

CLUJ COURT OF APPEAL

Third Administrative and Fiscal Division

PANEL D14

Case file no. 114 / 33 / 2023

Hearing: **22 May 2023**

Your Honor,

The first - sixth line claimants Indicated in the contentious administrative proceedings, with address for service at Revnic, Cristian & Asociații partnership of lawyers in Cluj-Napoca, str. Pavel Roșca , nr. 1, ap. 7, Cluj County,

Through Ms. Roxana Mândruțiu, attorney-at-law, whose power of attorney has been filed,

hereby submit the following

SUMMARY OF PLEAS OF ILLEGALITY

wherein you are requested that the application brought before the administrative court be granted as lodged, in relation to the following pleas of illegality:

1. The defendants are currently failing to comply with their legal obligation to reduce greenhouse gas emissions by at least 55% below the 1990 level, which is necessary to prevent dangerous climate change

(1) The National Integrated Energy and Climate Change Plan (NIECCP) is the only national document that includes a commitment made by the defendants to reduce greenhouse gas emissions by 44% from the 2005 level (42% from 1990 according to the Climate Analytics Country Sheet), exclusively through the application of the greenhouse gas emissions trading scheme.

The incompatibility of Romania's commitment with its legal obligation under Article 2 of the Paris Agreement

(2) The defendants' commitment is unlawful because:

- It is not consistent with the climate objective undertaken in Article 2.1(a) of the Paris Agreement to limit global warming to 1.5 degrees Celsius and 2 degrees Celsius respectively; the Paris Agreement represents the primary legislation and the purpose of initiating any action on climate change is to prevent the attainment of the critical thresholds as established and undertaken by this international treaty;
 - In accordance with Article 2.1(a) of the Paris Agreement, the States-Parties have made a commitment to keep global temperature increase well below 2 degrees Celsius above pre-industrial levels and to continue efforts to limit temperature increase to 1.5 degrees Celsius.
 - Limiting global warming to 1.5 degrees Celsius, even when it requires a collective effort, is also the individual responsibility of the defendants, as each signatory party must pursue this climate objective;
 - We would like to emphasise that the long-term temperature target is an important starting point for assessing the legality of the defendants' efforts under national law. Scientifically speaking, the relevant temperature limit determines the amount by which a State is required to reduce its emissions and the rate at which it must do so. Furthermore, in assessing the legality of efforts to combat climate change, the court will also have to take into account the evolution of scientific evidence from the time of the Paris Agreement to the present day that the current NDCs are insufficient:
 - ⇒ **IPCC reports from 2022** (Volume IV, pages 16-57, 58-89);
 - ⇒ **IPCC March 2023 Synthesis Report** (Volume IV, pages 154-189),
 - ⇒ **Climate Analytics¹ Country Report for Romania** (Volume V, pages 13-19); the Report also states that the range of emissions compatible with 1.5 degrees Celsius created by the two emission reduction scenarios is between **79-83%** of the 1990 levels, with the exception of LULUCF.
- (3) Although expert reports are not legally binding, they are **relevant** in assessing the legality of the defendants' efforts, given the scientific and political consensus concerning them.

¹ Climate Analytics is a non-profit research and consultancy organisation, founded in Berlin in 2008, which focuses on the scientific, political and economic aspects of tackling climate change. The organisation provides analysis and expertise to support climate action, developing science- and policy-based strategies and solutions. Although its reports are not official UN documents, they can be used to assess progress under agreements such as the Paris Agreement. <https://climateanalytics.org/about-us/>

The unlawfulness of the measures taken by the defendants in the light of the positive obligation of the Romanian State to protect the constitutionally enshrined rights (the right to a healthy environment, the right to health, the right to life, the right to private and family life, the right to a dignified future). Applicability of the European Court of Human Rights case law.

- (1) The defendants have breached their constitutional obligations under Article 135(2)(d-g) of the Romanian Constitution, since the measures proposed to be implemented with a view to combating climate change, as detailed in section 6.1.1 of the application, will not lead to limiting global warming below the critical thresholds indicated above, while exceeding such thresholds creates risks for the safety of citizens, the environment and the rule of law, of which the defendants are aware, as is clear from their political statements.
- (2) In assessing the legality of the measures taken to reduce greenhouse gas emissions by the defendants, we believe that the following principles should be applied:
 - **The precautionary principle.** This principle is enshrined in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU), Principle 15 of the 1992 Rio Declaration on Environment and Development, Article 3 of the United Nations Framework Convention on Climate Change, as well as in various provisions of secondary legislation, such as Article 3 of the Government Emergency Ordinance no. 195/2005. It essentially assumes that lack of or insufficient scientific knowledge about the possibility of environmental degradation will not be an obstacle to the adoption of precautionary measures designed to eliminate or minimise the occurrence of damage.
 - **The principle of intergenerational equity.** Part of the principle of sustainable development, enshrined in paragraphs 4, 9 and 32 of the Preamble to Regulation (EU) 2021/1119 (European Climate Act), Article 3 of the Government Emergency Ordinance no. 195/2005, it consists in meeting the needs of the present generation without compromising the ability of future generations to meet their own needs.
- (3) Essentially, the defendants were required to take "reasonable" and "appropriate" measures to prevent or minimise a foreseeable and serious risk of harm to human rights, in accordance with the Romanian Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. The lack of reasonableness of such measures is tantamount to their unlawfulness.

- (4) In its case law, the European Court of Human Rights has held² that this positive obligation has two aspects: (a) the obligation to provide a regulatory framework; and (b) the obligation to take preventive operational measures.
- A state, for instance, can be held liable for failing to regulate an industry because it has an obligation to take reasonable and appropriate measures to guarantee the rights protected by the European Convention on Human Rights³. In other words, "a state must take into account the diligence obligations in its policy".
- (5) In the particular case of climate litigation, such efforts made by defendants should reflect the highest ambitions to mitigate climate change and reflect progress over time.
- (6) The lack of reasonable measures, and therefore their unlawfulness, is revealed by an analysis of the documentary submissions, according to which:
- ⇒ The defendants **have failed to take all necessary measures to respect human rights** by introducing alternative clean energy and creating simple procedures for access to it, through activities leading to the prevention of deforestation and ensuring afforestation;
 - ⇒ **There has not been a progressive increase in ambition and regression has not been avoided.** According to official data provided by the European Environment Agency (detailed in item 6.2.2. of the application) Romania ranks last in Europe together with Slovenia in terms of the integration of renewable energy sources into the national electrical grid. Moreover, frequent interference in the legislative and regulatory framework, lack of transparency and strategic vision, and the administrative apparatus' reduced capacity to adjust to trends in the sector have led to a loss of investment momentum and a general state of uncertainty for the renewable industry. As a result, **from 2016 to 2021, no new renewable energy capacity was installed and producers faced large capital losses⁴.**
 - ⇒ Through the implemented measures, the defendants **do not intend to reduce emissions to keep the global average temperature below 1.5 degrees Celsius.** The burden of proof rested on the defendants to show why such an objective could not

² https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf

³ Fadeyeva v. Russia (n.100), paragraph 89; Hatton and Others v. United Kingdom (n. 100), paragraph 98; see also Birnie et al. (2009), page 284

⁴ https://bankwatch.ro/wp-content/uploads/2021/03/Raport_Regenerabile.pdf

be reached, but it appears from all the documentary evidence submitted by the defendants that there is no adequate justification to that effect in accordance with the necessity and proportionality tests, given the extent of the damage to human rights by failing to limit global warming to 1.5 degrees Celsius.

- (7) In section 6.1.1. item 10 et seq. of the application, we explained in detail that although there are technological solutions and measures which, when properly implemented, would contribute effectively to combating climate change, the defendants' measures in each segment are almost non-existent or ineffective:

⇒ **Lack of inspection and control of deforestation.**

- From the Report of the Court of Auditors on the management of public forests 2013-218 (Volume III, pages 1-74) it appears that the SUMAL application has a number of shortcomings, as it is impossible to detect illegal logging and *"the volume of illegally logged timber appearing in the official records does not reflect the scale of the phenomenon"*. It is also noted that the volume of illegally harvested timber (more than 20 million m³) is disproportionately high in relation to the controls and sanctions that have been imposed. In other words, instead of promoting the efficiency and effectiveness of monitoring procedures, the current measures make the process of punishing environmental offences more ineffective, thus giving rise to the certainty of impunity and consistently encouraging environmental offences.
- From the Formal Notice no. 2020/2033 sent by the European Commission (Volume III, pages 75-102) it appears that the Romanian authorities have undertaken in 2017 that the SUMAL 2.0 - Forest Inspector application will be fully functional by 2020. As it appears from the statement of defence submitted by the Ministry of the Environment, Forests and Waters, it is promised that the application will be operational in 2024. At the same time, COP 27 decided to end deforestation no later than 2025, recognising the crucial role of forests in the climate change mitigation strategy⁵.

⇒ **Romania's renewable energy and energy efficiency setback**

- In the report "Romania's national energy strategy, EU ambitions and the climate emergency" (volume II, pages 144-159) it was concluded that the

⁵ <https://www.consilium.europa.eu/ro/meetings/international-summit/2022/11/07-08/>

ambition **in the renewable segment** is very modest, considering the country's capacity and geographical conditions. Therefore, current ambitions propose the installation of 6GW of wind and solar power in addition to the existing capacity by 2030, which will bring Romania to a total of about 10.3 GW, representing only 0.01% of total wind and solar for one of the largest countries in the Union. Romania's natural potential is 227 GW wind and 381 GW solar.

- The Energy Policy Group report (volume II, pages 160-188) points out that the development of at least 15GW of offshore wind power capacity in the Black Sea, i.e. in the Exclusive Economic Zone (EEZ), is necessary to achieve climate neutrality until 2050 and could become the country's largest source of electricity (40% of the total).
- As the Bankwatch⁶report shows, no new renewable energy capacity has been installed from 2016 to 2021;
- However, the National Integrated Energy and Climate Change Plan (NIECCP) proposed an increase from 24.3% to 30.7% until 2030, which is significantly lower than the 45% set by REPowerEU and below the 40% previously proposed by the "Fit for 55" package. Yet there is no adequate justification for such petty ambitions, since Romania has the capacity to invest in green energy (wind and solar);
- Another pressing energy policy issue, which is in breach of the Paris Agreement climate target, is the allocation of funds for investments in fossil fuels, obsolete hydropower projects and woody biomass, which is leading to a decrease in funding for wind and solar energy sources;
- In terms of **energy efficiency**, Romania's current ambitions do not set out real increases in energy efficiency, i.e.:
 - i) The National Recovery and Resilience Plan includes references to heat pumps, but does not set any targets, which shows that there is no clear policy to widely promoting and using them;
 - ii) The defendants have not set as an objective the effective resolution of the energy poverty (translated by the population's income, housing conditions, etc.); the heating subsidies increase the

⁶ https://bankwatch.ro/wp-content/uploads/2021/03/Raport_Regenerabile.pdf

dependence of vulnerable consumers and the rehabilitation programmes are not able to solve such a phenomenon which is unfavourable to the population. The lack of clear targets for increasing energy efficiency breaches the fundamental rights to a decent living and a dignified future.

- (8) In conclusion, as regards the general legal obligation to tackle the effects of climate change, the defendants' ambitions are contrary to their legal obligations under the Paris Agreement, the European Climate Law and the Romanian Constitution, whereas:
- The rather modest 44% is based on a different reference date (2005) than the one assumed by the EU (1990), given that between 1990 and 2000 Romania had one of the highest levels of greenhouse gas emissions in Europe⁷, due to the extensive use of fossil energy and strong industry, and that emissions were decreasing in 2005; therefore, the assumed percentage based on 1990 emissions is less than 44%;
 - Romania is only assuming a percentage reduction through the Emissions Trading Scheme;
 - There is no assumed percentage for Romania calculated on all types of emissions (legal and illegal);
 - There is no commitment for the period after 2030;
 - Defendants' measures do not pass the reasonableness test (Defendants have not taken all possible measures to reduce emissions, there has not been a progressive increase in ambition, but on the contrary, a regression, the measures taken do not lead to limiting global warming to 1.5 degrees Celsius).

2. Breach of specific climate change obligations

- (1) As regards **the share of renewables** in the final energy consumption, the National Integrated Energy and Climate Change Plan (NIECCP) foresees an increase in the share to 30.7% until 2030 (and up to 29% through the National Recovery and Resilience Plan - the NRRR), which is well below the 45% target set by the REPowerEU Package. This is again a disregard for the highest possible climate ambition standard.
- (2) There is a tendency to report data that do not match the reality on the ground with a view to creating the impression of national progress, without pursuing adaptation and increasing climate ambitions in line with updated scientific data and strategies adopted notably at EU level.

⁷ <https://ourworldindata.org/co2/country/romania>

- (3) Projects and investments involving the use of fossil fuels are also ongoing, with the appearance of introducing green hydrogen, for which there is still no concrete data on feasibility.
- (4) Investment programmes are ineffective in the solar energy sector (of the installation of photovoltaic panels, thus hindering potential prosumers who would contribute to the national power grid).
- (5) To conclude, the targets set by the defendants do not meet the standard of the highest possible climate ambition, given Romania's geographical conditions, favourable to offshore and onshore wind and solar energy.

3. The lack of strong measures, coherent plans, monitoring and reporting mechanisms creates an immediate and substantial risk to the collective and individual fundamental rights of complainants.

- (1) As detailed in section 6.3. of the action brought before the administrative court, the claimants' fundamental rights guaranteed by the Constitution, the EU Charter of Fundamental Rights and the European Convention on Human Rights are affected.
- (2) As far as collective rights are concerned, the Declic Association and the individual claimants believe that all scientific reports show a causal link between climate change and the environment. The lack of adequate measures aimed at preventing dangerous climate change creates an immediate and substantial risk to the claimants' right to a healthy and ecologically balanced environment, which is a collective right enshrined in the Romanian Constitution.
- (3) Moreover, the right to health and to a dignified future are substantially connected to and determined by a healthy environment.
- (4) These constitutionally guaranteed freedoms are matched by the defendants' constitutional obligation under Article 135(d-f) to protect the natural foundations sustaining life.
- (5) The state's obligation to maintain the ecological balance and provide the necessary conditions for a better quality of life is not only related to traditional environmental factors such as water, air and soil, but also to climate.

The extent of the protection which the defendants are required to provide includes:

- The prevention of damage;
- The requirement to remove/compensate for damage that has already occurred;

- The requirement to minimise risks;
 - The requirement to preserve resources in a sustainable manner;
 - The prohibition to substantially damage the environment.
- (6) The commitments made by the defendants and the measures sought to be implemented have the effect of a light breeze on the phenomenon of climate change, whose progress is unrestricted, leading to a clear infringement of the defendants' obligations to prevent damage and minimise risks.
- (7) In section 6.3.1. we have pointed out that the National Meteorological Administration Reports (from 2015 and 2022) show **the causal link between climate change and the health of Romania's population** (heat waves are increasingly intense and persistent, aggravating respiratory and cardiovascular diseases, asthma, allergies, mental illness, etc.).
- (8) In urban areas there is a heat island effect, caused by the urban structure and the materials used, which trap heat and alter the microclimate, as shown in the recent report⁸ on the situation in Europe by the World Health Organisation.
- (9) In addition, according to an analysis⁹ of climate change in Europe carried out by the European Centre for Disease Prevention and Control, the impact of climate change on public health is manifested in an increase in the number of hospitalisations and deaths caused by heat waves and in the number of hypothermia caused by blizzards, the number of injuries and deaths due to flooding, and changes in the areas of vector-borne disease transmission, such as the Hantavirus (rodent-borne), the West Nile virus (mosquito-borne), the tick-borne encephalitis, the Lyme disease (also tick-borne), the Malaria and the Dengue disease (both mosquito-borne). The Centre also draws attention to how such negative effects of climate change on population health will continue to intensify in the future as environmental conditions worsen. Basically, as temperatures and humidity levels rise, these vectors will spread even to areas where they have not previously had widespread access.

⁸ World Health Organization - Regional Office for Europe, *Heat and health in the WHO European Region: updated evidence for effective prevention*, 2021, pages 98-106, source: <https://apps.who.int/iris/bitstream/handle/10665/339462/9789289055406-eng.pdf>

⁹ European Centre for Disease Prevention and Control, *Climate change in Europe Public health area*, sursa: <https://www.ecdc.europa.eu/en/climate-change/climate-change-europe>

- (10) In the specific case of West Nile virus, the carrier mosquitoes find the warmer temperatures favourable for extending their breeding periods and for surviving the winter (which becomes milder). Rising temperatures also shorten the incubation period of the virus and favour its spread. In the European Environment Agency document referred to above, a chart¹⁰ (reproduced below) illustrates the increase in the likelihood of West Nile outbreaks in Europe between 1951 and 2020, where the highest risk is in Central and Eastern Europe, including Romania.
- (11) **To conclude**, the lack of firm, concrete and coordinated climate change policies, although the defendants are aware of the danger posed by climate change, is circumscribed by the indirect intention, which is the form of culpability whereby the defendants disregard their legal obligations and harm our right to health.
- (12) In terms of **the right to a dignified future**, the Declic Association and the claimants are a spokesperson for future generations, which, in the absence of vigorous action on the part of the defendants in the area of mitigation and adaptation to climate change, will have to bear this burden unfairly and will be deprived of their fundamental rights.
- (13) In respect of **the individual fundamental rights of the 2nd-6th line claimants** (the right to life, the right to privacy, the right to property) these are deeply intertwined with the right to a healthy and ecologically balanced environment and the right to health, and the way in which such rights are impaired is detailed at length in the action brought before the administrative court.
- (14) The World Bank report prepared for the Romanian Government¹¹ lists the main vulnerabilities to climate change that have been identified in our country in various spheres of activity related to **water use**. The essential nature of this natural element for life and health is a well-known fact that does not need to be substantiated. As a vital element involved in daily life, any degree of damage to it has particularly important consequences, and depending on the severity of the damage caused, the impact may be felt more strongly by a greater number of people. As such, the identified hazards are as follows:

¹⁰ van Daalen K.R., et al., 2022, 'The 2022 Europe report of the Lancet Countdown on health and climate change: towards a climate resilient future', Lancet Public Health 2022, ([https://doi.org/10.1016/S2468-2667\(22\)00197-9](https://doi.org/10.1016/S2468-2667(22)00197-9)), *apud* European Environment Agency, Climate change as a threat to health and *well-being in Europe: focus on heat and infectious diseases*, *op. Cit.*, page 47.

¹¹<https://documents1.worldbank.org/curated/en/296921468298795648/pdf/955960ROMANIAN0391419B0A110romanian.pdf>

- Water supply will be affected as warmer and shorter winters will lead to seasonal snow volume decreases and early and rapid snow melt, causing shortages in the summer months.
 - Warmer and drier summers will also lead to a deterioration in the quality of water resources, effectively reducing water supply.
 - Water supply will also be negatively impacted by the lowering of groundwater levels in the summer months due to reductions in surface flows.
 - Higher summer temperatures will cause more evaporation and transpiration and therefore higher water demands in agriculture at the same time as the water supply will be scarce. Domestic water demand and supply will feel the same effect (but less pronounced).
 - Domestic water treatment will be more frequently affected by flooding, due to infiltration of rainwater into sewerage systems, and also due to direct flooding of the treatment plants.
 - The flora and fauna of aquatic ecosystems (rivers and lakes), as well as those dependent on rainfall and river flows (such as wetlands) will suffer due to reduced water flows in summer and increased frequency of floods and droughts.
 - High summer temperatures, which lead to degradation of water quality (through lower dissolved oxygen levels, eutrophication and excessive algal blooms), will also harm the environment.
- (15) Therefore, in relation to the way climate change affects water use alone, the impact on the right to property, the right to a decent living, but also on life, the right to privacy and family life, is negatively felt in multiple forms and degrees, depending on the extent of the consequences triggered.

Accordingly, in the light of the considerations set out in the action initiating proceedings and this summary of pleas of illegality, you are requested to grant the application as submitted.

Yours faithfully,
The DECLIC Association,
Through Ms. Roxana Mândruțiu, Attorney-at-law.