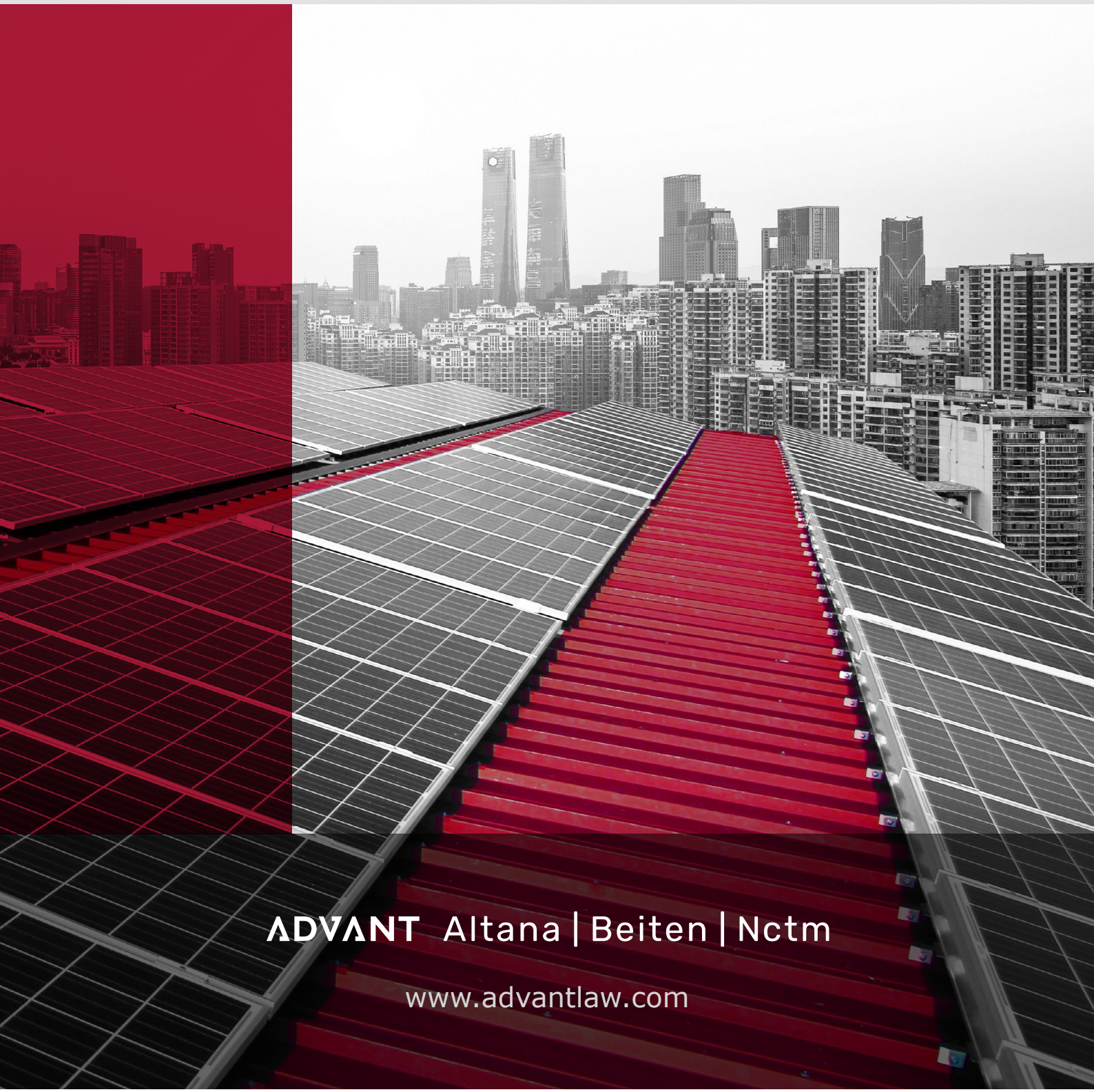
ADVANT

ADVANT FAQs on Climate Change Litigation



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INTRODUCTION

Companies are under increasing social, regulatory and economic **pressure in almost all sectors to contribute to the reduction of greenhouse gas emissions** ("GHG emissions") and to think about their contribution to climate protection. *Pars pro toto* from a legal point of view is the classification of economic activities as environmentally sustainable or non-sustainable according to the EU Taxonomy Regulation as well as upcoming detailed reporting obligations pursuant to the Corporate Sustainability Reporting Directive ("CSRD"). After its implementation into national law, particularly large limited-liability companies will be obliged to describe in their annual reporting pursuant to the European Sustainability Reporting Standards (ESRS), *inter alia*:

- their plans to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1,5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 and, where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities as well as
- their time-bound targets related to sustainability matters, including, where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050, and the progress made towards achieving those targets.

Independent of already existing, if less detailed, reporting obligations of large capital-market-oriented companies and possible further-reaching obligations in the future (see for example Art. 15, 25 of the draft Corporate Sustainability Due Diligence Directive ("CSDDD") proposed by the EU Commission in February 2022), many companies have already adopted plans to reduce their GHG emissions and report on such plans in more or less detail.

Climate change litigation exerts considerably additional pressure on companies to focus on their GHG emissions. **A comprehensive climate strategy should therefore also consider the risks associated with this kind of litigation.**

The subsequent **ADVANT** FAQs explain why.

SUBJECT AND SCOPE OF CLIMATE CHANGE LITIGATION

1. What is climate change litigation?

Climate change litigation refers to legal actions brought by individuals, organizations, or governments against other individuals, organizations, or governments, in order to address the issue of climate change.

2. Why should enterprises care about climate change litigation?

Climate change litigation can have significant financial and reputational consequences for businesses since it typically aims at forcing businesses to reduce their GHG emissions, to pay for damages caused by GHG emissions, and/or to take steps to mitigate the effects of climate change.

Plaintiffs are often NGOs or persons financed by NGOs but, as the case may be, also strategic investors. Sometimes the aim of the plaintiff is not even to win the case at all costs but rather to attract public attention and create negative reputational consequences for the respective businesses, if they do not change their position. The number of climate change litigation cases is increasing rapidly as public awareness of climate change and its consequences increases, too. While approximately 800 climate change-related cases have been filed worldwide in 28 years between 1986 and 2014, the number has more than doubled during the last 8 years since 2014, for a total of 2,002 ongoing and completed climate change related litigations worldwide as of May 2022. Roughly one-quarter of these were filed between 2020 and 2022.

3. Why should enterprises care about climate change litigation?

The majority of lawsuits are still likely to be brought against companies associated with the fossil fuel sector, particularly the oil or gas industry and energy supplier. However, especially in Europe lawsuits are increasingly being directed against the food and agriculture sectors, the transportation, and the financial sector.

4. What are climate change lawsuits against companies typically aimed at?

Lawsuits against companies are often motivated by concerns about the impact of corporate actions on climate change (e.g., lawsuits against construction projects and their impact on the environment) or address corporate responsibility for climate change (e.g., liability for damages resulting from extreme weather events). Thus, they typically include paying for damages, reducing GHG emissions or implementing mitigation measures. Additionally, as companies increasingly market their products as environmentally friendly, NGOs in particular are increasingly having corresponding advertising claims reviewed in court for their accuracy and comprehensibility, thus creating another category of climate lawsuits aiming to detect wrong or misleading environmental claims (so called greenwashing or climate washing). We expect a considerable number of potential cases as, for example, a survey in 2021 found that 42% of websites contained environmental claims that were false, deceptive or exaggerated and could qualify as unfair commercial practices under EU regulations. Further areas of climate change litigation are evolving, including in particular personal liability of directors and officers
(see question 7).

5. Are there already climate change-related court decisions or pending cases against companies?

5.1 Overview

A landmark decision was taken by the Hague District Court in May 2021 ordering Royal Dutch Shell (RDS) to reduce its emissions by 45% in 2030 compared to 2019 levels (Milieudefensie et. al. v. RDS). Although RDS has appealed against this decision, this was the trigger for similar actions against companies seeking for a reduction of corporate GHG emissions in further European jurisdictions, in particular in France, Germany and Italy (see below). However, as the respective provision of Dutch tort law which the claimants had chosen in the RDS case does not have an exact counterpart in other national tort laws, the decision of the Hague District Court cannot be easily relied upon in other jurisdictions. Further lawsuits against companies are pending but, until now, there are not too many judgements. However, even though actions against alleged greenwashing are relatively new, we see a rising number of court decisions especially in this area.

5.2 France:

Until now, most public attention in France has been mainly attracted by actions directed against the State. In this respect, one can mention the very mediatic *"Affaire du Siècle"* (*"case of the century"* i.e. name given to the claim by the claimants themselves), initiated by four NGOs, which led to the condemnation of the French State, on October 14, 2021, to "repair the ecological damage" caused by the government's failure to meet its commitments to reduce GHG emissions. It is also worth mentioning the July 1, 2021 decision by which the *Conseil d'Etat* (i.e. the French Supreme Court for administrative justice) enjoined the Prime Minister to "take all useful measures" to achieve the GHG emission reduction target set by the Paris Agreement.

Nevertheless, private actors are not off the hook. Stimulated by the introduction of the duty of vigilance resulting from Law No. 2017-399 of March 27, 2017, the number of actions of a similar nature - but this time targeting private companies - is increasing rapidly.

This law requires companies that meet certain thresholds to establish a plan that defines *"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 activities of the company and those of the companies it controls"* as well as its usual subcontractors and suppliers.

At least a dozen French companies would already be concerned by actions on this basis, the outcome of which is still very uncertain.

This is the case, for example, of the retailer Casino, which was sued on March 3, 2021 by several associations and organizations representing indigenous peoples in Colombia and Brazil, who claim that the company should be liable for the Amazon deforestation in which its subsidiaries in Latin America would be allegedly involved.

The latest company targeted by such an action is Danone, which was sued on January 9, 2023, by three NGOs for its alleged lack of ambition to reduce its use of plastic.

Claims target companies from all sectors: energy (Edf, Suez, TotalEnergies), financial services, food (Lactalis, Mc Donald's), retail (Casino, Auchan, Carrefour) or cosmetics (Yves-Rocher).

As an illustration, the three NGOs which sued Danone requested that the latter be ordered to pay 100,000 euros per day of delay in implementing a plan that would be deemed satisfactory to reduce its use of plastic, in addition to compensation for ecological damage.

On 28 February 2023, the Paris Court of Justice handed down the very first decision on the merits of this duty of vigilance, in a dispute between Total Energies and six NGOs, which claim that the company allegedly failed to reduce the environmental impact of an oil pipeline project in Uganda.

Although it declared the NGOs' claim inadmissible because they did not comply with a procedural prerequisite to send a prior formal notice several months before filing their claim, the Paris Court took the opportunity of this case to provide an analysis of the duty of vigilance law, recognizing in particular that the law referred to vague notions, making its application by the judge difficult.

Other ongoing proceedings which have received media attention concern allegations of greenwashing against companies on the basis of misleading commercial practices. For instance, associations are claiming that Nespresso's allegations that its coffee is "carbon neutral" or that its capsules are "100% recyclable" are misleading. TotalEnergies has been targeted by three NGOs for having displayed the same ambition of achieving "*carbon neutrality*" by 2050. They see such advertising as constituting a misleading commercial practice.

5.3 Germany:

So far, there are only some first instance court rulings in Germany in the "classic" area of climate change litigation but no final judgements. In the current proceedings against companies in Germany, the plaintiffs are often seeking compensation for damages incurred or to be incurred in the future, or direct influence on the strategy and conduct of the defendant company. All proceedings have in common a high level of media attention, which can result in risks to the company's reputation.

One of the most prominent German cases is currently pending before the Higher Regional Court of Hamm. A Peruvian farmer filed a lawsuit against RWE AG back in 2015 to enforce, among other things, a *pro-rata* payment for allegedly necessary flood protection measures due to a glacier melting as a result of global warming and rising water levels. In support of its claim, the plaintiff pointed out that RWE AG is responsible for 0.47% of the greenhouse gases emitted worldwide and has thus contributed to climate change. The court of first instance dismissed the claim, but the Higher Regional entered into evidence.

Subsequent to the decision of the Hague District Court (see above), lawsuits were filed against Mercedes-Benz, BMW and Volkswagen before several Regional Courts in 2021. The claimants seek to prevent the production of vehicles with combustion engines from 2030. The Regional Courts already dismissed the claims mainly on the ground that it was up to the legislator to comply with climate protection targets and to impose binding emission or reduction requirements; however, there are no reduction targets for individual companies in Germany yet. Claimants appealed to the Higher Regional Courts and the Higher Regional Courts. Another case is pending against Wintershall Dea before the Kassel Regional Court, in which the company is required by the plaintiffs to reduce its gas and oil production from 2026 by no longer participating in the development of new gas and oil fields.

These above lawsuits are largely based on the "climate decision" of the German Federal Constitutional Court from spring 2021. According to this judgement, fundamental rights also serve to safeguard freedom intertemporally.

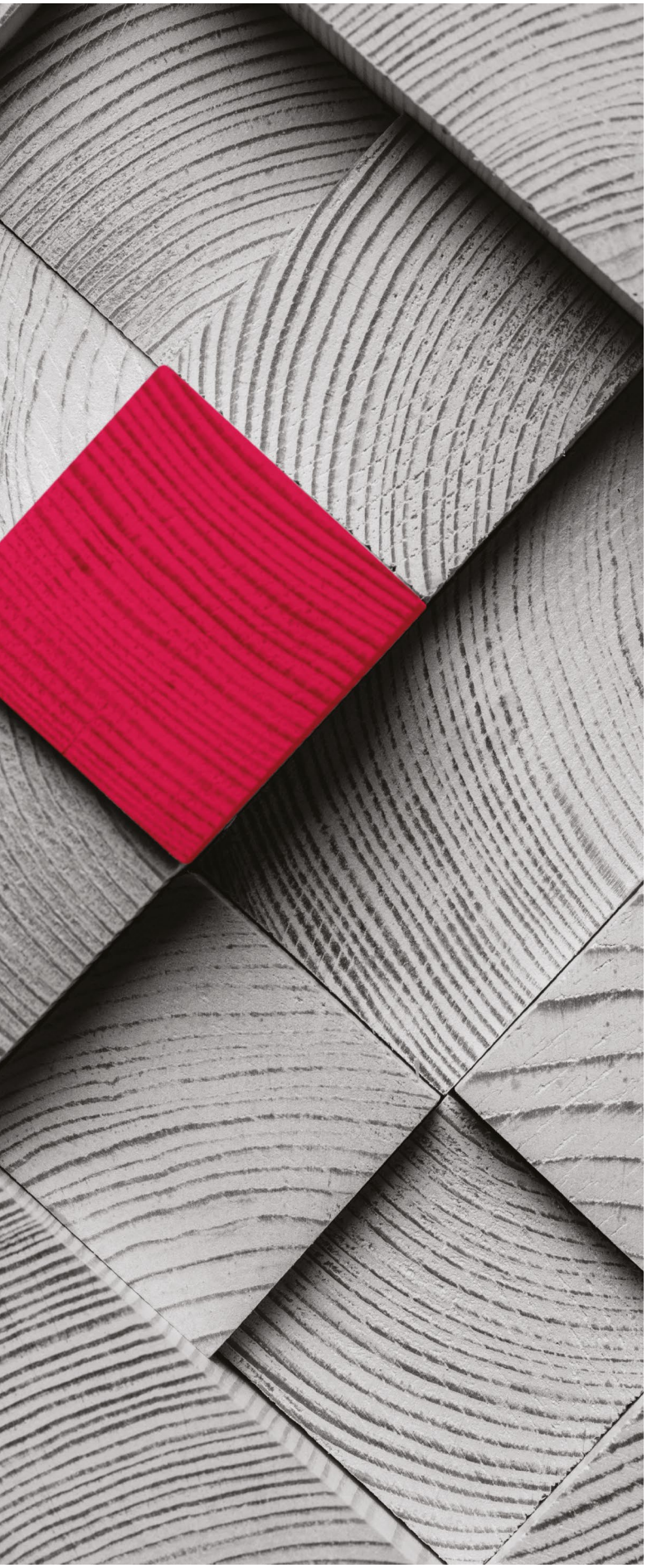
Thus, the state's duties to protect also include the prevention of future threats to freedom caused by unilaterally shifting the burden of reducing emissions into the future. As a consequence, the German Climate Protection Act was to be amended, as sufficient specifications for the reduction of GHG emissions were missing. Irrespective of this the Act continues to contain general reduction targets only, but no concrete targets for individual companies.

Furthermore, there are already several court decisions dealing with the question whether or when advertising

for a "climate-neutral" product qualifies as misleading. The majority of the courts apply a rather strict standard and subject the companies to a more or less far-reaching duty of disclosure to explain what is concretely meant by climate neutrality. In a further ruling the Regional Court of Stuttgart granted an injunction against an investment company claiming that investors could reduce CO2 emissions by a certain amount through their investment even though the quantifiable contribution to achieving environmental goals was only described as a non-binding investment goal in the information memorandum.

Finally, in Germany climate change related corporate litigation is evolving too. Minority shareholders sued Volkswagen in 2022 to put an item on the agenda for the 2023 annual general meeting dealing with the amendment of the articles of association pursuant to which the management board would have to provide more extensive information about climate-related lobbying activities. The case is pending before the Braunschweig Regional Court, but will probably be decided, finally, only by the German Federal Supreme Court.

Since the German Supply Chain Due Diligence Act did not come into force until 1 January 2023 and is structured differently compared to its French counterpart, at least until now there seems to be no pending litigation in that regard.



5.4 Italy:

Climate change litigation in a broad sense is beginning to spread also in Italy, also because social sensitivity towards environmental issues is increasing. Nevertheless, for the time being, there is not yet a settled case-law regarding the "classic" area of climate change litigation in strict sense.

In particular, in this specific field there is currently only one case pending before Italian civil courts involving the Italian State for its "climate inaction".

It was brought against the Italian state (represented by the Presidency of the Council of Ministers) in the framework of the "Giudizio Universale" ("The Last Judgment") Campaign, i.e. an initiative aimed at enforcing protection duties to protect the human right to the climate in the dangerous situation of climate emergency, in accordance with the climate obligations established at international and European Union level.

It is worth noting that the plaintiffs (some NGOS and private citizens) did not request the civil Court of Rome to impose any pecuniary penalty on the defendant Rather, the plaintiffs requested the court to declare, in principal, that the Italian State is liable pursuant to article 2043 of Italian Civil Cod (tort liability) for its failure to tackle the climate change emergency and, as a consequence, to order the latter to adopt, pursuant to article 2058 of Italian Civil Code, any necessary initiative for the abatement, by 2030, of artificial national CO2-eq emissions. The proceedings is still pending and its final hearing is scheduled for September 2023

Besides the above-mentioned Italian leading case for climate inaction, it is worth mentioning a couple of cases commenced in 2021 by Italian citizens against Italy and 32 other States before the European Court of Human Rights ("ECHR"), i.e the cases Uricchio vs. Italy and De Conto vs. Italy which are quite similar to each other. In both cases the plaintiffs are young people claiming the compensation of health damages (mainly psychological distress) allegedly suffered as a consequence of global warming. In particular, by relying on Articles 2, 8, 13 and 14 of the European Convention of Human Rights, the plaintiffs claim that the 33 States,which are also parties to the 2015 Paris Agreement (including Turkey, Switzerland, Portugal, Austria, Norway and France) have not taken sufficient measures to implement the latter.

With regard to the internal division of jurisdiction within the Italian legal system, the Italian Supreme Court has recently stated, with respect to health damages arising from air pollution claimed by a citizen of Milan, that a claim based on the protection of a fundamental right – like the right to health - always retains its nature as a subjective right, which cannot be degraded to a legitimate interest, with the result that the case shall be devolved to the jurisdiction of the ordinary civil courts, rather than to the administrative courts.

In addition, it is worth pointing out a strand of initiatives recently taken by a group of Italian NGOs and environmental movements before the National Contact Point of the Organization for Economic Cooperation and Development ("OECD") which, strictly speaking, cannot be considered as judicial, but, in any case, highlight the increasing trend of using climate change emergency as the basis for potential complaints and/or as a tool for inducing companies to comply with climate change targets. *Inter alia*, it is worth mentioning an initiative undertaken in 2022 by a network of Italian lawyers and researchers committed to enforcing climate justice against public institutions and private companies, who submitted a climate-related complaint by alleging the inadequacy of the business plan pursued by the Italian giant oil company ENI S.p.A.. Specifically, the complaint highlights that ENI S.p.A. has committed to net zero emissions by 2050, but its actions run contrary to this goal. For example, the complaint alleges that ENI has not complied with the OECD Guidelines for Multinational Enterprises due to: *(i)* the fact that the company's strategic plan does not foresee a sufficient cut in GHG emissions in the coming years; *(ii)* the lack of a climate impact assessment of the company's activities; *(iii)* the absence of transparent and adequate information; and *(iv)* the failure to develop a plan for risk prevention and mitigation. As the National Contact Point is a non-judicial grievance mechanism, the applicants have requested mediation with ENI, since the latter did not comply with a notice to desist previously sent to the company by the Legality for Climate Network

Last but not least, special mention should be made of Italian case law related to "greenwashing", since the key climate-related cases in Italy have focused on unfair commercial practices. In this respect it is worth mentioning, in particular, the following cases:

1) Italian Competition Authority ("ICA") fine to ENI S.p.A.: in 2019 ICA fined ENI S.p.A. for 5 million euro, for having launched a misleading marketing campaign for its *Diesel+* fuel. The decision was taken upon notice of some NGOs. In particular, ICA found that the marketing campaign constituted an unfair commercial practice, within the meaning of Articles 21 and 22 of the Consumer Code. Indeed, it consisted in the dissemination of misleading and omissive information concerning the positive environmental impact related to the use of Eni *Diesel+* fuel, as well as the particular characteristics of that fuel in terms of reduction of consumption and GHG emissions. The fine was confirmed, after ENI's appeal, by the Regional Administrative Tribunal of Lazio in 2021.

2) Alcantara S.p.A. vs Miko S.r.l., which is the first Italian case related to "greenwashing" between competitor companies. It was commenced by the former in July 2021 before the local civil Court of Gorizia in the Friuli-Venezia Giulia region. In particular, Alcantara S.p.A., a manufacturer of a micro-fibre product used in the automotive sector, requested the Court to issue an *interim* order preventing one of its competitors, Miko S.r.l., from continuing its "green advertising", which was allegedly false, vague and non-verified, and constituted an act of unfair competition.

In November 2021 the Court of Gorizia upheld Alcantara's request, deeming that Miko's "green claims" were a form of misleading advertising in breach, *inter alia*, of article 12 of the Italian "Code of Self-Discipline for Commercial Communication", and accordingly ordered Miko to immediately remove these claims from any website, social media platform, etc. and to publish the Court order on its website for 60 days. The Court stated, *inter alia*, that ecological virtues praised by a company could influence purchasing choices and, accordingly, in order to prevent any abuse or deceptive information, "green claims" must be true, clear and scientifically verifiable.

6. What is the legal framework for Climate Change Litigation?

6.1 Overview

Companies are well advised to look not only at their home jurisdiction when it comes to climate change litigation. The relevant legal framework for Climate Change Litigation depends on the place of jurisdiction as well as the applicable law. Within the EU, international jurisdiction is to be determined pursuant to the Brussels Ia Regulation. As a general rule a company can be sued at the place where it has its statutory seat, central administration or principal place of business. But places of special jurisdiction are also available for claimants. Furthermore, as far as climate change litigation does not relate to a contractual relationship, the applicable law is to be determined pursuant to the Rome II Regulation. Thus, as a general rule the law of the country in which the damage occurs will be applicable. If, however, the non-contractual obligation directly or indirectly arises out of environmental damage, the person seeking compensation for damage may choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred. As an example: The above-mentioned Peruvian farmer was allowed to sue the German company RWE in Germany and to choose German instead of Peruvian law due to these provisions.

As a consequence, even if climate change litigation addresses similar issues related to GHG emissions worldwide, the merits of the claim depend, *inter alia*, on where the action is actually filed, and which law is applicable. Often, different options are available in one specific case so that the claimant may choose the most promising option. Beyond that, there is an ongoing discussion in many jurisdictions as to whether and when a company can be held liable for their subsidiaries abroad.

Until now most climate change disputes are to be decided according to national, non-unified law. However, the European Commission is pushing forward with regard to ESG legislation. In addition to the Taxonomy Regulation and the CSRD (see above), the European Commission published its proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) in February 2022 which provides, *inter alia*, for civil liability of companies for damages if they failed to comply with the obligations laid down in specific provisions of the CSDDD dealing with prevention or mitigation of potential adverse human rights and/or environmental impact and termination of actual adverse impact. Furthermore, in March 2022 the European Commission proposed a Directive on empowering consumers for the green transition through better protection against unfair practices which was complemented in March 2023 by a further proposal for a Directive on the substantiation and communication of explicit environmental claims. It remains to be seen what the final directives will provide for. At the moment the following provisions are relevant in France, Germany and Italy.

6.2 France:

French private law, and in particular business law, is increasingly incorporating rules related to environmental protection. A recent law of May 22, 2019 has thus modified the definition of "Company" to now provide that: "*the company is managed in its social interest, taking into consideration the social and environmental issues of its activity*".

In addition to the duty of vigilance mentioned above, which France was the first European country to adopt - before its probable generalization in the legislation of other member countries at the instigation of the European Commission - there has been a tremendous development in contemporary French legislation of measures specifically aimed at regulating the actions of economic actors in environmental matters, or at least at encouraging them to adopt virtuous practices, and which are likely to be used against them in the context of private law disputes.

Among these tools, and without claiming to be exhaustive, one of the most remarkable is the consecration, in articles 1246 et seq. of the French Civil Code, of the notion of ecological harm. Clearly departing from the distinction which is the *summa divisio* in French law between private and public law,

the legislator has now provided for the prevention of, and, failing that, compensation for, damage to the environment - a subject of general interest - by means of the tools of the ordinary law of civil liability, when these are normally only available for the defence of private interests. For the time being, it is essentially "localized" ecological damage that the courts have had occasion to deal with (for example, the damage caused to the ecosystem of a natural park as a result of illegal fishing or the damage caused by the increase in the surface area of a body of water as a result of undeclared work), but in the future it could be aimed at damage on a larger scale, such as that caused by global warming, the causes of which could be attributable to certain companies.

It is then important to mention a certain number of measures recently introduced into French law, the purpose of which, or at least the effect of which, is part of what could be described as the fight against "greenwashing". In this respect, the Climate and Resilience Act (No. 2021-1104) of August 22, 2021 established "greenwashing" as a variant of the offence of "misleading commercial practices" provided for in Article L. 121-2 of the French Consumer Code: such a practice is now defined in this text as one that *"relies on false allegations, indications or presentations or that is likely to mislead and that concerns"*: the *"environmental impact"* of the goods or services offered, or *"the scope of the commitments made by the advertiser, in particular with respect to the environment"*. As mentioned above, Nespresso and TotalEnergies have already been the target of actions on this basis which, in addition to constituting a criminal offence, could be used in the context of a civil action, in particular that brought by a competitor company on the basis of unfair competition. In this respect, the Court of Cassation has already admitted that non-compliance with environmental law could, in itself, be analyzed as constituting unfair competition.

Furthermore, and in the same vein, the aforementioned law of 22 May 2019 has allowed companies to include in their articles of association, alongside the definition of their corporate purpose, *"the principles with which the company is equipped"* and which constitute its *"raison d'être"*. Some companies, such as Engie or Danone, have been tempted to use this option and proclaim their commitment to environmental protection values. Such an initiative should not be taken lightly: the French *Conseil d'Etat* has already had occasion to state that *"for companies that have made this choice, inclusion in the articles of association will oblige them to comply with it"*.

6.3 Germany:

There are no specific statutory provisions in Germany dealing with corporate responsibility to reduce GHG emissions or to compensate damages caused by climate change. Thus, in the climate change disputes pending in Germany the claimants primarily rely on the general liability provisions in the German tort and property protection law as contained in the German Civil Code (BGB), since no contractual relationship exists between the parties. As there are no final court decisions up to now, many legal questions regarding climate change disputes remain open. One of these questions is whether respective claims can be grounded on general provisions or whether it is up to the legislator to first impose binding emission or reduction requirements (as ruled by several District Courts). Another very complex issue is causality. Liability can only be incurred if there is a sufficient causal link between the action or omission and the damage. With regard to climate change it is disputed whether a sufficient causal link exists between GHG emissions of a specific company, global warming, alteration of a microclimate, environmental impact of the altered microclimate, and the specific weather or natural event causing the specific damage.

The German Supply Chain Due Diligence Act imposes certain human rights due diligence obligations on large companies domiciled in Germany. However, this Act does not amend companies' liability, as it explicitly states that a violation of obligations under the Act does not give rise to any liability under civil law, but that any liability under civil law arising independently of the Act remains unaffected.

Actions due to alleged greenwashing are based on the general provisions of the German Unfair Competition Act pursuant to which advertising statements must not be misleading. A rather broad understanding is to be applied, so that not only factually incorrect information is covered, but also objectively accurate information which is likely to cause a misconception in the course of business.

6.4 Italy:

In lack of a specific legal framework for Climate Change litigation, in Italy reference shall be made to general law principles, which, however, are evolving in a more sensitive way with respect to environmental issues. First of all, the Italian constitutional law, which in 2022 was updated in its Article 9, regarding the fundamental principles of the Italian constitutional Charter, by including, besides the protection of the *"landscape and the historical and artistic heritage of the nation"*, also the protection of *"the environment, biodiversity and ecosystems, also in the interest of future generations"*. In same year also Article 41 of the Italian Constitution, regarding economic relations, was amended by making reference also to the need of protection of health and the environment in the framework of the free exercise of private economic initiative.

Furthermore, the Italian Civil Code, although it does not set specific rules dedicated to climate change (as it was published in 1942 and not yet updated on the matter), nevertheless still represents a valid point of reference also for Climate Change litigation. For instance, in this respect reference can be made (as it was in the aforementioned Italian litigation cases) to the general principles on tort liability set forth by Article 2043 of the Italian Civil Code, according to which *"any intentional or negligent act, that causes unjust damage to others, obliges the perpetrator to compensate the damage"*.

It emerges from case law, *inter alia*, that *(i)* the Court of Cassation affirmed the legal principle according to which the *"ineliminable core constituent of personal dignity"* must be guaranteed by the State in cases of serious risk deriving from climate change, given that *"all States are bound to guarantee individuals living conditions that make it possible to fully exercise the right to life, in its broadest sense"* (Order no. 5022/2021); *(ii)* the Council of State stated the *"pre-eminent interest of the community in the gradual reduction of the component of carbon dioxide in the atmosphere"* (Ad. Plen. no. 9/2019); *(iii)* the Constitutional Court declared the public purpose of *"eliminating dependence on fossil fuels"* in connection with the *"strong favour"* towards energy sources other than fossil fuels (Constitutional Court, 46/2021).

At last, some detail legislation recalls the importance of an ESG approach (this happened recently in specific banking secondary legislation).

7. Is there a risk for personal liability of management board members?

7.1 Overview

Whether and when management board members can be personally held liable in connection with aspects of climate change is a largely open question. While the above considerations were focused on possible claims against companies, the perspective changes here as it is now essentially a matter of possible claims by the company (or even third persons) against management board members for damages related to climate change. Possible scenarios are truly manifold. In any case, the liability of the management board members for a breach of duty is governed by the general liability provisions contained in the applicable national company law. Therefore, it makes no difference whether the alleged breach of duty relates to aspects of climate change or other issues.

It should be noted that the above-mentioned proposal for a Corporate Sustainability Due Diligence Directive envisages that directors would be personally responsible for ensuring the implementation of due diligence measures to which the company is bound, so that they may be held personally liable in the event of the company failing to meet its obligations.

Again, Shell is on the front line of climate change litigation in this specific area. In 2022, an NGO initiated legal proceedings against Shell's board members in the UK, seeking to hold them personally liable since they allegedly failed to properly prepare for the energy transition and, thus, would be in breach of their duties under the UK Companies Act. Only recently the NGO has taken derivative action to compel Shell's Board of Directors to act in the best long-term interests of the company by strengthening its climate plans, by arguing that Shell's board members are "mismanaging the material and foreseeable climate risk which the company is facing, in breach of its legal duties". However, the UK High Court ruled that application and evidence "do not disclose a prima facie case for giving permission to continue the claim". Additionally, in the Netherlands it was brought forward that the board members would not take sufficient action to comply with the order of the Hague District Court (see above) and, thus, would be personally liable in this respect.

The legal framework in France, Germany and Italy, respectively, does not exclude that similar claims are brought forward against board members of companies domiciled in these countries:

7.2 France:

The question arises in different terms depending on whether the liability of the director is sought internally by the company itself or by a shareholder, or whether the action is brought by a third party. If the directors cannot normally be held liable, with respect to third parties, for environmental damage, like any other damage, attributable to the company, this principle gives way in the case of *"faute détachable"* (i.e., intentional fault of a particular gravity incompatible with the normal exercise of the company's functions). However, since case law assimilates the intentional criminal offence to *"faute détachable"*, the considerable development of the repressive legislation in this matter is likely to pave the way to more and more liability actions on the civil ground against directors – in addition to the criminal proceedings to which they are, in this case, likely to be personally subject, alongside their company. In internal relations, the director must be particularly vigilant and ensure that his management complies with the principles and values to which the company has proclaimed its attachment, notably through the adoption of codes of governance, or the inclusion of a *raison d'être* in its articles of association, if applicable. Indeed, these principles are imposed on the company insofar as they participate in the definition, in the internal order, of the terms of its mission, so that their disregard could certainly be invoked for the characterization of a mismanagement likely to engage his responsibility. More generally, and although the scope of these principles still seems rather unclear, the director is the first concerned by this new provision of the Civil Code, according to which the company is *"managed in its corporate interest, taking into consideration the social and environmental stakes of its activity"*.

7.3 Germany:

In managing the affairs of the company, the members of the management board are obliged vis-à-vis the company to exercise the due care of a prudent manager faithfully complying with the relevant duties. No dereliction of duties will be declared in those instances in which the member of the management board, in taking an entrepreneurial decision, was within its rights to reasonably assume that it was acting on the basis of adequate information and in the best interests of the company. Members of the management board acting in dereliction of their duties are liable vis-à-vis the company as joint and several debtors to compensate the company for any damage resulting from their actions (personal internal liability).

There are no court rulings yet which define the due care of a prudent manager, specifically with regard to climate change. However, it seems plausible that acting on the basis of adequate information might include climate change and its consequences if relevant for the respective entrepreneurial decision. Furthermore, the management board is responsible for the company's compliance with the law. This also includes, *inter alia*, observance of the German Unfair Competition Act.

Within a stock corporation, the Supervisory Board has to assess and decide whether the company asserts claims against board members. However, the general meeting may resolve by simple majority to appoint special auditors in order to audit any matter relating to the management of the company's business, and to assert damage claims against board members. Additionally, if the general meeting rejects a respective motion, minority shareholders whose shares are at least equivalent to one hundredth of the share capital or to a stake of 100,000 euros may file a petition to the court to appoint special auditors or, in the event of serious misconduct, even to allow them to assert damage claims in their own name. However, the latter has only little practical significance.

The personal external liability of board members vis-à-vis third parties is an exception that requires special justification due to the principle of concentration of liability. Under narrow conditions, however, the managing director may also be directly liable towards third parties, in particular in tort.

7.4 Italy

There are no rulings yet in Italy establishing what specifically constitutes the diligence of a prudent manager in relation to climate change.

One must therefore, at present, refer to the provisions (albeit general, and not specific to the issue of climate change) enshrined in the Italian legal system and adapt them with specific regard to individual cases.

The directors' liability to the company is a contractual liability for breach of duty of conduct incumbent on them by law or by statute. To prove directors' liability it is therefore necessary to demonstrate:

- the existence of the breaches of the obligations incumbent on the directors
- the damage incurred by the company
- the causal link between the violations and the damage.

It is the duty of directors to fulfill the obligations imposed on them by law and the bylaws with the diligence required by the nature of the office and their specific skills.

It should be noted, however, that discretion of directors' management choices is a well-established principle under Italian case law. From this principle it follows that no liability can be attributed to directors in case their managerial choices resulted in a damage to the company they administered. In fact, liability arises solely from the violation – to be assessed by means of an *ex ante* judgment – of legal obligations and not from having made choices that turned out to be inappropriate ex post.

Moreover, directors are also liable towards the company's creditors (only for failure to comply with obligations to preserve the integrity of the company's assets), as well as to single shareholders or third parties which were directly harmed by intentional or negligent acts of the directors and/or as a consequence of the breach of their specific obligations, inherent to their office, or of general obligations, established by law to protect the rights of third parties. In the latter case, the following conditions must be met: the directors must have *(i)* committed an unlawful act in the exercise of their office and and *(ii)* caused a direct damage to the assets of the individual shareholder or third party, that is to say, a damage which is not merely a reflection of the damage possibly suffered by the company's assets.

In the above framework, it seems therefore possible for board members to be held liable also in connection to climate change issues.

IMPACT AND MITIGATION

8. What is the potential financial impact of climate change litigation?

Generally speaking, the impact of climate change litigation can be enormous, as the external costs of GHG emissions and climate change are huge, and the business model of nearly every company involves GHG emission. Thus, if climate change litigation leads to an internalization of these costs, it would have a huge negative impact on the enterprise value and to adapting the company business model to climate change. Beyond that, climate change litigation can have considerable negative reputational consequences which translate into potential further financial loss, as a negative reputation may make it more difficult to attract and retain customers, investors and employees.

9. How can my enterprise mitigate the risk of climate change litigation?

Your enterprise can mitigate the risk of climate change litigation by taking steps to reduce its carbon emissions and environmental impact, implementing sustainable business practices, and keeping up to date with developments in climate change legislation and regulations, by monitoring relevant news sources, consulting with legal experts, and closely following changes in climate change legislation and regulations. Additionally, it is important for companies to include climate change risks in their overall risk management and strategy, to consider how they can mitigate these risks, and to communicate and disclose their actions on climate change to the public and stakeholders in a legally admissible way.

OUTLOOK

10. What is to expect?

We assume that we will see a further increasing number of climate change lawsuits in the near future. It will certainly take a while until at least the most important questions will be answered by supreme court decisions in the different jurisdiction. Until then, a considerable uncertainty as to the consequences of climate change litigation remains. Furthermore, we may see superseding legislation which goes beyond already existing carbon pricing schemes and emission trading systems. Specific legislation could decrease the relevance of how climate change is to be dealt with pursuant to the general civil law provisions.

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