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ESG in Europe:
Top Litigation Case Studies 2022-2023

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Introduction

Focusing on important cross jurisdictional relevant ESG litigation cases throughout the European region, the WSG ESG Group has published this key report with country-by-country case outcomes that have impacted ESG initiatives and regulations.

The cases included are categorized by the following types in each jurisdiction:

- **Climate Litigation**: Generally initiated by NGOs against governments for perceived inaction on climate change and other environmental issues.
- **Greenwashing**: Generally initiated by consumer protection agencies against companies claiming (often without basis) to be more sustainable than competitors.
- **Major Construction Projects**: Generally initiated by NGOs or local residents after relevant authorities have granted permission to build or operate.
- **"Brown Industries" Litigation**: Generally initiated by NGOs targeting specific industries (e.g. energy, natural resources, mining), to change their business practices.
- **Corporate Sustainability**: Case law on corporate sustainability and value chain due diligence regarding fundamental rights.

On behalf of the WSG ESG Group, we hope this report provides helpful industry updates and trends and assists with navigating the densely regulated ESG landscape.

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CLIMATE LITIGATION

Are the Austrian government's measures sufficient to combat climate change?

The Austrian Climate Protection Act of 2011 established a general obligation to implement climate protection measures in order to meet the greenhouse emission targets set by the EU and international law.

This law was challenged by individual plaintiffs before the Austrian Constitutional Court. They argued that the law was not effective enough (e.g. since lacking adequate sanctions in case of non-compliance with the targets), and thereby violated their constitutionally guaranteed human rights, such as the right to life.

In June 2023, the court dismissed the cases on formal reasons. Therefore, there was no decision on the merits of the cases regarding the highly contentious issue of climate protection and possible violations of constitutionally guaranteed human rights.

The judgment is final, as there is no national legal recourse against decisions of the Austrian Constitutional Court.

GREENWASHING

"CO2 Neutral" Brewing of Beer)

The Austrian Consumer Protection Organization sued a major Austrian brewery in civil court over misleading advertising for beer, which claimed CO2 neutral brewing. The advertising on packaging and TV ads claimed that the beer was 100 % CO2 neutral. The plaintiff claimed that this advertising was deceptive.

In the proceedings, it was determined that the assertion of 100 % CO2 neutrality omitted the energy-intensive processes of malting. The plaintiff argued that consumers generally consider the entire beer production process from harvesting – including malting – to be part of "brewing," while the defendant contended that malting was separate.

In March 2023 the court of first instance ruled in favour of the plaintiff, emphasizing the lack of clear language in the advertising and criticizing the defendant for explicitly including malting as part of the brewing process on the website. However, the court also ruled that claims of carbon neutrality can refer to only part of a value chain if communicated transparently.

The judgment is final, as the defendant did not appeal.

GREENWASHING

"CO2 Neutral" Flying

The Austrian Consumer Protection Organization sued a major Austrian airline in civil court over misleading advertising for flights as "CO2 neutral". The dispute revolved around the airline's advertisement which proclaimed "CO2 neutral flights to the Biennale? No problem for us! 100% SAF." SAF (Sustainable Aviation Fuel) was mentioned as the means to achieve the carbon neutrality. The plaintiff considered this to be misleading and filed a lawsuit for breach of competition law.

In the proceedings, it was determined that SAF is currently blended with conventional kerosene, since aviation standards set maximum blending limits. The maximum SAF blend in fossil kerosene is currently 5 %. It is therefore technically impossible to operate flights with 100 % SAF and claim them to be fully carbon neutral.

In June 2023, the court of first instance ruled in favour of the plaintiff and found that the advertising was misleading. The court emphasized that the assessment of environmental claims for potential deception should be rigorous and noted that the airline could have reasonably and feasibly provided information about the use of SAF in a way that would have given consumers a clear understanding of the situation.

The judgment is final, as the defendant did not appeal.

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MAJOR CONSTRUCTION PROJECTS

Potential breaches by a power plant

In 2019, the Bulgarian environmental authorities renewed the operating permit for the thermal power plant Maritsa-Iztok 2 ("TPP"), allowing the plant to release a certain amount of mercury and sulphur oxides. This decision was appealed by the NGO "For the Earth".

The Administrative Court of First Instance dismissed the case, finding no violation of the Aarhus Convention or the relevant European Directives on air quality and industrial emissions.

The plaintiffs appealed to the Supreme Administrative Court ("SAC"). The SAC found a discrepancy between the update of the air management plan for the surrounding municipality and the contested decision of the environmental authorities. The SAC asked the Court of Justice of the European Union ("CJEU") for a preliminary ruling on the obligations of competent authorities when considering a request for a derogation from the set emission limit values when reissuing integrated permits.

The CJEU ruled that a derogation from the set emission limit values may only be granted if less stringent emission limit values would not cause "significant pollution" and a "high level of protection of the environment as a whole" could be achieved despite the derogation. The pollution exceeding the air quality limit values in the area of the TPP could objectively be described as "significant pollution" and a derogation from the set emission limit values could not be granted. Additionally, the competent authority empowered to grant such a derogation must also refrain from setting less stringent emission limit values for pollutants from an installation if such a derogation would be in conflict with the measures laid down in the air quality plan adopted for the zone concerned.

On 31 July 2023, the SAC overturned the judgment of the Administrative Court of First Instance due to substantive violations of the rules of judicial procedure. Since then, the case has been pending before another panel of the Administrative Court of First Instance.

CLIMATE LITIGATION

Low Emission Zones in Sofia

In 2023 the NGO For the Earth and affected citizens filed an appeal with the Sofia City Administrative Court against a Sofia City Municipal Council Ordinance from December 2022 on the creation of low emissions zones ("LEZ"). The following reasons were given:

- The implementation of effective measures to achieve air quality standards in the shortest possible time is not guaranteed;
- The decision on LEZs has not been made on the basis of sufficiently thorough analysis and forecasting, including measures for transport and domestic heating;
- There are concerns that the LEZs will simply shift pollution hotspots from one part of the city to another;
- Restrictions would be imposed on citizens, without a clear picture of benefits;
- Ineffective allocation of funds: 83% of the budget is allocated to transport measures, which are expected to lead to only a 6% reduction in annual emissions of fine dust particles.

As the appeal process has no suspensive effective, the LEZ-Ordinance has been in force since December 2023.

It should be noted that the LEZ was one of many measures proposed as a result of a class action lawsuit against Sofia Municipality, in which it was condemned for its failure to act on its air quality management obligations. Sofia Municipality was ordered to take corrective measures by November 2022; but most of the planned measures have not yet been implemented.

MAJOR CONSTRUCTION PROJECTS

Combined power and waste management plant

In 2015, the Sofia Regional Environmental Inspection authority issued a positive environmental impact assessment ("EIA") for the construction of a combined power and waste management plant in Sofia ("Toplofikatsia Sofia EAD").

The decision was challenged by a group of plaintiffs, including the NGO For the Earth. Court proceedings took place before the Sofia City Administrative Court as court of first Instance and the Supreme Administrative Court (SAC). In 2020, the SAC overturned the decision of the Sofia City Administrative Court and sent the case back for reconsideration by another panel.

In September 2023, the Sofia City Administrative Court annulled the Environmental Impact Assessment. The court ruled that the technical indicators, the results of the research and the responsibility towards the citizens had been neglected by the project applicants and Sofia Municipality. Additionally, the project will endanger the health of Sofia residents, pollute the air, generate toxic ash and increase traffic. Furthermore, the assessment did not take certain factors into account, including existing pollution, specific relief, temperature inversions, and the issue of hazardous waste.

Toplofikatsia Sofia EAD appealed against the decision.

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MAJOR CONSTRUCTION PROJECTS

Additional runway at Prague Airport

Three individual plaintiffs challenged the so-called Principles of Territorial Development of the Region of Central Bohemia ("Principles" - the tool for urban development of the region issued by the local self-governing authority), which defined an area for the construction of a new runway for Prague Airport.

In a supplementary submission, the plaintiffs stated that these Principles of Territorial Development also undermine the goals of the Paris Agreement, as the expansion of the airport would cause additional indirect greenhouse gas emissions.

In June 2020, the Prague Regional Court annulled the Principles on the grounds that the new runway was a significant source of noise and emissions (other than greenhouse gases). The supplementary submission was rejected on procedural grounds; nevertheless, the court decided to comment on it. The Court held that the State's commitment to a gradual reduction of greenhouse gas emissions could not be invoked in any activity related to air traffic. Even more so given that Principles were issued by a local self-governing authority which is not bound by any national law to fulfil the State's obligation under the Paris Agreement.

CLIMATE LITIGATION

Are the Czech government's measures sufficient to combat climate change?

In April 2021, a collective of Czech citizens filed a lawsuit against the government, claiming that its failure to address climate change resulted in violations of their human rights.

The plaintiffs included the NGO Klimatická žaloba ČR, the town of Svatý Jan pod Skalou, and four individuals, with various Ministries and the Czech Republic's government named as defendants. The plaintiffs argued that the government's failure to effectively combat climate change violated Czech citizen's rights to life, health, and a safe environment – rights protected under the Czech Constitution, the EU Charter of Fundamental Rights, and the European Convention on Human Rights.

The plaintiffs sought to demonstrate that the Czech Republic has a finite carbon allowance to meet its constitutional and Paris Agreement commitments and claimed that the government's Climate Protection Policy permits emissions that exceed this allowance by 2.5 times. They sought a court order requiring the government to comply with a specific carbon limit from January 2021 until the end of the century, alongside measures to adapt to climate change.

In June 2022, the Prague Municipal Court ruled in favour of the plaintiffs and ordered the state to take immediate action to mitigate climate change. The court declared the state's inaction to reduce greenhouse gas emissions illegal and instructed the state to stop violating the plaintiffs' rights through such inaction. The court derived the responsibility to mitigate climate change from the Paris Agreement and the EU Climate Law (55% reduction of greenhouse gas emissions by 2030), as the Czech Republic does not have a specific climate law. The state must therefore develop a detailed and comprehensive strategy to achieve this target. Although the court acknowledged that the Paris Agreement's target (to keep the global temperature rise below 2°C) are not legally binding, the Czech Republic's national commitment is unavoidable. Failure to meet these climate targets could jeopardise the plaintiffs' constitutionally protected rights, and the government cannot dismiss its climate obligations on the grounds of its minor contribution to global climate change.

The Ministry of the Environment appealed to the Supreme Administrative Court of the Czech Republic. In February 2023, this court overturned the Prague Municipal Court's ruling and sent the case back to the original court for reconsideration. The primary reason for this reversal was the collective nature of the EU's 55% GHG commitment by 2030 and the ongoing legislative and political discussions about the specific allocation among Member States. The Supreme Administrative Court also noted that the plaintiffs needed to demonstrate more precisely how the defendants' alleged inactivity violated their rights.

In October 2023, a public hearing took place, and the Prague Municipal Court ultimately dismissed the case. The plaintiffs have expressed their willingness to escalate the matter to the Supreme Administrative Court and the Constitutional Court.

France

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CORPORATE SUSTAINABILITY

First case ruled on merit under French national law

Since March 2017, French companies with more than 5,000 employees have to "establish and implement a vigilance plan including reasonable vigilance/due diligence measures to identify risks and prevent serious violations of human rights, fundamental freedoms, the health and safety of persons and the environment", aka the "Vigilance Duty". Since then, several cases have been brought by NGOs or trade unions, only some of them have been successful (exclusively on procedural grounds).

The conviction of the La Poste group by the Paris Judicial Court in December 2023 at the request of the Sud PTT union is the first case ruled on merit on the Vigilance Duty. This decision sheds light on the issue and should serve as a guideline for other companies:

- The risk map was too general and did not make it possible to identify the actions that need to be introduced or reinforced as a priority;
- The trade union can still appeal even if it was consulted beforehand;
- The procedures for assessing third parties (subcontractors, suppliers etc) were not adequately mapped;
- The vigilance plan needs to include a warning and reporting mechanism;
- The court did not grant an injunction to adopt "very precise and concrete measures concerning subcontracting, psycho-social risks or harassment".

This decision highlights the vagueness of the 2017 law (what exactly are the mechanisms to prevent serious harm? What is the scope of mapping or third party assessment?), which may have led companies to underestimate the concrete scope of the legal requirements.

Although the decision of the Paris Judicial Court has no major financial consequences for the La Poste group - the injunctions were issued without any penalty, leaving it the possibility of correcting its vigilance plan in its future annual version - the resulting bad press (and the consequent increased risk of liability) should encourage other companies.

GREENWASHING

NGOs allowed to sue TotalEnergies

In December 2023, the Paris Court of Appeal confirmed the admissibility of the case brought by the NGOs Greenpeace France, Friends of the Earth France and Notre Affaire à Tous against TotalEnergies for misleading commercial practices.

The associations accused Total of having launched – in parallel with its name change – a communication campaign "designed to convince consumers of its transformation into a player in the transition and a contributor to the fight against global warming". This despite the fact that the oil company was aiming to increase its oil and gas production. They therefore want the judge to sentence TotalEnergies to withdraw its misleading advertisements, to disseminate the judgment and to include a mandatory mention of the reality of its plans in any communication about its climate ambitions.

According to the NGOs, TotalEnergies has been aware of the impact of its activities on the climate for more than half a century but continues to produce disinformation with impunity to protect its climate-destroying activities. For its part, Total claims that it has taken concrete action for the climate, namely investments, new businesses and a significant reduction in greenhouse gas emissions in Europe by 23% between 2015 and 2021.

The case was brought under a provision of the French Consumer Code that prohibits misleading commercial practices and allows for fines up to €1.5 million, 50% of the company's turnover and 400% of its advertising costs.

It is now up to the Court to rule on the merits. This case is one of the very first aimed at punishing greenwashing in the field of misleading commercial practices. The case could set an important precedent in regard to the proposed EU directive on unfair commercial practices and misleading environmental claims.

CORPORATE SUSTAINABILITY

Due diligence in regard to an oil project in Africa

In February 2023, the Judicial Court of Paris dismissed the plaintiffs' (six NGOs including les Amis de la Terre, Survie and four Ugandan NGOs) action against TotalEnergies. The latter was accused of carrying out an oil project in East Africa with disregard for human rights and the environment and being in breach of its obligations under the Vigilance Duty under French national law.

The six NGOs targeted two major projects that were intrinsically linked: the "Tilenga" project, a drilling of 419 wells in Uganda, a third of which were located in the Murchison Falls Natural Park; and East African Crude Oil Pipeline project, the world's longest heated oil pipeline, intended to transport hydrocarbons from Tilenga to the Indian Ocean crossing Tanzania for over 1,445 km.

These projects entered the construction phase when TotalEnergies announced a $10 billion investment agreement with Uganda, Tanzania and China's CNOOC. According to the plaintiffs, the proposed project faces strong opposition from the local population. Additionally, they claim that the vigilance plan is flawed, and the expropriated people are deprived of their land without payment, even though they are supposed to receive 'fair and prior compensation'.

The project is also under attack for its climate impact, estimated by NGOs at up to 34 million tons of CO2 per year. According to these estimates, the pipeline would also affect the land of nearly 62,000 people and threaten more than 2,000 square kilometers of nature reserves near Lake Victoria in Tanzania.

TotalEnergies successfully focused its defense on the inadmissibility of the NGOs' request, stressing that the summons launched in 2019 targeted the 2018 vigilance plan, which had since evolved. The company also refuted allegations of human rights violations and defended the project's interest in the development of both countries claiming that all relevant stakeholders had been regularly consulted and informed of the project's progress.

In the summer of 2023, the NGOs and 26 local plaintiffs launched a new case based on TotalEnergies' duty of care and alleged human rights violations against the local population.

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MAJOR CONSTRUCTION PROJECTS

Balaton Gate project at Tihany ferry station

The Hungarian Government Decree 314/2005 (25.XII.) lists the activities for which an Environmental Impact Assessment procedure ("EIA") is required. The focus lies on determining of the environmental impact of the project and setting conditions for the use of the environment.

In one notable case from 2021, the NGO National Society of Conservationists ("NSC") successfully intervened in a project to build a large visitor center complex at the Tihany ferry station on Lake Balaton, one of the largest freshwater lakes in the CEE region. The local authorities determined that the project would not have a significant impact on the environment and therefore did not require an EIA.

NSC challenged this decision before the Veszprém County Court. The court shared NSC's concerns stating that a brief table with unclear data was insufficient to cover climate change impacts, and therefore annulled the decision of the environmental authority and ordered the reassessment of the need for a full EIA.

GREENWASHING

Past Cases and Status Quo in Hungary

The Hungarian Competition Authority has a long greenwashing track record with (i) cases which are listed here, (ii) a Greenwashing Guidance since 2020 to navigate market participants to avoid greenwashing (iii) as well as a freshly launched a market analysis initiated in 2022 to investigate in detail the use of environmental ("green") claims by undertakings in the food, clothing, chemical and cosmetics sectors with further recommendations to the regulator and the market participants to avoid misleading green claims.

The Hungarian Competition Authority has case history dating back to 1997 regarding unlawful and misleading greenwashing claims.

In a case from 1997, a company producing multilayer cardboards for food and beverage packaging was fined for misleading consumers and unfair commercial practices. The company was unable to explain or substantiate its "environmentally friendly" claim on its packaging.

In a case from 2002, a coffee producer was fined for unfairly influencing consumer decisions. The company claimed that its product was the cleanest coffee, stating that it came from the best managed plantations in the world and was grown with environmentally friendly technology. The producer was only able to provide evidence relating to the processing stage, not the growing stage.

In a case from 2011, a cosmetic company was fined for unfair commercial practices against consumers. The company claimed that its face creams, firming lotions and face masks were 100% organic and were ECOCERT certified. However, it was later found out that not all the raw material could be considered as "organic".

In a case from 2015, a player in the food supplements industry was fined for unfair commercial practices against consumers. The company claimed that the products were of "100% natural origin", and "natural in all aspects". However, there was no evidence or certification for each individual ingredient and the presence of artificial ingredients could not be ruled out.

In another case from 2015, a tanning salon was fined for unfair commercial practices against consumers. The company used claims as "green", "organic", "with power of nature"; however, these claims could not be substantiated.

In a case from 2021, a dental clinic chain operator was investigated for claiming to be an "environmentally conscious clinic". However, the claim was found to be too general, and the company was not able to substantiate it. As the company cooperated during the procedure, was classified as small- and medium sized enterprise, and committed a competition law infringement for the first time, only a warning (but no fine) was issued.

Since 2022, there is an ongoing investigation against a company that operates a return system for reuseable, washable cups at various events and bars. When consumers return a cup, they receive a token instead of money. The investigation covers elements of the company's advertising communications relating to the environmental impact of the cups and the return scheme. Some of the company's advertising claims (e.g. "The use of returnable and washable cups can reduce waste production by up to 80% at events and catering") are likely to be unsubstantiated and the company is unlikely to have sufficient evidence to justify the claimed environmental benefits.

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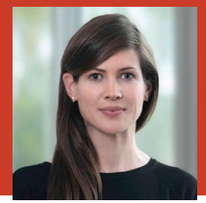

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MAJOR CONSTRUCTION PROJECTS

Data center and electricity substation

A case from 2023 dealt with two judicial review challenges to grants of planning permission by An Bord Pleanála (**ABP**) (the Irish planning authority) for a data centre and a related electricity substation and grid infrastructure which were challenged by two local residents.

The applicants relied on a number of grounds including:

1. The duty of ABP to "have regard to" certain Government policies.

   One of the key issues raised by the applicants was whether, in making their decisions, ABP had satisfied their obligation under certain domestic legislation to "have regard to" climate change policies in their decision-making process. Section 15 of the Climate Action and Low Carbon Development Act 2015 requires ABP to "have regard to" certain factors including the furtherance of certain climate change objectives and policies and the reduction of greenhouse gas emissions. The Court considered the "have regard to" obligation contained in certain domestic legislation and determined that the obligation generally falls short of requiring any compliance with, or implementation of, policies or other matters to which regard must be had. The Court was of the view that decision-makers obliged to "have regard to" a factor were free to give no weight to that factor and that their decisions in that regard could only be challenged by way of judicial review on grounds of irrationality of such decisions. In short, the onus on decision makers to "have regard to" certain Government policies was not a very stringent obligation.

   The Court also looked more broadly at the various Government policies which were applicable to the proposed development, including the National Planning Framework, the Climate Action Plan 2019 (the Climate Plan 2019) and the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy 2018. The Court found that Government policy clearly favoured the continuing development of data centres and noted that such a policy was specifically provided for in the Climate Plan 2019. However, it ruled that as a consequence of the constitutional separation of powers, short of such policies being adjudicated to be irrational, the Courts have no function in reviewing Government policies other than as to their legality as opposed to their merit. The Court further noted that irrationality as a concept had a particular and restricted meaning in the law of judicial review.

2. The failure of ABP to assess the cumulative environmental impacts of GHG emissions from the generation of electricity to power the data centre.

The Court held that there were no direct CO2 emissions from the data centre and that the cumulative effect of emissions had been adequately considered as a proportion of the national emissions of CO2. The effects of the emissions from the data centre on climate change or on specific individuals were too remote and incapable of measurement to be considered as cumulative effects in the Environmental Impact Assessment for the proposed development.

3. The decisions of ABP amounted to a breach of the applicants' human and constitutional rights.

The applicants argued that ABP may not permit development which would significantly contribute to CO2 emissions and thus climate change and expose them to foreseen risks to life and health as a result. The Court noted that in case law the Irish Supreme Court had recognised the dangers posed by climate change but had nevertheless declined to recognise a justiciable personal right to a healthy environment. It also noted that the European Convention on Human Rights did not provide for a personal right to a healthy environment. The Court expressed the view that the question as to how climate change was to be addressed was a question for the Executive and the Legislature rather than for the Courts. The applicants also lacked standing to raise these issues as they had not raised them before ABP.

The Court ultimately rejected each ground of challenge to the decisions of ABP regarding the proposed development and the applicants' claim was dismissed.

MAJOR CONSTRUCTION PROJECTS

Cheese processing plant

A judicial review case from 2022 centred on a challenge to the grant of planning permission for a cheese processing plant by An Bord Pleanála (**ABP**), the Irish planning authority. The central issue in this appeal to the Irish Supreme Court was whether ABP was under an obligation to assess the upstream supply chain consequences of the proposed plant either as part of the Environmental Impact Assessment (**EIA**) for the project under the Environmental Impact Assessment Directive (**EIA Directive**) or as part of the Appropriate Assessment (**AA**) for the project under the Habitats Directive.

As regards the EIA Directive, the Court considered the meaning of Article 3(1) which requires each EIA to "identify, describe and assess" the "direct and indirect significant effects of a project" and offered two possible interpretations. The first possible interpretation was that the obligation to assess indirect effects could be read in an open-ended fashion such that any effects on the environment would have to be considered. The second possible interpretation was that indirect effects must only be those which the development itself has on the environment.

The Court held that assessing the upstream or downstream consequences of a development was too remote and impractical. The Court held that the open-ended test would barely limit the range of possible inquiries into such developments, and that the production of milk to supply the cheese factory was too remote to require consideration for the purposes of the EIA. For these reasons, the Court adopted the more limited interpretation of Article 3(1), where only the effects of the development itself had to be considered by ABP.

In considering whether an adequate AA had been carried out consistent with Article 6(3) of the Habitats Directive, the Court held that the information before ABP had to remove all reasonable scientific doubt about potential effects on the proposed development. In its assessment of the information which had been before ABP, the Court was satisfied that this had been the case. The Court dismissed the appeal.

GREENWASHING

Energy provider claims usage of 100% green energy

The Advertising Standards Authority for Ireland's (the **ASAI**) Code for Standards for Advertising and Marketing Communications in Ireland (**Code**) applies to all marketing and advertising communications in Ireland. While not legally binding, in practice it is adhered to and advertisements in breach of the Code must be withdrawn. There is also typically media coverage of these complaints.

The Code contains specific requirements regarding environmental claims. Absolute (unqualified) environmental claims may only be made where advertisers can substantiate a claim that the product will cause no environmental damage – a very high bar - and all claims are considered across their lifecycle.

The Code operates a complaints-based model and unsurprisingly green claims are a particular focus. In a recent case, an energy provider claimed to be supplying "100% green energy". The advertisements suggested that when using electrical appliances, the energy provider's customers were using power from 100% renewable sources. Complainants questioned how the provider could claim to provide 100% green electricity to households in circumstances where the energy provided to households was sourced from the national grid, which pooled renewable and non-renewable energy.

In response to the complaint. the energy provider submitted a detailed analysis (including supporting information from the Irish utilities regulator) supporting its claims and noting that it was certified to offer the supply of 100% green electricity by the utility's regulator. Despite this, the ASAI upheld the complaint and found that the advertisement was in breach of the Code because the complainants were correct in stating that the energy which an individual customer used was not necessarily from a "100% green" source.

In contrast, complaints were made against a different energy provider who advertised that they supplied "100% green electricity" were not upheld because the ASAI determined that their advertisement did not imply that the 100% green energy was being provided to end users' premises.

These cases demonstrate the level of precision required when making environmental claims. However, the ASAI has recognised the complexities and committed to engaging with the utilities regulator to develop further guidance for companies in this sector making environmental claims.

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"BROWN INDUSTRIES" LITIGATION

Liability of a major energy producer

In May 2023 two NGOs, namely Greenpeace Italy and ReCommon, and 12 individuals initiated a lawsuit against Eni S.p.A., the major Italian energy company (the "Company"). According to the plaintiffs the Company should be held liable for past and future damages caused by climate change, to which it had contributed by continuing to invest in fossil fuels. The lawsuit was also filed against the Ministry of Economy and Finance, and Cassa Depositi e Prestiti, an Italian public investment bank, in their role as main shareholders of the Company. The co-defendants would be jointly and severally liable with the Company for its choices regarding energy-climate strategies and the resulting emissions of greenhouse gases.

The plaintiffs in this case do not seek to quantify damages at this stage, but to establish the defendants' liability for the damages that the plaintiffs suffered and will suffer as a result of the consequence of climate change. Furthermore, the plaintiffs have asked the Court to order:

- The Company to cease its harmful conduct and to adopt a new industrial strategy aimed at limiting the total annual amount of greenhouse gas emissions (and in particular CO2) into the atmosphere so that by the end of 2030 emissions are reduced by at least 45% compared to 2020 levels, with a trend consistent with the scenarios developed by the international scientific community to limit the average global temperature increase to 1.5 degrees Celsius, in line with the Paris Agreement (which entered into force in November 2016 and is binding on all signatories);
- The Ministry of Economy and Finance, and Cassa Depositi e Prestiti to adopt their own policies for the guidance of their participation in the Company, to set and monitor the Company's climate objectives in line with the Paris Agreement and with respect for human rights.

This is a remarkable case, especially in light of the recent constitutional reform in Italy which includes the protection of the environment, biodiversity, ecosystems, and animals. It also appears to be the first case of climate litigation initiated against a private company in Italy. The case is still in an early stage but has all the makings of a leading case, whatever the final outcome (should it come to that stage).

GREENWASHING

Alcantara marketed as environmentally friendly

In July 2021, a company specialising in the production of Alcantara, a textile widely used in the automotive sector, brought an action before the Court of Gorizia against another company also involved in the production of textiles, for unfair competition due to the dissemination of misleading "green claims" to promote a textile product.

By this action, the plaintiff asked the Court to prevent the defendant from continuing to use certain expressions to promote its textile product as environmentally friendly. The Court granted the petition, holding that the use of these expressions such as "friend of the environment", "natural choice, friend of the environment, the first and only microfibre that guarantees eco-sustainability during the entire production cycle, ecological microfibre", and "reduction of energy consumption and CO2 emissions" constituted misleading advertising under Italian law, as the defendant was unable to prove the accuracy of the data, descriptions, or statements it provided.

According to the Court, under Italian law misleading statements in advertisements can be defined as statements that convey a green image of the company in the absence of adequate evidence, thus influencing the consumer to purchase the allegedly "green" product on the basis of such unfounded claims. This is in line with the proposed European Greenwashing Directive.

In its verdict, the Court not only prohibited the defendant to use the aforesaid expressions again, but also ordered that the decision to be published on the defendant's website for a period of 60 days.

CLIMATE LITIGATION

Humanitarian protection grounded on environmental claims

In February 2021, the Italian Supreme Court upheld the appeal of an immigrant who sought international protection and consequent authorisation to remain in Italy on the grounds of the environmental disaster in the Niger Delta, an area which has been seriously polluted by a large oil industry.

The Court of First Instance limited its assessment for international protection to the existence of danger arising from an ongoing armed conflict. The Court did not in any way consider the context of the environmental disaster, i.e. the impact that the severely degraded environmental situation could have on the minimum threshold of human rights, including the right to health and well-being.

The Italian Supreme Court, instead, found that the harm to individual life relevant for the recognition of protection does not necessarily have to result from an armed conflict, but may depend on socio-environmental conditions that are attributable to human actions. These include conditions of environmental degradation, climate change or unsustainable development of the area, which may seriously endanger the survival of the individual and his or her relatives.

Poland

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CLIMATE LITIGATION

Are Polish government's measures sufficient to combat climate change?

In 2021, the NGO ClientEarth filed lawsuits against Poland on behalf of five individual Polish citizens. The issue is whether the Polish government's failure to protect the claimants from the worsening effects of climate change violates their personal and human rights.

The plaintiffs based their case on three different legal instruments:

First, they relied on the Polish Civil Code, claiming that the State Treasury's failures in climate policy threatened their personal rights. ClientEarth also invoked the provisions of the European Charter of Human Rights, citing the right to life and the right to respect for private and family life. They referred to the fact that the Act imposes so-called "positive duties" on its signatories, obliging the government to take steps to prevent changes that could adversely affect their rights under its provisions.

The plaintiffs also referred to the Polish Constitution arguing that the Polish government's conduct violated the obligation imposed on public authorities to ensure every citizen's right to health care. In addition, they claim that the state is violating its obligations to pursue policies that ensure environmental security for present and future generations.

The plaintiff also referred to the provisions of the Paris Agreement, which was ratified by Poland, and accused the government of a climate policy that is too lenient and will not achieve the goals set out in the Paris Agreement. The case is still pending.

"BROWN INDUSTRIES" LITIGATION

Strategy to reduce GHG emissions and abandon coal investments

In March 2020, the NGO Greenpeace Poland filed a lawsuit against PGE Górnictwo i Energetyka Konwencjonalna ("PGE"), which owns (among other power plants), the Bełchatow power plant. Greenpeace contends that PGE is the largest utility company in Poland and generates about 90% of its electricity from coal.

In its lawsuit, Greenpeace demanded that the company to cease all new investments in coal and to implement greenhouse gas reduction strategy to achieve zero emissions from coal-fired power plants by 2030 at the latest. The legal basis for this demand is found in the Polish Environmental Protection Act. According to this law, an environmental organization may file a claim to restore the lawful state of affairs, to take preventative measures, or the cessation of operations, in the event of unlawful impact on the environment.

GREENWASHING

Verification activities of the Competition and Consumer Protection Authority

The Polish Competition and Consumer Protection Authority has long carried out monitoring activities to verify practices that may bear the hallmarks of greenwashing. Initially, the authority sent "soft" requests (without initiating proceedings) to more than a dozen companies, asking them to voluntary resolve doubts about compliance with competition and consumer-protection regulations regarding their use of slogans related to ecology, sustainability, and environmental protection.

Recently, the Authority's activities in this area have intensified, as it has initiated explanatory proceedings against selected Polish companies offering their products to consumers, mainly in the clothing and cosmetics industries.

Among other things, the Authority is investigating whether, in their marketing practices, the companies have used commercial information, labelling or claims relating to ecological, sustainability or environmental issues in their marketing practices and whether they have verified (and can prove) the veracity of these statements). So far, no administrative decisions directly addressing greenwashing have been issued.

For companies whose "green" claims and labels are untrue or present information in an incomplete or unreliable manner, or otherwise create a risk of misleading consumers, the Competition and Consumer Protection Authority may initiate proceedings for violating consumers' collective interests. This can result in a fine of up to 10% of annual turnover.

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CLIMATE LITIGATION

Partially successful challenge to UK Government's Net Zero Strategy

In October 2021, three NGOs - Friends of the Earth, ClientEarth and the Good Law Project - challenged the UK Government's Net Zero Strategy. They argued that the Strategy failed to comply with the requirements of the Climate Change Act 2008, which sets a 2050 net zero target for the UK's greenhouse gas emissions and requires the Government to set carbon budgets, and to prepare and report on policies and proposals to enable those targets and budgets to be met.

In July 2022 the Administrative Court rejected some of the claimants' arguments (e.g. an argument that the Strategy breached the European Convention on Human Rights) but did rule that the Government had failed to comply with its obligations under the Climate Change Act 2008 in relation to the Strategy for two reasons. First, it had made decisions on whether the proposals and policies in the Strategy would enable carbon budgets to be met without being briefed about the contribution that individual policies would make to reductions in greenhouse gas emissions. Second, it had failed to explain to Parliament how those policies were intended to meet emissions reduction targets.

The Court ordered the Government to update the Strategy by March 2023, to show how its policies would achieve the 2050 net zero target. The Government appealed but withdrew its appeal in October 2022. In March 2023 the Government published a Carbon Budget Delivery Plan to fill the gaps in the Strategy, but the claimants have challenged that too. A decision in that case is awaited.

Although the claim partially succeeded, the judgment confirms the wide discretion given to the Government under climate legislation and that the courts can only compel compliance with general duties, and not create their own climate policies.

"BROWN INDUSTRIES" LITIGATION

Derivative claim for climate change risk management strategy fails

Section 260 of the UK Companies Act 2006 allows a company's shareholders to bring a derivative claim against the company's directors for acts or omissions involving negligence, default, breach of duty or breach of trust. ClientEarth held a small number of shares in Shell and brought a derivative claim against Shell's directors, on the grounds that Shell's climate change risk management strategy breached the directors' duties to promote the company's success and to exercise reasonable care, skill and diligence.

In July 2023 the High Court rejected ClientEarth's claim. It held that Shell's directors had not breached their duties under the Companies Act and that ClientEarth had failed to establish even a prima facie case that the directors' current approach fell outside the range of reasonable responses to climate change risk and would cause harm to Shell's shareholders.

Although unsuccessful, ClientEarth's derivative claim represented an innovative attempt to challenge company directors' decision-making in relation to climate change issues through the courts. The case demonstrates that the English courts will not impose additional duties on company directors in respect of climate change beyond what legislation requires. However, where companies publish climate targets and then fail to deliver on them, there may still be scope for derivative claims in the future.

"BROWN INDUSTRIES" LITIGATION

Claim against pension trustees for investing in fossil fuels fails

In July 2023 the English Court of Appeal dismissed a common law derivative claim by members of a pension scheme against their pension trust company's current and former directors. The pension scheme was the Universities Superannuation Scheme (USS), which provides pension benefits for academic staff in universities and higher education establishments in the UK.

The claimants were members of the pension scheme. They claimed that the current and former directors had breached their duties as directors under the Companies Act 2006 on various grounds, including that they had failed to form an adequate plan to deal with the financial risks involved in investments in fossil fuels, in particular by continuing to invest in fossil fuels without any plan (or any adequate plan) for divestment. The long-term interests of the scheme required an immediate plan for divestment.

The High Court originally rejected the claimants' case in December 2021. It held that there was no evidence of loss to USS, or any allegation of a causal connection between the alleged loss and the investment in fossil fuels. Further, there was no evidence that the directors had secured a personal benefit from the alleged breaches of duty. The Court of Appeal agreed.

The judgment makes clear that the courts will not interfere in commercial decisions which they are not equipped to take themselves. It is also a useful reminder of the difficulties that pension scheme members face in getting their schemes to invest in what they perceive to be responsible investments.

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