

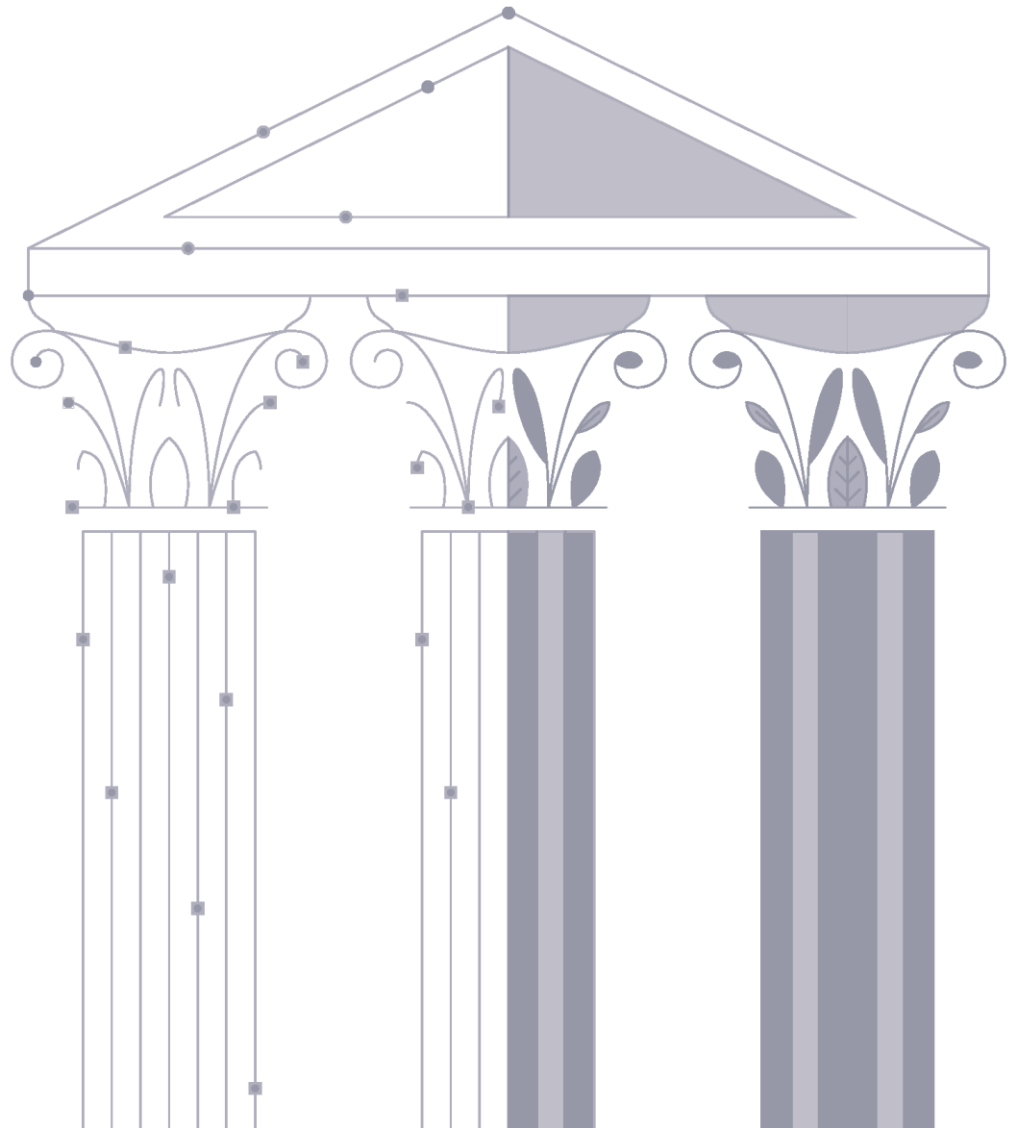
Climate change law in Europe

What do new EU climate laws mean for the courts?

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and Emily Bradeen

Policy report

March 2023



The Centre for Climate Change Economics and Policy (CCCEP) was established in 2008 to advance public and private action on climate change through rigorous, innovative research. The Centre is hosted jointly by the University of Leeds and the London School of Economics and Political Science. It is funded by the UK Economic and Social Research Council. www.cccep.ac.uk

The Grantham Research Institute on Climate Change and the Environment was established in 2008 at the London School of Economics and Political Science. The Institute brings together international expertise on economics, as well as finance, geography, the environment, international development and political economy to establish a world-leading centre for policy-relevant research, teaching and training in climate change and the environment. It is funded by the Grantham Foundation for the Protection of the Environment, which also funds the Grantham Institute – Climate Change and the Environment at Imperial College London. www.lse.ac.uk/granthaminstitute

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Acknowledgements

The authors declare financial support from the Economic and Social Research Council (ESRC), the Foundation for International Law for the Environment and the Grantham Foundation for the Protection of the Environment for the submitted work. The authors declare no other relationships or activities that could appear to have influenced the submitted work. The views in this report are those of the authors and do not necessarily represent those of the host institutions or funders. Any errors and omissions remain those of the authors.

The authors thank Annalisa Savaresi, Veerle Heyvaert, Lara Fornabaio, Guillermo Ramo, Marcin Stoczkiewicz, Sophie Marjanac, Amandine Van Den Berghe and Kaja Blumtritt for their helpful review comments on this report.

Georgina Kyriacou copy-edited the report.

This report was first published in March 2023 by the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy.

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Suggested citation: Higham C et al. (2023) *Climate Change Law in Europe: What do new EU laws mean for the courts?* London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

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Summary

- **Europe is undergoing an unprecedented shift in the scale and ambition of climate policy** following the announcement of the European Green Deal and the passage of the European Climate Law.¹
- **There is a significant history in Europe of climate litigation being used as a lever to influence the outcomes and ambition of climate policy.** Over the past three decades a broad array of litigants has used European legislation in a range of climate change cases. Some of the cases can be understood as examples of *strategic* litigation: where the litigants are not exclusively concerned with their own rights or interests but rather seek to advance a broader social goal.
- **We anticipate an increase in climate litigation cases as a result of recent and ongoing legislative efforts at the EU level.** In particular, significant litigation is likely following the introduction of the 'Fit for 55' package, the European Union's flagship decarbonisation measures. Much of this litigation is likely to involve challenges to government action or inaction. It may include both strategic and non-strategic cases. Possible cases could include:²
 - **Litigation focused on the extension of the European Union Emissions Trading System (EU ETS),** building on a history of litigation following previous reforms. Such litigation may seek to prevent or delay the implementation of new rules that impose new costs and obligations on the private sector.
 - **'Government framework' litigation,** focused on the overall ambition and implementation of new climate policies and legislation by the EU and its Member States. In some circumstances such cases may be grounded in human or constitutional rights and argue that governments are not taking sufficiently ambitious action to protect these rights. In others, cases may be grounded in domestic climate change framework laws, arguing that government actors are failing to comply with relevant duties established under these laws.
 - **'Just transition' litigation** over the distribution of benefits and burdens of climate action, and over decision-making processes at the Member State and EU level. This is likely to be particularly relevant in the context of new requirements for Member States to create 'Social Climate Plans' to access the Social Climate Fund created by the new legislation.
 - **Disputes over what constitutes 'renewable energy',** particularly regarding bioenergy. We also anticipate disputes over permitting for both renewable and fossil fuel projects to remain a focus of litigation.
- **Measures aimed at ensuring that the EU's climate goals translate into activities in the real economy may well give rise to litigation against companies and financial institutions.** In addition to extending existing obligations under the EU ETS, several new measures are focused on corporate governance. Many of these measures share a common focus on the collection and disclosure of information, with a goal of influencing the choices made by consumers and investors. Measures under debate also include extending corporate due diligence obligations to climate change, but current draft legislation may fall short of imposing clear entity-wide obligations to minimise climate damage.

¹ We focus on legislation issued by the legislative bodies of the European Union in the report but as EU legislation exerts a significant regulatory pull on near neighbours of the Union, we include the United Kingdom and countries that are members of the European Free Trade Agreement in our survey of litigation.

² The term 'strategic litigation' is defined in Part 1 of the report.

Key measures discussed include:

- **Reforms to the governance of corporations and corporate value chains**, the extent of which are unclear in current legislative proposals, and which are likely to remain the subject of disputes even once the legislation is passed.
- **Reforms regarding the provision and use of sustainability information** in financial transactions and by financial service providers.
- **Reforms to consumer protection legislation**, which may be invoked in the context of a recent wave of 'climate-washing' litigation across Europe.
- **It is critical that governments and legislators, businesses, lawyers, and civil society groups understand the bigger picture of how climate change law in Europe is changing.** This includes a need to understand legislative developments holistically, rather than focusing on individual measures in isolation. It is important to understand new and amended legislation in the context of the history of European climate litigation, and to anticipate the ways in which litigation may be used by a wide range of actors in the coming years. In particular:
 - **Governments and legislators should try to avoid legal controversy by bringing together key stakeholders** in the development of further legislation and plans for implementation.
 - **Businesses and their professional advisors should be aware of litigation risk** and reform internal practices to avoid this.
 - **Civil society groups should consider key issues for advocacy and engagement campaigns**, with litigation pathways being available where these options are not successful.

Introduction

In November 2019, the European Commission issued a communication on its flagship [European Green Deal](#), setting out plans to “transform” the European economy and set it on “a more sustainable path”.

In order to implement this political commitment, European legislators first approved the [EU Climate Law](#) in 2021 and are now working on a sweeping package of legislative reforms, commonly referred to as the ‘Fit for 55 package’, in reference to the European Climate Law’s objective of reducing emissions by 55% compared with 1990 levels by 2030. This package includes new measures and amendments on a wide-ranging set of issues, including updates to existing regulatory mechanisms such as the European Union Emissions Trading System (EU ETS) and the Effort Sharing Regulation, and revised legislation regarding renewable energy, transport and land use. The implementation of the package is also complemented by several other legislative reforms that will impact the provision of climate information and management of climate risks and impacts by the private sector.

Understanding the likely impacts of this legislative package in Europe and beyond is crucial. Stakeholders such as industry, policymakers and legislators, and civil society will need to understand how the different parts of the package interact, and what their cumulative effect will be (Piebalgs et al., 2021). Existing analysis has tended to focus on individual aspects of the package. However, there is a need to understand changes to the legislative landscape in the round. **In this report, we take a bird’s-eye view of the issues, helping the reader to contextualise individual developments to which more attention has been given elsewhere.**

Given the breadth of the proposals, the new package is also likely to result in new climate change litigation being brought. The Intergovernmental Panel on Climate Change (IPCC) has recognised the important role that climate litigation plays in influencing the outcome and ambition of climate governance (IPCC, 2022). We anticipate that litigation may play a major role in Europe over the coming years. So called ‘strategic’ climate litigation might seek to delay the implementation of legislation or to ensure its effective implementation (Setzer and Higham, 2022; see further discussion in Part 1). However, other types of litigation are also likely to be filed.

We present an overview in the report of key trends and themes in EU climate litigation and legislation. Our aim is to help readers develop an understanding of future directions in European climate law and the role the courts may play in shaping Europe’s transition to a low emission society. Our premisses are that clearer legislation enables more legal certainty and reduces the role of litigation. Businesses and their professional advisors need to understand the new legislation and incorporate it into their due diligence work and decision-making. With European companies assessing the carbon footprint of their operations and value chains, supply chains globally are likely to be impacted. Civil society will need to encourage more ambition at both the national and EU levels.

Box 1. Data sources and methods

Litigation data

Litigation analysis for this report is based on the following key sources:

i) *Climate Litigation in Europe: A summary report for the European Forum of Judges for the Environment*

This earlier report was written by the authors for the European Forum of Judges for the Environment 2022 Annual Conference (Setzer et al., 2022) and forms the basis for the current report. The earlier report reviewed climate litigation in Europe over the past three decades. Here, we have drawn on that analysis to help us understand the possible future trends for climate litigation in the face of major legislative changes described in this report.

ii) *The 'Global Trends in Climate Litigation' series*

The *Global Trends in Climate Litigation* reports published by the Grantham Research Institute review key global developments in climate change litigation and are published annually. The latest, *Global Trends in Climate Litigation: 2022 Snapshot*, covered the period from May 2021 to May 2022. The series can be found on the Grantham Research Institute website.

iii) *Climate litigation databases*

The report also uses data from the Sabin Center for Climate Change Law at Columbia Law School's Global Climate Litigation Database, maintained by the Sabin Center in partnership with institutional partners including the Grantham Research Institute. A separate climate litigation database for the United States is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter Kaye Scholer.*



Legislation data

Information regarding legislation currently in force is drawn from the Climate Change Laws of the World database maintained by the Grantham Research Institute, in partnership with institutions including the Sabin Center. Information regarding legislation that is still in the process of being passed has been drawn from official EU websites. We have consulted the original Commission proposals for legislation found on the EUR-lex website, as well as drafts and documents on the official websites of the Parliament and the Council.

Geographical scope

The legislation discussed in this report is formally binding within EU members, but it exerts a strong regulatory pull in other jurisdictions, particularly those that have a close relationship with the EU's single market. For this reason, we have defined European climate litigation as litigation occurring within EU Member States or before EU institutions and regional courts, as well as litigation occurring in countries that are parties to the European Free Trade Agreement and in the United Kingdom.

*Data that informs Part 1 of the report is based on information in the databases as of 31 December 2022.

Structure of the report

Part 1 provides a brief overview of the role that climate litigation has played in shaping Europe's climate legislation to date. It reviews the way in which European climate legislation has been used in cases at both the EU and Member State levels, considering the different approaches that litigants have taken to try to influence the climate policy debate, whether seeking more or less climate action.

Part 2 provides an overview of the measures contained in the EU's flagship Fit for 55 package, which was proposed by the Commission in July 2021. Although much of this legislation is still subject to further negotiations, the overall shape of the proposed reforms – including their broad scope and ambition – is already clear. Given the extensive nature of these developments and their likely impact on Member States, companies and individuals, we consider how and where conflicts and uncertainties might arise and lead to a potential increase in climate litigation.

Part 3 looks beyond the Fit for 55 package towards a broader programme of legal reforms associated with the EU's climate ambitions. While it is difficult to draw the precise limits around this extensive legislative programme, we focus on critical reforms that aim to integrate climate action into the real economy. Our focus is on reforms to corporate governance and finance, and reforms to measures aimed at addressing the need for more robust information on the climate impacts of key products and services to inform decision-making. While some of the measures discussed predate the Fit for 55 package, each measure included has been explicitly linked to the EU's 2030 target or to the passage of the European Climate Law, which in turn provides insight into the broader picture of major change underway across the bloc.

Part 1. The role of litigation in Europe's climate legislation

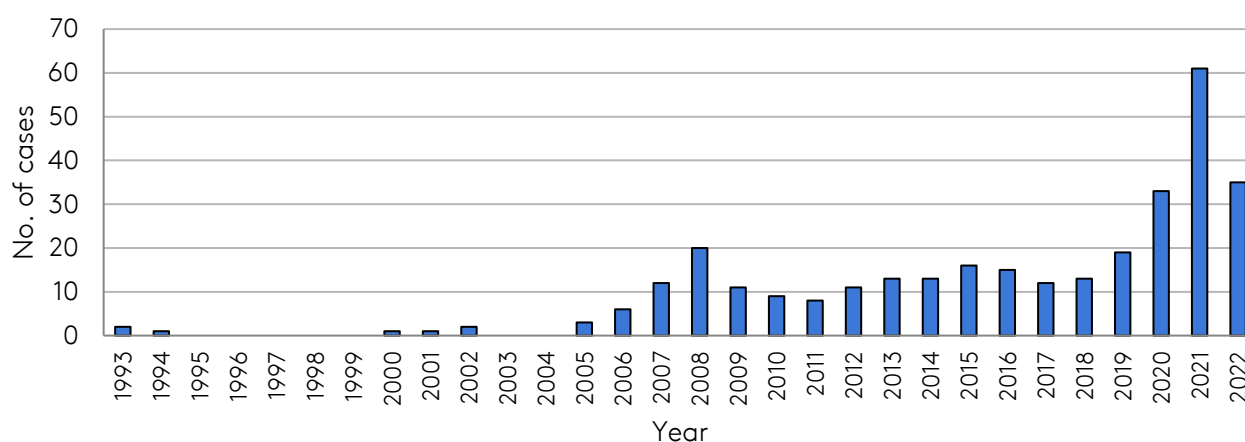
Continental Europe has been a fertile ground for climate litigation. Some of this litigation can be connected to past developments in legislation at the EU level, and some can be understood as trying to fill gaps in legislation at the EU and national level.

This section emphasises the strong connection between EU legislation and the shape of the litigation documented to date, drawing from a recent study of the landscape of European climate litigation (Setzer et al., 2022). It also provides an overview of the potential avenues by which different types of litigants may bring cases before either the Court of Justice of the European Union (CJEU) or the courts of EU Member States challenging the validity or interpretation of EU climate legislation. In addition, we note that domestic legislation transposing EU legislation may also give rise to new types of climate litigation, even when these do not directly involve questions of EU law (see Table 1).

1.1. Climate litigation in Europe

More than 318 climate cases have been identified across Europe since 1993 – see Figure 1 (see also Setzer et al., 2022).

Figure 1. Number of cases filed in European jurisdictions, 1993 to 2022



The mid-2000s saw a boom in European climate policy and legislation and, subsequently, in litigation. When the first iteration of the EU ETS Directive came into force in 2005 it had a significant impact on the activities of private parties. Litigation spiked in 2008, as the EU ETS was moving into its second phase, with disputes surrounding the interpretation of Directive 2003/87/EC (EU ETS Directive) and the relative expansion of the competencies of the European Commission and Member States in the regulation of greenhouse gases (see Bogojević, 2010).

Since around 2015, European climate litigation has followed the global trend for increasingly complex climate change litigation, with courts from all over Europe seeing a growing number and diversity of climate cases filed (see further discussion of global litigation trends in Setzer and Higham, 2022).

A key trend in the litigation documented during this period has been the growth of 'strategic' litigation. Strategic cases can be understood as cases that seek to use the courts and the law to

generate social change (Batros and Khan, 2022). In these cases, litigants are not exclusively concerned with their own rights and interests: instead, they also seek to highlight broader systemic problems that they believe violate existing legal standards. Such cases are typically accompanied by media campaigns and are frequently brought or supported by advocacy groups and NGOs who seek to use the case to initiate a broader discussion. Even where such cases are unsuccessful before the courts, they may have significant impacts on the climate governance debate in the countries where they are brought. In many instances, strategic litigation cases employ novel legal arguments, such as the famous case of *Urgenda Foundation v. State of the Netherlands*. However, we consider that such arguments are not always necessary for a case to be strategic, and that in many strategic cases litigants may rely on relatively straightforward questions of statutory interpretation.

The motivations behind strategic climate cases can be quite distinct. Some seek to advance climate action. These are referred to as 'pro-climate', 'pro-regulatory' or 'climate-aligned' cases. These are the cases to which most discussion has been paid to date in both academic literature and the media, and which will be the focus of this report.

Climate cases can also aim at delaying or preventing climate action. These are referred to as 'anti-climate', 'anti-regulatory' or 'non-climate aligned' cases (Peel and Osofsky, 2015; Markell and Ruhl, 2012; Setzer and Higham, 2022; Silverman-Roati, 2021). Typically, it is more difficult to establish whether these lawsuits are truly 'strategic' in nature, although there are clear examples where this has been the case (see Box 2).

Box 2. Anti-climate litigation



Anti-climate litigation often has considerable impact on climate policy, as demonstrated by the literature. At the EU level, this has previously played out in the case of *Air Transport Association of America v. Secretary of State for Climate Change*. The case was brought before the UK courts following the adoption of amendments to the Directive establishing the European EU Emissions Trading System that would have seen international aviation included in the system. While the Court of Justice of the European Union issued an unfavourable judgement, the case nevertheless formed an important part of a campaign waged by multinational airlines against the new measures, which did eventually achieve significant political success (Hartmann J, 2013; Scott and Rajamani, 2012; Chalmers et al., forthcoming 2024).

More recently, US fossil fuel company Exxon has also threatened to launch litigation against the EU, challenging the planned imposition of a 'solidarity' tax on fossil fuel companies as part of the bloc's response to the dual challenges of global gas shortages and the climate crisis (Brouwer et al., 2022). This litigation is a clear example of the way in which the courts may be used to challenge the introduction of the ambitious climate measures discussed below.

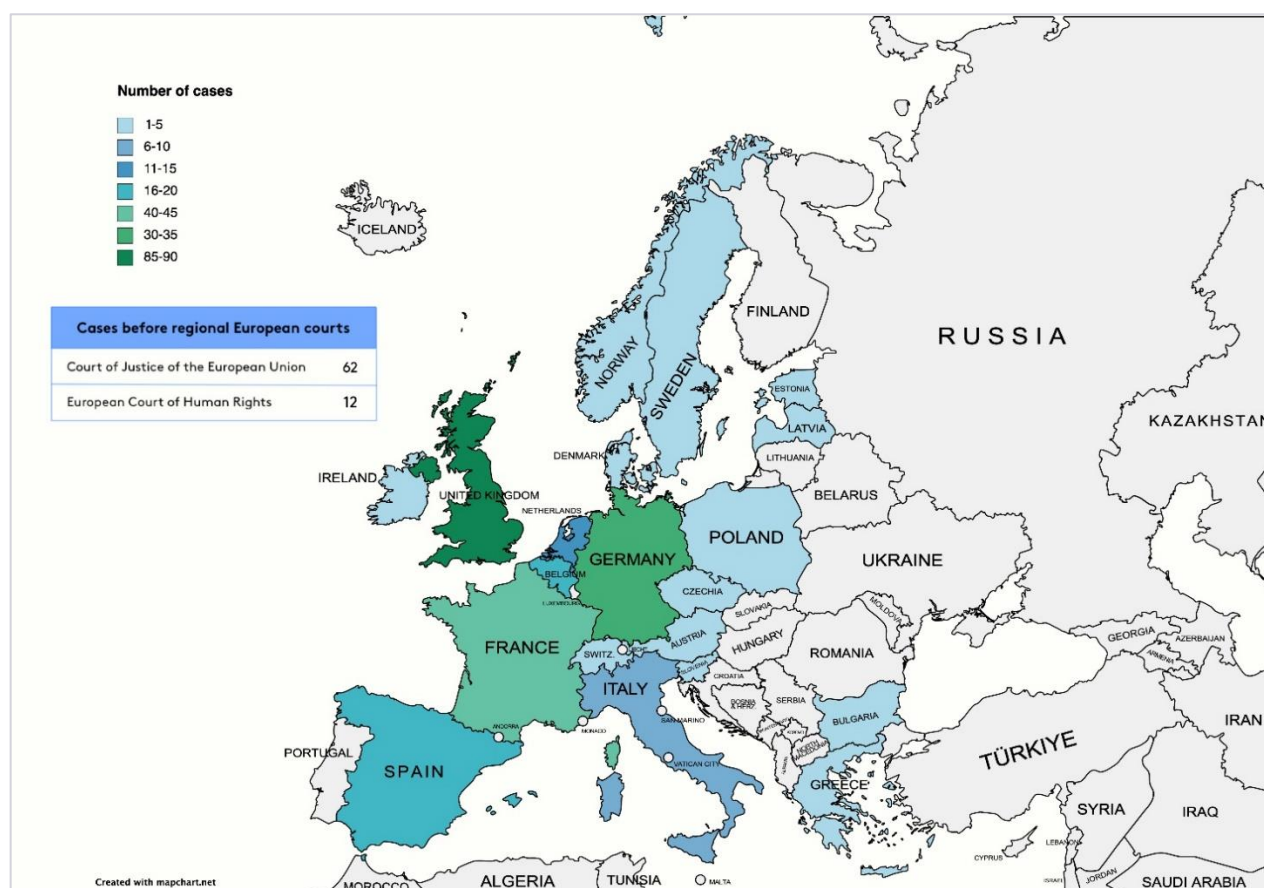
Photo: Kevin Woblick, Unsplash

1.2. The connection between climate legislation and litigation in Europe

Currently, climate cases of all types have been documented in 20 countries in Europe (see Figure 2 below). The UK, France, Germany and Spain are the countries with the most cases filed before their domestic courts and collectively account for more than half the total number of cases. More than 60 cases have now been filed before the Court of Justice of the European Union (CJEU), which is divided into the Court of Justice and the General Court, and at least 10 cases are pending before the European Court of Human Rights (ECtHR).³ The broader trend in litigation suggests that most countries in the European continent will see climate cases filed in the coming decades. This expansion in litigation is likely to be driven in part by a greater interest in using litigation as a strategic intervention, as well as the ongoing development of an increasingly specialised community of litigants with access to growing resources (Vanhala, 2022).

European climate legislation has been central to a significant proportion of the climate litigation cases filed in Europe to date. Strategic cases (both climate-aligned and non-climate-aligned) have been brought to seek broader change in the EU’s climate policy or its implementation at the Member State level. Non-strategic cases, in turn, have been brought to clarify or implement EU directives and regulations.

Figure 2. Map of cases filed in the EU27, EFTA countries and the United Kingdom



Source: Authors

3 One case before the ECHR, *Pavlov and Others v. Russia*, has been excluded from this report as it was brought on environmental rather than climate grounds. However, the Court’s ruling examined the issue of whether the right to a healthy environment exists under the European Court of Human Rights Convention, and found that while this right may not exist explicitly under the Convention, Article 8 may be interpreted to encompass positive obligations relating to the protection of the environment. See ruling here: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-219640%22%5D%7D>. As such, the case has been included in the CCLW and Sabin databases. A further two climate cases brought against the UK were also dismissed in early 2023.

In Table 1 we outline key avenues by which European climate law has been or could be used in climate litigation. For ease of understanding, we break this down by the type of applicant, since certain types are given privileged access to EU courts under EU law.

Table 1. Climate litigation involving EU legislation, by applicant type

Type of applicant	Types of action
<p>Citizens (including both natural and legal persons, i.e. individuals but also companies and NGOs)</p>	<ul style="list-style-type: none"> • Citizens can bring ‘direct action’ before the General Court against EU Institutions if they fail to act when required to do so by EU law or if an action by the Institution is contrary to EU law. Applicants must demonstrate that the matter is of ‘direct and individual concern’ to them. This avenue was unsuccessfully attempted in <i>Armando Carvalho and others v. European Parliament and Council</i> (see further below). Cases have also been brought by corporate actors challenging actions by the European Commission to implement EU climate laws (see <i>Lípidos Santiga v. Commission</i> and <i>Saint-Gobain Glass v. Commission</i>). One further recent effort to access direct action proceedings is a case brought by a Member of the European Parliament challenging the new sustainable finance taxonomy for its inclusion of gas as a green fuel (<i>Repasi v. European Commission</i>; see Part 3). • Environmental NGOs can ask the Commission and other EU Institutions to consider whether an administrative act or omission contravenes EU law. If not satisfied with the results of the review, they can then bring proceedings before the CJEU (as per Regulation 1367/2006 – ‘the Aarhus Regulation’). Following its successful use in the climate context in the case of <i>ClientEarth v. European Investment Bank</i>, this process is currently being used by environmental groups to challenge decisions made by the Commission regarding the implementation of the Taxonomy Regulation (<i>Austria v. European Commission</i>; see Part 3). • Citizens may bring cases challenging the interpretation or the validity of EU law before the courts of Member States. These cases may – and sometimes must – result in Member State courts issuing a request for a preliminary ruling to the Court of Justice. Questions concerning the interpretation of EU law may be raised in cases brought against a Member State or between private parties. Existing litigation in which preliminary references have been issued includes cases challenging the implementation of the EU ETS by Member States (see <i>Borealis et al. v. Environmental Protection Agency of Sweden</i>) and challenges concerning the consistency of sub-national government planning decisions with EU climate policy (<i>Azienda Agro-Zootecnica Franchini Sarl v. Regione Puglia</i>). Cases have also been filed challenging national plans developed to implement EU legislation (see discussion of <i>Greenpeace v. Spain</i> below). • Citizens may file cases before international bodies challenging the processes by which policies and legislation developed to meet EU requirements at the Member State level have been developed. To date, at least one such case has been recorded before the Aarhus Convention Compliance Committee (see Duvic-Paoli, 2019). • Citizens may file cases before the Member State courts claiming that EU climate laws do not go far enough to protect the rights of citizens insofar as they are enshrined in domestic law. While such cases may not directly challenge the validity of the European legislation, they may nonetheless have an impact on how it is understood and applied. For

	<p>example, in the case of <i>Neubauer et al. v. Germany</i>, the litigants argued that Germany’s domestic climate law was insufficient to protect their fundamental rights, as were the EU’s legislative targets at the time of filing, so EU law was indirectly implicated in the case.</p>
<p>Member State governments</p>	<ul style="list-style-type: none"> • Under EU law, Member States may bring challenges to the actions of EU institutions before the CJEU on the basis that a legislative act or other action by the Institution is unlawful. For example, Austria has filed a challenge to the Commission’s inclusion of fossil gas in the new taxonomy on sustainable finance (see further below). • In theory, infringement proceedings could also be brought by one Member State against another for non-compliance with climate obligations. To date, this procedure has been used in at least one case brought by the Czech Republic against Poland for authorising the extension of the environmental permit for a lignite mine without conducting a new environmental impact assessment, which is required under EU law. The case was settled following political negotiations between the parties; however, it may provide a model for future cases (Tigre, 2022).
<p>Sub-national Governments</p>	<ul style="list-style-type: none"> • Sub-national governments such as cities and regions have been involved in climate cases in Europe and beyond as both applicants and defendants (see C40, 2021). Under EU law, cities have the same options to challenge the interpretation and validity of EU legislation as citizens, and therefore can only bring direct proceedings where they can establish that a legislative measure is of direct concern to them (see <i>Ville de Paris and others v. European Commission</i>).
<p>European Commission and EU Institutions</p>	<ul style="list-style-type: none"> • The European Commission has the power to start ‘infringement proceedings’ against Member States that fail to comply with their obligations to act in accordance with EU laws. These cases may ultimately end in a judicial decision from the CJEU. Such proceedings may be initiated following an assessment or investigation by the Commission or on the basis of complaints submitted by EU citizens, as in the case of <i>ClientEarth and Ecologistas en Acción v. Spain</i>, in which infringement proceedings were initiated following a complaint about Spain’s failure to protect the Mar Menor lagoon from damage caused by intensive agriculture. In some instances, infringement proceedings have been used with regard to climate legislation, mostly concerning a failure to implement the EU ETS (e.g. <i>Commission of the European Communities v. Finland</i>).

Part 2. The 'Fit for 55' package: developments in direct decarbonisation laws at the EU level

This section provides a bird's-eye view of the EU's current direct decarbonisation reforms, the 'Fit for 55 package'. It then considers what these developments may mean for the future of climate litigation in Europe and beyond.

2.1. The European Climate Law: moving targets

Prior to the passage of the European Climate Law in July 2021, the core of the EU's legislative response to climate change consisted of a series of 'direct decarbonisation' measures, which are further supported through 'facilitating' and 'integrating' measures (Chalmers et al., forthcoming 2024):

Direct decarbonisation measures include:

- The flagship EU ETS, which covers the majority of greenhouse gas emissions from electricity and heat generation, energy-intensive industry, and commercial aviation. The current Directive aims to reduce emissions from covered sectors by 43% by 2030 compared with 2005 levels by reducing the number of allowances available year on year.
- The Land Use, Land Use Change and Forestry Regulation (LULUCF Regulation), first adopted in 2018, which introduces new and more comprehensive rules concerning the accounting of greenhouse gas emissions from the LULUCF sector. In its current iteration, the Regulation requires that greenhouse gas emissions from land use in each Member State are compensated by greenhouse gas removals from the sector. This is known as the 'no debit rule'.
- The Effort Sharing Regulation (ESR), which creates an obligation on Member States to meet emissions reduction targets for emissions not covered by the ETS and LULUCF Regulation by taking domestic action (sectors covered include agriculture, road transport, waste, small industries and buildings). Different annual emissions reduction targets for each Member State are calculated by the Commission. The ESR also provides rules aimed at allowing Member States flexibility in how they achieve these targets.
- Two energy-focused Directives, the Recast Renewable Energy Directive (RED II) and the Energy Efficiency Directive (EED), both passed with reducing greenhouse gas emissions associated with energy generation, distribution and use as a primary aim.

Facilitating measures include the Regulation (EU) 2019/199 on the Governance of the Energy Union and Climate Action ('Governance Regulation'), which sets out harmonised requirements for Member States to plan, monitor and measure emission reductions.

Integrating measures are typically those reforming or introducing sectoral legislation to ensure better alignment with the EU's climate goals.

Several of these laws were last amended through reforms agreed between 2015 and 2019, following the Council's endorsement of the 2030 Framework for Energy and Climate for the Union at the end of 2014. This Framework committed the bloc to emissions reductions of 40% by 2030 from 1990 levels. As late as November 2018, the European Commission restated a commitment to maintaining its existing 2030 target, in its 'Clean Planet for All' long-term strategy, even while recognising the dire warnings from the IPCC issued in the *Special Report on Global Warming of 1.5°C* and the need for rapid progress towards net zero emissions globally.

Just one year on from the Clean Planet for All strategy, the newly appointed Commission President Ursula von der Leyen announced an ambitious European Green Deal, which included plans to increase the level of ambition to the current goal of 55% by 2030. The reasons for the step-change in ambition are likely to remain hotly debated for years to come, with speculation about the role of the 'Fridays for Future' youth movement, the IPCC's *Special Report on Global Warming of 1.5 Degrees*, Europe's desire to demonstrate regional leadership, and the results of the 2019 European Parliamentary elections. Whatever the motivation, this shift in ambition has had major implications for the speed and scale of the legal and policy shifts required for the EU to meet its climate targets.

2.2. The Fit for 55 package: a bird's-eye view

The Fit for 55 package – a set of interconnected legislative proposals (see Table 2) – forms the primary mechanism by which the Commission intends to meet the updated 2030 targets. According to Commission documentation, the package consists of at least 13 measures, including five new legislative acts, and amending eight pieces of existing legislation.⁴ At the time of writing, most of these measures are still subject to negotiations and current legislative proposals could change (see Box 3). As Przyborowicz (2021) argues, finalising these negotiations will probably be “the most challenging policy making process” in the last decade or more, and many parties are likely to be unhappy with the results.

Box 3. The legislative process in the European Union



European Parliament building in Strasbourg.
Photo: EU, 2021 via Flickr

Under the EU's ordinary legislative procedure, legislation is adopted by the European Parliament and the Council of the European Union acting as 'co-legislators'. This process is often referred to as 'co-decision'. Under the process, an initial proposal for the legislation is developed by the European Commission, after an impact assessment and a period of public consultation. The Parliament and the Council then consider this proposal in up to three readings. Following the first reading, the Parliament will adopt a position, followed by the Council. At this stage, the co-legislators will usually enter into informal 'trilogue' negotiations to try to agree a provisional text that is acceptable to the co-legislators, with the Commission mediating between the Council and the European Parliament.

⁴ Schlacke et al. (2022) identify 16 proposals in the original package, based on their review of the Commission's website, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en. The discrepancy with our figure is likely due to differences of classification and the interconnected nature of several measures. Our approach has been to treat proposals for the expansion of the ETS as part of one legislative package, while considering associated facilitating proposals as separate measures. Similarly, we have not included the EU Forests Strategy in our analysis, since the strategy relies on further legislative reform to ensure its implementation. Several of the reforms proposed in the strategy are discussed in Part 3 below. Finally, although subsequent reforms such as the reform to the Energy Performance of Buildings Regulation proposed by the Commission in December 2021 have been linked to the Fit for 55 package, we have limited ourselves to describing the original measures listed.

Table 2. Outline of core elements of the Fit for 55 proposals (as of March 2023)

Decarbonisation measures
<p><i>Amending the Emissions Trading Directive</i></p> <p>One of the most profound changes under discussion is the expansion of the European Union Emissions Trading System. The proposal aims to increase the overall emission reductions to be achieved by the sectors currently covered by the ETS to a 61% reduction on 2005 levels, an 18% increase on the previous target of 43%. The existing ETS will also be extended to include emissions from maritime transport. The primary mechanism for meeting these new targets will be to reduce the availability of emission allowances more rapidly than previously anticipated.</p> <p>In addition to expanding the existing ETS, the Commission’s proposal would create a second parallel emissions trading system, referred to by some commentators as ETS-2, which would cover emissions in the buildings and road transport sectors. These sectors are collectively responsible for around 30% of greenhouse gas emissions, but they are challenging to regulate through an ETS because they largely arise from the activities of households and small businesses. Rather than imposing onerous monitoring obligations on these stakeholders, the scheme instead imposes administrative obligations upstream in the supply chain on fuel suppliers, who will now be required to surrender emission allowances based on products sold.</p> <p>See here for the Commission proposal.</p>
<p><i>Amending the Effort Sharing Regulation</i></p> <p>The primary change to the ESR considered under the Fit for 55 package is to increase the ambition of the greenhouse gas emission reduction targets for sectors not covered by the ETS or the LULUCF Regulation. In early November 2022, the co-legislators provisionally agreed to proposals that would increase the emission reduction targets to 40% overall. Provisions aimed at ensuring flexibility for Member States – such as the ability to ‘borrow’ emission allocations from future years and to trade emission allocations between themselves – were also agreed. It appears that a proposal from the European Parliament to include a provision on access to justice, which would have allowed citizens and NGOs to enforce the Regulation, may be excluded from the most recent draft, meaning that the Commission remains the primary enforcer of the obligations imposed on states. Importantly, the ESR has not been amended to exclude buildings or transport despite their proposed inclusion in ETS-2, amounting to double regulation of these sectors.</p> <p>See here for the Commission Proposal, here for amendments by the European Parliament, and here for the provisional agreement.</p>
<p><i>Amending the LULUCF Regulation</i></p> <p>The EU’s co-legislators have provisionally agreed to set an overall target for at least 310 million tonnes (Mt) of CO₂ equivalent net removals from the LULUCF sector by 2030. Between 2021 and 2025 the no debit rule will remain in place. For 2026 to 2030 this will be replaced by annual targets for each Member State, to be calculated by the Commission based on information submitted for the preceding years. Complex accounting rules adopted in the previous iteration of the Regulation will no longer be applied from 2025.</p> <p>See here for the Commission proposal and here for the latest update from the European Parliament.</p>
<p><i>Amending the Renewable Energy Directive</i></p> <p>The Commission’s original proposal for amending the Renewable Energy Directive included a new target to increase the share of renewables in Europe’s energy mix to 40% by 2030. This is likely to be amended to 45% following the announcement of the REPowerEU Plan, a separate reform introduced as part of Europe’s response to the energy crisis caused by the war in Ukraine. The proposals also include provisions to try to increase the renewables share in energy used by the heating and cooling</p>

and transport sectors, and creating new processes for community development of renewable energy. Among the most important updates to the Directive are new provisions on bioenergy, targeted at preventing the degradation of carbon sinks and biodiversity loss associated with existing practices.

See [here](#) for the Commission proposal.

Amending the Energy Efficiency Directive

The amendments to the Energy Efficiency Directive would require Member States to integrate the 'energy efficiency first' principle into all planning, policy and major investment decisions, with a view to meeting an increased EU target of no more than 1,023 Mt of oil equivalent (Mtoe) to be used in 2030. Under the Council's proposals, Member States are required to submit an indicative nationally-set energy efficiency target, with the potential for 'corrective' action to be taken by the Commission in the event that the sum of these targets falls short of the overall requirements. Separate targets are also set for public buildings, which are to play an 'exemplary role' in achieving energy efficiency savings.

See [here](#) for the Commission proposal, [here](#) for amendments adopted by the European Council, and [here](#) for the Council's general approach.

Introducing 'Refuel EU' for aviation

This Directive aims to increase the uptake of 'sustainable aviation fuels' (SAFs) and reduce the use of fossil jet fuels through imposing an obligation on suppliers to steadily increase the share of SAFs in fuel supplied to airports, to reach at least 63% by 2050.

See [here](#) for the Commission proposal.

Introducing 'Fuel EU' Maritime

This Directive aims to reduce emissions associated with shipping through imposing an obligation on shipowners to gradually reduce the emissions intensity of ships to 75% by 2050 and to require ships to connect to onshore power when in port. The directive applies to commercial vessels of 5,000 tonnes and above, with fishing and military ships exempt. The requirements would apply to all journeys between EU ports and apply to 50% of the energy used by ships arriving in or departing from EU ports to ports outside the bloc.

See [here](#) for the Commission proposal.

Amending the Vehicle Emission Performance Standards Regulation

With this amendment, the EU agrees to the *de facto* phase-out of all new fossil fuelled cars by 2035, with interim targets to reduce the average emissions of new cars sold in the bloc by 55% by 2030, and new vans by 50% by 2030.

See [here](#) for the Commission Proposal, [here](#) for amendments adopted by the European Parliament, and [here](#) for the European Council's provisional agreement.

Facilitating measures

Amending the Market Stability Reserve

Amendments to the Market Stability Reserve, which operates to correct imbalances between supply and demand in the market for emission allocations, introduced in 2018, will be extended under the new proposal. These amendments are aimed at decreasing the number of emission allocations in circulation to prevent carbon prices becoming too low.

See [here](#) for the Commission proposal.

Introducing the Social Climate Fund

The Social Climate Fund aims to address the distributional impacts associated with the extension of the ETS to buildings and transport, which are anticipated to have a disproportionate impact on low-income groups. The Fund will be supported in part by revenues generated by the ETS. Member States are required to develop Social Climate Plans, setting out measures to address the impact of the increased carbon price on vulnerable groups. The Fund will support up to 50% of the costs of implementing these plans, subject to the Commission's approval. The share of the fund that each Member State is eligible to receive is set out in Annex I to the Regulation creating the fund.

See [here](#) for the Commission proposal.

Introducing the Carbon Border Adjustment Mechanism

The Carbon Border Adjustment Mechanism (CBAM) aims to prevent 'carbon leakage' arising from the EU ETS by equalising the carbon price between goods produced in the EU and regulated under the ETS and goods produced in third countries with lower carbon prices or no carbon price. Under the scheme importers will have to purchase CBAM certificates to sell imported products, which will cost the difference between the carbon price in the country where the goods were produced and the price under the ETS. Initially the obligations on importers will be limited to reporting the lifecycle emissions associated with imported goods. However, by 2030 the new pricing mechanism should apply to all the equivalent products covered by the ETS.

See [here](#) for Commission proposal, and [here](#) for the agreement provisionally agreed by the European Council.

Integrating measures

Amending the Energy Taxation Directive

This proposal would amend the Energy Taxation Directive to introduce a graduated system of taxes for energy sources. Energy sources will be ranked according to both energy content and environmental impact, with those with the highest energy content and the lowest environmental impact taxed at a lower rate. The Directive will also be expanded to cover more sources of energy, including high-emitting fuels used in the maritime and shipping industries.

See [here](#) for the Commission proposal.

Introducing a new Alternative Fuels Infrastructure Regulation

This proposal requires Member States to meet specific targets for the deployment of new infrastructure, such as charging points for electric vehicles. It would also repeal a previous Regulation on Alternative Fuels Infrastructure passed in 2014.

See [here](#) for the Commission proposal.

2.3. Fit for 55 and the prospects for climate litigation

In some ways, challenging direct decarbonisation measures at the EU level is not the obvious cause of action for applicants seeking to bring strategic climate litigation – but this may change. Existing strategic climate litigation before the CJEU has met with little success so far, in large part due to restrictive interpretations by EU courts of who has standing to bring 'direct action' proceedings (Brown, 2022). However, avenues for action have expanded following amendments to the Aarhus Convention, which, as noted in Table 1, have already been utilised by environmental groups to bring actions challenging the decisions of EU institutions. Nonetheless, while strategic challenges to or based on the legislation described above before EU courts may be relatively limited, this is far from the only type of climate litigation that may arise from this unprecedented package of legislation.

Much attention has been paid to a small handful of high-profile strategic cases, but these are far from the only type of cases to have emerged in response to climate policy (see Bouwer, 2018). For example, the original introduction of the ETS Directive was accompanied by more than 10 cases before the national courts in Spain, in which companies raised challenges around the criteria and procedure used by national authorities in allocating emissions allowances. We anticipate that similar challenges around the meaning and implementation of new provisions in the Fit for 55 package may also arise, particularly where Member State legislation transposing new Directives into national law leave room for ambiguity and debate. In addition, we may see stakeholders who are dissatisfied with the new measures – whether because they deem them to be too ambitious or not ambitious enough – looking for avenues to challenge implementing efforts, either through national courts or via a direct action proceeding before the CJEU. Finally, we may see growth in the number of infringement proceedings initiated by the Commission if Member States fail to meet the numerous procedural and substantive requirements imposed by the new legislation, particularly the Effort Sharing Regulation (see Peeters and Athanasiadou, 2020).

While cataloguing every possible legal action that could arise as a result of the new legislation is beyond any commentator’s capacities at this early stage, **below we discuss four areas in which we may see litigation following hot on the heels of the finalised Fit for 55 legislation.**

i) Extension of the EU Emissions Trading System

Since the introduction of the EU ETS in 2005, litigation brought by corporations and governments focusing on the EU ETS framework has accounted for a majority of the CJEU’s climate caseload. Analysis of the CJEU’s existing EU ETS litigation provides some indicators of the likely nature, parties and prospects for litigation contesting the extension of the EU ETS. In the mid-2000s, numerous companies brought direct actions challenging the application of new ETS provisions, but the majority failed on standing grounds, with the CJEU holding that corporations could not sufficiently demonstrate that they had been individually affected by the Commission’s decisions (Setzer et al., 2022).

The expansion of the ETS regime to include corporations from the shipping, buildings and road transport industries will likely bring fresh challenges from these sectors. Challenges to the interpretation and validity of EU law by corporations are likely to result in an increase in requests from Member States’ national courts for a preliminary ruling by the CJEU. Corporate claimants may engage in strategic litigation focused on pursuing broader legal or policy change in the new EU ETS framework. This would stand in contrast to earlier EU ETS litigation, most of which was non-strategic in nature. Given the general trend towards greater strategic climate litigation globally and in Europe since 2015 (Setzer and Higham, 2022), we are likely to see increasingly sophisticated behaviour by both corporations and other claimants in litigating the extension of the EU ETS.

Several features of the new policy and regulatory regime loom as potential sources of litigation, although it is difficult to fully anticipate the substantive claims made by parties to any future litigation. A likely site of contestation stems from the regulatory design of ETS-2. As Schlacke et al. (2022) note, ‘friction’ may be caused by the inclusion of transport and buildings in this new ETS while they are also still included under the Effort Sharing Regulation. This imposition of a double regulatory burden on companies may lead to non-climate-aligned litigation from companies seeking to reduce their regulatory obligations. It is also possible that it may lead to inaction or to inconsistent action on the part of Member States, which may subsequently give rise to climate-aligned litigation from strategic claimants seeking to drive climate action.

Beyond indicating future litigation from corporate claimants, EU ETS case law before the CJEU also points to the possibility of litigation brought by Member States and the European Commission. Cases brought by Member States challenging Commission decisions have been uncommon, but some have met success. In the 2009 cases of *Republic of Estonia v. Commission*

of the European Communities and Republic of Poland v. Commission of the European Communities, Estonia and Poland successfully challenged the Commission's findings that the countries' respective 'National Allocation Plans' put forward to implement the legislation were incompatible with the relevant EU ETS criteria. However, the CJEU dismissed a more fundamental challenge to the ETS, concerning the legislative procedure under which it was first filed in 2016 (*Poland v. European Parliament and Council [C-5/16]*).

The Commission, on the other hand, has brought at least two infringement proceedings against Member States in 2006 that provide an example of a potential enforcement strategy for the extended EU ETS. In *Commission of the European Communities v. Italian Republic* the Commission successfully brought an action against Italy for failing to adopt all laws, regulations and administrative provisions necessary to comply with its obligations under Article 31(1) of the EU ETS Directive (Setzer et al., 2022). While a similar case was brought and won by the Commission against Finland in the same year, active enforcement through infringement proceedings of the Directive and successor regulations through the CJEU has not remained a common practice. As Oberthür et al. have argued, how the Fit for 55 package will be enforced is a key issue for policymakers to consider in the coming months. Strengthening the Commission's capacity to bring infringement proceedings is one option to actively ensure the implementation of new climate laws, although whether it will be adopted in practice remains to be seen (Oberthür et al., 2023).

Box 4. Challenges to the CBAM: international litigation



Coal power plant in Germany. Photo: Arnold Paul (Wikimedia Commons)

One aspect of the Fit for 55 package that has been the subject of much speculation regarding possible legal challenges has been the Carbon Border Adjustment Mechanism (CBAM), which is set to be introduced alongside the amendments to the EU ETS. This mechanism has proved highly divisive for the international community, with many countries bitterly opposing its passage and arguing that it constitutes a violation of international trade law (Mohan, 2021). Although the EU Institutions have made efforts to ensure compliance with international law (European Parliament, 2021), and some scholars have concluded that it likely would not constitute a breach of international trade law (Leturcq, 2022), some countries may nonetheless seek to challenge the CBAM before the World Trade Organization Dispute Settlement Body.

ii) Enforcing and enhancing climate targets

One of the key trends in climate change litigation in recent years has been the filing of cases against national governments looking at the alleged inadequacy of governments' overall climate policy response (elsewhere we refer to these cases as 'government framework litigation' [Higham et al., 2022]). To date, more than 80 such cases have been documented worldwide, with more than half of those cases having been filed in Europe (ibid.).

EU climate legislation has already played a significant role in several of these cases. The most well-known is that of *Carvalho and Others v. The European Union*, also known as ‘The People’s Climate Case’, in which a group of families involved in agriculture and tourism, and an NGO representing similar families, commenced direct action proceedings before the CJEU challenging the climate targets introduced in 2018. The claimants argued, *inter alia*, that the overall target of 40% emission reductions on 1990 levels by 2030 created by the Emissions Trading Directive, the Effort Sharing Regulation and the LULUCF Regulation was insufficient to comply with the ‘higher-ranking’ requirements of the European Convention on Human Rights and the Paris Agreement (Winter, 2020). They requested that the Court order the relevant legislation be set aside and replaced with more ambitious emission reduction measures. The case was dismissed in 2019 on the basis that the applicants lacked standing to bring direct action.

Framework cases filed before the courts of Member States (see also Box 5) could involve the following issues:

- **EU targets as a floor, not a ceiling.** Building on the case of *Neubauer et al. v. Germany*, cases may argue that despite increased ambition, EU legislation is still insufficient to protect fundamental rights under national constitutions or international law. Such cases may involve indirect questions about EU legislation.
- **Inadequate national plans.** Perhaps the most likely set of arguments to arise in domestic framework cases following the adoption of the new legislation are disputes regarding the adequacy of national implementation measures. Such arguments can already be found in cases such as *Greenpeace et al. v. Spain I and II*. In the *first* of these two cases, a group of NGOs filed an action alleging that Spain was in breach of its obligations under the Governance Regulation because it had failed to approve either a National Climate and Energy Plan detailing climate action measures to be taken up to 2030, or a Long-Term Strategy detailing climate action measures to be taken up to 2050. The *second* case was filed following Spain’s adoption of both strategies, arguing that the 2030 strategy was inadequate to meet Spain’s legal obligations, including those under the Paris Agreement. In the absence of clear estimates assessing how policies introduced to meet the new targets will achieve their goals, cases may also arise seeking further transparency and information around emission reduction policies and plans.
- **Failure to implement national plans.** In addition to cases arguing that Member State plans to meet the new targets are insufficient, cases may arise challenging failures to implement the policy actions outlined in national plans. For example, in *Notre Affaire à Tous et al. v. France*, claimants successfully argued that the government had caused environmental damage by failing to enact sufficient policies to meet its 2020 emissions reduction targets.

A further type of climate change framework litigation that has not yet come before the courts might include infringement proceedings against Member States for their failure to introduce framework policies and laws required by the Governance Regulation. In September 2022, the Commission issued a formal notice to Bulgaria, Ireland, Poland and Romania regarding their failure to publish Long Term Strategies on climate change as required by the Regulation.⁵ It is possible that this matter or others like it could ultimately end up before the CJEU.

⁵ A summary of the matter can be found in European Commission, September Infringements package: key decisions (Brussels 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402

Box 5. Could the European Court of Human Rights open the door to new challenges before the CJEU?

On 29 March 2023, the Grand Chamber of the European Court of Human Rights (ECtHR) is due to hear the first case concerning the climate protection obligations of signatories to the European Convention on Human Rights. Among the key issues to be considered will be the question of whether the plaintiffs meet the test for 'victim status' under the Convention, and whether they should be granted standing to bring their claims. Should the ECtHR adopt a broad approach in this regard or should the ongoing negotiations regarding Union accession to the Convention finally conclude, this could give rise to new arguments about the standing of individuals to bring challenges to the EU's climate targets grounded in the right to a remedy under Article 13 of the Convention.



European Court of Human Rights, Strasbourg. Photo: Outlandos [ym], Flickr

iii) Just transition litigation

One area where scholars have predicted major growth in climate litigation over the coming years is the area of 'just transition' litigation (Savaresi and Setzer, 2022; Setzer and Higham, 2022; Tigre et al., 2023). Although the conceptualisation of this area of litigation is still at an early stage, just transition cases can be broadly understood as cases challenging whether climate policy measures are just or fair. These cases may focus on the distributional impacts of new climate policies – i.e. the way in which high costs associated with carbon pricing may impact on low-income families – or they may focus on procedural questions about who should be involved in decision-making about measures and projects to advance the transition to net zero. Although this field is at an early stage of development – regarding both the filing of cases and the scholarship around those cases – at least one just transition case has already been identified in Europe (*FOCSIV and others v. FCA Italy [Stellantis NV]*). It seems highly likely that this number will grow as those impacted by the EU's decarbonisation measures and their implementation turn to the courts for redress.

Elements of the Fit for 55 package will have a "regressive impact" (Bülbül, 2021), putting a strain on the finances of low-income households already stretched by the cost-of-living crisis. For example, energy-related household expenses are expected to rise by an average of 0.8% as a result of the implementation of the package (ibid.). As noted above, EU institutions have sought to mitigate these impacts by introducing a Just Transition Fund and a Social Climate Fund Regulation as part of the overall Fit for 55 package. The Just Transition Fund will mobilise over €25 billion in funding to regions and sectors most affected by decarbonisation in general, while the Social Climate Fund will mobilise a proposed €86.7 billion to address the impacts of the EU ETS in

particular. The Social Climate Fund regulation requires active engagement with the social impacts of climate action and requires Member States to create 'Social Climate Plans' in order to access funds.

There are reasons to believe that these measures may be insufficient to avoid controversy and potential litigation. Firstly, the overall funds available for disbursement through the Social Climate Fund may be insufficient to meet the challenge of avoiding potential impacts on households, particularly as 50% of the funding for achieving Social Climate Plans must be committed by Member States already facing financial pressures (Defard and Thalberg, 2022). Secondly, there may well be challenges to ensuring that Social Climate Plans and spending under the fund are developed in a manner that takes account of multiple stakeholder perspectives (Bülbül, 2021). This may give rise to disputes about the distributional choices made in the Social Climate Plans and about the processes behind their development. There is a significant need for such processes to be enhanced to ensure adequate public participation (Oberthür et al., 2023).

iv) Defining 'low-carbon' energy

The question of which fuels should be considered 'low carbon' and prioritised in the energy transition has been highly contentious for more than a decade, especially with respect to bioenergy. Currently, more than 60% of energy in the EU classified as renewable energy comes from burning wood or woody biomass (Catanoso, 2022). Expert commentators have argued that if this trend continues – as it is predicted it will do under the current Commission proposals included in the Fit for 55 package – then the EU will continue to exacerbate both climate and biodiversity problems (Searchinger et al., 2022). This concern is reflected in the position adopted by civil society groups, who have expressed reservations about the way in which current EU law proposals would continue to categorise bioenergy and other controversial fuels as renewable energy sources (WWF et al., 2022).

Controversy over what constitutes 'renewable energy' has already found its way to court. In 2019 a group of civil society organisations sought to challenge RED II legislation on the basis that it would lead to increased environmental impacts associated with deforestation before the CJEU in the case of *Sabo and Others v. Parliament and Council ('EU biomass case')*. Although the case failed on standing grounds, it has not prevented cases focused on similar issues from being brought before national courts. Two examples include the unsuccessful case of *Coöperatie Mobilisation for the Environment U.A. and others v. Executive Board of Province of North Holland* and a complaint under the OECD Guidelines for Multinational Enterprises filed against Drax Group Plc before the UK National Contact Point over the company's allegedly misleading statements regarding the burning of biomass being a 'carbon neutral' fuel (see further Box 7). The current proposals for the revision of RED II are still under negotiation.

Box 7. Fraud and misrepresentation

One area where the co-legislators have anticipated legal controversy in the implementation of RED II is the potential for fraudulent statements and other misrepresentations regarding the origins of renewable energy, particularly from biofuels, an issue that can be connected to the rapid growth of 'greenwashing' or 'climate-washing' litigation in Europe and globally (Setzer et al., 2022). This concern with the integrity of statements regarding renewable energy can be seen in proposed amendments to recital 38 of the Directive made by both the European Parliament and the Council.



*Drax biomass dome, UK.
Photo: Department of Energy and Climate Change, Flickr*

Reliance on a number of disputed principles and definitions may give rise to new disputes over their exact parameters and meanings – including the ‘cascading principle’ for bioenergy use and the delegation of powers related to its implementation.⁶ This could result in decisions by either the Commission or Member State authorities being subject to requests for judicial review before national courts, or through the internal review process created by the Aarhus Regulation (see Table 1), and to disputes involving corporations regarding their application of national implementing regulations.

Similar disputes may also arise regarding the reforms to the LULUCF Regulation. For example, there may be significant controversy over the way in which the Commission will set targets for removals from carbon sinks in the sector under Article 4 of the Directive.

Finally, another area of controversy that may arise from the reforms to RED II relates to proposals to speed up the permitting process for renewable energy projects across the EU and to introduce a requirement for Member States to develop plans for renewables ‘go-to areas’ in which to locate new projects, creating a presumption that new renewables projects are of overriding public interest. Provisions to exempt certain renewable projects from established environmental assessment requirements may be motivated by understandable concerns for both energy security and climate protection. However, civil society groups such as ClientEarth have raised concerns that such proposals could in fact lead to more uncertainty in the planning and siting of projects (ClientEarth, 2022a). It is also worth noting that while these legislative reforms to permitting for renewable energy may prove a source of future legal controversy, the absence of more comprehensive reforms to legislation concerning environmental impacts for fossil fuel projects in the Fit for 55 package may lead to continued controversy too (see Box 8).

Box 8. Limited reforms to Environmental Impact Assessment may drive litigation

The EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU) has been a centrepiece of EU environmental legislation for over 35 years. The Directive seeks to ensure that environmental impacts are considered when project decisions are being made. The Directive operates alongside the SEA Directive (Directive 2001/42/EC), which similarly ensures that environmental matters are considered in the preparation and adoption of plans and programmes that set the framework for projects covered by the EIA Directive.

Aside from the reforms regarding renewable energy permitting described above, there are no plans to substantially alter these Directives. This lack of reform may spur further litigation on other topics. For example, in recent years the scope of environmental impact assessment for projects has emerged as an important issue in climate litigation. In cases such as *R (Finch on behalf of the Weald Action Group & Others) v. Surrey County Council*, *Greenpeace v. United Kingdom* and *Greenpeace v. North Sea Transition Authority* claimants have sought to challenge EIAs for fossil fuel projects on the basis that scope 3 emissions were not taken into account in the assessment process. So far, these cases have been unsuccessful but in the absence of legislative clarity, a successful appeal to the UK Supreme Court in the pending case of *Finch* may lead to further litigation in the UK on this question. While no decision of the UK courts would be binding on EU courts, a successful decision might nonetheless inspire litigants to bring similar cases elsewhere in Europe.

⁶ The cascading principle is broadly defined as ensuring that woody biomass is used for the most socially beneficial purposes in order of priority. Its application remains contested. See further: <https://task40.ieabioenergy.com/wp-content/uploads/sites/29/2013/09/t40-cascading-2016.pdf>

Part 3. Beyond the 'Fit for 55' package: integrating climate risks and impacts into the European economy

The direct decarbonisation measures in the Fit for 55 package are far from the end of the story when it comes to EU legislative reforms accompanying the European Green Deal. Further integrating and facilitating measures have been designed to try to ensure that economic activity within the Union is better aligned with climate goals. In this section we focus on measures that aim to influence the flow of finance between private parties within and beyond the Union.⁷

Broadly, these developments can be understood as falling into three categories: corporate governance and supply chain reforms, sustainable finance reforms, and consumer information reforms. All the measures discussed share a common focus on transparency and information sharing. We treat each in turn, starting with corporate governance and supply chains, which may have the most transformative potential.

3.1. Corporate governance and supply chain reforms

Recent years have seen significant momentum around the concept of mandatory due diligence legislation, which requires companies to identify, prevent, mitigate and remedy the adverse human rights and environmental impacts of their operations, including climate-related impacts (Rajavuori et al., forthcoming, 2023). In February 2022 the European Commission presented its proposal for a law on this issue – the Corporate Sustainability Due Diligence Directive (CSDDD), sometimes referred to as the 'EU Supply Chain Law'. The CSDDD aims to set a horizontal framework for better human rights and environmental protection, creating a level playing field for companies within the EU and avoiding fragmentation resulting from Member States' national approaches. Since its publication, the proposed CSDDD has attracted significant attention and it has been debated within the Council and various committees of the European Parliament. A Council negotiating position – referred to as a 'General Approach' – was adopted in December 2022. The European Parliament took longer to begin substantial discussions on the CSDDD proposal, and the final 'trilogue negotiations' between the European Parliament, the Council and the Commission are expected to take place in May 2023.

According to the current draft, the EU Supply Chain Law will apply to: EU companies that are 'very large' (i.e. with more than 500 employees on average and a net worldwide turnover of more than €150 million), or that are 'large and have high-impact' (i.e. with more than 250 employees and a global turnover of €40 million, provided that at least €20 million was generated by high-risk sectors, including textiles, agriculture, food, metals and mineral extraction). It will also apply to non-EU companies with a turnover of more than €150 million in the EU, or that have over €20 million generated in a high-risk sector (Article 2[2]) and thus can be understood as extra-territorial in nature. To be in line with the recently adopted Corporate Sustainability Reporting Directive (CSRD), which came into force in January 2023, these thresholds might be reduced and applied initially only to very large companies.

Companies falling under the scope of the Directive must fulfil their due diligence obligations along the value chain regarding human rights and the environment. To do so, they must identify actual or potential negative impacts on human rights and the environment, and take appropriate

⁷ Concerns regarding such flows of finance have also been drawing the attention of the climate litigation community (see Higham and Kerry, 2022; Solana, 2020).

measures to prevent, mitigate and remedy them. The overarching idea is to integrate environmental and human rights due diligence into company policies and management systems. Following the position adopted by the Council, it is likely that the obligation might not apply to a full life cycle 'value chain' of products or services. However, it will apply to a 'chain of activities' that covers activities of a company's upstream business partners related to the production of a good or the provision of services, or downstream business partners related to the distribution, transportation, storage or disposal of the product, including the dismantling, recycling, composting or landfilling.⁸

Three aspects of the proposed legislation are likely to have a major impact on climate litigation:

- **Firstly, climate change was not explicitly mentioned in the proposal of the Commission and the Council as one of the adverse environmental impacts against which companies need to exercise due diligence.** The Commission proposal specifically includes a review clause foreseeing the possibility of expanding the list of impacts – and potentially including climate – but only seven years after the CSDDD (Art. 29) enters into force. It could be argued that even before any such review, climate change is nonetheless implicitly included as falling within the scope of other environmental impacts that are covered (Hartmann and Savaresi, forthcoming 2023). However, this is unclear and is rendered all the more so by the lack of clarity in the relationship between Article 15, discussed below, which explicitly applies to climate change, and the primary due diligence obligations created by the legislation. The creation of a possible exemption for climate due diligence from the legislation has been heavily criticised for not filling the gaps of corporate climate accountability (ClientEarth, 2022b).
- **Secondly, the CSDDD explicitly addresses the potential civil liability of a company, in a provision that could be used by litigants seeking redress for climate damages.** In the current text of the Directive proposed by the Council, a company is liable for a damage if it can be demonstrated that the company **intentionally or negligently** failed to comply with the due diligence obligations laid down in the CSDDD, and as a result of such a failure a damage to the natural or legal person's legal interest protected under national law was caused (Art 22).⁹ Under the Council's proposal, such civil liability could be extended to harms arising from the actions of subsidiaries or any direct or indirect business partners in the company's chain of activities. Therefore, a parent company domiciled in the EU, or with a sufficiently high turnover in the EU, could be held responsible for the actions of a subsidiary, which may not currently be possible under domestic systems. However, the Council has indicated a desire to limit interference with existing systems, noting that if existing conditions for liability are met then a subsidiary may still be the entity held responsible, regardless of whether the subsidiary or the parent company conducted the due diligence (cf. Council's new recital 16b). Should these provisions be adopted from the Council's General Approach then this could lead to significant legal controversy about which entity should be held responsible in which circumstances.
- **Thirdly, the new legislation could help expand the existing contours of corporate climate accountability.** Studies have started to explore connections between mandatory due diligence legislation and climate change (Bright and Buhmann, 2021; Macchi, 2021, 2022). Recent developments in climate litigation against corporations have already shed some light on what climate due diligence obligations could be. Climate litigation and mandatory due diligence legislation may interact in different ways. According to Rajavouri et al.

⁸ The obligation expressly excludes the disposal of the product by consumers and the distribution, transportation, storage and disposal of the product being subject to, *inter alia*, EU export control under Regulation (EU) 2021/821.

⁹ The text referred to here is Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, Brussels 30 November 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

(2022), the legislation can provide grounds for litigation (e.g. in *Notre Affaire à Tous and Others v. Total; Envol Vert et al. v. Casino*); litigation might fill gaps where the legislation does not yet exist or is weakly enforced (e.g. in *Milieudefensie et al. v. Royal Dutch Shell plc*; and in the non-judicial disputes before the OECD National Contact Points); or litigation may act as a driver for legislation.

The current draft of the CSDDD relates to some of the existing litigation by requiring that certain companies adopt so-called ‘transition plans’. Article 15 of the proposed directive provides that large companies “shall adopt a plan to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement”.

The proposed net zero plans under Article 15 of the CSDDD have been criticised by civil society organisations for being vague, unclear and weak (E3G, 2022; ClientEarth, 2022b), and by business actors for potentially infringing property rights (Hansen and Lilja, 2022). Several criticisms have been made in this regard, but important points of concern include the weak expectations for companies to draw up a transition plan, allowing companies to continue business as usual, lack of clarity on the structure or content of the envisaged plans, and silence regarding delegated legislation that may specify such elements.

Overall, the CSDDD might contribute to making it explicit that large corporations have a responsibility to reduce greenhouse gas emissions in their operations and along their value chains. However, national and transnational climate litigation is still likely to be increasingly used as a tool to hold companies to account for their greenhouse gas and climate impacts (Rajavuori et al., forthcoming 2023), particularly where there is a lack of clarity on the extent and meaning of the CSDDD’s provisions. These wider obligations for due diligence set out by the CSDDD and the CSRD will in turn be complemented by targeted interventions to protect the environment and the climate, halting deforestation and biodiversity loss (see Box 9). The EU has made a considerable effort to set mandatory due diligence rules for companies to ensure that a set of key goods placed on the EU market will no longer contribute to deforestation or forest degradation (Durán and Scott, 2022). Following the trilogue, in December 2022 the European Commission, Council and European Parliament reached provisional agreement on the new Regulation on deforestation-free supply chains (EC, 2022). Once adopted, the new law will prohibit the import, export or making available products linked to deforestation, degradation or illegality for products such as cattle, cocoa, coffee, oil palm, rubber, soya, wood and some derived products (such as beef, furniture and chocolate).

According to the current text, operators and traders will have 18 months to implement the new rules. From then on, companies supplying, exporting or placing ‘forest risk commodities’ on the EU market will have to undertake mandatory due diligence to ensure that their products fulfil the requirements of the regulation. This due diligence obligation is product-based, rather than company-based. Companies will further have to ensure that goods have not been produced on deforested or degraded land, and the import, export or making available of these goods will be prohibited. This will likely lead to significant questions about what robust due diligence processes look like, and we anticipate that civil society groups and affected communities will seek to use provisions on processes to report ‘substantiated concerns’ where a company is deemed not to comply with the requirements of the regulation (e.g. where non-compliant products are placed on the European markets as a result of insufficient or absent due diligence). The regulation creates clear obligations for EU Member States, including, for example, through the establishment of quantified targets. There is also potential for Member State authorities to take enforcement action, even in the absence of civil society scrutiny, although this will depend on political will and effective resourcing of regulators.

Box 9. New developments in biodiversity legislation at EU level

Over a decade ago, under the United Nations Convention on Biological Diversity (CBD), countries created a 10-year plan, subdivided into 20 targets, for protecting and conserving natural systems. The plan, also known as the Aichi Biodiversity Targets, expired at the end of 2020, with none of the targets met (Xu et al., 2021). With greater attention being paid to the interlinkages between biodiversity and climate change, governments around the world started introducing new targets for halting biodiversity loss and protecting nature, with the most significant being those agreed at Biodiversity COP15 in Montreal (the 15th meeting of the Conferences of the Parties of the CBD).



There have been many developments at the EU level in biodiversity legislation and policy, including the adoption of the EU Biodiversity Strategy for 2030. This is a soft law instrument that proposes nature restoration targets for degraded ecosystems, with a particular emphasis on restoring sites with the greatest potential to capture and store carbon. The Strategy proposes to increase protected area targets to at least 30% of the EU's land and sea areas (an increase of 4% and 19% respectively, compared to with current levels) with at least 10% of these areas acquiring 'strictly protected' status, which automatically covers all primary and old-growth forests (Europarc, n.d.). Member States will be responsible for determining which sites fall under protected and strictly protected areas, either through existing Natura 2000 criteria (established through the 1992 Birds and Habitats Directive) or under national protection schemes.

Within the Strategy lies a proposal for a Nature Restoration Law, which would create more stringent restoration obligations for Member States for areas that fall outside currently designated sites. The proposed Law sets an overarching target of restoring at least 20% of the EU's land and sea area by 2030, and all ecosystems in need of restoration by 2050. While the Law would create enhanced biodiversity targets throughout the EU, critics point out a lack of alignment with national mitigation and adaptation plans. The 20% target does not apply at the Member State Level, and there is a need for more ambitious targets on peatlands and wetlands (Cliquet, 2022).

3.2. Legislation to facilitate sustainable capital allocation

The EU legislators are also finalising a package of reforms to the European legislation governing financial markets, with the aim of ensuring that finance flows to 'sustainable' activities. These reforms were first announced in 2018 with the launch of an EU Action Plan on Financing Sustainable Growth.¹⁰ The plan included closely interconnected legislative and policy reforms, including: a 'fitness check' on the Non-financial Reporting Directive, which resulted in the introduction of the far more extensive CSRD (adopted at the end of 2022 as Directive 2022/2464); a proposal to develop a framework to facilitate sustainable investment, which has resulted in the EU's Sustainable Finance Taxonomy (adopted in 2019 as Regulation 2020/852); and plans for a new Regulation requiring financial service providers to be more transparent about the incorporation of sustainability information into decision-making when promoting new products (also adopted in 2019 as Regulation 2019/2088).

¹⁰ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions Action Plan: Financing Sustainable Growth, COM/2018/097 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097>

At least one aspect of these financial reforms has already been subject to legal proceedings – which is unsurprising given the increasing scrutiny of financial flows in the context of climate litigation (Setzer and Higham, 2021). The 2020 Sustainable Finance Taxonomy Regulation requires the Commission to develop a series of delegated acts setting out screening criteria for ‘sustainable’ activities in an effort to introduce consistency and transparency into financial markets. To be classified as sustainable under the taxonomy, an activity must contribute ‘substantially’ to achieving one of six environmental objectives and it must do so in a way that does ‘no harm’ to the other objectives and complies with minimum social safeguards.

The first of these delegated acts (Commission Delegated Regulation 2021/2139, of 4 June 2021) established the technical screening criteria for an economic activity to be considered as contributing to climate change mitigation or adaptation.¹¹ This act sparked significant controversy. Five requests for internal review were submitted by different NGOs challenging different aspects of this act.¹²

A Complementary Climate Delegated Act was published in July 2022 and included specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy. The act proved highly controversial, and a number of NGOs (including Greenpeace, ClientEarth, Friends of the Earth and WWF) asked the Commission to review the inclusion of natural gas and nuclear in the Delegated Act.¹³ The NGOs argue that inclusion of these economic activities in the EU green taxonomy is in breach of the Taxonomy Regulation, as well as the EU Climate Law and the EU’s obligations under the Paris Agreement. Depending on the response given by the EU Commission, some of these requests might become filings before the CJEU.

Because this matter was considered essential to facilitating sustainable investment, in addition to the requests brought by NGOs, in October 2022 a Member of the European Parliament (MEP) brought a case against the European Commission, before the EU General Court (*Repasi v. European Commission*).¹⁴ The same month, Austria filed an action for annulment with the Court of Justice of the European Union (*Austria v. European Commission*),¹⁵ arguing that economic activities related to nuclear energy and gas cannot be defined as ‘green’ and asking for the rules under the EU taxonomy to be quashed.

This controversy gives a flavour of the heated nature of efforts to draw clear lines about what is and is not ‘sustainable’ in legislation. Further examples of such definitional controversy can be found in other regulations, such as the Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector. Article 4 on transparency of adverse sustainability impacts at entity level requires that financial service providers within the scope of the directive must publish information including “a reference to their adherence to responsible business conduct codes and internationally recognised standards for due diligence and reporting and, where relevant, the degree of their alignment with the objectives of the Paris Agreement”. The question of where alignment with the objectives of the Paris Agreement is ‘relevant’ is likely to be the subject of significant court disputes. This phrasing could therefore result in efforts by the climate litigation community to encourage enforcement actions by national authorities, or, if national law allows, this issue could result in direct litigation by activist shareholders and institutional investors.

11 https://ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2021-4987_en.pdf

12 https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en

13 <https://www.greenpeace.org/eu-unit/issues/climate-energy/46384/taxonomy-greenpeace-takes-legal-action-against-the-eus-gas-and-nuclear-greenwashing/> and <https://www.clientearth.org/latest/latest-updates/news/we-ve-started-legal-action-against-the-classification-of-gas-as-sustainable/>

14 <https://curia.europa.eu/juris/document/document.jsf?text=taxonomy&docid=269645&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3506978#ctx1>. Also <https://verfassungsblog.de/a-chernobyl-case-for-our-times/>

15 <https://curia.europa.eu/juris/document/document.jsf?text=taxonomy&docid=269637&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3506978#ctx1>

3.3. Consumer protection legislation and climate-washing litigation

The final area of EU legislative activity relates to the provision of better information for consumers and protection against unfair practices. In March 2022 the Commission published plans for a Directive that would enhance consumer rights and introduce new rules over providing additional consumer information. The Directive seeks to amend two existing directives, the Unfair Commercial Practices Directive 2005/29/EC ('UCPD') and the Consumer Rights Directive 2011/83/EU ('CRD'), in order to facilitate a circular, clean and green EU economy by empowering consumers to make informed purchasing decisions. The legislation is still under development and has been referred to the Committee on the Internal Market and Consumer Protection within the European Parliament.

The impetus for the legislation can be seen in the increasing number of greenwashing and climate-washing cases such as *Greenpeace France & Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*, and *FossielVrij NL v. KLM*, where claimants have challenged both governmental and non-state actors for actions that misleadingly claim to address climate change. The case of *FossielVrij NL v. KLM* provides an example of the ways in which EU legislation forms the basis for strategic litigation, with the claimants citing both the proposed Directive and the updated guidelines on the UCPD (2021/C526/01). Those guidelines make clear that misleading actions and omissions prohibited under Articles 6 and 7 of the UCPD extend to environmental and sustainability claims, which form the basis of the claimant's argument that Dutch airline KLM engaged in misleading advertising under its 'Fly Responsibly' campaign.

While the proposed amendments to the UCPD and CRD touch on a range of issues, certain aspects of the reforms seem likely to attract litigation. Article 1 of the proposed amendments creates new rules in relation to product characteristics and prohibits false or misleading information about the environmental and social impact, durability and reparability of products. Litigation and enforcement activity will be driven by national courts and administrative authorities, which will be required to assess on a case-by-case basis whether this information is misleading under Article 6(1) UCPD. Similarly, the practice of making environmental claims about future environmental practice (such as becoming 'carbon neutral') without clear, objective and verifiable commitments and targets will need to be assessed case by case. Claims about future environmental practice will also have to be subject to an independent monitoring system, which is likely to lead to litigation connected to compliance with those third-party schemes.

It is also proposed that Annex 1 of the UCPD will be amended to add 10 new banned commercial practices that will always be considered misleading, irrespective of the circumstances. Of note is the prohibition on making generic environmental claims, such as 'environmentally friendly', 'eco-friendly', 'eco', 'green', and 'carbon neutral', among others. Such claims are only permissible where traders can demonstrate 'excellent environmental performance', in compliance with either the EU Ecolabelling Regulation (EC) No 66/2010, officially recognised ecolabelling schemes at the national level, or top environmental performance in accordance with other applicable EU laws. Traders will therefore have multiple national and EU level regulatory regimes available to them to substantiate any claim that they are demonstrating excellent environmental performance, which increases the likelihood of litigation brought by claimants seeking to contest generic environmental claims.

While the precise contours of future litigation stemming from the consumer information reforms are difficult to predict, the visibility and concern around greenwashing and climate-washing ensure that the courts will play an active role as the new Directive is implemented.

Conclusion and recommendations

The EU is developing an unprecedented package of legislation that will have radical impacts on the way European society and the economy operate. However, to fully understand the implications of this sweeping new package of reforms, they must be read against the backdrop of existing climate change litigation and the communities of practice actively seeking to use the law to advance their various agendas in the climate policy arena.

Climate litigation has been shown to have an impact on outcomes and ambitions of climate governance. This is especially true in Europe, where there has been a concentration of cases against governments seeking increased action and ambition, and where a new wave of cases is being filed against corporations. It is important to understand these cases in order to appreciate both the environment for the development of the new package of legislation and the litigation that may result from it.

In the context of the direct decarbonisation measures set out in the Fit for 55 package, there is a high likelihood that states may be involved in litigation, as both defendants and plaintiffs, particularly as civil society activists seek to ensure that national-level policies and action are as ambitious as possible, and as controversies over the type and nature of new energy technologies continue to play out. It is also likely that there will be a spate of legal cases concerning the application of reforms to the Emissions Trading System and the creation of ETS-2 to encompass new sectors, following the trend seen in the past.

In the context of reforms to finance, company law and consumer protection measures, litigation is more likely to target private entities. The reforms discussed in this report primarily take an approach grounded in the idea that clear information on climate risks and impacts will help corporate actors to undertake more sustainable economic activities. The CSDDD is exceptional in that it includes specific obligations concerning the mitigation and remediation of harm, although the extent to which these will apply in the climate context remains unclear. Overall, while leading companies in the field of sustainability may try to implement these ideas rigorously, others might find themselves exposed to litigation risks.

Recommendations

- **National-level legislators** need to consider litigation risks when transposing new and amended EU directives into national law. There is evidence that litigation will continue to increase in coming years. The increasingly well-resourced community of practice will continue operating in a highly strategic manner to push for more action. Existing litigation gives an indication to legislators and policymakers of what areas are likely to be challenged and may need closest attention. Legislators and policymakers must also note that litigation can be used by many actors, and that non-aligned, anti-climate cases are also likely to grow in number.
- **National governments** should also seek to learn lessons from the field of climate litigation when implementing requirements under EU Regulations. For example, the development of new Climate and Energy Plans and New Social Action Plans must be done in a way that includes active consensus-building and stakeholder engagement, taking proper account of distributional factors.
- **Businesses, legal counsels and professional service providers** should pay close attention to these developments. It will take more than box-ticking to comply with the new legislation in a way that minimises litigation risk. There will be significant scrutiny on the activities of large companies and financial institutions and given the complex patchwork of requirements created by the various reforms discussed here, adopting a 'do the minimum' approach in one area may lead businesses to fall short in another. General counsel and environmental advisors

will have a particularly important role in ensuring that their clients are aware of the bigger picture, rather than trying to address each new requirement separately.

- **Civil society** will continue to have a major role to play in ensuring that this new suite of climate laws is implemented in a way that advances climate action to the greatest extent possible. Given the breadth of reforms under discussion, civil society groups will need to think carefully about how and where their interventions will be most impactful.
- **Judges** are likely to have to decide on cases seeking more action or seeking the enforcement or clarification of the new legislation. European and domestic courts can help by providing specialisation and training to judges, clerks and other court officers.

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