](#footnote-ref-19)
20. According to the Netherlands Supreme Court, the purpose of the Nuisance Act was to prevent as much as possible that an installation as referred to in said Act would cause danger, damage to property, to businesses or to health or nuisance of a serious nature. The permit granted in this case pursuant to this Act even contained a rule that the permit holder had to prevent the formation of colonies of crows and rooks, which crows and rooks caused the damage which led to the subsequent civil law litigation. [↑](#footnote-ref-20)
21. Article 5.12 of the Environmental Law Decree concerns an implementation of Article 9 of the Industrial Emissions Directive and Article 26 of the ETS Directive.. [↑](#footnote-ref-21)
22. Particularly not when there has been litigation on these rules before the administrative court. See: Netherlands Supreme Court 17 January 1997, ECLI:NL:HR:1997:ZC2249 [↑](#footnote-ref-22)
23. Netherlands Supreme Court 26 November 1993, ECLI:NL:HR:1993:ZC1156, with notes by F.H. van der Burg, AB 1995, 81, para. 3.3. [↑](#footnote-ref-23)
24. (2009/C 27/15). [↑](#footnote-ref-24)
25. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 December 2020, COM(2020) 564 final. [↑](#footnote-ref-25)
26. Note concerning the European Council meeting (15 and 16 October 2020) – conclusions, EUCO 15/20. [↑](#footnote-ref-26)
27. See the Carbon Pricing Dashboard of The World Bank for a worldwide overview of all countries which have introduced and will introduce a carbon pricing measure: <https://carbonpricingdashboard.worldbank.org/>. [↑](#footnote-ref-27)
28. Parliamentary Documents II 2020-21, 35575, no. 3, p. 2. [↑](#footnote-ref-28)
29. For example, Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. [↑](#footnote-ref-29)
30. See: Unlocking the inclusive growth story of the 21st century, accelerating climate action in urgent times, by The Global Commission on the Economy and Climate, Exhibit 291, pp. 15 , 23 and 47. In this exhibit reference is made for further supporting arguments to: World Bank, 2018. State and Trends of Carbon Pricing 2018; and, CPLC, 2017. Report of the High-level Commission on Carbon Prices. [↑](#footnote-ref-30)
31. See the judgment of the District Court of The Hague of 24 June 2015 (ECLI:NL:RBDHA:2015:7145), para. 4.80 and the judgment of the Court of Appeal of The Hague of 9 October 2018 (ECLI:NL:GHDHA:2018:2591), para. 54. [↑](#footnote-ref-31)
32. Netherlands Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, NJ 1989/743, with notes by J.C. Schultsz and J.H. Nieuwenhuis. [↑](#footnote-ref-32)
33. Netherlands Supreme Court 14 June 1963, NJ 1965, 82 (EZH/Bailey en De Koophandel; with notes by JHB). [↑](#footnote-ref-33)
34. Netherlands Supreme Court 16 June 2017, ECLI:NL:HR:2017:1106, paras. 3.3.2 et seq. [↑](#footnote-ref-34)
35. X.E. Kramer and H.L.E. Verhagen, Asser 10/III 2015/1055, De gevolgen van een vergunning. [↑](#footnote-ref-35)