**UNOFFICIAL TRANSLATION**

**VG 10 K 412.18**

Announced on 31. October 2019

ADMINISTRATIVE COURT BERLIN

JUDGEMENT

On behalf of the people

In the administrative procedure

of

1. Mr. Jörg Backsen
2. Ms. Silke Backsen
3. …

...

14. Greenpeace e.V...

**plaintiffs,**

represented by attorneys:
Rechtsanwälte Guenther,
Mittelweg 150, 20148 Hamburg

a g a i n s t

the Federal Republic of Germany,
represented by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety security,

**defendant,**

represented by attorneys:
**…**

the Administrative Court of Berlin, 10th Chamber, based on the hearing on 31 October 2019 attended by

the chairman judge at Administrative Court Mr. …
the judge at the Administrative Court Ms. …
the judge Mr. …
the honorary judge Mr. … and the honorary judge Mr. …

has ruled:

The action is dismissed.

Orders the plaintiffs to pay the costs of the proceedings.

The judgement is provisionally enforceable with regard to the costs against security amounting to 110% of the respective enforceable amount.

The appeal is granted.

## Facts

The plaintiffs primarily wish the Federal Government to be ordered to take additional measures in order to achieve the climate protection target it has set itself for 2020 and to fulfil its reduction obligations under European law.

The Action Programme Climate Protection 2020 is based on a Cabinet decision of 3 December 2014, which sets the objective for the German government to reduce greenhouse gas emissions in Germany by 40 % until 2020 compared to 1990. To achieve this, emissions would have to be reduced from around 1,250 million tonnes of CO2 equivalent (CO2 eq.) in 1990 to a target value of no more than 750 million tonnes of CO2 eq. in 2020. According to the German government's own projections, the 2020 climate protection target will not be achieved. In fact, according to the Federal Government's Climate Protection Report 2018 (p. 9), Germany is likely to achieve only a reduction in CO2 emissions of 32 % and according to the projection report of the Federal Government of May 2019 (Table Z-2, p. 23), 33.4 %.

The plaintiffs also rely in the first alternative application on the so-called burden sharing Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009, which determines the contribution of the respective Member States to achieve a reduction of greenhouse gas emissions throughout the Community in economic sectors not subject to EU emissions trading. According to Art. 3 (1) in connection with Annex II of the Decision, Germany limits its greenhouse gas emissions by at least 14% compared to its emissions in 2005. Art. 3 and 5 of the Decision provide for certain "flexibilities" in meeting commitments. Among other things, states may transfer up to 5% of their emission allocations to other states if they exceed their targets (Art. 3 para. 4). Emissions in Germany will only have fallen by 3 % by 2017 (government draft for a Federal Climate Protection Act of 9 October 2019, A. Problem and target). Germany is unlikely to achieve the 2020 climate protection target for the non-ETS sectors through domestic reductions. This is one of the findings of a 2018 report by the Federal Environment Ministry, Climate Protection in Figures, (p. 23).

The plaintiffs 1) to 13) are three families of farmers and their children who practice organic farming on their own land in Germany. The plaintiffs 1) and 2) run a farm with a total of 180 hectares on the North Sea island Pellworm, which has been in existence since 1703 and is mainly oriented towards cattle farming and arable farming. They have already been affected by crop losses due to extreme events (heat with no possibility of irrigation) and heavy rainfall. They fear that they will not be able to use their family farm in the long term without sufficient climate protection, for example because of difficult drainage and exceeding the technical limits of flood protection.

The plaintiffs 7) to 9) are owners of an organic dairy farm which is operated as a civil law partnership [Gesellschaft bürgerlichen Rechts] – which is the plaintiff 10). The farm has 380 hectares of agricultural land and about 100 hectares of forest. They were affected by crop losses and fear that without effective climate protection their dairy cattle could be damaged by heat stress and their land could become unusable due to lack of irrigation. The plaintiff 11) runs an orchard on more than 20 ha with own and leased land in “Alten Land” near Hamburg. His farm is infested by pests such as codling moth and the cherry fruit flies, which increase the effort extremely. He fears that heavy rainfall events and hail with waterlogging in winter and spring as well as extreme summers without climate protection could push his farm to its economic limits. The children and heirs of the current farm owners - the plaintiffs in 3) to 6), 12) and 13) - intend to take over their parents' farms.

The plaintiff 14) is Greenpeace e.V., an environmental association, which has as the statutory target, among other things, climate protection and the prevention of dangerous climate change. Greenpeace is currently not recognised as an environmental association within the meaning of § 3 of the Environmental Appeals Act (UmwRG).

The plaintiffs brought their action on 29 October 2018.

According to the plaintiffs, legal recourse to the administrative courts is open. Insofar as the defendant asserts that the core area of executive autonomy of the Federal Government is being encroached upon and its scope for political action is being curtailed, this must be examined not in terms of admissibility but in terms of the reasonable justification of the action.

The plaintiffs are pursuing their request in the form of an action for performance [Leistungsklage]. They are of the opinion that they can claim the continuation of the climate protection programme with appropriate measures as an act of the defendant. This is because the abandonment of the 2020 climate protection target is objectively unlawful and violates the plaintiffs' fundamental rights. They are specifically affected by this.

With regard to the legal standing, the theory of possibility applies in the administrative proceedings, according to which it would be only necessary to examine whether on the basis of the complaint an infringement of the plaintiffs subjective rights appears possible. This would be the case here.

The plaintiffs are of the opinion that the 2020 climate protection target represents a legally binding voluntary commitment by the defendant and as such has external effects. Since 2007, the defendant has repeatedly adopted the 2020 climate protection target as a cabinet decision (currently through the Climate Protection 2020 Action

Programme). It was not a purely political declaration of intent, but a legally enforceable legal act of the defendant, on which an affected party could also rely.

The legal character of the climate protection objective is first of all due to the fact that it has been the subject of several cabinet decisions under § 15 of the Rules of Procedure of the Federal Government (GOBReg). Resolutions of the Federal Government serve to ensure effective and trustful cooperation between the members of the Federal Government and have a legally binding effect on its members. They were to be qualified as binding state act with internal effect.

In accordance with the general principles of self-binding administration and on the basis of the protection of confidence from real action, the 2020 climate protection target can be assumed to have an external impact. At the very least, a sudden deviation from the previous practice would require a comprehensible justification.

Climate protection programmes were a form of administration actions and as such they are to be assigned to the programme or steering plans. For the defendant, the 2020 climate protection target represents an "administrative directive" which restricts its political freedom. The defendant had set a binding emissions level for 2020 through the 2020 climate protection target and pursued it for over 11 years, had repeatedly taken measures to achieve it, and at the same time had used it as a basis for draft legislation and interventions in fundamental rights. For example, when Section 13g of the Energy Industry Act (EnWG) was introduced, the Statement of reasons for the law expressly referred to the national climate protection target for 2020 in order to justify an interference with the freedom of occupation of the operators of lignite-fired power plants.

The climate protection target 2020 serves the implementation of the state's duty to protect in the context of international and Union law and its own constitution and thus of higher-ranking law. In principle, Article 20a of the Basic Law (Grundgesetz - GG) leaves environmental protection to the legislature, which is why the legislature has a duty to act and defines appropriate levels of protection. This active duty to act under Article 20a of the Basic Law has, however, so far only been implemented at federal level through government action in the form of climate protection programmes or cabinet decisions. By fulfilling its constitutional obligation to an effective protection concept against global climate change only at the level of cabinet decisions by the stae, those targets and the climate protection programmes of the defendant would, conversely, acquire constitutional significance. Only the legislator could change the 2020 climate protection target.

The climate protection target 2020 would be still achievable even now (study by the Fraunhofer Institute for Greenpeace, How Germany can still achieve its climate goal 2020, August 2018).

The fundamental rights of the plaintiffs 1) to 13) from Article 2.2 of the Basic Law (life and physical integrity), Article 12 (freedom of profession) and Article 14 of the Basic Law (property) were violated. There were indirect, factual encroachments on these fundamental rights. The plaintiffs 1) to 9) and 11) to 13) were not currently affected in their right to health, but they were threatened by the harmful health consequences of climate change and in particular the more frequent heat waves. The plaintiffs 1) to

13), as current or future owners and operators of agricultural holdings, were also affected by their right, protected by Article 14 of the Basic Law, to continue their business to the same extent as before. By failing to implement the 2020 climate protection target, the defendant is indirectly and de facto encroaching on the scope of protection of Article 14.1 of the Basic Law. This would enable third parties to emit significantly more greenhouse gas emissions than those continuously determined since 2014 by the 2020 climate protection target. This would intensify and further advance anthropogenic climate change and thus also regional environmental degradation. The defendant is aware of this complex process. The defendant is aware of the resulting impairment of the plaintiffs' civil liberties, but would accept this.

No scientific proof of causality between the concrete CO2 emissions caused by the failure to meet the 2020 climate protection target and the concrete threat to the plaintiffs' fundamental rights must be presented. For the legal possibility of a threat to fundamental rights is sufficient to assert the factual impairment resulting from the failure to achieve the 2020 climate protection target. Moreover, there was no justification for the encroachment on fundamental rights. This fails because there is no legitimate purpose for the abandonment of the previous reduction target.

In the alternative claim, the applicants invoke the duty of the State to protect fundamental rights. Article 2 of the Basic Law not only grants a subjective right of defence against state intervention, but also has an objective-law content. From this, they argue, arises the duty of the state to protect and promote the aforementioned legal interests. This general constitutional principle developed for the protection of life under Article 2.2 of the Basic Law was also transferable to the protection of property in Article 14 of the Basic Law.

The plaintiffs submit that duty of the state to protect against climate change also flows from Article 20a of the Basic Law, which the plaintiffs can refer on in this context. There would be a prohibition of insufficient means, which is violated by the abandonment of the climate protection target 2020. The balance between the legal interests of the persons affected, in this case the exercise of freedom of the persons who have an adverse effect on the environment on the one hand and the protection of the plaintiffs as persons who have an affected on the other hand, which is necessary in a multipolar constitutional relationship, falls short of the requirements of the prohibition of insufficient means, to the detriment of the plaintiffs. The 40% target had already been adopted in 2007 on the basis of the 4th Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) and is based on scientific findings. According to scientific statements, Germany was approving considerably more of the remaining global greenhouse gas budget than was justified. According to a brief report by the German Institute for Economic Research for Greenpeace (When Germany will actually achieve its 2020 climate protection target, October 2019), the 2020 climate protection target will not be achieved until 2025 at the earliest. The plaintiffs invoke various scenarios for the fair distribution of the greenhouse gas budget, according to which even the 40 % target for 2020 still permits too many greenhouse gas emissions. Art. 4 para. 3 of the Paris Convention 2015 obliges the states to show the greatest possible ambition. In order to prove that the climate protection target of 40% in 2020 represents the constitutionally required minimum level of climate protection,

the plaintiffs suggest that further expert opinions be obtained. In any case, the possibility of a violation of law by undercutting the minimum level cannot be dismissed.

The plaintiffs refer to the affirmative decision of the Court of Appeal of October 9, 2018 in the Urgenda climate action in the Netherlands (ECLI:NL: GHDHA: 2018:2610). This decision is based on obligations under Articles 2 and 8 of the European Convention on Human Rights (ECHR), which must also be applied in Germany. The duties to protect of the ECHR grant the states a narrower scope of action in comparison with the case-law of the Federal Constitutional Court.

Also on the basis of the most important UN human rights treaties, there is a legal obligation of states to reduce greenhouse gas emissions with the highest possible ambition (cf. Office of the High Commissioner for Human Rights, Five UN human rights treaty bodies issue a joint statement on human rights and climate change, 19 September 2019).

For the plaintiff 14), there would be legal standing as an environmental protection association in the form of a procurator's right of action to assert the subjective legal positions of individuals, as well as on the basis of the case-law of the European Court of Justice (ECJ) in the so-called Protect decision on the effect of Article 9(3) of the Aarhus Convention and Article 47 of the Charter of Fundamental Rights of the European Union. According to these, environmental associations could request compliance with the environmental legislation of the European Union. The lack of recognition of the plaintiff 14) under § 3 UmwRG does not preclude this. For access to court on the basis of Article 9.3 of the Aarhus Convention was not only open to environmental associations recognised under § 3 UmwRG. Alternatively, the applicant's eligibility for recognition under 14) UmwRG could be assumed, since he is not responsible for the failure to grant recognition (§ 2 sub-section 2 UmwRG). Since the 2020 climate protection target is objective environmental law with a background in EU law, the plaintiff in 14) could have compliance with the climate protection targets, or in any event Decision No. 406/2009/EC, fully reviewed by the courts.

The Burden Sharing Decision No 406/2009/EC is a legally binding decision of the European Parliament and of the Council. Such decisions are binding in their entirety under the first sentence of Article 288(4) of the Treaty on the Functioning of the European Union (TFEU). They could also have an external effect. Germany had to achieve a reduction of 14% by 2020 compared to 2005. The decision does provide some leeway for achieving this target. However, these could only be used under the condition that the Member State concerned had otherwise taken the necessary steps after the decision. Since 2016, Germany has not achieved any quantifiable reductions. It would be contrary to the burden sharing decision if a Member State stopped its reduction efforts completely. In addition to the obligation to succeed, the burden-sharing decision provides for an obligation to take action for continuous emission reductions. Otherwise, the planned annual reduction plan would be legally irrelevant. A reference for a preliminary ruling to the European Court of Justice might be necessary. Germany might not be in a position to fulfil its obligations for the years from 2017 onwards, even if it were to make use of the scope of the burden-sharing decision. While the hearing, the Chamber rejected a request by the plaintiffs to take evidence in this regard.

The applicants claim that the Court should

> order the defendant to update or supplement the National Climate Protection Programme 2020 in the form of the defendant's cabinet decision of 3 December 2014 (Action Programme Climate Protection 2020) with appropriate measures in such a way that it contains all the measures necessary to ensure that the binding target of the Action Programme Climate Protection 2020 of reducing greenhouse gas emissions in Germany by 40 % by 2020 compared with 1990 can be achieve
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> order the defendant to supplement the National Climate Protection Programme 2020, in the form of the defendant's cabinet decision of 3 December 2014 (Action Programme Climate Protection 2020), with appropriate measures in such a way that it contains all the necessary measures to reduce CO2 emissions to such an extent that the approximately 650 million tonnes Co2 equivalent already emitted in excess of the binding climate protection target for 2020 can be saved by the date of delivery of the judgment
>
> alternatively
>
> order the defendant to supplement the national climate protection programme 2020, in the form of the defendant's cabinet decision of 3 December 2014 (Action Programme Climate Protection 2020), with appropriate measures in such a way that the reduction requirements of Article 3(1) in conjunction with Article 3(2) of the directive are met Annex II of Decision No. 406/2019/EC are complied with by 2020,
>
> alternatively
>
> order the defendant to ensure, by means of appropriate supplementary measures, that the gap in action to achieve the climate objective for 2020 of reducing greenhouse gas emissions in Germany by 40 % compared with 1990 is closed as quickly as possible.

The defendant claims that the Court should

> dismiss the action.

The defendant takes the view that the action is inadmissible because it concerns an act of the executive branch of government which is not justiciable. The plaintiffs sought to impose certain political objectives on the federal government. This encroaches on the core area of the federal government's political powers. The Action Programme Climate Protection 2020 is a political programme that precedes legislation and governmental and administrative action without establishing rights and obligations for citizens and companies. The complaint concerns the executive, not the administrative activities of the Federal Government. The plaintiffs attempted to deprive the federal government of its scope for shaping its policies and to replace it with a judicial determination of objectives. The complaint encroached on the core area of executive personal responsibility. This area would be protected by the separation of powers. The transfer of a political decision from the Federal Government to the

courts , would be incompatible with the democratic principle of the Basic Law. Even if the Administrative Procedural Law does not expressly provide the lack of justiciability for violation of the principle of the separation of powers and the principle of democracy, this gap could be closed by analogy.

The defendant also takes the view that the present dispute must be classified as a constitutional dispute and that administrative legal proceedings have therefore not been initiated.

The action is also inadmissible because the applicants would have no legal standing. They could not derive any subjective rights from the Action Programme Climate Protection 2020. This programme is not a legal norm, but a simple cabinet decision that lacks external effect. The climate protection programme had not led to any self-binding to the administration. There was also no violation of the principle of protection of confidence.

Nor does the definition of the state's objective, which is laid down in Article 20a of the German Constitution and covers climate protection, constitute a subjective justification of individual persons. From this, only an obligation of the state under objective law arises, whereby it is incumbent on the legislature to define the appropriate level of protection.

The plaintiffs were in the same situation as all other persons living in Germany.

At the request of the Court of First Instance, the defendant stated that at present it was not possible to make any concrete statement as to when the interim target of a 40 % reduction in greenhouse gas emissions compared with 1990 would be achieved.

The possibility of a violation of the plaintiff’s fundamental rights through de facto intervention by the State is not given. With regard to those plaintiffs who are currently not the owners of the agricultural holdings in question, there were already considerable reservations about opening up the scope of protection of the fundamental rights invoked. With regard to the alleged violations of Article 12 of the Basic Law and Article 14 of the Basic Law there is no de facto, indirect encroachment on fundamental rights. The necessary attribution of greenhouse gas emissions to the state was missing. If every violation of a duty to protect would at the same time result in the existence of an encroachment on a fundamental right, the distinction between encroachment and duty to protect would be dissolved.

A possible infringement of the plaintiffs' rights does not result from the dimension of protection of fundamental rights either. For the legislature was responsible for drawing up and implementing a concept of protection, which in principle had a scope for assessment, evaluation and design. The level of protection was not completely determined under constitutional law. The establishment of a specific climate policy was a political decision of direction within the Federal Government of Germany with a fundamental character. The implementation of the policy could have an impact on a wide range of areas of life and thus affect a large number of potentially conflicting public interests, including the fundamental rights of third parties. From the perspective of fundamental rights, this leads to a complex situation in which, in addition to the Federal Government, it is the task of the legislature to make the necessary trade-offs

and, on this basis, to define a protection concept. In view of the complexity of this decision-making situation, it was by no means evident that the demanded commitment of the Federal Government alone to the climate protection objective stated in the applications for a preliminary ruling was constitutionally permissible. The minimum level of protection in climate protection could not be equated with the Action Programme Climate Protection 2020.

The plaintiffs also lack a general interest in legal protection. Even a successful lawsuit would not improve the subjective legal position of the plaintiffs.

The plaintiff in 14) was not entitled to file an action because he lacked recognition under § 3 UmwRG. This cannot be overcome in the present case according to § 2 subsection 2 sentence 1 UmwRG, as the plaintiff in 14) is not recognisable (§ 2 sub-section 2 sentence 1 no. 1 in conjunction with § 3 sub-section 1 UmwRG). The necessary democratic internal structure would be missing in the matter.

The burden-sharing decision No 406/2019/EC does not create subjective rights of individuals either, but serves solely to protect the general interest. At the request of the Court, the defendant stated that the Federal Government was using its political room for manoeuvre in order to achieve the reduction targets of Article 3(1) of the burden-sharing decision. Should these reduction targets not be achieved the defendant assumes that an infringement of the burden sharing decision can be avoided by purchasing emission allocations pursuant to Article 3(4) or (5) and/or Article 5 of the decision.

The second alternative claim was too vague in terms of time because it did not specify by when the 40% reduction target should be achieved.

By decision of 11 July 2019, the Rapporteur rejected the plaintiffs in 14) request to invite 220 natural persons and one cooperative society as interested third party’s to the proceeding. By decision of 5 September 2019, the request to invite the municipality Pellworm as interested third party’s was rejected.

For further details of the facts and circumstances of the case, reference is made to the defendant's case file and the administrative procedure which was submitted and, where relevant, taken into account in the decision.

## Reasons for decision

The action is inadmissible for lack of standing. The second alternative claim is too vague.

Administrative legal proceedings have been opened pursuant to § 40 (1) sentence 1 of the Administrative Court Rules (VwGO). In principle, this is given in all public law disputes of a non-constitutional nature. The action concerns a public law dispute in the relationship between citizen and state.

Contrary to the defendant's view, the plea in law is justiciable. It is true that there are sovereign acts that are not subject to judicial review. A prime example are decisions that refuses to grant clemency (BVerfG, decision by 4 to 4 votes of 23 April 1969 - 2 BvR 552/63 -, BVerfGE 25, 352-366, marginal no. 34, special vote marginal no. 46).

In the literature, governmental acts (sovereign acts of state) are also partly regarded as sovereign acts without judicial power. This opinion is based on a brief consideration in an essay from 1950 (Klein, VVDStRL 8, 67, 111). Whether this opinion is still held today seems questionable. According to the correct view, however, under Article 19 (4) of the Basic Law, sovereign acts of state control cannot generally be regarded as should be excluded from judicial review, since such acts, despite their political significance, are also subject to legal obligations under Article 1.3 of the Basic Law (Kopp/Schenke, VwGO, 25th ed. 2019, § 40 marginal no. 5b). The Administrative Court can take sufficient account of the principle of the separation of powers by granting the government a wide margin of manoeuvre (on the area of foreign policy, see BVerfG, judgment of 22 November 2001 - 2 BvE 6/99 -, BVerfGE 104, 151-214, juris marginal no. 158).

The defendant cannot successfully invoke the case law of the Federal Constitutional Court on the core area of executive self-responsibility of the government. The government is responsible for shaping policy and is accountable to parliament (BVerfG, Order of 30 June 2015 - 2 BvR 1282/11 -, BVerfGE 139, 321-378, juris para. 126). In this context, the government's responsibility towards parliament and the people necessarily presupposes a core area of executive individual responsibility, which includes an area of initiative, consultation and action that cannot be investigated in principle (BVerfG, resolution of 13 June 2017 - 2 BvE 1/15 -, BVerfGE 146, 1-70, juris marginal no. 92). The core area of executive individual responsibility primarily relates to ongoing proceedings. In individual cases, access to documents on completed proceedings must also be denied. This serves to protect the freedom and openness of decision-making within the government (BVerwG, judgment of 13 December 2018 - 7 C 19/17 -, juris para. 18). The Federal Constitutional Court developed this case-law in the relationship of the government to the right of Members of the Bundestag to ask questions and to the rights of parliamentary committees of inquiry under Article 44 of the Basic Law; it also applies to requests for information under the press law and under the Freedom of Information Act. In relation to the administrative courts, the refusal of access to documents is regulated by special legislation: § 99.2 VwGO provides for an in-camera procedure if a supreme supervisory authority refuses to submit files or information. However, the issue here is solely one of access to information and not one of judicial control of the government's actions.

There is no regulatory gap for an analogy between the principle of democracy and the principle of the separation of powers, as demanded by the defendant. The special role of activities of state leadership is taken into account by granting corresponding scope for action, which is subject only to limited judicial control. A complete exclusion of judicial review of the government's actions would not be compatible either with the principle of the rule of law or with the guarantee of legal recourse under Article 19.4 of the Basic Law. On the question of justiciability of a climate protection programme, the Irish High Court came to a similar conclusion in its judgment of 19 September 2019 (Friends of the Irish Environment v. Ireland - 2017 No. 793 JR).

This is also a legal dispute of a non-constitutional nature. The prevailing opinion is based on the theory of dual constitutional immediacy: According to this theory, a public law dispute is of a direct constitutional nature if parties directly involved in constitutional life are in dispute over legal relationships that belong exclusively to constitutional law (see Kopp/Schenke, loc.cit., § 40 marginal no. 32 with further references). For this reason, proceedings between citizens and the state, including those in which constitutional norms, in particular fundamental rights norms, are decisive in the dispute, belong in principle before the administrative courts and not before the constitutional courts (BVerwG, judgment of 3 November 1988 - 7 C 115/86 -, BVerwGE 80, 355-373, juris nos. 13 et seq.) An exception to this is the action of a citizen for the enactment of a formal law. A citizen's right to have a formal law enacted, if such a right exists, can only be enforced before the constitutional courts (BVerwG, judgment of 15 January 1987 - BVerwG 3 C 19.85 -, BVerwGE 75, 330, 334, juris nos. 33).

Here the plaintiffs have not specified in detail which measures the Federal Government should take into count to achieve the climate protection target for 2020 in time. They have mentioned support programmes, measures in the state sector and also voluntary agreements with industry that do not require formal legislation. However, the expert opinion of the Fraunhofer Institute for Greenpeace presented by the plaintiffs in August 2018 provides for the shutdown of lignite-fired power plants as a central measure. This would hardly be enforceable without formal legislation. However, the restriction that the administrative court cannot oblige the legislator to enact formal legislation does not lead to the inadmissibility of the action as a whole. The Advocate General at the Supreme Court of the Netherlands (Hoge Raad) came to a similar conclusion in his opinion of 13 September 2019 on the Urgenda climate action (ECLI: NL:PHR:2019: 887; Ref.: 19/00135, marginal no. 5.43); there too, the specialised courts cannot oblige the legislature to enact laws.

For all claims, the general action for performance is the valid form of action. The two main claims and the first alternative claim are also sufficiently specified. The requirement of a specific claim is set out in § 82.1 sentence 2 VwGO as a mere nominal provision; it must, however, be made clear to the complainant at the time the claim is made in the oral proceedings (§ 103 para. 3 VwGO) shall be satisfied. In a specific application, which must be self-explanatory, the nature and scope of the legal protection sought must be specified. In the present case, the indication of the objective alone - compliance with the national climate protection programme 2020 - is sufficient in view of the government's room for manoeuvre (see BVerwG, judgment of 5 September 2013 - 7 C 21/12 -, BVerwG-GE 147, 312-329, juris nos. 54 - 55 on actions for the enactment of clean air plans).

A. However, the applicants do not have standing for the two main claims.

I. With regard to the individual plaintiffs, the plaintiffs in 1) to 13), according to settled case-law, the substantive judgment requirement of legal standing as set out in § 42.2 VwGO is also applied accordingly to the general action for performance (BVerwG, judgment of 5 September 2013 - 7 C 21/12 -, BVerwGE 147, 312-329, juris para. 18). Accordingly, the action is only admissible if the plaintiffs claim that their rights have been infringed by an administrative act or its omission. However, it is also necessary

and sufficient that, on the basis of the plaintiffs' submissions, the violation of a subjective public right appears possible (BVerwG, judgment of 5 April 2016 - 1 C 3/15 -, BVerwGE 154, 328-351, juris nr. 16). This is not the case if the legal position asserted by the plaintiffs obviously and unambiguously cannot exist or be due to them from any point of view (BVerwG, judgment of 19 November 2015 - 2 A 6/13 -, BVerwGE 153, 246-254, juris para. 15 with further references). Legal standing is dependent on the plaintiffs being able to rely on a public-law provision which, according to the decision-making programme contained therein, (at least also) protects them as third parties. In this respect, it is decisive that a group of persons can be inferred from individualising elements of the norm which is sufficiently different from the general public (see BVerwG, judgment of 28 November 2007 - 6 C 42/06 -, BVerwGE 130, 39-52, juris para. 11 on the action for an obligation which constitutes a subset of the action for performance).

Therefore a public-law norm or legal basis is needed from which a corresponding obligation of the Federal Government to act can arise. The inaction of the defendant must make it possible to violate a subjective public law. This is ultimately not the case here.

1) The plaintiffs under 1) to 13) cannot base their request on the decision of the Federal Cabinet of 3 December 2014 - the Action Programme Climate Protection 2020. This Cabinet decision constitutes a political declaration of intent, but does not contain any legally binding regulation with external effect to which the plaintiffs could refer. Also the Federal Government has postponed the 2020 climate protection target to the year 2023 in a permissible manner through the government draft of the Federal Climate Protection Act, which was passed by cabinet decision on 9 October 2019.

a) A Cabinet decision is adopted by a majority of votes in accordance with § 24 (2) GOBReg. This decision is binding the Federal Ministers and constitutes domestic law (cf. on the Action Programme Climate Protection 2020 Wegener, ZUR 2019, 3, 9; Voland, NVwZ 2019, 114, 116 - "political guideline" - and on the Climate Protection Plan 2050 Saurer, NuR 2018, 581). Even the rules of procedure of the Federal Government itself only constitute internal government law and as such only the members of the Federal Government are entitled and obliged to do so; the legal relationship with other federal bodies or with the citizen does not concern them (BVerwG, judgment of 13 December 2018 - 7 C 19/17 -, juris para. 30).

The fact that it is an action programme does not mean that it is binding on the citizen. The action programme is upstream of specific measures. In this respect, the plaintiffs speak of an "administrative action directive", without it being clear what legal consequences this should have. A "plan" or "programme" is not a uniform legal form, but can take very different forms (cf. Saurer, NVwZ 2017, 1574, 1578). Certain plans and programmes under environmental law are subject to a strategic environmental assessment pursuant to § 33 of the Environmental Impact Assessment Act (UVPG). These include, for example, regional planning, urban land use planning, clean air plans and waste management plans. The legal effects of these plans and programmes vary. What they have in common is that - unlike the Action Programme for

Climate Protection - they are each based on a legal basis which also allows conclusions to be drawn for them to be legally binding.

The context and wording of the Action Programme Climate Protection 2020 argue against a binding regulation with external effects. The cabinet decision is published in a colourful brochure, edited by the Federal Environment Ministry (BMU) with a foreword by the then Federal Environment Minister, and accompanied by many photos, illustrations and tables. The structure of the Action Programme names "Key policy measures" as the main structure item (pages 24 to 71). With regard to the climate protection target for 2020, it literally states: "Our next stage in climate protection is to reduce greenhouse gas emissions by at least 40 percent by 2020 compared with 1990. In doing so, we want to create the basis for also achieving the following targets for 2030, 2040 and 2050 and to achieve the European climate target". (p. 9) The use of the 1st person plural fits in with a political declaration of intent, but would be extremely unusual nowadays for a legally binding regulation of the state in relation to the citizen (cf. on the other hand the formulations of climate targets in § 4 of the Baden-Württemberg Climate Protection Act of 23 July 2013 and § 3 of the government draft for a Federal Climate Protection Act of 9 October 2019).

The plaintiffs also fail with the other arguments for a legally binding external effect of the Action Programme Climate Protection 2020.

The plaintiffs invoke a self-binding of the administration. This legal figure leads, among other things, to the fact that administrative regulations, which constitute internal law of the administration, can have an external effect. It is based on an administrative practice in relation to the citizen on which other citizens can rely in accordance with the principle of equal treatment in Article 3 of the Basic Law. An internal regulation only has an external effect indirectly through the obligation of the authorities and courts to comply with Article 3.1 of the Basic Law if and to the extent that an administrative practice corresponding to the Directive has actually developed (so-called self-binding of the administration) (BVerwG, judgment of 15 November 2011 - 1 C 21/10 -, BVerwGE 141, 151-161, juris para. 15). It is true that the 2020 climate protection target was the basis for numerous measures of the Federal Government. However, no administrative practice directly vis-à-vis the citizen, to which the plaintiffs could refer under Article 3 of the Basic Law, is apparent.

An external effect from the point of view of the protection of confidence is out of consideration. Protection of confidence plays an important role, for example, in cases of a false retroactive effect of laws and in the protection of property. The prerequisite is that the person concerned has made dispositions of assets in reliance on the validity of the legal situation, which are now frustrated by a change in the legal situation (cf. BVerfG, judgment of 6 December 2016 - 1 ByR 2821/11 -, BVerfGE 143, 246-396, juris para. 372 on the nuclear phase-out). The plaintiffs have not claimed that they made investments in reliance on the existence of the 2020 climate protection target.

Nor does the materiality principle imply any external effect of the cabinet decision. The plaintiffs are of the opinion that it would have been necessary for the climate protection targets to be laid down in law (see Saurer, NuR 2018, 581). Since this had not been done, the decision of the Federal Government acquires "constitutional significance". The materiality principle or the parliamentary reservation states that in the

area of sub-legislative standard-setting, essential questions of the exercise of and intervention in fundamental rights must be regulated by parliament itself (see BVerfG, Beschluss vom 8 August 1978 - 2 BvL 8/77 -, BVerfGE 49, 89-147; Leitsatz 2 - Kalkar I). The legal consequence is that a corresponding sub-statutory provision is unconstitutional because it violates the reservation of the law. The conclusion that a corresponding resolution of the Federal Government would be constitutionally revalued if the parliamentary reservation were violated cannot be drawn from this.

Finally, the plaintiffs argue that the Federal Government's climate protection target 2020 serves in some laws as justification for encroachments on fundamental rights and must therefore have an external effect, for example in section 13 g EnWG on the decommissioning of lignite-fired power plants. This provision constitutes an encroachment on fundamental rights for the operators. However, this is already justified by the climate protection constitutionally anchored in Article 20a of the Basic Law, without it being relevant whether the decision of the Federal Government has external effects or not. Pursuant to Article 20a of the Basic Law, the legislature is required, particularly with regard to the principle of sustainability, to achieve further reductions in greenhouse gas emissions (BVerfG, Order of 13 March 2007 - 1 BvF 1/05 -, BVerfGE 118, 79-111, juris para. 110).

b) In addition, the Federal Government has postponed the 2020 climate protection target to 2023 in a permissible manner through the government draft of the Federal Climate Protection Act, which was adopted by cabinet decision on 9 October 2019. In principle, a cabinet decision can be amended or repealed by a subsequent cabinet decision (actus contrarius). The explanatory statement of the government draft states that Germany will clearly miss the climate protection target for 2020. The target value of the 40% reduction compared to 1990 is 750 million tonnes of CO2 eq. (Action Programme Climate Protection 2020, p. 11). The government draft of the Federal Climate Protection Act provides for sector-specific reduction targets, which are broken down by year and sector in a table in Annex 2 to § 4 (permissible annual emission quantities). If the various sector-specific values are added together, the total quantity of CO2 eq. is 813 million tonnes for 2020 and 756 million tonnes for 2022. This means that according to the government draft, a 40% reduction is not to be achieved until 2023. The German government has not exactly been proactive in communicating this fact. However, the objective explanatory value of the table does not allow any other interpretation.

2. The plaintiffs under 1) to 13) cannot derive any claim from an impairment of their fundamental rights through an indirect, factual intervention of the state. As defence rights, fundamental rights protect against unjustified state intervention. A violation of Article 2.2 sentence 1 and/or Article 14.1 of the Basic Law presupposes an intervention attributable to the Federal Republic of Germany. It is true that the protection of fundamental rights is not limited to imperative interventions, i.e. to measures which lead directly and specifically (finally) to a reduction of interests protected by fundamental rights by means of a law or prohibition decreed by the state. Rather, fundamental rights can also be affected by indirect and factual impairments if these are equivalent to imperative interventions in terms of their objectives and effects (BVerfG, Non-Acceptance Decision of 15 March 2018 - 2 BvR 1371/13 -, juris marg. nr. 29 with

further references). Here, greenhouse gas emissions, even if they originate from German soil, cannot be attributed to the state. In this respect, what the Federal Constitutional Court has decided on forest damage applies to climate protection: The state's preventive control of the use of technology associated with the emission of air pollutants cannot serve as a starting point for a joint responsibility of the state under intervention law for the consequences of general air pollution (BVerfG, Kammerbeschluss vom 26. Mai 1998 - 1 BvR 180/88 -, juris nr. 17).

The view of the plaintiffs that the distinction between the fundamental rights defence dimension and the fundamental rights protection dimension has only been partially clarified does not lead any further. The plaintiffs refer to the decision of the Federal Constitutional Court on the Mühlheim-Kärlich nuclear power plant. According to this decision, the state assumes its own co-responsibility for the dangers arising from the peaceful use of nuclear energy (BVerfG, Order of 20 December 1979 - 1 BvR 385/77 -, BVerfGE 53, 30-96, juris marg. 54). This decision explicitly refers to the special features of nuclear law and is almost two decades older than the Forest Damage Decision. In the decision on the stationing of US nuclear weapons at Büchel airbase, cited by the plaintiffs, the Federal Constitutional Court examines both a factual intervention and a duty of the state to protect and denies both (BVerfG, Non-Acceptance Decision of 15 March 2018 - 2 BvR 1371/13 -, juris nos. 29, 31 et seq.) Finally, the plaintiffs refer to an upholding judgment of the Münster Higher Administrative Court on the use of Ramstein Air Base for armed U.S. residential missions in Yemen. This decision denies any intervention by the German state (judgment of 19 March 2019 - 4 A 1361/15 -, juris para. 134) and is based on the state's duty to protect under Article 2.2 of the Basic Law (ibid. para. 182).

There are no discernible rates for an extended interpretation of the intervention attributable to the State. The dogmatically important distinction between encroachments on fundamental rights that require justification and the state's duties of protection founded on fundamental rights would otherwise be blurred.

(3) Nor does it follow from the state's duties of protection under fundamental rights that the plaintiffs under 1) to 13) could have had their fundamental rights violated. They have not sufficiently substantiated that the state might have fallen below the constitutionally required minimum level of climate protection.

According to the case law of the Federal Constitutional Court, basic rights are not only rights of defence against state intervention, but also generate in their objective content protective duties of the state. Public authorities are obliged to protect the legal interests protected by fundamental rights against interference, in particular by private third parties. Furthermore, a duty to protect is also advocated if other dangers such as forces of nature can only be averted with state assistance (BVerfG, non-adoption decision of 4 September 2008 - 2 BvR 1720/03 -, juris marg. no. 36 with further references). The public authority must place itself "protecting and promoting before the fundamental rights" (BVerfG, judgment of 25 February 1975 - 1 BvF 1/74 -, BVerfGE 39, 1-95, juris marginal no. 153, Abortion I).

The plaintiffs under 1) to 9) and 11) to 13) invoke the protection of physical integrity in Article 2.2 sentence 1 of the Basic Law. They have no acute complaints due to climate change, but fear long-term health risks, in particular due to more frequent heat

waves. It is true that mere threats to fundamental rights generally still lie in advance of constitutionally relevant impairments of fundamental rights. However, under special circumstances, they can be equated with violations of fundamental rights (BVerfG, Order of 19 June 1979 - 2 BvR 1060/78 -, BVerfGE 51, 324-351, juris nr. 72). Risk prevention relating to threats to fundamental rights may be covered by the duty of protection of state bodies (BVerfG, Order of 14 January 1981 - 1 BvR 612/72 -, BVerfGE 56, 54-87, juris nr. 60).

The property of agricultural holdings falls within the scope of protection of Article 14 (1) of the Basic Law. The right to the established and practised business within the framework of the freedom of profession in Article 12 of the Basic Law does not play an independent role apart from Article 14 of the Basic Law. Only the concrete stock of rights and goods is covered; mere turnover and profit opportunities or actual circumstances are, in contrast, not covered by the guarantee of ownership, even from the point of view of the established and operated commercial enterprise (BVerfG, judgment of 6 December 2016 - 1 BvR 2821/11 -, BVerfGE 143, 246-396, juris para. 240). In contrast, the children and heirs of the current proprietors - the plaintiffs in 3) to 6), 12) and 13) - cannot rely on Article 14.1 of the Basic Law. Article 14.1 of the Basic Law only protects legal positions to which a legal subject is already entitled (BVerfG, Order of 22 January 1997 - 2 BvR 1915/91 -, BVerfGE 95, 173-188, juris marginal no. 66).

It can remain open whether the plaintiffs have sufficiently demonstrated the necessary to be concern directly by the actions and/or omissions of the Federal Government. The European Court of First Instance (EGC) has dismissed a climate action against the EU Parliament and the Council for lack of standing under Art. 263 (4) TFEU (ruling of 8 May 2019- T-330/18 marginal no. 50). Every individual is affected by climate change in one way or another. The fact that climate change may have different effects on some individuals than on others does not constitute grounds for standing against generally applicable measures (see critically Winter, ZUR 2019, 259, 266 et seq.) The Federal Constitutional Court has also denied the direct effect in the non-adoption decision on the stationing of US nuclear weapons. In this respect, the engagement did not differ from the unmanageably large number of residents; social commitment did not lead to a (constitutional) legal privilege in the assertion of its own interests (Federal Constitutional Court, Non-Acceptance Decision of 15 March 2018 - 2 BvR 1371/13 -, juris para. 47).

In the present case, the applicants in (1) to (9) and (11) to (13) do not differ from the rest of the population with regard to the health risks claimed. In contrast, the owners of the three organic farms are particularly affected by climate change. The mere fact that a very large number of people are affected by the effects of climate change does not rule out the possibility that they may be affected individually.

The question can also be left unanswered whether the plaintiffs have sufficiently demonstrated the causality between the Federal Government's failure to take further climate protection measures and an impairment of the plaintiffs' position, which is protected by fundamental rights. About 1.1% of the world's population lives in Germany and about 2% of global greenhouse gas emissions originate here (see Rahmstorf, Emissionsbudget, Spiegel-online of 20 October 2019). The Percentage

by which the 2020 climate protection target is missed has a comparatively small share in annual emissions. Nevertheless, the state has a common but differentiated responsibility for mitigating climate change (cf. Art. 2 para. 2 of the Paris Convention). A contracting state cannot evade its own responsibility by referring to greenhouse gas emissions in other states. Individual legal protection with regard to climate protection is only conceivable if the requirements of causality between the omitted national measures of climate protection and the effects on the protected legal positions of those affected are not overstretched.

Finally, the question can be left unanswered whether plaintiffs can rely on Article 20a of the Basic Law within the framework of their fundamental rights (expressly left open in the Federal Constitutional Court, non-adoption decision of 10 November 2009 - 1 BvR 1178/07 -, Schacht Konrad, juris para. 32). Pursuant to Article 20a of the Basic Law, the state protects the natural foundations of life also in responsibility for future generations. This includes climate protection (BVerfG, Decision of 13 March 2007 - 1 BvF 1/05 -, BVerfGE 118, 79-111, marginal no. 110). In this respect, the state must develop a suitable and effective protection concept (Callies, ZUR 2019, 385, 386 with reference to the prohibition of insufficient means). If the invocation of Article 20a of the Basic Law is permitted in the context of fundamental rights, climate protection would not only be required by objective law, but would also be enshrined in fundamental law (see the declaration of 19 September 2019, Office of the High Commissioner for Human Rights, Five UN human rights treaty bodies issue a joint statement an human rights and climate change, quoted by the plaintiffs).

In the literature, the view is held that the plaintiffs' request would amount to a claim to secure constant climatic conditions that could be enforced in court, which the defendant could not guarantee in any case (Wegener, ZUR 2019, 3, 9). Indeed, such a claim cannot exist. In the opinion of the Chamber, however, the plaintiffs' claim is limited solely to condemn the Federal Government on the basis of the fundamental duties of protection to achieve the self-imposed climate protection target for 2020 within the deadline.

The legislator and the executing authority have a further scope to assess, evaluate and formulate the fundamental rights in the fulfilment of the duties of protection. This also leaves room to take into account competing public and private interests. This wide freedom of scope can only be examined by the courts to a limited extent, depending on the specific nature of the area in question, the possibilities of forming a sufficiently certain judgement and the significance of the legal interests at stake. In view of this of scope, the fundamental right claim associated with a duty to protect is only directed at the fact that the public authority takes precautions to protect the fundamental right that are not entirely unsuitable or completely inadequate (BVerfG, Order of 29 October 1987 - 2 BvR 624/83 -, BVerfGE 77, 170240, juris para. 101). Unless in rare exceptional cases a concrete duty to protect can be inferred from the constitution that compels a particular action to be taken, the legislature, as the competent state body, is left to draw up and implement a concept of protection (BVerfG, judgment of 30 July 2008 - 1 BvR 3262/07 -, BVerfGE 121, 317-388, juris para. 120).

However, in order to fulfil its duty to protect, the state must take sufficient measures of a normative and factual nature which lead to adequate and as such effective protection being achieved - taking into account conflicting legal interests (prohibition of insufficient means). The precautions that the legislature takes must be sufficient for adequate and effective protection and must also be based on careful fact-finding and reasonable assessments (BVerfG, judgment of 28 May 1993 - 2 BvF 2/90 -, BVerfGE 88, 203366, Schwangerschaftsabbruch II, juris para. 166).

The Federal Constitutional Court applies both standards - a wide scope for assessment, evaluation and design on the one hand and the prohibition of insufficient means on the other - side by side. It intervenes if the state authority evidently violates the duty to protect. With regard to the prohibition of insufficient means, the court examines whether the state authority has handled its scope of assessment in a justifiable manner (BVerfG, Order of 4 May 2011 - 1 BvR 1502/08 -, Aircraft Noise, juris para. 38).

The plaintiffs must conclusively demonstrate the violation of the duty to protect in order to substantiate their standing to bring an action pursuant to § 42, Subsection 2, VwGO (BVerwG, judgment of 5 April 2016 - 1 C 3/15 -, BVerwGE 154, 328-351, juris, para. 23). This represents a high hurdle for the acceptance of the right to bring an action (different view apparently Voland, NVwZ 2019, 114, 117).

According to these standards, the plaintiffs have not conclusively demonstrated a violation of the Federal Government's fundamental duty to protect the climate. The previous climate protection measures are not entirely unsuitable or completely inadequate. Also the prohibition of insufficient means is not obviously violated. The 2020 climate protection target does not represent the constitutionally required minimum level of climate protection.

Art. 3 para. 1 of the 1992 Framework Convention on Climate Change stipulates that the Parties shall protect the climate system for the benefit of present and future generations on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. The developed countries should take the lead in combating climate change and its adverse effects. The principle of common but differentiated responsibilities is reaffirmed in Art. 10 para. 1 of the 1997 Kyoto Protocol and is also found in Art. 2 para. 2 of the 2015 Paris Convention. According to Art. 4 para. 3 of the Paris Convention, the Parties are to show "maximum ambition" in their reduction contributions. In three decades, the international community has not come far in operationalising this responsibility and assigning it to the individual states. In the Kyoto Protocol of 1997, the participating industrialized countries committed themselves to reducing their annual greenhouse gas emissions by an average of 5.2 percent compared to 1990 levels within the so-called first commitment period (2008 to 2012). These emission reductions were achieved. In the negotiations for the second commitment period of the Kyoto Protocol from 2013 to 2020, a total of 38 countries committed themselves to quantitative emission reductions, which would amount to a total of approximately 18%. This continuation of the Kyoto Protocol has not yet come into force (see Wikipedia, Kyoto Protocol). The European Union has promised a reduction of 20% by 2020 compared to 1990 (https://ec. europa.eu/ clima /policies /strategies/progress/kyoto_2_en) and will achieve this target. In the Dutch

case law (Urgenda) cited in detail by the plaintiffs, the two courts of first and second instance ordered the Dutch government to make a 25% reduction compared to 1990 (see Wegener, ZUR 2019, 3 and Voland, NVwZ 2019, 114 m.w.N.). Under the Paris Convention, the European Union only committed itself to a 40% reduction by 2030 compared with 1990 (https://ec.europa.eu/ clima/policies/international/negotiations/paris_en). In 2007, when the German government first adopted the 2020 climate protection target, the Intergovernmental Panel on Climate Change (IPCC) has recommended a significant reduction in emissions for developed countries as a group "under most equity interpretations" of 10 to 40% by 2020 compared with 1990 levels (Contribution of VVorking Group III to the Fourth Assessment Report of IPCC, p. 90). At the UN Climate Change Conference in Bali in 2007, an action plan was adopted in which the recommendation, that the industrialised countries should reduce their greenhouse gas emissions by 10 % to 40 % by 2020, was adopted (Wikipedia, Bali Road Map). The 2020 climate protection target of a 40% reduction compared to 1990 is therefore an ambitious target at the upper end of the recommendations in an international comparison. The plaintiffs' view that this is the minimum required under constitutional law is difficult to understand against this background. Even if Germany were to achieve a reduction of only 32 % by 2020 and the 40 % reduction were to be delayed by three or five years, this does not mean that the constitutionally required minimum level of climate protection is evidently undershot. The Federal Government has not remained completely inactive. As the plaintiffs themselves admit, it has implemented measures from the Action Programme for Climate Protection 2020 and this year has initiated numerous other measures to achieve the climate targets of a 55% reduction from 1990 levels by 2030.

The plaintiffs base their view, that the 2020 climate protection target represents the constitutionally required minimum level of climate protection, on the base of recent scientific findings. The question, as wide the Federal Government's scope for action extends and at which point the prohibition of insufficient means clearly requires further measures, is a legal question which the courts has to decide by applying constitutional standards. This legal question cannot be clarified by obtaining expert opinions which alone can serve to clarify facts. In its Special Report of 8 October 2018, the Intergovernmental Panel on Climate Change (IPCC) states the global CO2 residual budget as 800 gigatonnes if the 1.75 degree target (in terms of mean global surface temperature) is to be achieved with 67 % probability (cf.) This emissions budget results from the fact that there is an approximately linear relationship between the cumulative total quantity of greenhouse gases emitted and the resulting temperature increase. According to the German Advisory Council on the Environment (SRU) in an open letter to the Climate Cabinet dated 16 September 2019, this means that for Germany, ignoring historical emissions and with evenly distributed among the world's population, a remaining national carbon budget of 6,600 million tonnes of CO2 from 2020. If emissions continue at today's level, this budget would be used up in less than 9 years (2028), with a linear reduction after just over 17 years (2037). The plaintiffs have submitted a calculation for this purpose, which can be found at www.paris-equity-check.org, equity map. This is intended to make clear that the 40 % target for 2020 minimum for the global budget is. The various distribution methods are compatible with the Paris Convention and can also be found in the 5th Assessment Report of the Intergovernmental Panel on Climate Change (IPCC). The "distribution algorithm"

had pass through a peer review. The plaintiffs ascribe to this calculation a higher scientific stringency and binding force than that which is due to it in relation to the determination of the constitutionally required minimum level of climate protection for the remaining 14 months until the end of 2020. The question of the distribution of the global CO2- residual budget is not the subject of descriptive natural science, but rather a normative and ethical discourse on questions of justice and equity and the subject of an important political negotiation process. There is much to indicate that the remaining global CO2 residual budget is to distribute equally per capita of the world population. As far as can be seen, however, there is probably not a single industrialized country in the world that has complied with this. And it is not up to the Administrative Court to prescribe this standard of the Federal Government as a mandatory and obligatory minimum level of climate protection, taking into account the executive's scope for design and assessment.

This result is not called into question even when taking into account the European Convention on Human Rights (ECHR). At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights (ECHR) serve as interpretative aids for determining the content and scope of fundamental rights and constitutional principles of the Basic Law (BVerfG, Order of 26 March 1987 - 2 BvR 589/79 -, BVerfGE 74, 358-380, juris para. 35; stRspr).

According to the consistent case-law of the European Court of Human Rights, Article 2 ECHR covers the positive obligation of the state to take appropriate measures to protect the lives of persons under its jurisdiction (ECHR (Section I), Judgment of 28 February 2012 - 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05 -, Kolyadenko v. Russia, marginal no. 151, German translation in NVwZ 2013, 993). Where a Convention State has to take practical protective measures he has, in accordance with the case-law of the Court a wide margin of appreciation. In this respect, no impossible or disproportionate burden may be imposed on the authorities (ibid., para. 160). The Dutch Court of Appeal in the Urgenda case based its judgment of 9 October 2018 on this. Contrary to the opinion of the plaintiffs, however, it cannot be inferred from the grounds of the Courts' judgment how of the term of wide scope of discretion is to be defined more precisely. The result - a condemnation of a 25% reduction by 2020 - is below the 32% that is expected to be achieved in Germany in 2020. There is no indication that the scope of discretion under the case-law of the European Court of Human Rights is to be understood more narrowly than under the case-law of the Federal Constitutional Court on fundamental rights protection obligations. The case-law of the Federal Constitutional Court appears more dogmatically sophisticated and does not contradict the case-law of the ECtHR.

II) The plaintiff in 14) also has no legal standing with regard to the two main claims.

The Environmental Appeals Act does not grant the legal standing. Greenpeace is not an association recognised under § 3 UmwRG and the action does not concern any of the subjects of action mentioned in § 1 section 1 UmwRG.

There is also no so-called procuratorial right of action. The Federal Administrative Court created this legal figure because the requirements of Article 9.3 of the Aarhus

Convention regarding access by environmental associations to administrative and judicial proceedings had not yet been implemented by the national legislature at the time of the decision (see BVerwG, judgment of 5 September 2013 - 7 C 21/12 -, juris nos. 31, 34 et seq., 48). An environmental association's right of procuration presupposes that a natural person has a legal standing with regard to the decision concerned, i.e. that any relevant provisions confer a subjective right (see BVerwG, judgments of 5 September 2013 - 7 C 21/12 -, juris para. 41, of 12 November 2014 - 4 C 34/13 -, juris para. 23 and of 18 December 2014 - 4 C 35/13 -, juris para. 57). This is not the case with regard to the two main submissions, as explained above.

Direct recourse to Article 9(3) of the Aarhus Convention is excluded because this provision is not directly applicable (BVerwG, judgment of 5 September 2013 - 7 C 21/12 -, BVerwGE 147, 312-329, juris nr. 21 with reference to the ECJ, judgment of 8 March 2011 - C 240/08 -).

Nor does the case law of the European Court of Justice in the "Protect" case (judgment of 20 December 2017 - C-664/15 -) give rise to any legal standing. Even if it is assumed that an environmental association can demand an objective legal control of compliance with European environmental law on this basis (see Berlin Administrative Court, judgment of 18 April 2018 - 11 K 216.17 -, Gigaliner, juris nos. 26 - 27), this does not establish the plaintiff's standing in relation to the two main claims.) This is because the 2020 climate protection target is not based on European law.

Even if the plaintiffs were entitled to bring an action with regard to a possible violation of the state's obligations to protect fundamental rights, the action would in any case be unfounded for the reasons stated above.

B. The first alternative claim is also inadmissible for lack of standing.

I. The individual plaintiffs 1) to 13) would have to demonstrate that Art. 3 (1) in conjunction with Annex II of the burden sharing decision results in an obligation of the Federal Government to take additional measures to protect the climate in Germany. This is not the case. The provision does not contain an unconditional obligation to achieve a specific reduction of greenhouse gas emissions in its own country.

The so-called "burden sharing decision" of the EU Parliament and Council of 23 April 2009 (406/2009/EU) is a decision that obliges the Member States to reduce their greenhouse gas emissions in economic sectors not subject to EU emissions trading in the European Union by a total of 10 % by 2020 compared to 2005. According to Art. 3 para. 1 in conjunction with Annex II of the Decision, Germany must reduce its emissions in the non-EU ETS sectors by 14% between 2005 and 2020. The limitation shall be linear each year (Art. 3 para. 2 2nd subparagraph). Articles 3 and 5 of the Decision do, however, provide for certain "margins of manoeuvre" (according to the wording of Articles 3(2) and 7(1)). Member States may offset surpluses from earlier years in later years and carry forward quantities from the following year to an amount equal to 5% of their annual emission allocation (Art. 3 para. 3). In addition, states may transfer up to 5 % of their emission allocations to other states if they exceed their targets (Art. 3 para. 4). In addition, states may transfer credits from project activities pursuant to Article 5 para. 4 up to 3 % of their greenhouse gas emissions of that

Member State in 2005. Only if the greenhouse gas emissions of a Member State exceed the annual emission allocations, taking into account these margins, does Article 7 provide for remedial action involving the Climate Change Committee (Article 13(1)).

This Decision is addressed to the Member States in accordance with Article 16. Nevertheless, under certain conditions it is conceivable that environmental associations or individual citizens may, under certain circumstances, sue for compliance with this objective norm of EU environmental law, as the case law of the European Court of Justice on the direct effect of directives shows (see ECJ, judgment of 26 February 1986 - Case 152/84 -, Sig. 1986, 723 -Marshall). However, this presupposes an unconditional obligation on the part of the Member State. Since the defendant has not fulfilled its obligation under Article 3.1 in conjunction Annex II of the burden sharing decision by offsetting against previous years or by purchasing surplus emission allocations from other Member States, the Federal Government cannot be condemned to take additional measures in its own country.

Germany is one of the countries that will probably not reach the 2020 climate target for the non-ETS sectors without additional measures (BMU, Klimaschutz in Zahlen 2018, p. 23). Emissions in Germany will only have fallen by 3% by 2017 (government draft for a Federal Climate Protection Act of 9 October 2019, A. Problem and target). However, according to the EU Commission, Germany has fulfilled its obligations under the burden-sharing decision up to and including 2016 (EU Commission, European Union Transaction Log, ESD Compliance Dashboard). The years 2017 and 2018 have not yet been settled at EU level. Upon request of the court, the defendant has stated that it assumes that a breach of the burden sharing decision could be avoided by purchasing emission allocations pursuant to Art. 3 para. 4 or 5 and/or Art. 5 of the decision if the reduction targets are not met. In the oral hearing, the representatives of the Federal Environment Ministry were surprisingly uninformed about the data for the years 2017 and 2018. The plaintiffs thereupon filed a request for evidence to establish, by way of expert opinion, that Germany might not be able to meet its obligations under the burden sharing decision from 2017 onwards, possibly even by purchasing emission allowances. The Chamber rejected the request for evidence on the grounds that the decision did not directly affect the burden sharing decision.

contains an unconditional and binding commitment to a certain reduction of greenhouse gas emissions at home. Otherwise, a conviction of the defendant would ultimately depend on whether the Federal Government succeeds in acquiring sufficient emission allowances from other Member States, which can only be finally determined after a time delay of about two years.

To the extent that the plaintiffs claim that the burden-sharing decision contains a duty of conduct in addition to the duty of success and requires a continuous reduction in greenhouse gas emissions, this leads to no other result. The leeway which the decision grants the Member States also applies in terms of time, for example, if unlimited crediting of surpluses is permitted in subsequent years. Contrary to the plaintiffs' assertion, Germany has not been completely inactive since 2017, as shown by the "climate package" from this autumn, which aims in particular at reducing greenhouse gas emissions in the building and transport sectors.

The rules of the burden sharing decision are clear and unambiguous as regards the margins provided for. In this respect, there is no reason for a referral to the ECJ under Art. 267 TFEU, which the Administrative Court as a court of first instance is not obliged to do anyway.

II. the plaintiff to 14) is also not entitled to file an action. Admittedly, it is a question of compliance with European environmental law, so that the right to bring an action by a collective action comes into consideration. Art. 3 para. 1 in conjunction with However, Annex II of the burden-sharing decision does not necessarily apply and thus does not provide what the plaintiffs seek.

Even if the action were admissible in relation to the first alternative claim, it would be unfounded for the reasons set out above.

C. The second alternative claim is also inadmissible. It is too vague.

The plaintiffs request that the defendant be ordered to ensure, by means of appropriate supplementary measures, that the action gap to achieve the 2020 climate target is closed as quickly as possible. This motion, like the other motions, only mentions the target to be achieved, but does not specify a concrete time frame. In order to satisfy the requirement of certainty, an application must be submitted in such a way that an enforceable judgment has an enforceable content. The enforcement proceedings should not be overloaded with factual questions while the dispute continues (BVerwG, judgment of 5 September 2013 - 7 C 21/12 -, BVerwGE 147, 312-329, juris marg. nr. 54 with further references). However, if neither the necessary measures nor a specific date are specified, it is almost certain that the legal dispute will continue in the enforcement proceedings. Essential issues are shifted to enforcement proceedings, although these do not constitute new discovery proceedings.

In any event, the applicants also lack the capacity to bring proceedings in that regard. Even if the second alternative claim were admissible, it would be unfounded.

The Chamber allowed the appeal pursuant to §§ 124 a (1) sentence 1, 124 (2) no. 3 VwGO (German Rules of the Administrative Courts) because the question of the individual plaintiffs' right to bring an action for breach of fundamental rights and the right to bring an action by associations is of fundamental importance with regard to an objective legal control of European environmental law.

The decision on costs is based on Section 154(1) of the VwGO. The decision on provisional enforceability is based on § 167 VwGO in conjunction with § 709 of the Code of Civil Procedure.

## Information on legal remedies

The parties are entitled to appeal against this ruling to the Higher Administrative Court of Berlin-Brandenburg.

The appeal must be lodged with the Administrative Court of Berlin, Kirchstraße 7, 10557 Berlin, within one month of service of the judgment in writing or in electronic form in accordance with § 55a of the Administrative Court Rules (VwGO). It must identify the contested judgment. The appeal must be substantiated in writing or in electronic form within two months of service of the judgment. The statement of

grounds shall be submitted to the Higher Administrative Court of Berlin-Brandenburg, Hardenbergstraße 31, 10623 Berlin, unless it is submitted at the same time as the appeal is filed. The statement of grounds must contain a specific request as well as the reasons for the challenge to be stated in detail (grounds of appeal).

Before the Higher Administrative Court, the parties must be represented by legal representatives. Lawyers and legal teachers at a state or state-recognised university of a member state of the European Union, another signatory state to the Agreement on the European Economic Area or Switzerland who are qualified to hold the office of judge are admitted as agents. In addition, the persons mentioned in § 67 Paragraph 2 Sentence 2 Nos. 3 to 7 VwGO designated persons and organisations. An authorised participant may represent himself as an authorised representative. Authorities and legal persons under public law, including associations formed by them for the fulfilment of their public duties, may be represented by employees qualified to hold the office of judge; the employment relationship may also be with another authority, legal person under public law or one of the aforementioned associations. Judges may not appear before the Court of First Instance, honorary judges may not appear before a panel of judges to which they belong.

….