In this month's ESG Matters, we take a look at the three climate change rulings delivered by the European Court of Human Rights on 9 April 2024. Our Spotlight section brings you up to date with March's key developments in ESG governance, disclosure, financial regulation and litigation.

1 Highlight – European Court rules that Switzerland's climate inaction violates human rights

On 9 April, the European Court of Human Rights delivered three rulings on cases related to climate change. In the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the Court found violations of Article 8 (right to respect for private and family life) and Article 6 (access to court) of the European Convention on Human Rights (ECHR) for Switzerland's failure to implement sufficient measures to combat climate change. This ruling can be seen as a landmark case, as it is the first time that the European Court confirmed that climate change protection falls within the scope of the ECHR.

Switzerland convicted for breach of Article 8 ECHR

The applicants in the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* case are a Swiss association whose members include more than 2,000 elderly women and four women aged over 80. They are concerned about the impact of global warming on their living conditions and health, and argued that the Swiss authorities are not taking sufficient action to mitigate the effects of climate change.

In a ruling of more than 250 pages, the Court held that Article 8 of the ECHR (right to respect for private and family life) encompasses a right to effective protection by the state authorities against the serious adverse effects of climate change on life, health, well-being and quality of life. On formal grounds, the Court declared the complaint of the four individual applicants inadmissible. However, the Swiss association had the right to bring a complaint.

Failure to act exceeds Switzerland's margin of discretion: the Court has jurisdiction to step in

The Court found that Switzerland had failed to fulfil its obligations under the ECHR concerning climate change. The Court ruled that there had been critical gaps in the process of putting in place the relevant domestic regulatory framework, including a failure by the Swiss authorities to quantify national greenhouse gas (GHG) emission limits, through a carbon budget or otherwise. Switzerland had also failed to meet its past GHG emission reduction targets.

The Court emphasises that climate change is one of the most pressing issues of our time. While recognising the limitations of its place in the democratic systems, the Court states that the judiciary must oversee compliance with legal requirements. The Court averred that it cannot ignore the widely acknowledged inadequacy of past state action to combat climate change and the ensuing threats to human rights. While weighing conflicts in national decision-making is part of democratic decision-making, it is complemented by judicial oversight. The intergenerational perspective underlines the risk that short term interests and concerns may prevail in political decision-making over the need for sustainable policy making.

In terms of the division of powers, the Court importantly rules that, on the one hand, states enjoy a wide margin of discretion in the choice of the means with which they pursue their climate objectives and targets. On the other hand, states have a reduced margin of discretion with regard to their commitment to combat climate change and to set the required targets and objectives. This follows from the nature and severity of climate change, and the international political consensus on the need to achieve net zero. More specifically, the Court considers that Article 8 of the ECHR requires states to adopt and effectively apply GHG emission reduction measures with a view to achieving net zero within, in principle, within the next three decades. In the balancing of all competing considerations, climate protection should be given considerable weight.

The Court considered that the Swiss Climate Act contains intermediate reduction targets, such as 75% GHG reduction by 2040 compared to 1990. At the same time,

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the Act lacks concrete measures to achieve the targets, stating that such measures should be taken 'in good time'. It also does not include a mechanism for quantifying the state's national GHG emissions limitations (through a carbon budget or otherwise). Besides, the state failed to meet its 2020 climate targets. While recognising the wide margin of discretion in the implementation of measures, the Swiss authorities had not acted in a timely and appropriate way to devise, develop and implement relevant legislation and measures. As there were critical gaps in the mechanisms under the Swiss Climate Act, Article 8 of the ECHR was violated.

Carême v. France - complaint held inadmissible

The case of *Carême v. France* concerned a complaint by a former resident and mayor of a French municipality, alleging that France had not taken sufficient measures to prevent global warming. The Court declared the application inadmissible on formal grounds, as the applicant appeared to have no relevant links with the municipality and no longer lived in France.

Portuguese youths v. Portugal and 32 other European states – complaint held inadmissible

The case of *Duarte Agostinho et al. v. Portugal* concerned the present and future severe effects of climate change. The applicants attribute these effects to the respondent states, claiming that they impact their lives, well-being, mental health, and the peaceful enjoyment of their homes. The applicants sought action against all European states, as they alleged that they are all responsible for the (failure in) combatting climate change. Their complaints were also declared inadmissible on formal grounds.

In respect of the complaint against Portugal, the Court found that the applicants had not pursued any legal proceedings in Portugal itself before resorting to the European Court. As concerned the other states, the Court found that there were no grounds in the ECHR for extending extraterritorial jurisdiction in the manner requested by the applicants.

Conclusion

Two out of the three cases were dismissed on procedural grounds. The case to be considered on its merits resulted in a conviction of Switzerland. Although the ruling is only directed at Switzerland, it will undoubtedly influence climate-related discussions and proceedings in other European jurisdictions, including the Netherlands, as well as outside Europe. The ruling could be seen as reinforcing the obligation of states to set the necessary targets to combat climate change, including its impacts, and to introduce and implement effective measures to achieve those targets, similar to those required under the Dutch ruling in the Urgenda climate case.

What it means for you:

- The rulings of the European Court are aimed at states. Their effects are therefore primarily on the duties of governments in relation to climate change, similar to the Urgenda ruling.
- The Swiss case strengthens the legal avenues for climate cases by confirming that

climate change is indeed an ECHR issue. It may well lead to additional action against states that are lagging behind in their climate targets and implementation of policies and measures.
- For corporates and financial institutions, the indirect effect may be substantial. New rules and more concrete policies can of course have an impact on current practices and, perhaps more importantly, lead to more certainty and new opportunities.

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2 Spotlight on ESG developments

Governance & transition

Council endorses modified version of CSDDD proposal

On 15 March, the European Council (EC) endorsed a modified version of proposed Corporate Sustainability Due Diligence Directive (CSDDD). The main elements of the final compromise text are explained in our latest CSDDD update. The current wording of the CSDDD already refers to the application of the OECD Guidelines for Multinational Enterprises, which emphasise the specificities of financial services and expect financial institutions to assess adverse impacts and use their influence on companies. The end of the European procedure for the CSDDD is now in sight. If the European Parliament (EP) adopts the proposal as planned on 24 April, the directive will be published in the Official Journal of the European Union. After the vote, member states have two years to transpose the directive into national law, so that the CSDDD will be in force by 2026.

Provisional agreement on ban on products made with forced labour

On 13 March, the Council and the EP reached a provisional agreement on a regulation on forced labour. The proposal bans the placing on the EU market, making available on the EU market and export to third countries of products made with forced labour. The regulation will apply to all products made with forced labour inside or outside the EU, and across all sectors. Competent national authorities must investigate reasonable indications that products have been made with forced labour. The agreement clarifies the roles of the different supervisory authorities. It also clarifies that if only a part of a product is non-compliant, an order to dispose of the product will only apply to that part and not to the whole product. The proposal now has to be formally approved by the Council and the EP.

EC communication on climate risks

On 12 March, the EC published a communication on managing climate risks in Europe. It sets out how the EU and its Member States can better anticipate, understand, and address growing climate risks. It shows how they can prepare and implement policies that will save lives, reduce costs, and protect prosperity across the EU. The communication also responds to the first ever European Climate Risk Assessment (EUCRA), a scientific report by the European Environment Agency. The communication and report are a call to action for all levels of government, as well as the private sector and civil society. They set out how all major sectors and policy areas are exposed to climate-related risks, how severe and urgent the risks are, and how important it is to have clarity on who is responsible for addressing the risks.

Provisional agreement on regulation on packaging and packaging waste

On 4 March, the Council and the EP reached a provisional political agreement on a regulation regarding packaging and packaging waste. The proposal takes into account the full life-cycle of packaging and sets requirements to ensure that packaging is safe and sustainable, by requiring that all packaging is recyclable and that the presence of substances of concern is minimised. It also sets out harmonised labelling requirements to improve consumer information. The proposal aims to significantly reduce the generation of packaging waste by setting binding reuse targets for 2030, restricting certain types of single-use packaging and requiring economic operators to minimise the packaging used.

Dutch ministry announces new round of SDE++ subsidies

On 1 March, the Dutch Ministry for Economic Affairs and Climate (EZK) announced that the SDE++ subsidy programme will re-open as of 10 September 2024, with an initial budget of EUR 11.5 billion. SDE++ is the main Dutch subsidy programme for large-scale sustainable (energy) projects. It reimburses the difference between the cost price of the technology and the revenue (the 'non-profitable top'). Subsidies will be available for the following categories, among others: sun, wind, geothermy and aquathermy, electric boilers, hydrogen, carbon capture and storage, process-integrated heat pumps and thermal storage for high-temperature heat.

Disclosure

SEC climate-related disclosures rules adopted and temporarily halted

On 6 March, the US Securities and Exchange Commission (SEC) adopted the climate-related disclosure rules for US public companies. The rules will be phased in gradually, with 'large accelerated filers' first reporting in FY 2025. Notably, scope 3 reporting has been removed from the rules, while companies will be required to report on scope 1 and 2 emissions, if material. The rules generally align with the disclosure framework of the former TCFD recommendations. As the rules do not allow for substitution, in-scope companies may, for example, be in scope of both the SEC rules and the Corporate Sustainability Reporting Directive (CSRD). On the day of adoption, litigation against the rules was announced from various angles. On 15 March, a US Court of Appeals temporarily halted the application of the rules while it hears an administrative appeal to the rules.

EC adopts delegated regulation on sustainability disclosures for STS securitisations

On 5 March, the EC adopted a delegated regulation setting out regulatory technical standards (RTS) on environmental disclosure standards for Simple, Transparent and Standardised (STS) securitisations. Under the Securitisation Regulation, originators of STS securitisations may voluntarily make disclosures on the principal adverse impacts on sustainability factors of assets backed by residential loans, car loans or leases. The RTS set out certain standards for these voluntary disclosures, including the content, methodologies and presentation of information. Originators of STS securitisations may choose to comply with the requirements of the Securitisation Regime or the alternative requirements of the RTS. The RTS supplements the EU Securitisation Regulation (2017/2402) and will enter into force on 25 March 2024.

EFRAG publishes second set of Q&A on ESRS

On 1 March, the European Financial Reporting Advisory Group (EFRAG) released a second set of Questions & Answers to collect views and information from stakeholders on the implementation of the European Sustainability Reporting Standards (ESRS) through its Q&A platform. EFRAG's answers are categorised as cross-cutting, environmental, social and other.

Financial institutions & regulation

ESMA launches consultation on rules for 'external reviewers' of EU green bonds

On 26 March, the European Securities and Markets Authority (ESMA) launched a consultation on Draft Regulatory Technical Standards (RTS) relating to the registration and supervision of external reviewers under the EU Green Bond Regulation (EuGB). ESMA's proposals aim to clarify the criteria used for assessing an application for registration by an external reviewer, to standardise registration requirements and to contribute to the development of a level playing field through lower entry costs for applicants. ESMA will consider the feedback received in this consultation and will submit the draft RTS to the EC by 21 December 2024.

ECB publishes study 'Business as usual: bank climate commitments, lending, and engagement'

On 22 March, the European Central Bank (ECB) published a study on the impact of voluntary climate commitments by banks on their lending activity and on the climate impact of borrowing firms. Overall, the results cast doubt on the efficacy of voluntary climate commitments for reducing financed emissions, whether through divestment or engagement. Making a commitment leads to an increase in a lender's ESG rating. Lenders reduce credit in sectors they have identified as high priority for decarbonisation. However, climate-aligned banks do not change their lending or loan pricing differentially compared to banks without climate commitments, suggesting that they are not actively divesting. Climate-aligned lenders do not divest more than 2.6% from firms in targeted sectors. Corporate borrowers are no more likely to set climate targets after their lender sets a climate target, casting doubt on active engagement by lenders.

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EIOPA publishes factsheet on taxonomy alignment of occupational pension funds' investments

On 14 March, the European Insurance and Occupational Pensions Authority (EIOPA) published a factsheet summarising the sustainable characteristics of investments made by occupational pension funds based in the European Economic Area (EEA). The factsheet shows that 4.5% of the investments issued by EEA-based funds were aligned with the EU Taxonomy, with a further 26.1% eligible for alignment with sustainable criteria. A breakdown shows that 9% of corporate bonds were Taxonomy-aligned (42% eligible) and 1% of equities were Taxonomy-aligned (15% eligible).

NZBA publishes second version of the Guidelines for Climate Target Setting for Banks

On 13 March, the members of the UN-convened Net-Zero Banking Alliance (NZBA) adopted a new version of the Guidelines for Climate Target Setting for Banks. The guidelines demonstrate a continued commitment to achieving net-zero by 2050 or sooner, and to setting intermediate 2030 targets that are consistent with the latest science, using low or no overshoot 1,5 degrees scenarios, and covering all or a substantial majority of nine carbon-intensive sectors. For the first time, the scope of the targets will be extended beyond lending and investment activities to include banks' capital markets activities.

ECB publishes study 'Greening the economy: how public-guaranteed loans influence firm-level resource allocation'

On 13 March, the ECB published a study on the reasons why banks' continue to support fossil fuel-based firms. It examines the role of public guaranteed loans (PGLs) in redirecting resources towards greener economic activities, thereby facilitating the climate transition process. The study has three main findings: (i) European banks perceive lending to green companies as riskier than to their brown counterparts (green transition risk); (ii) European banks have strategically leveraged PGLs to channel resources towards environmentally sustainable activities during the COVID-19 pandemic, thereby increasing the proportion of green loans in their portfolios and partially shifting the inherent 'green transition risk' to European governments and citizens; and (iii) a preference by banks for awarding PGLs to financially robust green firms rather than less profitable, highly indebted green firms, which could pose significant challenges for green businesses in need of financial support during the COVID-19 crisis.

DNB publishes analysis of financial institutions' climate plans

On 8 March, De Nederlandsche Bank (DNB) published a report analysing the climate action plans of around 50 banks, insurers, pension funds and asset managers. The analysis shows that financial institutions have developed strategies to achieve their (self-imposed) climate targets. However, these strategies often lack specificity and a clear link to the targets. The institutions also provide little insight into which functions within the organisation are responsible for implementing the plans. DNB emphasises the importance of actually implementing the action plans in order to avoid reputational risks, and the importance of a common reporting format and a digital environment for storing and monitoring the plans.

EIOPA publishes paper on demand-side aspects of the protection gap

On 29 February, EIOPA published a revised version of its paper on addressing natural catastrophe protection gaps. The paper examines the underlying causes of the protection gaps from a demand-side perspective and identifies options to address mainly the demand factors. Some of the main 'solutions' mentioned to limit the gaps are: (i) increasing risk awareness and coverage, for example through digital tools that can more easily present the risks to which consumers are exposed; (ii) improving consumer understanding and product comparability; (iii) streamlining the consumer journey during the purchasing process; and (iv) reducing insurance premiums by requiring risk mitigation measures to limit insurers' exposure to risk and incentivising consumers to purchase natural catastrophe coverage.

Litigation

Travel website removes sustainable travel campaign

On 25 March, the Dutch Authority for Consumers and Markets (ACM) announced that travel website Booking.com will remove its 'Travel Sustainable' campaign. The announcement follows 'normative discussions' of the ACM with the company. As part of the campaign, member accommodations received a sustainability score and a number of green leaves on the website. The ACM assessed the presentation of this programme as misleading, among others because (i) the statement 'Travel Sustainable' could wrongly make consumers believe that travelling to the selected accommodations is sustainable; (ii) it was unclear to consumers what the sustainability score was specifically based on; and (iii) the programme did not display the sustainability efforts of non-member accommodations.

Amsterdam District Court declares 15 green statements by Dutch airline misleading

On 20 March, the District Court of Amsterdam ruled that 15 sustainability-related statements by Dutch airline KLM are misleading. The case marks the first time a Dutch court decides on a greenwashing claim. Of considerable practical relevance are the court's considerations on the statements on (i) commitment to the Paris Agreement targets; (ii) measures taken to achieve net zero ambitions; (iii) the use of carbon credits; and (iv) the use of sustainable aviation fuel. The court ruled that statements violated the Dutch implementation of the Unfair Commercial Practices Directive. The court found that it is sufficiently plausible that the average consumer would take a different economic decision as a consequence of the statements. The court rejected the NGO's other claims, which included an injunction to stop making these statements in the future, an order to publish rectification statements, and an order to publish warnings on its website and on flight tickets.

Spanish energy company files greenwashing lawsuit against competitor

On 18 March, it was reported that Spanish energy company Iberdrola has filed a greenwashing lawsuit against its competitor Repsol based on Spanish competition law. Iberdrola accuses Repsol of presenting itself as a leader in the energy transition while being the largest greenhouse gas emitter in Spain. Iberdrola requests the removal of Repsol's advertising campaigns relating to biofuels and green hydrogen.

Belgian farmer files climate lawsuit against French energy company

On 13 March, a Belgian farmer and three NGO's sued French energy company TotalEnergies at the Commercial Court of Doornik. The farmer claims that TotalEnergies is partly responsible for the damage caused to his operations by extreme weather events in the period 2016-2022, and requests a symbolic amount of EUR 1,00 in damages. TotalEnergies is also requested to (i) immediately stop investing in new fossil fuel projects; (ii) reduce its greenhouse gas emissions from the production and supply of fossil fuels by 60% in 2030; and (iii) reduce its oil and gas production by 47% in 2030, 75% in 2040 and 88% in 2050. The claim is based on Belgian tort law and refers to the recent ruling of the Brussels Court of Appeal in the climate case (Klimaatzaak) against the Belgian governments.

OECD complaint against Luxembourg pension fund

On 11 March, NGO Greenpeace Luxembourg filed a complaint with the OECD National Contact Point (NCP) against sovereign pension fund Fonds de Compensation de la Sécurité sociale SICAV FIS (FDC SICAV). The NGO alleges that the fund's investment strategies are not in line with the OECD Guidelines for Multinational Enterprises. It requests the fund to (i) set up an investment strategy including risk-based human rights and environmental due diligence and in line with the Paris Agreement; (ii) conduct human rights and environmental due diligence on its investments; and (iii) establish a grievance mechanism in line with the UNGPs. If the parties do not reach a solution during the mediation phase, the NCP will issue a non-binding advice on the matter.

Danish court declares pork producer's green statement misleading

On 1 March, Denmark's Western High Court ruled that pork producer Danish Crown has misled consumers by marketing its products as 'climate-controlled'. The case was brought by NGO's the Danish Vegetarian Association and the Climate Movement. The court ruled that Danish Crown could not sufficiently substantiate its statement that its meat is 'climate-controlled pig'. Notably, the court ruled that this statement could be expected to significantly distort the economic behaviour of the average consumer. The statement 'Danish pork is more climate-friendly than you think' was not found misleading. The court also rejected the NGO's request for a prohibition to make these statements in the future and to publish a rectification.

Do you have any questions or comments on a specific ESG topic? Please do not hesitate to contact our Sustainable Business & Climate Change team. If you or members of your team would also like to receive updates, please sign up.

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