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WHITE PAPER

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ESG—Climate Change and Related Litigation Take Center Stage in Europe

Nearly every board of a publicly traded company in the European Union, United Kingdom, or United States will have considered and, for most, reported on ESG matters. And it is not just public companies. In what has been little more than a few years, ESG has become one of the dominant themes for both traded companies and their investors, and increasingly for many medium and large privately owned businesses. What began as a focus on climate and the environment now includes diversity, equity and inclusion, and local and global supply chains and human rights. No sector is untouched.

Litigation is a growing part of the landscape. It has flourished in response to the actions taken and commitments made by governments and businesses. In this *White Paper* on ESG-related litigation, we explore the status and trends across Europe, with a focus on climate- and environmental-related litigation.

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INTRODUCTION

Climate change activists have for many years used litigation, and also the threat of it, as a means of challenging governments. In recent years, they have turned their attention to businesses. Their targets are not just the defendants to the proceedings they instigate or support, but also decision-makers—in businesses as well as in government, where they seek to influence behavior and outcomes. In turn, decision-makers, observing this growing trend, have responded with climate-related pledges of their own.

Europe is at the center of the action. It has seen the first successful court rulings compelling a state (*Urgenda v State*; the Netherlands) and a multinational corporation (*Milieudefensie v. Royal Dutch Shell plc*. ("RDS"); also the Netherlands) to reduce greenhouse gas emissions. These rulings have inspired and encouraged increasingly inventive litigation strategies from activists across Europe.

In parallel, and likely fuel for future litigation, there has been growth in ESG-related regulations imposing reporting obligations on businesses and requirements to establish global ESG compliance programs. These often stretch beyond the corporate entity itself to encompass the activities of its group companies and those with whom they do business through their supply chains. In addition, businesses have developed sustainability strategies and are increasingly communicating their efforts to become carbon neutral. The increase of corporate communications and advertisements on climate commitments and objectives, as well as on the environmental characteristics of products and services, while understandable, has resulted in a growing trend of direct litigation and regulatory action citing claims of "greenwashing."

In this *White Paper*, we summarize the principal developments of climate-related litigation in Europe, identify the key trends, and consider what lies ahead for businesses.

FIVE KEY TAKEAWAYS

As is clear from the more detailed analysis that follows, climate litigation risks are inherently jurisdiction specific. The precise claims a business and/or its individual directors may face (and which court it may have to argue them in front of) will be a product of its corporate structure and the shape of its activities and business footprint.

Nevertheless, there are some overarching lessons that can be taken from the cases which have been brought across Europe in recent years:

1. **For claimants, the objective is not only to win at trial**: NGOs and activists are pursuing novel and inventive litigation strategies. Many of the routes to liability are far from straightforward and difficult to bring successfully. But success at trial often is not the point. Litigation is being used to attract publicity, obtain disclosure of documentation and information, and pressure businesses to change corporate behavior. And not just the behavior of the defendant, but the behavior of other businesses and decision-makers observing the risk of litigation and the direction of judicial travel.

2. **Mind the gap between aspiration and execution**: Any gap between a company's aspirations and its actions creates litigation risk. It is not enough for an organization to make aspirational commitments, however well intentioned. In order to mitigate litigation risks, commitments should be backed up by action—whether that is a credible plan for achieving net-zero pledges, or proper oversight of a subsidiary's activities to ensure group policies are being adhered to in practice—and adequate justification needs to be made available to the public in order to demonstrate the accuracy of the company's communications and the seriousness of its plans.

3. **The importance of robust, credible, and scientifically verifiable evidence**: Companies making "green" claims about their products or services will need to ensure they can justify those claims by reference to robust, verifiable evidence based on recognized scientific methodologies. Statements that give only part of the story have been found to be misleading, so care needs to be taken to ensure that environmental claims reflect, for example, the full life cycle of a product, or the overall impact of an organization's activities on the environment or climate (rather than just one of its business lines).

4. **Supporting decision-makers**: Evidencing board decision-making is good practice in any event, but directors and other decision-makers within a business will be particularly keen to ensure proper records are kept that they have complied with all relevant obligations when making decisions with potential environmental impact.

5. **Diligence, diligence, diligence**: When it comes to ESG and climate change, lines between corporate entities are increasingly blurred. Financial institutions find themselves having to rely on data disclosures provided by corporate issuers to meet their own ESG-related reporting requirements. Supply chain due diligence legislation codifies what was in any event a growing responsibility on parent companies to be alert to the activities not just of their subsidiaries but of those with whom they do business. Robust processes to diligence information and business practices and to audit compliance are essential.

THE TARGETS OF CLIMATE-RELATED LITIGATION IN EUROPE

In Europe, climate-related litigation has largely been brought by highly motivated NGOs—either as plaintiffs where they have standing under local law, or by supporting the individuals and communities who do. Their targets have changed rapidly over the last decade, and now a wide range of businesses are in the firing line.

The first wave of climate-related litigation was directed against states, with a series of claims across Europe that sought (with varying degrees of success) to compel governments to implement more stringent measures to reduce the effects of climate change.

Although these cases had different nuances and relied on local as well as international laws, their aims were similar. First was the objective of achieving judicial recognition that a state's climate change mitigation pledges were legally enforceable obligations, rather than just aspirational targets. Then to obtain court orders that the states must take specific steps to meet those goals. Most of these cases invoked and continue to invoke human or fundamental rights, and the disproportionate impact of climate change (including the burden of mitigating its effects) on future generations.

These successes, and in particular the sympathy shown by judges in a number of jurisdictions to the argument that protection from climate change is a fundamental right, have emboldened NGOs to focus their attention on the businesses they consider to be the biggest contributors to climate change.

Unsurprisingly, among the first to be targeted were entities from the energy sector. However, as the jurisdiction-by-jurisdiction snapshot below demonstrates, litigation is no longer limited to that industry. We are now seeing claims brought against pension funds, banks, automotive groups, retail groups, and chemical groups.

FINANCIAL INSTITUTIONS UNDER THE SPOTLIGHT

The spotlight has already turned to the financial institutions charged with funding climate-impacting projects.

The Belgian National Bank faced a challenge before the Brussels Court of First Instance ("BCFI") that its purchase of bonds from greenhouse gas ("GHG") intensive companies violated its environmental, climate, and human rights-related legal obligations. The BCFI rejected the claim in December 2021 and refused a petition to the European Court of Justice, but an appeal has been lodged.[1] Deka Bank has already faced a claim (now settled) in Germany alleging it misled customers about the positive impact of its Deka-Sustainability Impact equity fund.[2]

NGOs have made no secret about their intention to target financial institutions. In November 2021, Roger Cox, attorney for *Milieudefensie* (Friends of the Earth Netherlands) is reported as saying:[3]

> "We have litigated against countries and been successful. Now we have shown that one can successfully litigate against fossil fuel corporations and I think that the next step is to start also litigating against financial institutions who make these emissions and fossil fuel projects possible."

Those who have made "net zero" pledges are coming under particular scrutiny, and letter-writing campaigns have been orchestrated targeting the boards of major banks and pension funds.

Regulators are also closely scrutinizing perceived gaps between pledges and practice. HSBC has recently faced censure from the UK Advertising Standards Authority for advertisements that promoted its green initiatives while omitting information about its financing of companies with substantial GHG emissions.[4] The investigation of DWS by the U.S. Securities and Exchange Commission ("SEC") and the German Federal Financial Supervisory Authority ("BaFin")—said to have been prompted by claims by its former head of sustainability that the asset manager was misrepresenting how it used ESG metrics across its investment platform[5]—remains ongoing.

But no industry is immune. Any organization that seeks to differentiate itself from its competitors on the basis of its "green" credentials will also face close scrutiny.

THE LEGAL BASES FOR THE CLAIMS

There are some bases for claims—for example, greenwashing in alleged violation of consumer protection legislation—that are underpinned by EU regulation and are therefore playing out in similar ways across Europe, although certain countries have adopted stricter prohibitions. For example, communications on net-zero commitments are prohibited from January 1, 2023, in France, unless the company communicating on such commitments can make available to the public: a GHG emission report integrating the direct and indirect emissions of their products or services; the process by which the GHG emissions are avoided, reduced, or offset; and the method for offsetting residual GHG emissions.[6]

The European Union is developing new regulations that will specifically address environmental claims aimed at influencing consumer choices. Until then, existing consumer protection regulations are being relied upon to tackle alleged instances of "greenwashing" or "climate washing" in advertising. Businesses that make misleading claims to European consumers about the environmental credentials of their product or their business practices face the prospect of regulatory action, direct claims for damages, and, in some cases, even criminal penalties.

Beyond consumer greenwashing claims, differences in local laws and procedures mean that the key focus of judicial activity varies from country to country. For example:

The Netherlands

In the Netherlands, the focus is on the "open norm" of "proper social conduct," which follows from Dutch tort law known as the unwritten standard of due care. This formed the basis of the headline-grabbing ruling in May 2021 in *Friends of the Earth Netherlands (Milieudefensie) v. Royal Dutch Shell plc.* (now subject to appeal), which saw the Shell group ordered to reduce its global annual volume of CO2 emissions by 45% by the end of 2030 (relative to 2019 levels).

France

NGOs and consumer groups are using the French 2017 Duty of Vigilance ("DoV") Law.[7] This law gives any interested party the right to bring a tort claim for a business's failure to comply with its DoV obligations in relation to environmental and social risks arising from their activities and, crucially, those of their subsidiaries, suppliers, and subcontractors in France and overseas.[8] This has led to a number of cases against major French companies (including major energy companies and food and retail giants such as Auchan and Carrefour, and, more recently, a major French bank) invoking the DoV framework to:

- Compel them to take more robust action to tackle climate change, plastic pollution, and decrease GHG emissions, and/or to stop financing new fossil fuel projects; and/or
- Obtain court injunctions to stop certain projects or activities that would be, according to claimants, in violation of the companies' duty of vigilance; and/or
- Establish liability on the part of the French parent company for specific human rights or environmental harms perpetrated abroad by a group company, subcontractor, or supplier.

Germany

One of the principal targets for climate-motivated litigation has been the German automotive industry. Greenpeace and a German environmental lobby group launched proceedings against a number of manufacturers, invoking tortious principles and previous judicial recognition of the potential impact of climate change on citizens' fundamental rights.[9] They are seeking an order that the manufacturers cease their worldwide sales of passenger vehicles containing internal combustion engines, unless they can demonstrate GHG neutrality. The action against Mercedes Benz before the Stuttgart Regional Court was dismissed at first instance: According to the court, it was not the task of the courts but of the legislature to decide on necessary climate-protection measures.[10] The plaintiff NGO, *Deutsche Umwelthilfe*, has already announced its appeal.

United Kingdom

In the United Kingdom, the potential for a shareholder derivative action to be brought against UK company directors for breach of directors' duties has caught the attention of activists. The circumstances in which a parent company is considered to have assumed a tortious duty of care for the harmful activities of its subsidiaries—or even those with whom it does business—has also come under scrutiny after decisions by the UK Supreme Court.[11]

Italy

The key climate-related cases against corporates in Italy have focused on unfair commercial practices in an antitrust context. This includes *Alcantara S.p.A. v Miko S.r.l*, which is one of the first examples in Europe of a competitor pursuing an action for greenwashing on the basis that making allegedly unverifiable "green" claims about a product constituted unfair competition.

A snapshot of the key developments in the Netherlands, France, Germany, the United Kingdom, and Italy is set out below.

RECURRING AND EMERGING THEMES

Although the causes of action vary from jurisdiction to jurisdiction, there are themes and trends that can be drawn out from the cases across Europe.

Pushing the Envelope in Tort

Plaintiffs are using inventive case theories in a bid to persuade courts to expand tortious concepts to novel situations. *Milieudefensie v. Royal Dutch Shell plc.* is the most well-known example. The open norm of proper social conduct was not widely recognized as being applicable to climate impacting behaviors until the case was brought (and indeed, Shell is appealing the judgment on, among other grounds, the basis that the court erred in its interpretation and application of the norm).

It is, however, not the only example. Across Europe, there is greater emphasis on an alleged tortious duty of care owed by businesses in relation to environmental matters. In the United Kingdom, global corporate policies and public commitments on ESG and climate change are being cited as evidence that a parent company has assumed a duty of care in tort for the actions of its subsidiaries (and even, in some cases, its suppliers). In Germany, RWE faces a case on tortious damages, where a Peruvian farmer seeks a contribution of 0.47% of the cost of protective measures against flooding in his village, which percentage is alleged to reflect RWE's historic contribution to global GHG emissions.[12]

Extraterritorial Scope

The location of a parent company is typically the jurisdictional "hook" for bringing a claim before a particular national court.

But a recurring theme in the cases is plaintiffs seeking redress for environmental incidents that occurred abroad. In the United Kingdom, a number of claims have been brought or threatened against UK-based companies alleged to be liable in tort for specific environmental incidents connected to operations conducted by their overseas subsidiaries. A number of the claims before the French courts pursuant to the DoV Law concern alleged environmental harms occurring abroad, for which the French parent company is said to be liable. The claim faced by RWE in Germany mentioned above seeks to establish its liability (through its alleged contribution to the increase in global temperatures) for the flood risk to a village in Peru caused by accelerated glacier melting.

Even where the focus is an action taken within a European country, the potential impact is often global. The judgment of the Hague District Court in *Milieudefensie v. Royal Dutch Shell plc.* concerned Shell's global corporate policies set, at the time, in the Netherlands, but the injunction was directed at Shell's *global* emissions. Similarly, the claims against automotive manufacturers in Germany seeks a worldwide cessation of sales of passenger cars with internal combustion engines.

Potential Liability for the Actions of Group Companies and Suppliers

This is a particular risk in France and Germany, where national legislation provides for specific ESG due diligence obligations intended to mitigate the adverse impacts of corporate activities on the environment and human rights.[13] By way of example, a French supermarket chain is facing a claim that it has breached its DoV obligations because its supply chain involved beef purchased from farming activities alleged to have been involved in illegal deforestation and the loss of land in Brazil and Colombia.[14] As discussed in more detail below, if the European Commission's proposed Corporate Sustainability Due Diligence Directive is adopted as proposed, this will potentially impose similar obligations on many more businesses, including those headquartered outside the European Union.

GHG Emissions Are a Target

Many of the claims against corporations are reactive—seeking to establish liability to remediate or pay damages in response to specific incidents of environmental harm. But "proactive" cases are also being brought on the basis of alleged contribution to climate change. For example:

- Automotive manufacturers in Germany have faced claims that the GHG emissions produced by their cars render them indirectly responsible for climate change, and therefore for violating the plaintiffs' fundamental rights.[15] The plaintiffs argued that the German court has recognized that unchecked climate change will lead to significant restrictions of personal freedoms by the German authorities, and as major GHG emitters, the defendants are a substantive cause of those likely future restrictions. They sought an order that Mercedes-Benz and Volkswagen discontinue worldwide sales of passenger cars with internal combustion engines by 2030 if they cannot demonstrate that they are GHG neutral. The action against Mercedes-Benz before the Stuttgart Regional Court has been dismissed at first instance (a decision that has been appealed by the plaintiffs),[16] but the actions against the other manufacturers remain ongoing.
- An energy company is facing a claim in France using the French DoV obligations as a platform to seek an injunction to compel it to take stronger measures to tackle climate change and decrease its GHG emissions.

Directors Are in the Firing Line

This is a particular focus in the United Kingdom, because UK company directors are subject to a specific statutory obligation to have regard to environmental impact.

Pursuant to section 172 Companies Act 2006, a UK company director must act in the way he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard to a number of non-exhaustive factors, including the impact of the company's operations on the community and the environment. These duties are owed to the company itself, but with the permission of the court, a claim for breach may be brought by way of shareholder derivative action, with the shareholder "stepping into the shoes" of the company to bring the claim.

Although there is a particular focus in the United Kingdom, it is worth noting that in the Netherlands, *Milieudefensie* has sent two letters, the last one dated October 27, 2022, to the board of directors of Shell alluding to the (potential) personal liability of the individual directors.[17] Friends of the Earth Netherlands writes that the individual directors are taking insufficient action to comply with the court order in *Shell*.

The Role of "Soft" Law

Complaints to the National Contact Points ("NCPs") alleging breach of the OECD Guidelines for Multinational Enterprises and complaints to national advertising authorities can be and are used to generate publicity and obtain access to information.

It has been reported that Italian oil company ENI has been referred to the Italian NCP by climate activists complaining that its strategic plan does not provide for sufficient emissions cuts to meet its Paris Pledge for Action.[18] BP plc has faced a complaint to the UK NCP that its global corporate advertising campaign misled the public in the way it presented BP's low-carbon energy activities (the UK NCP held the complaint did not merit further examination because the relevant campaign had already come to an end).[19] The Dutch NCP published a report in 2019 titled "Compliance of the Dutch Oil and Gas Sector with OECD Guidelines," concluding that overall transparency on environmental impact and the registration thereof requires improvement.[20] Advertising authorities across Europe are handling complaints about advertising campaigns said to contain false or misleading environmental claims about products and businesses (also known as greenwashing).

LOOKING TO THE FUTURE

As well as specific developments in each jurisdiction, there are a number of pan-European pieces of legislation that are expected to prove a focus for climate-related litigation in Europe in the future.

Supply Chain Due Diligence

In February 2022, the European Commission published its proposed Corporate Sustainability Due Diligence Directive (the "CSDD Directive").[21] A more detailed Jones Day *Commentary* on the CSDD and its proposed extraterritorial effect is available here.

If adopted as proposed, the CSDD Directive will introduce an obligation on qualifying entities to address human rights and environmental impacts in their business and those of their subsidiaries and supply chains.

As currently formulated, the new obligations will apply not only to large companies based in the European Union but also to those based outside the European Union with an EU-generated net turnover of above certain thresholds (€150 million; €40 million if they operate in a high-risk sector). There is no territorial limitation on the location of the suppliers or subsidiaries for which the company in scope can be responsible. It is therefore very likely that the CSDD Directive will impact many non-EU businesses, both directly and indirectly.

The primary route for enforcement will be through national regulators (with fines imposed for noncompliance), but the current draft of the CSDD Directive also envisages that national governments will be required to ensure victims of breaches can bring civil claims for damages before national courts. The CSDD therefore has the potential to provide a platform across EU Member States for climate change litigation cases similar to those brought in France pursuant to the French DoV.

EU Rules to Combat Consumer Greenwashing

In March 2022, the European Commission published its proposed Directive on Empowering Consumers for the Green Transition through Better Protection Against Unfair Practices.[22] If adopted (which it could be by the end of 2023), this will amend existing regulations governing business-to-consumer marketing, to (among other things) restrict the use of generic environmental claims (e.g., "eco-friendly," "green," "biodegradable") and expressly prohibit claims about future environmental performance that are not supported by clear, objective, and verifiable commitments and targets.

In parallel, the European Commission is working on the Initiative on Substantiating Green Claims,[23] which is expected to lead to a regulation that focuses on both business-to-business and business-to-consumer commercial practices.

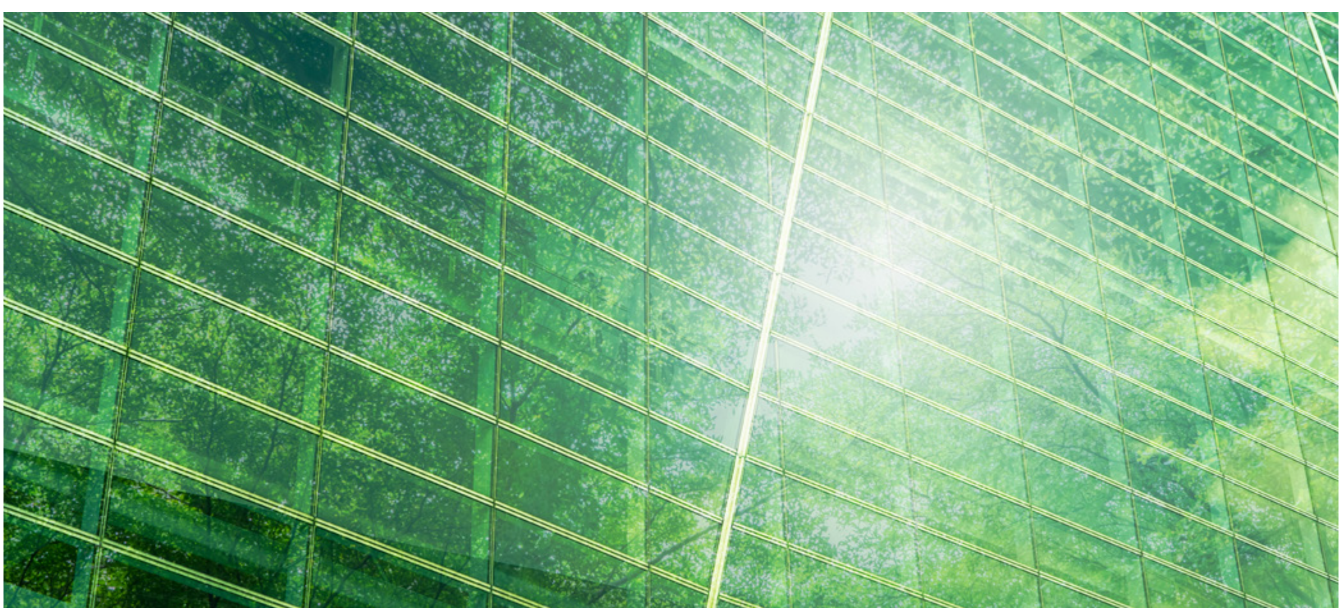
As set out in more detail below, existing consumer protection legislation is already being used by national regulators, advertisers, and civil litigants to bring actions for allegedly misleading environmental claims aimed at consumers. These proposals would codify and extend those regulations.

ESG-Related Corporate Disclosures

Certain transparency requirements under the Disclosure Regulation have already started to apply to the largest EU financial institutions. This will be followed by the first phase of disclosures for financial and non-financial companies under the Taxonomy Regulation by the end of 2022, with more detailed requirements flowing from both the Disclosure and Transparency Regulations coming in on a phased basis from the start of 2023. Moreover, following the publication of a number of drafts, on November 10, 2022, the European Parliament adopted the text of the Corporate Sustainability Reporting Directive ("CSRD") which is expected to come into force from early 2024.[24] The CSRD introduces significantly more detailed ESG-related corporate reporting and disclosure requirements, and expands the pool of companies subject to such enhanced rules. In particular, the CSRD will extend the scope of sustainability reporting to non-EU companies and groups meeting certain EU size and/or turnover thresholds. A Jones Day *Alert* providing a more detailed overview of the CSRD as adopted is available here.

In the United Kingdom, entities within scope are required to make disclosures in accordance with the requirements of the Task Force on Climate-Related Financial Disclosures ("TCFD"). The first wave of TCFD-aligned disclosures for the largest UK listed companies were required in early 2022 (for companies with financial years ending on December 31, 2022, with this obligation being extended to all UK listed corporates in 2023 for their accounting periods starting from January 1, 2022, onwards. The FCA has already published a review of the first wave of TCFD-aligned disclosures and suggested various areas for improvement.[25]

Although the UK regime is slightly less onerous, both the EU and UK regimes require granular reporting against ESG and climate-related metrics, and false or misleading statements are an obvious source of risk. Regulators will be closely scrutinizing these disclosures, and they will no doubt investigate and take enforcement action against any noncompliance. But there is also a risk of direct civil litigation by shareholders or investors who claim to have relied to their financial detriment on misleading statements to the market.



The Netherlands

In the Netherlands, the focus is on the "open norm" of "proper social conduct" set out in the Dutch Civil Code. The District Court of The Hague hit the headlines in May 2021 when it handed down judgment (now subject to appeal) in *Friends of the Earth Netherlands (Milieudefensie) v. Royal Dutch Shell plc.* and, on the basis of that "open norm," ordered the RDS group to reduce its global annual volume of CO2 emissions by 45% by the end of 2030 (relative to 2019 levels). This obligation applies not only in relation to RDS's own emissions but also extends to the entire Shell group and (on a best-efforts basis) its suppliers and customers—so-called Scope 1, Scope 2, and Scope 3 emissions—based on what the court found was RDS's policy-setting influence over those other parties.

Spurred on by that success, in January 2022, *Milieudefensie* challenged 29 other large Dutch companies to provide a climate plan setting out the actions they will take to achieve the same reduction in emissions, or risk a similar case against them. In July 2022, it published the so-called "Climate Crisis Index" in conjunction with the New Climate Institute ranking those companies based on their plans (including Shell).[26] It ranked none of them as being of high or reasonable integrity in relation to their sustainability targets. It will be interesting to see whether the threat of further *Shell* style claims are used to pressure businesses into revising these plans.

Watch out for: *Milieudefensie* filed its Statement of Defense on October 18, 2022, with the appeal due to be heard in late 2023 or early 2024. *Milieudefensie* has also written to the directors of Shell threatening to take action against them personally for their alleged failure to take sufficient action to implement the judgment.

France

In France, the French Duty of Vigilance Law of 2017 gives any interested party the right to claim damages in tort for harm suffered due to a company's failure to comply with its DoV Law obligations. Under that law, large French companies are required to publish a due diligence plan providing for reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals, and the environment resulting from the companies' activities and their usual subcontractors and suppliers.[27]

Companies subject to the law must: (i) establish an internal whistleblowing procedure; (ii) take reasonable measures to prevent or mitigate serious violations; (iii) evaluate the effectiveness of measures taken; and (iv) communicate the implementation of the due diligence plan in their annual reports. The law applies to all French limited liability companies that have the relevant threshold number of employees (with the threshold varying depending on the location of the parent company's subsidiaries).

The law provides for two enforcement routes, designed to ensure effective compliance and to sanction any violations: (i) a preventive action to put an end to unlawful conduct *before* any damage occurs; and (ii) a tort liability action *after* any damages have occurred.

This has led to a number of cases against major French companies invoking the DoV framework not only in respect of specific human rights or environmental harms allegedly caused by an entity in the supply chain, but also more broadly to compel them to take action to reduce GHG emissions.

These cases have been mired in arguments about jurisdiction, but in late 2021, the French courts ruled that such claims fell within the ambit of the judicial rather than commercial courts.[28] Decisions on the merits are expected in 2023/2024.

Watch out for: Decisions on the merits in the DoV claims, DoV actions against financial institutions, and actions for alleged greenwashing under the French Climate and Resilience Law.

Germany

Germany adopted a similar supply chain due diligence law in June 2021 (the Act on Corporate Due Diligence Obligations in Supply Chains, or LkSG). German companies or branch offices with employee numbers above certain thresholds (3,000 in January 2023, lowering to 1,000 in January 2024) will need to implement supply chain risk management systems covering human rights and environmental protection or face administrative fines of up to 2% of global annual turnover. The LkSG does not, however, provide a route for interested parties to bring a direct claim against an allegedly violating company, so it will not become a focus for civil litigation in the way that the French DoV Law is.

Instead, the automotive industry is the subject of litigation in relation to climate change. In late 2021 Greenpeace and a German environmental lobby group sued a number of automotive OEMs, alleging their emissions-producing business activities breached the plaintiffs' fundamental rights and seeking an order that they cease worldwide sales of passenger vehicles containing internal combustion engines, unless they can demonstrate GHG neutrality.[29] One lawsuit has already been dismissed in the first instance.[30] The plaintiffs have announced that they will appeal.

A recent development concerns a climate change-related lawsuit launched by investors against Volkswagen AG. According to media reports, the plaintiffs are Danish and Swedish public pension funds as well as the Church of England Pensions Board.[31] These investors want the competent court to order that a motion be put on the agenda of the next annual general meeting to amend the articles of association of Volkswagen to require the board to provide more extensive information about the group's climate-related lobbying activities. The case shows that ESG risks for companies in Germany increasingly emanate not only from NGOs but also from (in principle) "non-activist" minority shareholders. Volkswagen, however, considers the lawsuit to be unfounded. While committed to transparency, its position is that such an amendment to the articles of association would not be permissible under German company law: The articles of association may not force the board of management to do something that it is free to decide according to statutory law.

Watch out for: A decision on the merits in *Luciano Lliuya v RWE AG*, where novel arguments are being advanced about the calculation of damages based on historic contributions to global GHG emissions; the court decisions in the still-pending climate lawsuits against German automakers; and the shareholder lawsuit against Volkswagen.

The United Kingdom

The key area of judicial focus for climate activists in the United Kingdom has been judicial review and challenges based on the Human Rights Act 1998, which are only available against corporate entities to the extent that they are exercising a public function. They typically, therefore, have only indirect impact on corporate business decisions.

As we reported here, ClientEarth has threatened to bring a shareholder derivative action against the board of Shell plc. for breach of directors' duty, citing the company's alleged failure to implement a Paris Agreement compliant climate strategy. This follows an (unsuccessful) attempt by members of the Universities Superannuation Scheme to obtain the English Court's permission to bring a breach of duty claim against the Scheme's directors.[32] Among other things, the members argued that the Scheme's failure to create a credible plan for the divestment from fossil fuel investments (despite an announced intention to be net zero for carbon by 2050) prejudiced the financial success of the company.

The UK Supreme Court has also recognized (at the jurisdiction stage) the potential for a UK-based parent company to owe a tortious duty of care in respect of environmental and/or human rights harms arising out of the activities of its overseas subsidiaries, based on the degree of supervision, control, and intervention exercised by the parent company over those activities.[33]

Watch out for: Whether the claim against Shell's directors will be pursued and, if so, whether the English court grants permission for it to be brought as a shareholder derivative action. Arguments on the merits are also expected to progress in *Okpabi and others v Royal Dutch Shell plc*.—given that the UKSC found it was arguable that a duty of care had been assumed, the High Court will now need to consider whether, on the balance of probabilities, such a duty was actually assumed.

Italy

The key climate-related cases in Italy have focused on unfair commercial practices in an antitrust context.

In December 2019, the Italian Antitrust Authority ("IAA") fined an Italian oil and gas company €5 million for dissemination of misleading and incomplete information and unfair commercial practices.[34] An advertising campaign had associated "green" and one of the company's diesel commercial names, which the IAA found had led consumers to associate the green claims with the fuel as a whole, rather than the component part of the product to which those claims related.

In March 2022, the Gorizia Court revoked on appeal a precautionary order in the case *Alcantara S.p.A. v Miko S.r.l*, which had prevented Miko S.r.l. (the manufacturer of a microfiber product used in the automotive sector) from disseminating advertising materials that contained allegedly unverifiable claims about the product's environmental sustainability. The case had been brought by a competitor, who alleged that the advertisements constituted an act of unfair competition.

Meanwhile, the automotive manufacturer Volkswagen is appealing the July 2021 decision of the Court of Venice in the "Dieselgate" class action, *Altroconsumo v Volkswagen AG and Volkswagen Group Italia S.p.A.* Volkswagen was found liable for unfair commercial practices (including providing false and misleading information on its diesel cars' polluting emissions) and ordered to pay €3,300 plus interest per consumer in the class—a total damages award of more than €200 million.

Watch out for: The "Dieselgate" decision to be issued by the Court of Appeal of Venezia in the upcoming two years, as it is likely to set a standard for damages compensation in class actions.

Consumer Greenwashing

As set out above, new EU regulations are being developed that will specifically address (among other things) environmental claims in marketing materials.

France is one step ahead, having already passed the French Climate and Resilience Law of August 22, 2021, and a Decree of April 13, 2022. These specifically address greenwashing in advertisements, banning the use of any wording on a product, its packaging, or in advertising material indicating that the product, service, or activity of the manufacturer is carbon-neutral or has no negative impact on the climate, unless substantiated by reference to recognized norms and standards under French, European, or international law.[35] Pursuant to the Decree's guidance,[36] a claim that a product is "carbon neutral" must be substantiated by reference to: (i) an annual GHG report covering the entire life cycle of the product; (ii) a reduction trajectory of GHG emissions with annual progress targets over 10 years; and (iii) the details of the arrangements for offsetting residual GHG emissions.

In the rest of the European Union and in the United Kingdom, existing consumer protection regulations are already being used to deal with allegations of false or misleading environmental claims aimed at consumers.

In most EU jurisdictions and in the United Kingdom, complaints about advertisements are handled by advertising standards regulators, who tend to rely on adverse publicity and "soft" enforcement powers like control over advertising space to ensure compliance with their rulings. But misleading environmental claims in advertisements potentially constitute unfair commercial practices,[37] leaving offending companies open to regulatory action, damages claims, and, in some cases, the risk of criminal prosecution.

Germany largely relies on decentralized enforcement of competition law by competitors, consumer protection groups, or other NGOs. As these groups are quite active in Germany, the risk of "greenwashing" lawsuits is high. There has been case law from the highest courts since the 1990s according to which strict standards must be applied to ensure that environment-related advertisements are not misleading, but the number of greenwashing lawsuits has increased sharply in recent years. Just this summer, an activist NGO, *Deutsche Umwelthilfe*, took legal action against eight companies and their advertising promise of "climate neutrality" or similar claims.[38] They include, for example, large drugstore chains as well as the German subsidiaries of leading oil companies.

Across Europe, complaints are being made, and regulators, NGOs, consumer groups, and competitors are taking notice. Fines have been levied by authorities in Italy and in France.[39] Italy has seen the first (albeit unsuccessful on appeal) case brought by a competitor alleging that misleading claims about a product's environmental impact constituted an act of unfair competition.[40] Advertising regulators across Europe, and in particular in the Netherlands, France, Germany, and the United Kingdom, have dealt with a number of complaints about advertising campaigns said to mislead consumers, with claims about sustainability, carbon neutrality, and the recyclability of packaging coming in for particular scrutiny.

In France, there have also been a number of claims filed before courts by NGOs, competitors, and customers against companies in various different industries including energy, phytochemicals, and food distribution. A recent claim has been filed by four NGOs against a major French energy company in early 2022, claiming that its "net zero by 2050" pledge and the associated communications would be misleading.

In light of the growing regulatory interest in and scrutiny of greenwashing, one can expect the rise of numerous greenwashing claims against private companies, in various sectors (e.g. energy, retail, finance), in the months or years to come.

EUROPEAN CLIMATE CHANGE LITIGATION: AT A GLANCE

An overview of some of the major climate change litigation activity in key jurisdictions in Europe:

THE NETHERLANDS

- ***Milieudefensie v Shell:*** May 2021 mandatory injunction issued by the District Court of The Hague requiring Shell to reduce CO2 emissions by 45% by 2030 (relative to 2019 levels). Claim in tort relying on open norm of "proper social conduct" in Dutch Civil Code. Appealed March 2022 – Schedule of Defense filed October 2022.
- **Demand to 29 Dutch Companies for a GHG Reduction Plan:** All responses deemed inadequate.
- **Criminal Investigation:** Launched by Dutch Public Prosecution Service against de facto directors of Tata Steel for systematically exceeding permit standards for release of hazardous substances into the air, soil, and surface water.
- **Greenwashing in Advertising:** Multiple decisions of the Dutch Advertising Code Committee, including against Shell, Dutch airline KLM, and electric mobility companies GO Sharing and Flex.

FRANCE

- **Supply Chain:** 2017 Duty of Vigilance Law imposes wide-ranging supply chain due diligence obligations on French companies. Any "interested party" can seek injunction to compel compliance and/or claim in tort for damages. Numerous cases against French companies, including energy companies and supermarket chains.
- **Greenwashing in Advertising:** Risks regulatory fines and/or proceedings by consumers, NGOs, and competitors. Claims filed alleging greenwashing, misleading or deceptive commercial practices, and/or deception or fraudulent concealment in the context of a contract.
- **Environmental Claims about Products:** French Climate and Resilience Law of August 22, 2021, and Decree of April 13, 2022, reinforces obligations on companies when making environmental claims in advertising or about their products.

GERMANY

- **Passenger Cars:** Claims by Greenpeace/DUH against Mercedes-Benz and Volkswagen seeking to prohibit their worldwide sale of passenger cars with internal combustion engines by 2030, on the basis that the defendants are indirectly responsible for violating the plaintiffs' fundamental rights. Case against Mercedes-Benz dismissed at first instance (subject to appeal).
- **Oil and Gas Fields:** DUH issued proceedings against oil and gas producer Wintershall-DEA to prevent it from developing new oil/gas fields after 2026, again alleging indirect responsibility for breach of fundamental rights.
- ***Lliuya v RWE:*** Tort claim brought by Peruvian farmer, seeking an order that RWE pay for protective measures in response to flood risk alleged to be caused by climate-related glacial melting.
- ***Verbraucherzentrale Baden-WüRteMberg vs. Deka:*** Deka Bank settled a claim by a consumer protection group alleging it misled customers about the positive impact of its Deka-Sustainability Impact equity fund.

THE UNITED KINGDOM

- **Judicial Review/Human Rights Act 1998 Claims:** Not available against corporates unless exercising a public function.
- **Parent Company Liability:** Potential extension of parent company liability in tort for specific overseas environmental harms.
- **Risk of:** (i) claims by shareholders/investors for misleading statements about climate performance; and (ii) derivative actions against directors for breach of duty. ClientEarth threatened shareholder derivative action against directors of Shell plc. for failure to implement Paris Agreement aligned strategy; permission refused to members of Universities Superannuation Scheme to bring similar claim for failure to create a credible plan to divest from fossil fuel assets.
- **Greenwashing in Advertising:** UK Advertising Standards Authority fielding numerous complaints concerning allegedly misleading environmental claims.

ITALY

- **"Dieselgate" Class Action:** July 2021, Volkswagen found liable for unfair commercial practices (€200m + damages award) for providing false and misleading information on its diesel cars' polluting emissions. Subject to appeal.
- **Antitrust Fine:** December 2019, Italian Antitrust authority fined an Italian oil and gas company €5 million for misleading environmental claims in a consumer advertising campaign.
- **Greenwashing Claim by Competitor:** Precautionary order overturned in March 2022 an appeal decision in a case alleging that misleading environmental claims constituted an act of unfair competition.

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