

Client Alert

International Arbitration and Litigation

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Climate Change and Human Rights – European Court Hands Down Landmark Ruling with Consequences for States and Businesses

SUMMARY

The Grand Chamber of the European Court of Human Rights has ruled that Council of Europe Member Statesⁱ have a positive obligation to adopt “measures for the substantial and progressive reduction of their respective GHG [Greenhouse Gas] emission levels, with a view to reaching net neutrality within, in principle, the next three decades.” “Immediate action” must be taken and intermediate goals must be set. While the ruling directly affects only States, it is likely to have significant indirect impacts on companies based or operating in Europe.

This positive duty on Member States goes beyond the obligations contained in the UN Framework Convention on Climate Change (the “UNFCCC”) and Paris Agreement, and provides a basis to bring legal proceedings against States for alleged shortcomings in their domestic climate policy.

The Court established a novel framework for determining causation in climate change cases and found that, through inadequacies and shortcomings in its domestic climate policy, the Swiss Government breached its obligations under the European Convention on Human Rights (the “Convention”). The matter will now go to the Committee of Ministers of the Council of Europe to monitor Switzerland’s implementation of the judgment.

The Court also clarified rules of legal standing that will make it difficult for individuals to bring climate suits before the Court. However, it also broadened the legal standing of human rights organizations representing their members to bring climate cases before the Court. More such cases can now be expected against other member States.



The Court rejected separate lawsuits in two other cases. This client alert provides a digest of all three cases, focusing on what they are likely to mean in practice for companies and future climate change litigation.

THE APPLICATIONS

On 9 April 2024, the Grand Chamber handed down rulings in three separate cases, each alleging that shortcomings in domestic climate policy breached the applicants' human rights:

- In ***Verein KlimaSeniorinnen Schweiz and Others v. Switzerland***, four Swiss nationals and a Swiss NGO complained that the Swiss Government had failed to take adequate action to mitigate the effects of climate change. The Court dismissed the applications by the four individuals on the basis that they lacked the necessary standing. However, it upheld the complaint by the NGO, finding that the Swiss Government had breached an obligation under Article 8 of the Convention (the right to private and family life) to ensure effective protection from the serious adverse effects of climate change on lives, health, wellbeing and quality of life. This finding is addressed further below in the section "*The right to effective protection from serious adverse effects of climate change*".
- In ***Duarte Agostinho and Others v. Portugal and 32 Others***, six young Portuguese nationals complained that they were exposed to a risk of harm from climate change caused by the failure of 33 European States adequately to mitigate the effects of climate change, in violation of Article 8, as well as the right to life (Article 2) and the prohibition of inhuman and degrading treatment (Article 3) of the Convention. The Court dismissed the application as inadmissible. With respect to all of the States except Portugal, it found that the alleged violations fell outside their jurisdiction, declining to extend the established bases for extra-territorial jurisdiction under the Convention. In the case of Portugal, the Court found territorial jurisdiction but ruled the application inadmissible on the ground that the applicants had failed to exhaust domestic remedies.
- In ***Câreme v. France*** a French national complained that France had taken insufficient steps to prevent climate change, violating his rights under Articles 2 and 8 of the Convention. The Court dismissed the claim as inadmissible on the basis that he lacked the necessary standing to bring a complaint.

THE RIGHT TO EFFECTIVE PROTECTION FROM SERIOUS ADVERSE EFFECTS OF CLIMATE CHANGE

In *Verein KlimaSeniorinnen Schweiz*, the Court established for the first time the existence of a Member State's positive obligation to protect the human rights to private and family life from the serious adverse effects caused by climate change. Member States have a duty to put in place, and effectively implement in practice "a binding regulatory framework" and other measures capable of mitigating the effects of climate change. More specifically, each Member State must undertake measures for the substantial and progressive reduction of their respective GHG emissions, "with a view to reaching net neutrality within, in principle, the next three decades."

The Court went on to outline specific features of States Parties' positive obligation in this respect. Namely, they must:

- Adopt measures which specify a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame;
- Set out intermediate GHG emissions reduction targets;
- Provide evidence of compliance with reduction targets;
- Update the GHG reduction targets in light of due diligence and the best available evidence; and



- Act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

This primary duty must be supplemented by ancillary adaptation measures aimed at alleviating the most severe or imminent consequences of climate change.

Following analysis of Switzerland's domestic regulatory framework and practical implementation of its climate policy, the Court ruled that Switzerland failed to devise, develop and implement the relevant legislative and administrative framework in good time and in an appropriate and consistent manner.

The Court cited "critical lacunae" in the Swiss regulatory framework (for example, a failure to regulate the period 2025-2030, pending new legislation and a failure to quantify its carbon budget); Switzerland's failure to set out the concrete measures to achieve the objectives laid out in its domestic legislation; and its failure to meet its past GHG emission reduction targets.

By limiting a Member State's margin of appreciation and effectively specifying certain, mandatory features, of domestic climate policy (such as introducing and implementing carbon budgets), the Court imposes obligations which go beyond those in the UNFCCC and Paris Agreement. Further, in finding that Switzerland's failure to achieve its stated GHG reduction targets was evidence of a breach of Article 8, the Court arguably imposes a presumptive obligation on Member States to achieve their stated targets. The UNFCCC and Paris impose no such obligation on States.

The Court's interpretation is binding on Member States at the international level and (subject to the peculiarities of certain national legal systems) enforceable in their domestic courts.

CAUSATION

In *Verein KlimaSeniorinnen Schweiz*, the Court took the opportunity to address certain "general considerations relating to climate change", including in relation to (the highly contested) issue of causation.

The Court acknowledged the difficulty of applying the traditional rules of causation in human rights and climate change cases. Against this background, it set out a novel approach to causation in such cases, addressing four different "dimensions" of causation:

- **First, the link between GHG emissions and the phenomena of climate change.** The Court ruled that this is a matter of scientific assessment and stressed its reliance on studies and reports by international bodies, in particular the Intergovernmental Panel on Climate Change (the "IPCC").
- **Second, the link between the adverse effects of climate change and the enjoyment of human rights (now and in the future).** Relying in part on IPCC reports, the Court concluded that "as a matter of fact" there are "sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, [and] that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5C above pre-industrial levels [...]"
- **Third, the link, at an individual level, between the harm or risk of harm complained of by the applicant and the acts or omissions of the respondent State.** The Court acknowledged that, in climate change cases, the causal link between the acts and omissions of a State and the harm suffered by an individual is "more tenuous and indirect" than in ordinary cases regarding environmental harm and human rights. It further acknowledged that, in the context of climate change, the State duty is to reduce, rather than eliminate, risks. In light of these features,



the Court concluded that causation in climate cases cannot be determined on the basis of a strict “but for” rationale. Instead, the Court determined that it is necessary to “further adapt the approach” and, taking account of the “special features” of climate change, determine whether a State’s obligations are triggered on the basis of “a threshold of severity of the risk of adverse consequences on human lives, health and well-being.” This is considered further below under “*Standing*”.

- **Fourth, the attribution of responsibility to a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions.** The Court ruled that, in light of the UNFCCC and Paris Agreement, each State has its own share of responsibilities to take measures to tackle climate change and that a State should not be able to evade its responsibility by pointing to the responsibility of other States.

STANDING (VICTIM STATUS)

In all three cases, the Court adopted a restrictive approach to the standing of individuals. It ruled, for the first time, that in climate cases, an individual applicant must satisfy two criteria: (a) high intensity of exposure to the adverse effects of climate change; and (b) a pressing need to ensure the applicant’s individual protection. The Court emphasised that the threshold for establishing standing in climate cases is “especially high”. This might be surmounted in a case where an individual applicant suffers from a critical medical condition whose aggravation is linked to an adverse effect of climate change (for example a heat wave) and cannot be alleviated by available adaptation measures. However, across all three cases, no individual applicant was able to meet this threshold, despite the provision of detailed medical evidence of conditions likely to be aggravated by heatwaves.

The only applicant which the Court determined to have the necessary standing was *Verein KlimaSeniorinnen Schweiz*, the Swiss climate NGO. The Court found that associations have standing to bring climate cases where they are (a) lawfully established in the relevant jurisdiction; (b) able to demonstrate that they pursue a dedicated purpose in accordance with their statutory objective relating to human rights and climate change; and (c) genuinely qualified and representative to act on behalf of affected individuals. However, meeting these criteria may not suffice. The Court will also consider such factors as the nature and extent of the organization’s activities within the relevant jurisdiction, its principles and transparency of governance, and “whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice.”

The restrictive approach to standing of individuals is likely guided by policy considerations and the Court’s concern not to open the floodgates to individual applications. While the rulings pave the way for applications by specialised climate NGOs to challenge a State’s climate policy, the rulings all but exclude applications (to the European Court at least) by large groups of affected individuals.

REMEDY

As the NGO did not submit a claim for damages, and all of the individual claims were declared inadmissible, the Court did not rule on damages (or “just satisfaction”). It did confirm that the Swiss Government was required to abide by its judgment. However, given the “complexity and nature of the issues involved” and the margin of appreciation afforded to States under the Convention, it declined to order detailed or prescriptive measures for improving Swiss climate policy and instead remitted supervision of the implementation of the judgment to the Committee of Ministers (the Council of Europe’s statutory decision-making body, comprising ministers from each Member State).



WHAT DO THE RULINGS MEAN FOR COMPANIES?

These rulings directly affect only the Member States, and not private enterprises. Indeed, the Court was careful to frame the right under Article 8 as (emphasis added) a “right for individuals to enjoy effective protection by the **State authorities** from serious adverse effects [...] arising from the harmful effects and risks caused by climate change”. Even so, the ruling will have indirect but potentially significant consequences for companies domiciled or operating in one of the 46 Member States.

First, in order to guarantee the right to effective protection (and avoid successful applications similar to that brought by the applicants in *Verein KlimaSeniorinnen Schweiz*), Member States may be required to strengthen domestic climate regulation and enforcement in ways which impact companies within their jurisdiction. This could take the form of, for example, the introduction of binding GHG emissions reduction targets for companies (or strengthening of existing measures).

Second, Member States will be required to ensure that policy decisions are compatible with the right to effective protection from climate change. Companies can expect that decisions relating to domestic energy policy will be challenged on the grounds of incompatibility with Article 8. In the United Kingdom (which remains a member of the Council of Europe), for example, this could result in a finding of unlawfulness in the context of a judicial review.

Third, even prior to the new ruling, claimants argued that the right to effective protection from climate change is a human right which companies must consider in carrying out human rights due diligence and assessing salient impacts. In fact, *Verein* recognized a duty only of *States*, not companies. Nonetheless, companies are well advised to expect that claimants will now cite *Verein* to press their contention.

Before joining King & Spalding, Peter Hood was the United Kingdom's agent in *Duarte Agostinho and Others v. Portugal and 32 Others*.

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¹ A list of Member States can be accessed at the following URL <https://www.coe.int/en/web/about-us/our-member-states>. It should be noted that the Council of Europe is not connected to the European Union. Accordingly, while the United Kingdom is no longer an EU Member State, it remains a Member State of the Council of Europe and therefore subject to obligations under the European Convention on Human Rights.