

Trend report

The rise of ESG litigation and horizontal human rights enforcement

ESG litigation is on the rise. There has been a strong increase in Environmental (climate change) litigation over the past years, as is also demonstrated in figures in the UNEP Report 2023. Within climate change litigation, over time the focus has shifted from mainly targeting States to targeting companies. Based on the general (corporate) duty of care in Dutch law and human rights, companies are more and more held responsible by interest organizations for their alleged impact on climate change. Such private enforcement of human rights against companies is not limited to Environmental (ESG) litigation, but also increasingly involves Social (ESG) litigation. Although (corporate) governance litigation is seen less frequently up till this point, the importance of a ESG fit corporate governance is and will remain key as legislative developments might lead to an increase in liability and litigation risks. What to expect next?

The rise of Environmental (ESG) litigation

Litigation on environmental related aspects, especially climate change litigation, is a fast developing field of law. It encompasses legal actions involving challenging enforcement of climate-related laws and policies, but also compelling action based on human rights. Such litigation is not only aimed - as it has traditionally mainly been - at States, but increasingly towards corporate liability and responsibility of individual private companies. And not only has the number and variety of climate change cases increased, but also the geographical range in which such climate change litigation takes place. Although climate change has always been more prominent in the United States, as is also reflected in the updated Global Climate Litigation Report 2023 (the **UNEP Report**) that was published on 27 July 2023 by the United Nations Environment Program (**UNEP**), the number of climate change litigation cases is growing in other jurisdictions as well, including the Netherlands and Germany.

The Urgenda-case as first landmark case on vertical enforcement of human rights

The 'first' landmark case in the Netherlands on climate change litigation is *the Urgenda Foundation v. Dutch State* in 2015 (see [our earlier blog](#)). The *Urgenda*-case reflects the trend of (vertical) human rights enforcement in ESG litigation between a State and its citizens, at least an interest organization on behalf of them. The Urgenda Foundation claimed that the Dutch State did not take sufficient mitigation measures to meet its commitments under the Paris Agreement and/or its responsibilities and obligations based on human rights. In June 2015, the District Court of The Hague ordered the Dutch State to ensure that the Dutch emissions will be at least 25% lower in 2020 compared to 1990 based on the State's duty of care towards its citizens. The judgment was confirmed by the Hague Court of Appeal (2018) and the Dutch Supreme Court (2019). This has been recognized as the first time - globally - in which a court found a State to be responsible for mitigating GHG emissions, basing its judgment on both climate-related laws and policies and human rights.

The *Urgenda*-case can be considered as a steppingstone for climate change litigation, both in the Netherlands and elsewhere. Similar cases have by now been litigated in

other jurisdictions. The UNEP Report mentions, *inter alia*, the case of *Klimatická žaloba ČR v. Czech Republic* (2022), in which the Prague Municipal Court ordered the State to urgently take the necessary measures to address climate change and devise a precise plan to achieve the goals of the Paris Agreement. Similarly, based on the supranational status of human right treaties including the Paris Agreement, the Brazilian Supreme Court ruled in *PSB et al. v. Brazil (on Climate Fund)* (2022) that there is a duty to mitigate climate change, concluding that the executive branch of the Brazilian State has a constitutional duty to execute and allocate funds to mitigate climate change. Another example is the class action launched by residents and Dutch citizens of Bonaire, together with Greenpeace Netherlands, against the Dutch State in May 2023, over its alleged failure to protect the Caribbean Island against climate change impacts.

More recently, on 30 November 2023, in the Belgian *Klimaatzaak*-case, the Brussels Court of Appeal ordered that the Flemish Region and Brussels Capital Region have to do more to reduce GMG emissions. By 2030, Belgium's GMG emissions must be reduced by 55% compared to 1990. Failure to undertake sufficient measures, as articulated by the Brussels Court of Appeal, constitutes a violation of the European Convention on Human Rights. The Brussels Court of Appeal underscores that, in accordance with prevailing scientific consensus, there exists a jeopardy to the right to life. In a similar way, a comparable decision was made in the *Urgenda*-case.

The *Shell*-case, horizontal enforcement of human rights and corporate duty of care

Following the *Urgenda*-case, the possibility to link (a) the lack of compliance with and enforcement of climate-related laws and policies to (b) the breach of human rights has been top of mind. The next even more recent visible trend revolves around whether such a duty of care (also) exists for individual private companies.

In the Netherlands, this question was answered - by a district court - in the landmark case *Milieudefensie et al. v. Royal Dutch Shell*. The District Court of the Hague ruled that Royal Dutch Shell (**Shell**) has an obligation to ensure that the greenhouse gas emissions of the Shell group, its suppliers and its customers are reduced by including mitigating provisions in the Shell group's corporate policy

(please see [our earlier blog](#) in this regard). The court based its judgment on the general, open standards of Dutch tort law, soft law instruments on business and human rights, the findings of the *Urgenda*-case, articles 2 and 8 of the European Convention of Human Rights and the Paris Agreement, offering protection against dangerous climate change. Shell filed an appeal against the judgment, which is still pending and a judgment is currently expected around September 2024.

Even though it is unclear whether the district court judgment will be upheld in appeal, this judgment demonstrates that responsibility and liability in relation to climate change is no longer limited to States. Through the duty of care, a company too can be held responsible for its (potential) impact on human rights. This approach, not invoking human rights vertically against a State, but horizontally (be it indirectly) against a company, has also served as inspiration to other initiatives in the Netherlands potentially resulting in Environmental (climate change) litigation. For example, Friends of the Earth Netherlands (*Milieudefensie*) has also indicated that it demands other companies (such as financial institutions, energy companies and chemical companies) to take similar actions to make the same reductions to its annual volume of all greenhouse gas emissions. For example, Friends of the Earth Netherlands announced on 27 November 2023 that it will initiate legal proceedings in the Netherlands in 2024 against (at least) a financial institution.

The global rise of Environmental (ESG) litigation

The rise of Environmental (ESG) litigation, in particular climate change litigation, is also visible outside of the Netherlands. The UNEP Report sets out that, increasingly over the period from 2020 up to 2023, climate change litigation cases have targeted companies attempting to identify their corporate responsibility to mitigate the climate change risks which their business activities entail. Reference is made to the *Shell*-case, but also to (for example) the *Envol Vert et al. v. Casino*-case (2021) in France, initiated by a group of NGOs suing the French supermarket chain Casino for its involvement in the cattle industry in Brazil and Columbia, which allegedly causes environmental and human rights harms. This case is still in the preliminary stage.

More recently, the Hawaiian city of Honolulu took several oil companies to court, claiming that the oil companies used deceptive marketing practices to conceal the dangers of their products in the light of climate change. Honolulu therefore does not merely allege that the oil companies contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and misrepresentation of the products' known dangers - and the simultaneous promotion of their unrestrained use - that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change. Honolulu claimed to have suffered substantial harm from these alleged tortious actions. On 31 October 2023, the Hawaii Supreme Court decided to proceed with the *Honolulu*-case on the merits. This is a new (and potentially very effective) approach similar to the approach as used in tobacco cases in the 1990's which eventually led to the *Tobacco Master Settlement Agreement* with a value of at least \$206 billion.

Social (ESG) litigation: the rise of horizontal human rights claims on social topics

While various cases on ESG litigation mainly focus on climate change and other environmental topics, there is also a trend noticeable towards horizontally enforcing human rights against corporates through the corporate duty of care in Social (ESG) litigation in the Netherlands. Recent examples are:

- **AbbVie-case**

Pharmaceutical company AbbVie is involved in a Dutch class action by a Dutch public interest group the Pharmaceutical Accountability Foundation (*Stichting Farma ter Verantwoording*). The interest organization claims that AbbVie acted unlawful by breaching its corporate duty of care (including human rights violations) by charging excessive prices leading to displacement of health care and also considering the *Shell*-case. The first hearing in this case will take place in 2024.

- **Prosus-case**

Dutch listed company Prosus is involved in a Dutch class action (summary proceedings) by Dutch public interest group the Ukrainian Victims of War Foundation because of allowing human rights violations by its Russian subsidiary Avito. Avito published thousands of

(digital) advertisements for the recruitment of Russian soldiers and other personnel for the war in Ukraine. The interest organization states that Prosus, based on the *Shell*-case, has a duty of care to prevent and counter human rights violations by its Russian subsidiary. On 15 July 2022, the District Court of Amsterdam recognized the advertisements for the recruitment of military personnel of Prosus' subsidiary Avito as illegal under international law and considering human rights. However, the court decided that the police recruitment was not illegal, and Prosus could not be obliged to influence future buyers to comply with the ban on hiring soldiers and officers on the online platform. The interest organization filed an appeal but withdrew this when it became known that Prosus had exited the Russian business and sold its shares in Avito.

Both cases reflect the rise of Social (ESG) litigation, as well as the trend of increasing horizontal enforcement of human rights by interest organizations against corporates. This aforementioned trend in Social (ESG) litigation underwrites that therefore - under certain circumstances - human rights can (also) be invoked against companies in horizontal relations with respect to Social issues in society. A typical example are the privacy-related (class action) cases which are currently pending against various social media and/or big tech companies.

The WAMCA as important driver of ESG litigation

Noteworthy is that many of the cases involving ESG litigation were initiated by means of class actions of interest organizations. This is no surprise, as class actions are particularly suited for legal actions and claims to the benefit of collective or common interests. The Netherlands has always been at the forefront of collective redress in Europe, especially since the introduction of the Act on Collective Damages in Class Actions (**WAMCA**) on 1 January 2020 which resulted in amended/expanded possibilities for class actions in the Netherlands (see [our earlier publications](#) on the WAMCA). We expect that the WAMCA will form a driving force of the increase in ESG litigation in the Netherlands and more specifically the further development of horizontal enforcement of human rights against companies through the corporate duty of care.

Governance (ESG) litigation: the vast growing importance of ESG (Corporate) Governance

There has not (yet) been a notable increase in Governance (ESG) litigation. This could potentially be explained by the fact that corporate governance related questions are more difficult to litigate effectively due to traditional concepts such as limited liability and deference to the judgments of the business.

However, both the Dutch and European legislator have introduced initiatives that regulate the governance of companies as part of an agenda to push Environmental and Social ESG aspects. For example, the (draft) Directive on corporate sustainability due diligence (the **CSDDD**) requires in-scope companies to conduct due diligence on, and take responsibility for, human rights abuses and environmental harm throughout their global value chains (see our [earlier blog](#)).

Another initiative is the European Commissions' proposal for the Green Claims Directive, which will provide detailed rules on the substantiation, communication and verification of environmental claims and labels by in-scope companies (and therefore potentially entail further Environmental (ESG) litigation risks, especially when it comes down to alleged greenwashing claims).

The increase in ESG Governance is also observable with respect to specific sectors. The upcoming EU Methane Regulation for example, seeks to entail the obligation for the energy sector within the European Union to reduce its methane emissions in Europe and in their global supply chains. It will oblige the fossil gas, oil and coal industry to properly measure, monitor, report and verify their methane emissions according to the highest monitoring standards.

These and other ESG legislative initiatives will, directly or indirectly, have an impact on the position of directors and - potentially - shareholders because they create additional ESG Governance related responsibilities. Particularly as these ESG legislative initiatives entail elaborated legal frameworks which can in specific cases eventually give substance to the open duty of care standard under Dutch law. It is therefore not inconceivable that, like Environmental and Social (ESG) litigation, there will be an increase in Governance (ESG) litigation in the Netherlands in the (near) future.

What to expect next?

In this trend report we have described an increasing trend of ESG litigation. The rise of ESG litigation started with Environmental (ESG) litigation in which a State's duty of care based on vertical human rights in relation to climate change was established (*Urgenda*-case) and evolved towards horizontally enforcing human rights against companies through a corporate duty of care (*Shell*-case). Environmental (ESG) litigation is likely here to stay in the Netherlands, whether it is climate change litigation or other forms of litigation such as alleged greenwashing and human rights violation claims.

Next to Environmental (ESG) litigation, slowly but steadily there is a rise of Social (ESG) litigation noticeable in the Netherlands. More and more, a corporate duty of care is at stake in relation to social issues (such as healthcare and privacy).

The anticipation for the future extends beyond just ESG (class action) litigation, as this is no longer the sole impetus driving this trend. Recent developments reveal that both Dutch and European legislators have initiated ESG legislative measures, empowering private enforcement of human rights and civil liability against companies within the realm of ESG. No significant Governance (ESG) litigation wave is yet expected in the Netherlands due to traditional concepts such as limited liability and deference to the judgments of the business. However, the importance of ESG (corporate) governance might grow exponentially when various ESG legislative initiatives are implemented.

Contacts

Bastiaan Kemp

Partner

T +31 20 578 50 46

M +31 6 13 85 43 31

E bastiaan.kemp@loyensloeff.com



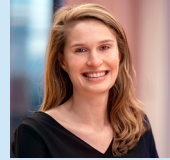
Marit Bosselaar

Attorney at law

T +31 20 578 51 59

M +31 6 10 96 98 53

E marit.bosselaar@loyensloeff.com



Irene Bloemen

Attorney at law

T +31 10 224 64 37

M +31 6 83 02 38 86

E irene.bloemen@loyensloeff.com



Sjoerd Pennink

Attorney at law

T +31 20 578 50 18

M +31 6 13 04 27 59

E sjoerd.pennink@loyensloeff.com



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