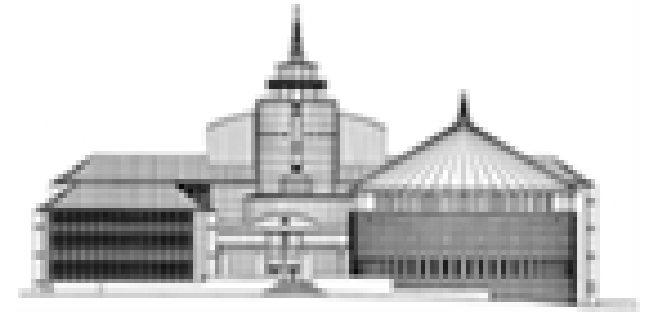


EUFJE Annual conference 2024

ELTE University, Budapest

- Human rights approach to the protection of the environment and future generations
- **Belgian case law : Klimaatzaak**
- **Cour d'appel de Bruxelles, arrêt du 30.11.23**
- Françoise Thonet, présidente de chambre honoraire et Caroline Henrotin, conseiller et présidente de la chambre de l'environnement, Cour d'appel de Mons
- Avec la collaboration du PRE (Pool de Réflexion sur le Droit de l'Environnement)



Case and parties

June 1, 2015, Klimaatzaak (association) and 8,422 individuals cited the Belgian State, the Walloon Region, the Flemish Region, and the Brussels-Capital Region before the First Instance Court of Brussels

Social purpose of the association :

Judgment of June 17, 2021

protection of current and future generations from climate change

protection of current and future generations from biodiversity loss

protection of the environment

The request

- Before the first judge, the plaintiffs requested that the defendants be ordered to reduce the total annual greenhouse gas (GHG) emissions in Belgium by the following proportions:
 - In 2020: at least 40%, with a minimum of 25%
 - In 2030: at least 55%, with a minimum of 40%
 - In 2050: at least 87.5%, with a minimum of 80%
- The challenged decision stated that
 - In pursuing their climate policy, the Belgian State, the Flemish Region, the Walloon Region, and the Brussels-Capital Region did not act as normally prudent and diligent authorities, which constituted a fault under Article 1382 of the Civil Code,
 - In pursuing their climate policy, these entities violated the fundamental rights of the plaintiffs, specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change that threaten the life and private life of the plaintiffs.
 - The court dismissed the remaining claims and did not consider itself competent, due to the separation of powers, to issue orders to the political authorities involved.

In appeal degree

- Klimaatzaak and the individuals request the court
 - to acknowledge that, in pursuing their climate policy, for 2020 and 2030, the respondents violated and continue to violate Articles 2 and 8 of the ECHR and have committed and continue to commit a fault under Articles 1382 and 1383 of the former Belgian Civil Code
 - to order them to take sufficient measures to reduce the total GHG emissions from Belgian territory by at least 61% by 2030 compared to 1990 levels, under penalty of a fine of €1,000,000 per month for failing to meet the 2030 target, starting from August 1, 2031
 - the communication of the GHG emission report for 2030 to Klimaatzaak on the same day it is communicated to the European Commission in 2031, under penalty of €10,000 per day of delay.
 - They commit to fully pay any fines due in accordance with their social purpose.

Plan

1. Jurisdiction of the national judge

2. Admissibility

- a. Existing and current interest
- b. Own interest

3. Articles 2 and 8 of the ECHR: direct effect of these articles in Belgian domestic law

- a. Scope of Articles 2 and 8 of the ECHR in environmental matters
- b. Control by the national judge, subsidiarity, and margin of interpretation
- c. Determination of standards based on soft law and reliable scientific studies
- d. Determination of a minimal threshold
- e. Impact of low emissions from Belgian territory, should it be taken into account?
- f. Division into three periods and its impact on assessing liability

4. Liability under Article 1382 and determination of damage (moral and ecological damage for Klimaatzaak and individual damage for the individuals)

- a. Individualization of faults, no joint liability but consultation between powers
- b. The damage

5. Injunction and separation of powers

6. Request for a penalty



Jurisdiction of the National Judge

- Article 144 of the Belgian Constitution: contestation of subjective rights
- Extra-contractual liability
- Right to life and respect for private and family life
- Prevention and compensation for any unlawful infringement of subjective rights by authorities in the exercise of their discretionary power
- Legal standard imposing a specific behaviour
- Duty of diligence of States

Admissibility and interest ?



Born and current interest + Prevention of the violation of a seriously threatened right (C. jud, art. 18)



Personal and direct interest (prohibition of popular action or action of collective interest)



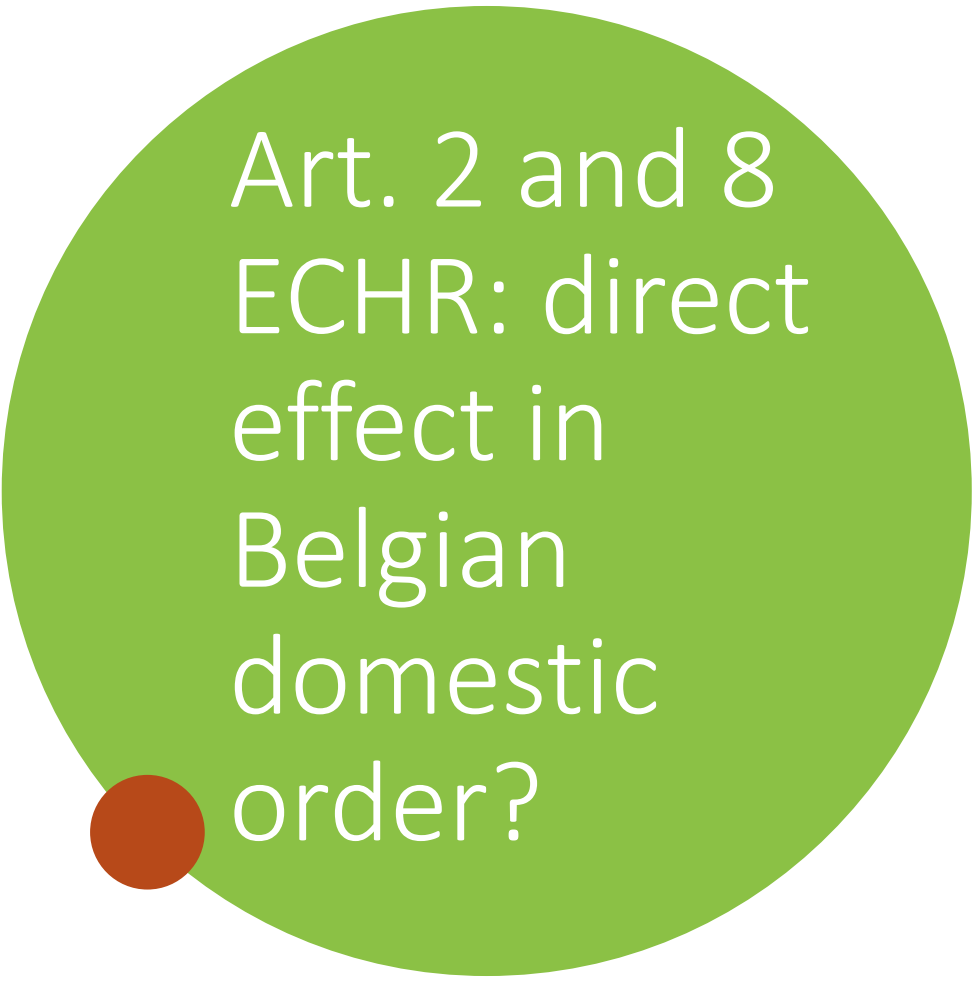
Art. 3.4 and 9.3 of the Aarhus Convention: access to justice for environmental protection associations



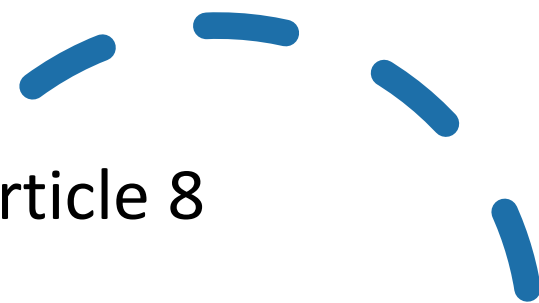
Klimaatzaak (Pure ecological damage $><$ individual ecological damage? Moral damage of an association)

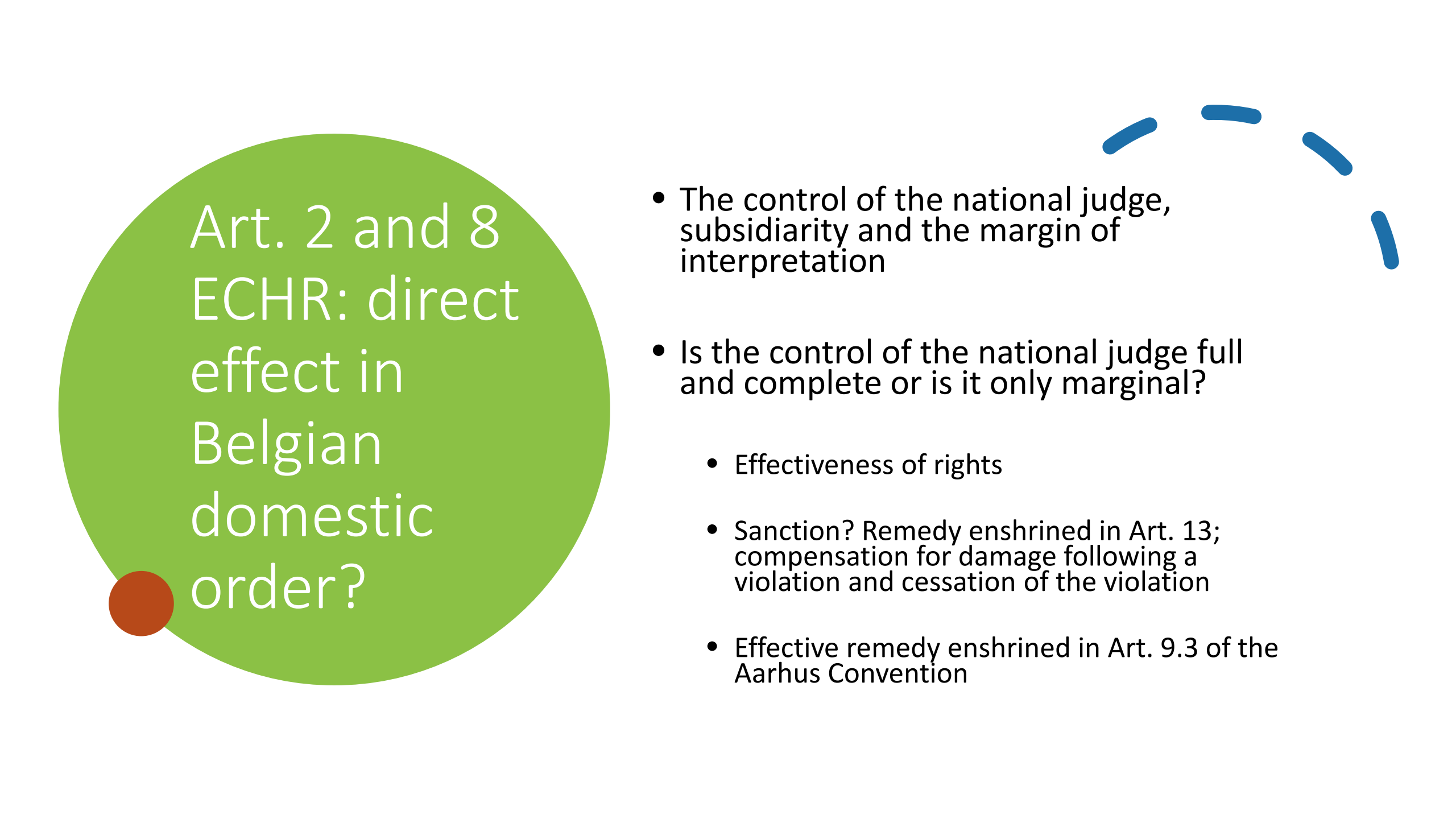


Individuals (Potential impact of global warming on the life and privacy of individuals)



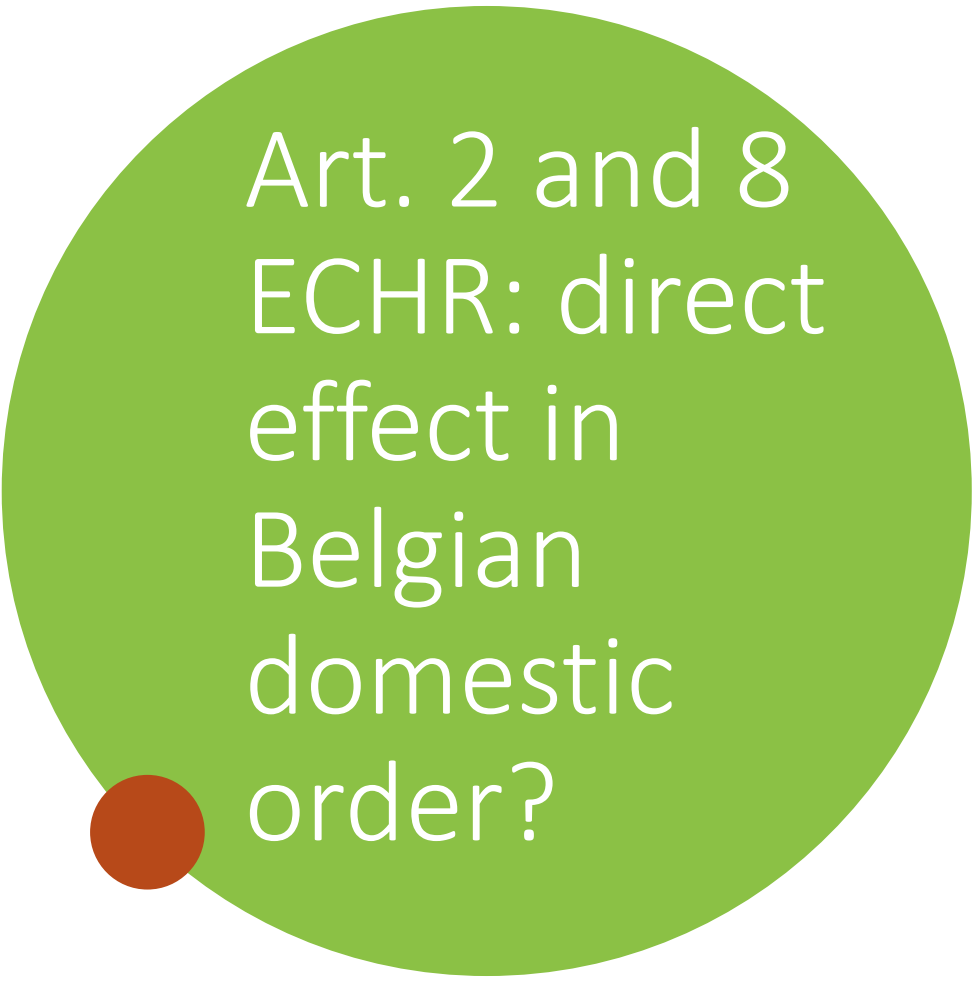
Art. 2 and 8
ECHR: direct
effect in
Belgian
domestic
order?

- 
- Scope of Article 2 and Article 8
 - Positive and negative obligations
 - Obligation of means




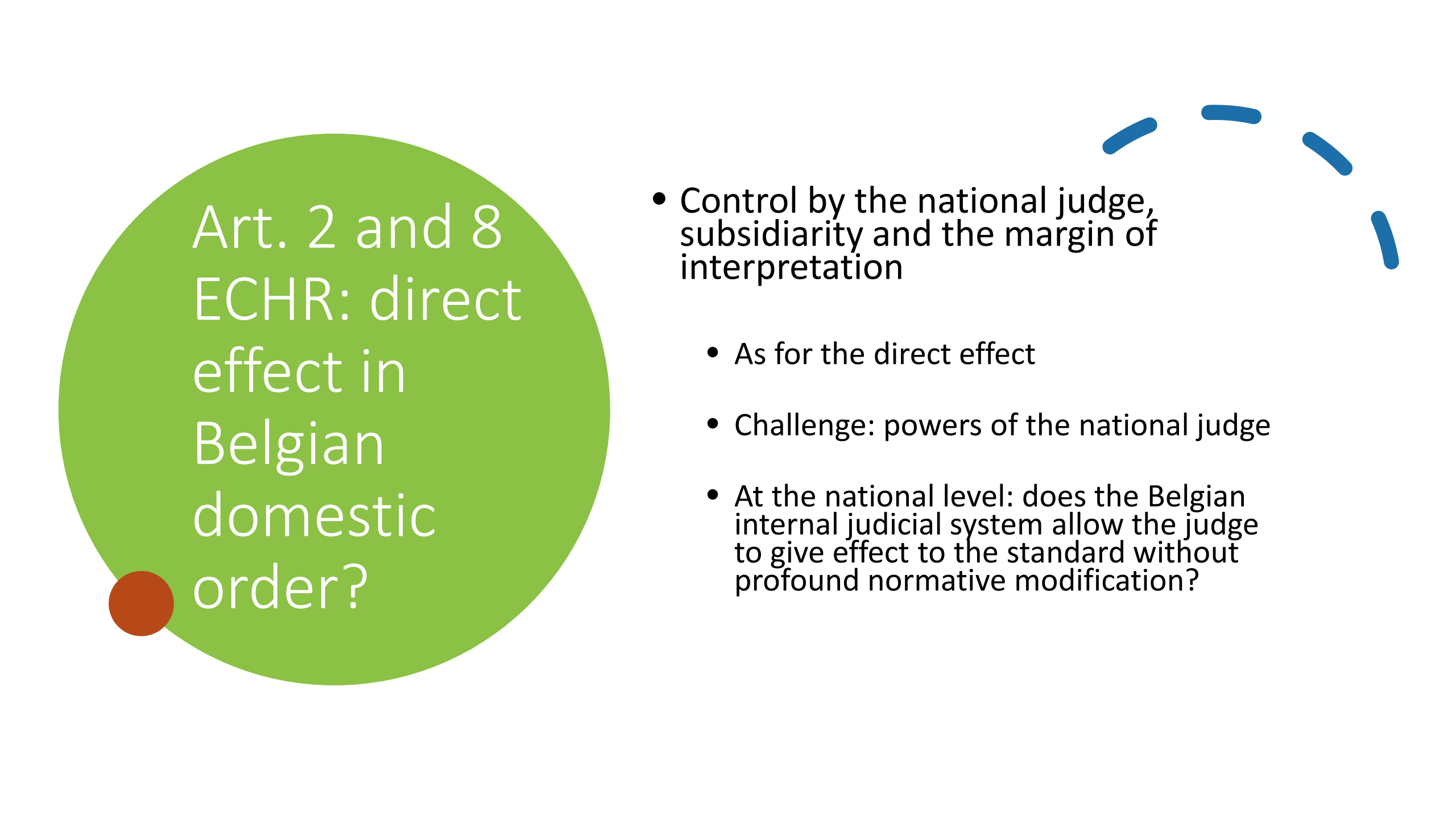
Art. 2 and 8
ECHR: direct
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order?

- The control of the national judge, subsidiarity and the margin of interpretation
- Is the control of the national judge full and complete or is it only marginal?
 - Effectiveness of rights
 - Sanction? Remedy enshrined in Art. 13; compensation for damage following a violation and cessation of the violation
 - Effective remedy enshrined in Art. 9.3 of the Aarhus Convention



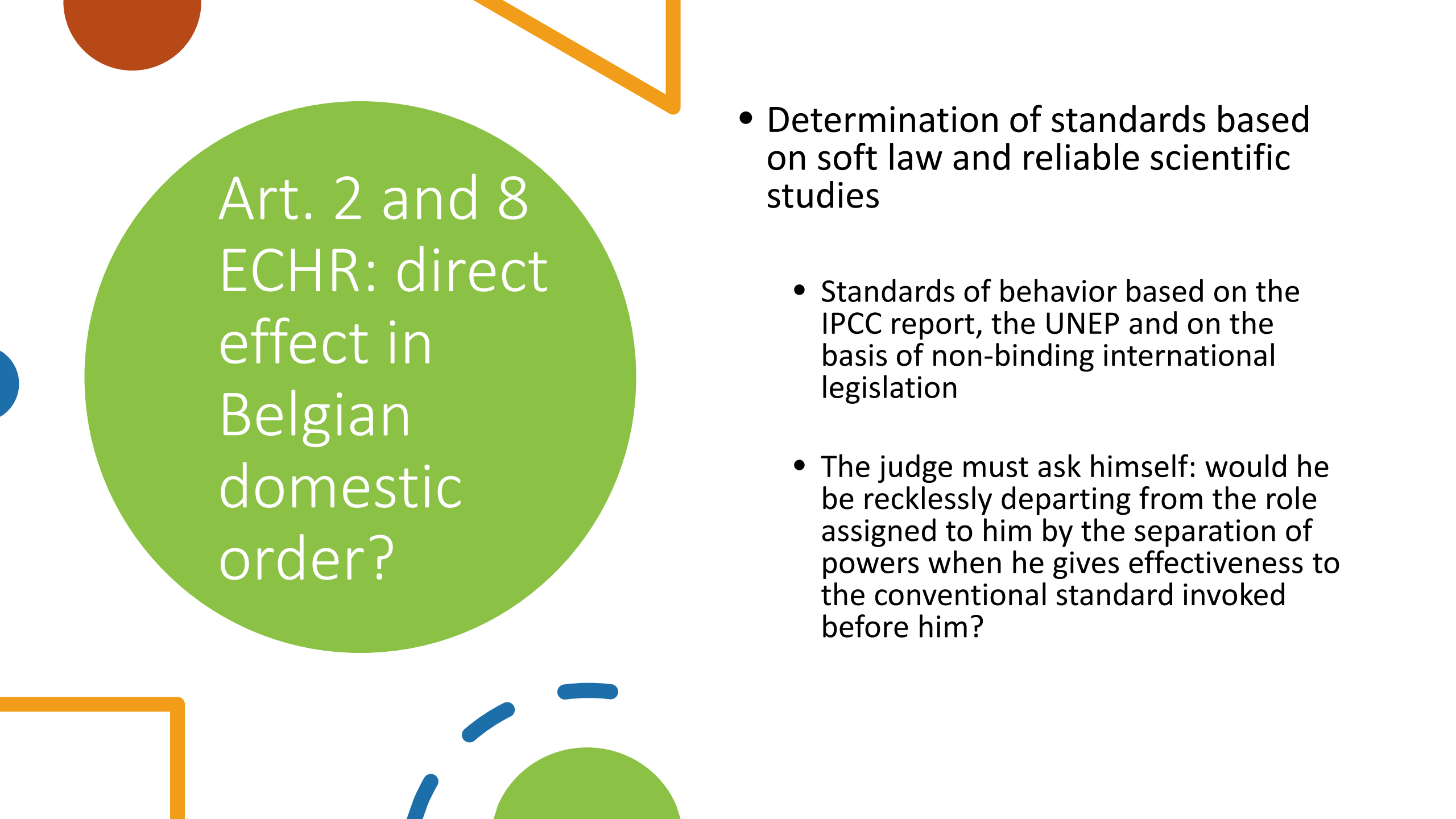
Art. 2 and 8
ECHR: direct
effect in
Belgian
domestic
order?

- 
- Control by the national judge, subsidiarity and the margin of interpretation
 - As for the margin of appreciation of the States



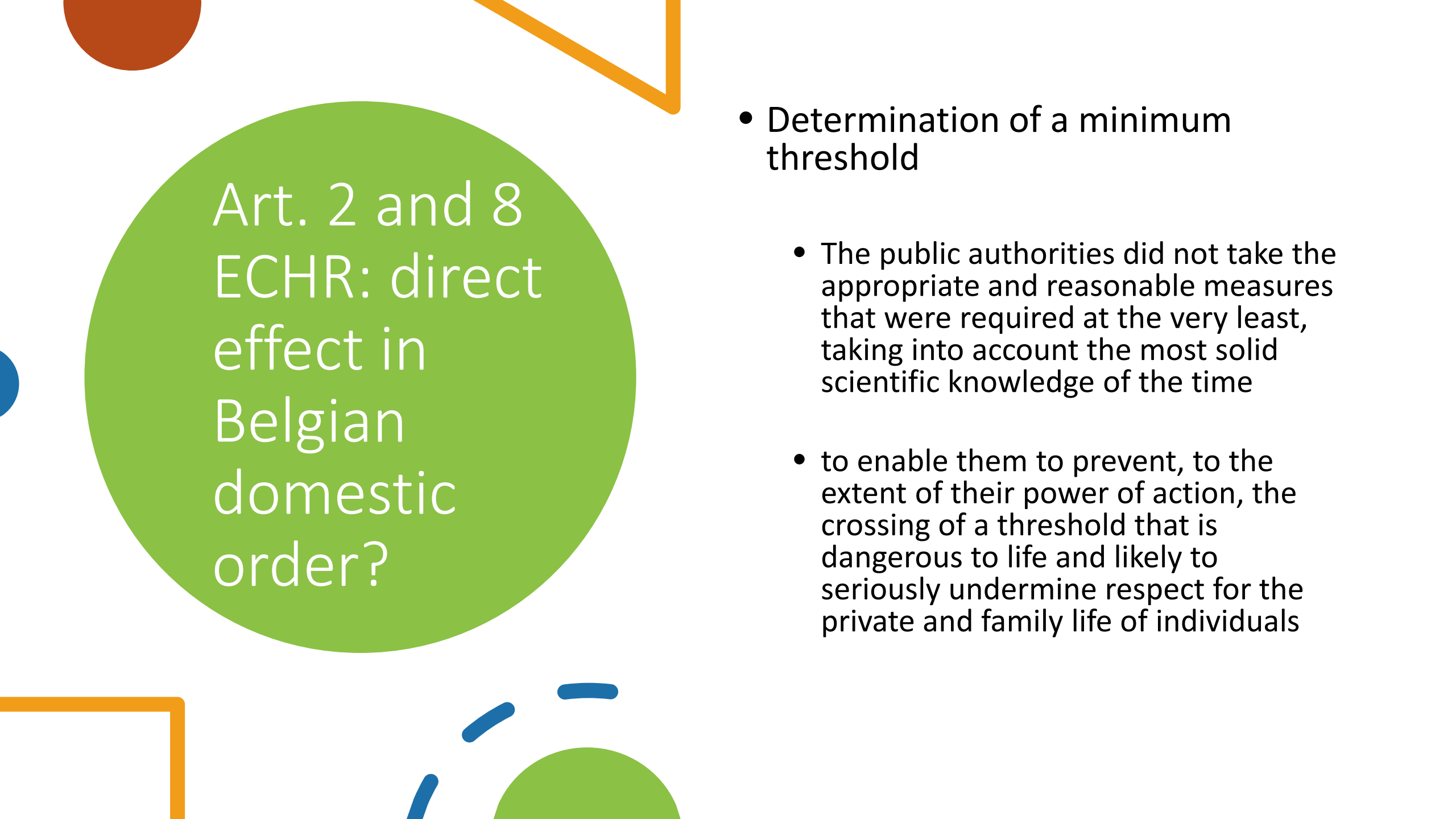
Art. 2 and 8
ECHR: direct
effect in
Belgian
domestic
order?

- Control by the national judge, subsidiarity and the margin of interpretation
 - As for the direct effect
 - Challenge: powers of the national judge
 - At the national level: does the Belgian internal judicial system allow the judge to give effect to the standard without profound normative modification?



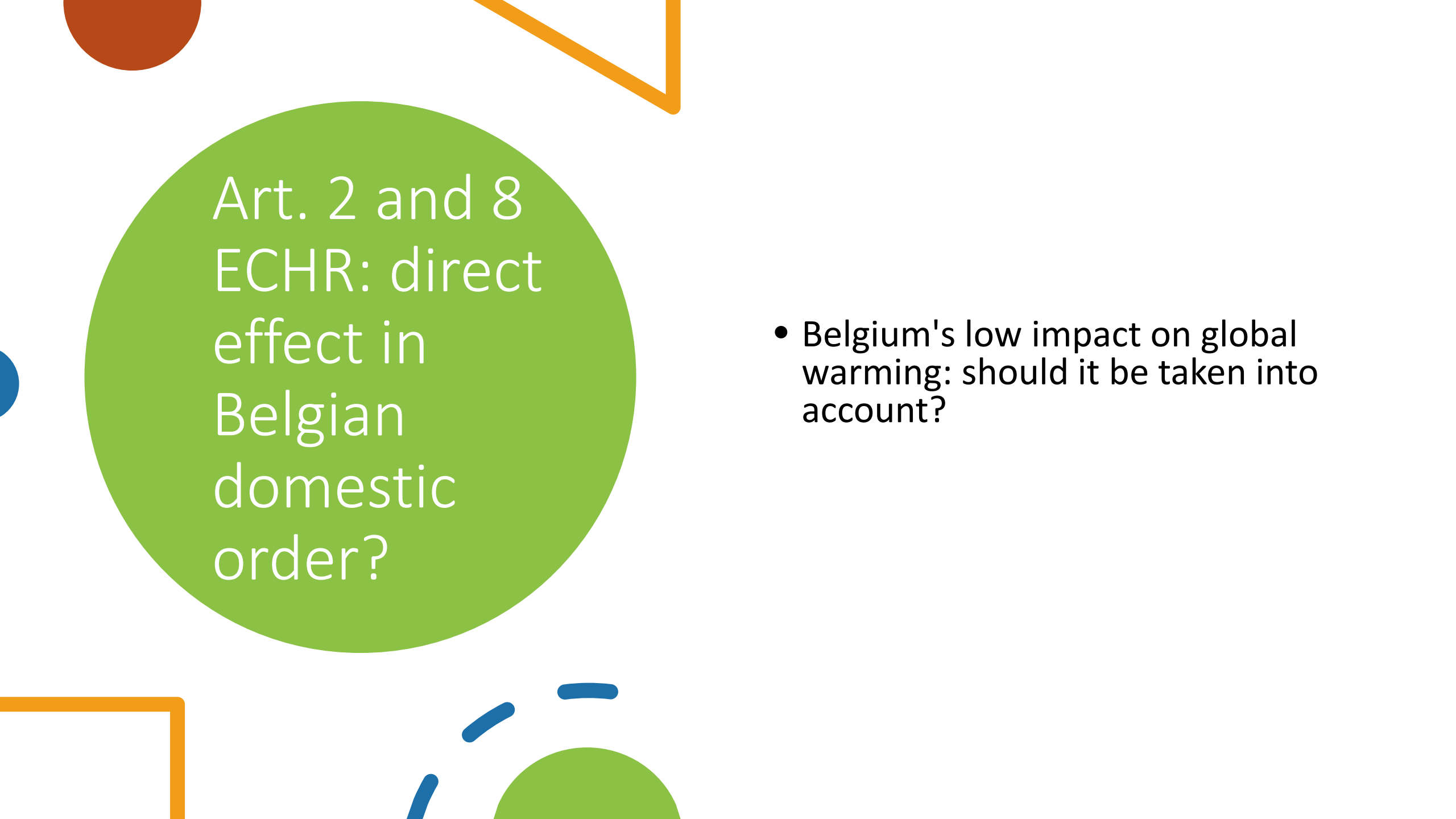
Art. 2 and 8
ECHR: direct
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order?

- Determination of standards based on soft law and reliable scientific studies
 - Standards of behavior based on the IPCC report, the UNEP and on the basis of non-binding international legislation
 - The judge must ask himself: would he be recklessly departing from the role assigned to him by the separation of powers when he gives effectiveness to the conventional standard invoked before him?



Art. 2 and 8
ECHR: direct
effect in
Belgian
domestic
order?

- Determination of a minimum threshold
 - The public authorities did not take the appropriate and reasonable measures that were required at the very least, taking into account the most solid scientific knowledge of the time
 - to enable them to prevent, to the extent of their power of action, the crossing of a threshold that is dangerous to life and likely to seriously undermine respect for the private and family life of individuals



Art. 2 and 8
ECHR: direct
effect in
Belgian
domestic
order?

- Belgium's low impact on global warming: should it be taken into account?

Art. 2 and 8
ECHR: direct
effect in Belgian
domestic order?

- Division into three periods and impact on the assessment of responsibility
 - 2013-2020: lack of ambition and poor coordination between the authorities
 - 2020-2030: GHG reduction rate at 55% minimum
 - After 2030: unfounded request
- The exclusion of the Walloon Region

Liability based
on Articles
1382 and
1383 of the
former Civil
Code and
determination
of damages

Fault: violation of the standard of prudence and a binding standard of international law

Damage

Causal link

Burden of proof

Fault of the victim

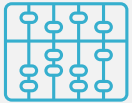
Minimum threshold – scientific consensus – 55%

Well-founded claim against the Flemish Region, the Belgian State and the Brussels-Capital Region

Individualization of faults



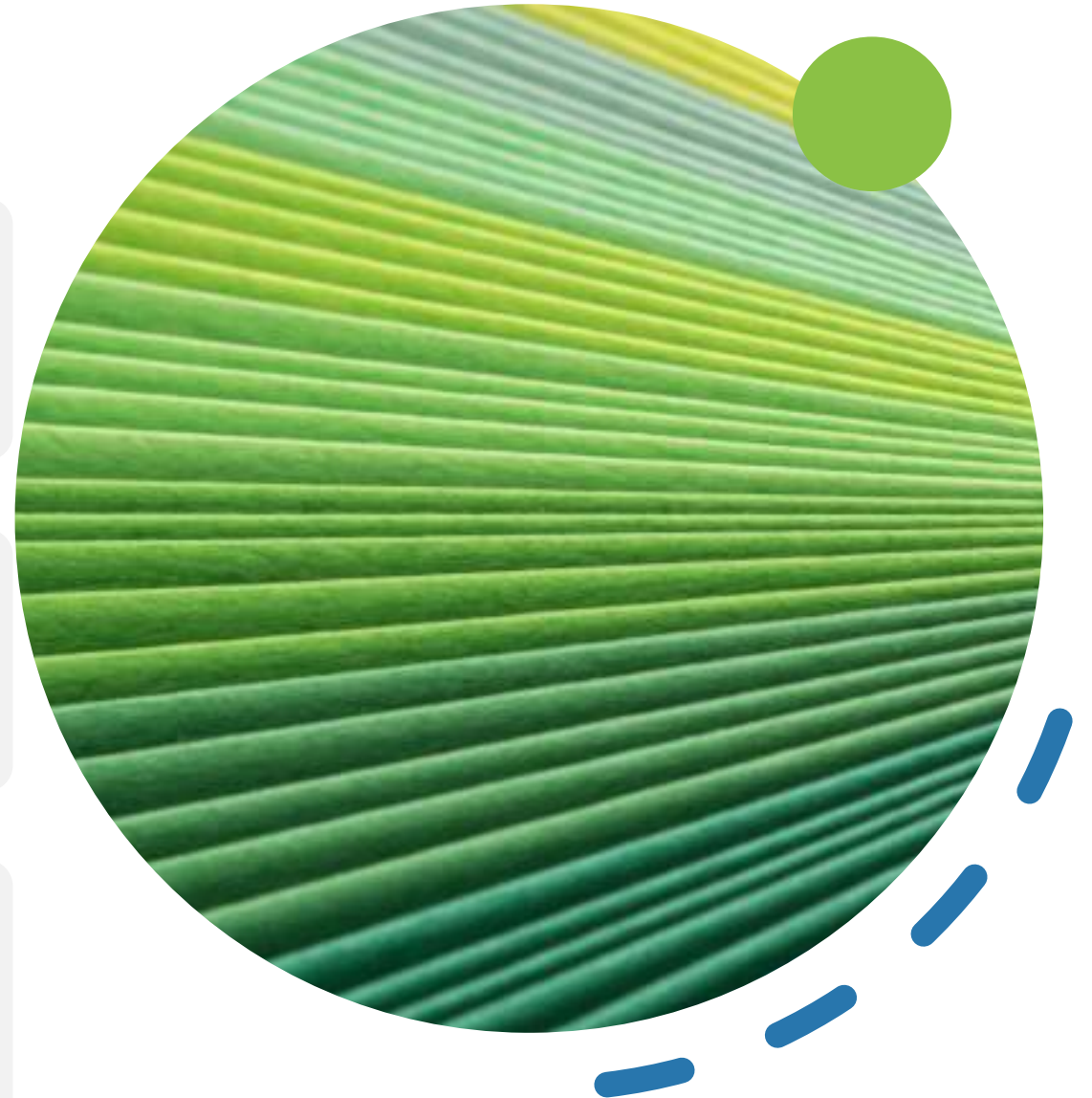
The federal state and the regions must cooperate to achieve the desired result



The cooperation necessary to define effective climate governance is not working



Individual responsibility of political entities





Damage

Klimaatzaak: moral damage and ecological damage

Established damage

Natural persons: person/assets

Damages are and will be suffered individually



Injunction

- Principle of separation of powers
 - Judicial judge guardian of subjective rights
 - Measures intended to put an end to the infringement of the victim's rights
 - Without depriving the public authority of the choice of measures to be implemented to achieve the ordered result
 - No ruling by way of general provision

Injunction

- Distribution of powers between the State and the Regions
 - Joint and solidary liability is unthinkable but nevertheless, is there a shared responsibility of all public entities
 - By leaving these parties the possibility of determining how the burden should be distributed
 - Minimum threshold determined at national level
 - Overall objective in which each entity is ordered to fulfill its part





Injunction

- Injunction as a sanction for the violation of Articles 2 and 8 of the ECHR
 - Right to an effective remedy Art. 13 ECHR
 - Best or only remedy for a violation

Injunction

- The injunction as
 - compensation in kind for damage causally linked to the faults committed and as
 - preventive measure against the occurrence of future damage





Coercive Fine

- no legal obstacle : it is not a measure of forced execution but a means of pressure.
- However, the court does not have sufficient elements to conclude that the effectiveness of the injunction requires the immediate imposition of a penalty, and there is no need to assume that the State will not voluntarily comply with the injunction

The Court's decision of November 30, 2023

- Confirms the judgment under appeal in that it:
- declared the original action admissible
- declares that, in pursuing their climate policy, the Belgian State, the Brussels-Capital Region and the Flemish Region are not behaving as normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 (extended by the Court to Article 1383) of the former Civil Code) and are infringing the fundamental rights of the applicants, natural persons, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change that are detrimental to their lives and private lives;
- For the remainder, the court reforms and notes that, with regard to the climate policy that they have pursued and implemented since the judgment under appeal until today, up to 2020, then up to 2030, the Belgian State, the Flemish Region and the Brussels-Capital Region have violated Articles 2 and 8 of the ECHR and have committed faults within the meaning of Articles 1382 and 1383 of the former Civil Code. As compensation for the harmful consequences of the breaches noted, to prevent the occurrence of future and certain damage, some of which has already occurred, and to ensure the effectiveness of the protection of Articles 2 and 8 of the ECHR, orders the Belgian State, the Flemish Region and the Brussels-Capital Region to take, after consultation with the Walloon Region, appropriate measures to do their part in reducing the overall volume of annual GHG emissions from Belgian territory by at least -55% in 2030 compared to 1990.
- stays the request for a penalty payment and orders the reopening of the proceedings.



What's next ?

Supreme Court

Future case

- Farmer and three associations
- Business Court, Tournai division
- Total Energie
- Personal damage due to the climate crisis
- Fault of the multinational

Comments :

On the responsibility of States (multinationals)

Effects of events (wars)

Coherent actions of associations and citizens

New challenges

Jurisdictions ready and equipped

Thank you for your
attention

