

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

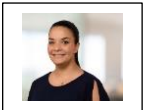
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IN THIS ISSUE

Climate change litigation is on the rise around the planet, with Europe being no exception. This article highlights the trends observed in the European Union and some major claims filed both against States and companies. Monitoring the European developments is key as the European authorities are pushing for increasing regulation aimed at tackling the impact of businesses on the environment, claiming to be at the forefront of such issues and pushing the rest of the world, including the United States, to move in the same direction. All industry sectors are concerned by these changes and not just fossil fuel/petrol companies, contrary to what it may seem.

State of Play of Pending Climate Litigation at European Level

ABOUT THE AUTHORS



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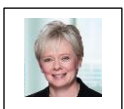
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ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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Since the Paris Agreement on climate change was entered into, climate litigation has been expanding rapidly, from 834 cases between 1986 and 2014, to 1,841 cases between 2014 and 2021. This litigation, typically targeting States, is now pursuing public and private actors individually¹.

The textual sources aiming at the protection of the environment have multiplied over the last thirty years, meaning that it is now possible to incur a State or a company's liability based on international law², European law³ or national law⁴.

The European Commission recently passed Regulation no. 2021/1119 called « *European Climate Law* ». This standard, which was immediately applicable, sets a global aim of climate neutrality by 2050. It also provides for an effective application of the Paris Agreement and sets a goal for its member States of reducing their greenhouse gas emissions by 55% by 2030.

While this legislative arsenal is intended to strengthen environmental protection, it is nevertheless a source of legal unpredictability. In addition to the significant number of sources available,

climate litigation is now split between national and European Courts, within the European Union.

- **Climate Litigation Before European Courts**

European Courts are a fertile ground for environmental litigation. In addition to the legislative arsenal available, these Courts hand down decisions with a real binding force on member States.

European climate litigation, which currently totals 56 active cases, focuses primarily on greenhouse gas emissions, in two main distinct parts.

The first part concerns member States and European institutions. In accordance with Article 9 of Directive no. 2003/87, each State is obliged to implement a National Action Plan. This plan must provide for the total quantity of CO2 emission allowances to be allocated for a given period as well as the corresponding allocation method. It is subject to an assessment by the European Commission, which can decide to reject it. The National Action Plan rejection decisions

¹ LSE, « Global trends in climate change litigation », https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf

² Paris Agreements on Climate Change from 12 December 2015, having come into effect on 4 November 2016 and been ratified by 196 countries

³ Directive 2008/50/EC of 21 May 2008, European convention on Human Rights, Charter of Fundamental Rights of the EU

⁴ For France: 2004 Environmental Charter, French Environmental Code, French Law on the Corporate Duty of Vigilance of 27 March 2017

are the origin of many objections before the CJEU.

The second part is made up of a dispute in which companies are challenging the member States, regarding greenhouse gas emission regulations. Numerous companies are contesting the allocation of quantities of CO2 emission allowances carried out by the States (last in date, Exxon Mobil challenged the quantities implemented by Germany, in accordance with Directive no. 2003/87).

- **Climate Litigation Pending Before National Courts**

Far behind the United States, which are at the top of climate litigation (1,408 cases since 2007)⁵, European countries are increasingly being faced with climate issues. In total, the Courts of Member States have been faced with around sixty litigation cases since 2011. However, this litigation is very unevenly spread out between the different States of the Union. For instance, France and Spain have the highest number of litigation cases with 13 and 15 cases respectively, whereas Latvia and Romania have not yet had to address such litigation.

In France, there has been acknowledgment, on several occurrences, of the neglect of the State in its fight against global warming (notably Paris Administrative Court, 3 February 2021, no. [1904967-1904968-1904972-1904976](#)) but also the decision of the Council of State to grant the request of the Grande-Synthe commune (and other

associations) aiming at having the inaction of the French State regarding the climate acknowledged. The highest Court of the administrative order ordered the government to take any necessary measures in order to meet the greenhouse gas reduction commitments by the end of 2022 (EC, 1 July 2021, no. 427301).

Companies are not being left out. An increasing number of them are being targeted by actions seeking recognition of a breach of the now famous "duty of care" (originating from Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies which orders companies for the purpose of preserving human rights, fundamental freedoms, the health and safety of individuals and the environment). In addition, companies are not exempt from litigation related to operating authorisations, such as the litigation against the Total group before the Marseille Administrative Court concerning a permit authorizing the installation of a biorefinery. The claimant associations are accusing the company of not having taken into account the environmental impact of the use of palm oil as a basis for the production of biofuel (Marseille Administrative Court, 1 April 2021, no. 1805238).

Elsewhere in Europe, a group of 5 **Polish** citizens have just brought an action against their government due to its inaction regarding the climate (and notably the lack of implementation of any public policy

⁵ Columbia Law School's Blog, «Non-U.S. Jurisdiction»,

<http://blogs2.law.columbia.edu/climate-change-litigation/non-us-jurisdiction/>

enabling the Paris Agreement to be met). The claimants consider that the government's inaction regarding the climate would be a violation of the right to live, to health and to property, as is protected by the Polish Civil Code. Likewise, Greenpeace Poland has just initiated an action against the public energy company *PGE GiEK* for it to put an end to any investments in fossil fuels.⁶ This action is based on Article 323 of the Polish Environmental Protection Act, which provides for an action to be brought by any person who believes that he or she is directly threatened by damage caused by unlawful harm to the environment.

In Italy, ClientEarth and Greenpeace Italy have just filed an action before the Italian Courts to have the government's authorisation for an offshore gas development, known as the "Teodorico Project", cancelled. This installation would be built in direct proximity to a marine protected area and would threaten underwater species⁷. A second litigation targeting the State is also pending. The association *A Sud*, as well as 200 claimants, are accusing the Italian government of violating the right to a healthy and stable environment, through its alleged inaction in the fight against global warming.

The association ClientEarth has also initiated an action **in Belgium** against the National

Bank of Belgium. It is accusing it of having not met the environmental standards and Human Rights obligations when purchasing financial bonds from oil companies. It ought to be reminded that the Belgian government has just been condemned for its inaction in the fight against global warming, following the joint summons from the association *Klimaatzaak* and 58,000 citizens. This action is in line with the *Urgenda v. The Netherlands* case, which recognised for the first time the existence of a scientific consensus on the seriousness of climate change, the contribution of human activities to this climate change and the obligation of the States to set national targets for reducing greenhouse gas emissions.

In the Netherlands, it is the oil giant Shell who has just been condemned to reduce its CO2 emissions by 45% by 2030, following a complaint filed by the association *Milieudefensie*, regarding the grounds of tort liability (Art. 6 :162 of the Dutch Civil Code). Faced with a binding decision, Shell is obliged to comply, or risk sanctions in the event of failure to do so. This decision paves the way for a new litigation which is a risk for companies insofar as it constitutes the basis for the recognition of climate liability for multinational companies.

In Germany, the association *DUH* is attempting to have the permit issued by the

⁶ Novethic, «*Climate justice; two new actions launched against Poland and South Korea*», <https://www.novethic.fr/actualite/environnement/climat/isr-rse/greenpeace-porte-plainte-contre-une-entreprise-energetique-d-etat-en-pologne-148319.html>

⁷ ClientEarth «*launch of an action against the Teodorico project*», <https://www.clientearth.org/latest/latest-updates/news/dolphins-turtles-under-threat-from-new-italian-gas-project-we-re-taking-action/>

Stralsund Mining Authority reviewed in light of the actual methane emissions. The association considers that the methane emissions coming from the Russian company Gazprom's pipeline are significantly higher than those declared in the scope of the initial permit request. If the permit cannot be revised, the association would like to obtain a preliminary ruling from the CJEU. Furthermore, the German government is faced with a complaint from the association *Les amis de la terre*, accusing it of having failed in reaching its own goals (and the Europeans goals for 2020) regarding CO2 emissions.

Lastly, while **Spain** has experienced strong climate activism with 13 cases between 2008 and 2010, its Courts are currently addressing only one case brought by the association Greenpeace Spain. The latter is accusing the Spanish government of having failed to implement public policies enabling the goals set by the Paris Agreement to be reached. The association is thus challenging the conformity of the 2021-2030 National Action Plan which has just been approved and considers that the latter does not enable the commitments made in the scope of the Paris Agreement to be met. (**The Czech Republic** is also faced with a similar complaint before its own Courts).

Although the **UK** has not yet seen the same increase in climate change litigations as other countries, it is becoming an increasingly important issue. The 2020 inquest in the case of *Ella Kissi-Debrah* was the first UK case where the Coroner found that high levels of air pollution contributed

to the illness and death. A further inquest was held that focussed on causation and contribution and what could have been done to limit the impact of the air pollution. The Coroner held that the air pollution had made a "*material contribution*" to Miss Kissi-Debrah's death which amounted to a breach of the UK's air quality legislation which has resulted in court orders requiring urgent corrective action and has called into question the need for a change in UK law to comply with Article 2 of the European Convention on Human Rights

- **Climate Litigation Perspective**

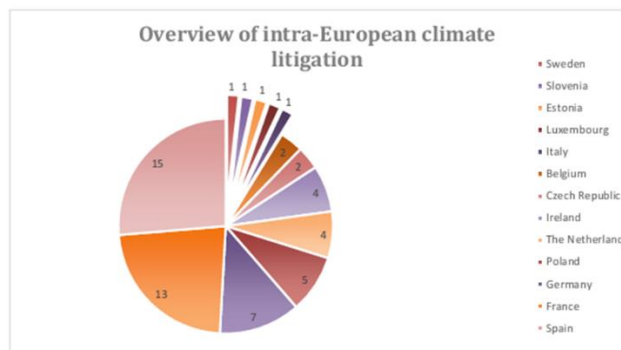
The litigation is therefore spread out between several actors (States and companies), at different levels (international, European and national) and depending on different environmental factors (CO2 emissions, air pollution, protection of species, non-compliance with climate agreements...).

Climate litigation is therefore no longer only repressive and seems to be evolving towards preventative litigation. Companies are now facing a new type of climate litigation which focuses on directing the practice of their activity, depending on environmental priorities. It is in fact accordingly that many scientific reports are inclined, the latest

being the one from the IPCC of August 9, 2021 which led to many reactions⁸.

With the explosion of climate claims and actions, judicial risk mapping is becoming particularly challenging for climate bond debtors. This is why companies must pay particular attention to compliance with environmental standards and ensure that they have a legal monitoring system and an action plan in line with current requirements.

Compliance with environmental standards is therefore increasingly seen as a "bare minimum" that must be met and should be exceeded.



⁸ Intergovernmental Panel for Climate Change, «sixth assessment report on climate change»,

<https://www.ipcc.ch/report/sixth-assessment-report-cycle/>

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