

Linklaters



Linklaters ESG Disputes Bulletin - December 2022 edition

Welcome to the quarterly Linklaters ESG Disputes Bulletin, our quarterly update covering key developments in the UK, US, EU and globally on the full range of ESG Dispute topics.

In this edition, we cover some of the key developments in contentious ESG matters since our August 2022 edition. To read our December general ESG Newsletter, covering developments from sustainable finance to human rights and everything in between, click [here](#).

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Legal challenges to the inclusion of nuclear and natural gas in the EU green taxonomy

A number of NGOs (including Greenpeace, ClientEarth, Friends of the Earth and the WWF) have asked the EU Commission to review the inclusion of natural gas and nuclear in the EU Taxonomy Complementary Climate Delegated Act. Read our [blog post](#) on this development.

NGO ClientEarth withdraws lawsuit against ECB's quantitative easing programme

In November 2022, ClientEarth announced it was withdrawing its claim against the central bank of Belgium in relation to the bank's implementation of the European Central Bank's (ECB) Corporate Sector Purchase Programme. The claim was brought "*to stop "quantitative easing" from European central banks flowing to fossil fuel companies and polluting firms that are exacerbating the climate crisis*". In withdrawing its claim, ClientEarth considered that the ECB's reforms announced in September 2022 have remedied the alleged violations that it had raised in court. Read our [blog post](#) on this development.

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France

Second penalty against the French State for non-compliance with air quality standards

On 17 October 2022, the Conseil d'Etat, French highest administrative court, ordered the French state to pay two new fines of €10 million each for failing to lower the concentration level of nitrogen dioxide and fine particles in urban areas classified as at risk.

On 17 July 2017, the Conseil d'Etat had ordered the French state to comply with European standards regarding air quality that have been incorporated into French law and had ruled, by decision dated 10 July 2020, that a penalty payment would be ordered, should the French state fail to do so within six months.

After ordering a first penalty payment of 10 million euros on 4 August 2021, covering the first half of the year 2021, the highest administrative court has now fined the French state with two new penalty payments of 10 million euros each, covering two periods from July 2021 to January 2022 and January to July 2022.

The court stresses that while improvements over time have been observed, nitrogen dioxide pollution limits were still exceeded in several areas in France, particularly in and around the cities of Paris, Lyon and Marseille. The Conseil d'Etat considered that the measures taken by the State do not guarantee that air quality is improving "*in a way that will ensure that pollution limits are met as quickly as possible*".

In 2023, the Conseil d'Etat will review the action taken by the State since the second half of 2022 (July 2022 to January 2023).

Energy company Perenco sued by NGOs for environmental damage

On 9 November 2022 two French NGOs, Les Amis de la Terre and Sherpa, filed a claim against the Franco-British leading oil and gas group for “*environmental damage in the Democratic Republic of Congo*” before the French courts. They request Perenco to be ordered to repair the so-called ecological damage already caused in the DRC, to stop the pollution and to prevent future environmental damage.

The French oil company operates 11 oil fields on the sea coast of the Democratic Republic of Congo. NGOs point to recent studies that would show “*devastating practices for both the environment and the health of local communities*”, especially after Perenco's alleged gas flaring (i.e. the elimination of large unwanted quantities of associated petroleum gas due to combustion during oil production).

TotalEnergies to sue Greenpeace for false and misleading claims about its greenhouse gas emissions

Accused by Greenpeace France of having minimised its carbon footprint in 2019, TotalEnergies questioned the methodology used by the NGO for its calculations and **announced** its intention to “*take legal action to compensate for the damage caused by Greenpeace's dissemination of this misleading information*”.

BNP Paribas on formal notice to stop funding deforestation in Brazil

On 17 October 2022, the NGOs Notre Affaire à Tous and Comissão Pastoral da Terra put BNP Paribas on notice, under the 2017 French Duty of Vigilance act, to stop financing a major Brazilian meatpacking company, Mafrig, which is allegedly involved in illegal deforestation and slavery-like practices, including forced labour and debt bondage. BNP Paribas has three months to comply with the French Duty of Vigilance act, which requires companies in France to take measures to prevent human rights and environmental abuses throughout their chain of operations.

BNP Paribas on formal notice to stop supporting the development of fossil fuel projects

On 26 October 2022, the NGOs Oxfam France, Les Amis de la Terre and Notre Affaire à Tous formally put the BNP Paribas group on notice, under the 2017 French Duty of Vigilance act, to stop supporting the development of fossil fuel projects. They contend that the French banking group would be a “*major contributor to the risks associated with global warming*” by supporting major oil and gas companies, through both its funding financing and investment activities.

In case the bank would fail to implement the requested measures within three months, including to stop all financial support for companies developing new fossil fuel projects and to exit the oil and gas industry by 2050, NGOs threatened BNP Paribas to refer the matter to the Paris courts. According to the NGOs, this case would be “*the first climate litigation in the world*” targeting a commercial bank.

For further details on the case, read our latest post [here](#).

Nine food companies on formal notice for plastic waste failures in France

On 28 September 2022, NGOs put nine French food companies (Auchan, Carrefour, Casino, Danone, Lactalis, Les Mousquetaires, Picard Surgelés, Nestlé France and McDonald's France) on notice to reduce their use of plastic to meet their legal obligations.

The NGOs – ClientEarth, Surfrider Foundation Europe and Zero Waste France – stress that the annual vigilance plans of these companies, taken in accordance with the 2017 French Duty of Vigilance act, do not include mitigation and prevention measures regarding the recyclability of plastic waste.

The companies concerned have three months to meet the requirements, failing which the NGOs are threatening to refer the matter to the French courts.

Paris and New York join lawsuit against TotalEnergies over “climate inaction”

On 21 September 2022, the cities of Paris and New York, as well as the NGO Amnesty International, announced that they would join a lawsuit filed in January 2020 by several NGOs and French local authorities against TotalEnergies.

The original plaintiffs had requested TotalEnergies to publish a new vigilance plan complying with the provisions of Article L. 225-102-4 of the French Commercial Code. Following TotalEnergies' refusal, the Nanterre civil court was called upon to order TotalEnergies to comply with these requirements. The claimants also required that the obligation to publish a new vigilance plan be sanctioned by a penalty payment.

The Mayor of Paris, Anne Hidalgo, explained that the city's position was that this action was necessary to force a major energy player to respect the Paris Agreement in reducing its greenhouse gas emissions and adopting a strong carbon neutrality trajectory.

For further details on the case, read our latest post [here](#).

NGO filed a complaint against FIFA for misleading advertising about the CO2 neutrality of the 2022 World Cup in Qatar

On 15 November 2022, the NGO “Notre Affaire à Tous” filed a complaint of greenwashing against FIFA with the French Advertising Ethics Jury (*Jury de déontologie publicitaire*). The NGO denounces FIFA's misleading advertising regarding the CO2 neutrality of the 2022 World Cup. According to a report by the NGO Carbon Market Watch, the claim of carbon neutrality made by the tournament organisers would be based on a significant underestimation of the greenhouse gas (GHG) emissions caused by hosting the tournament.

The French Advertising Ethics Jury only gives non-binding opinions and has no power to impose judicial sanctions. Similar complaints are said to have been made in the UK, Switzerland, Belgium and the Netherlands.

Several Public Interest Judicial Agreements (French non-prosecution agreements) signed for pollution

On 12 September 2022, a Public Interest Judicial Agreement (non-prosecution agreement in French law) for an environmental matter was concluded between the Prosecutor's office of the Judicial Court of Charleville-Mézières and Nestlé France. In August 2020, a Nestlé factory had accidentally released wastewater into the Aisne River at Brecy-Bières and Challerange, causing the loss of several tonnes of fish. The Ardennes fishing federation had subsequently filed a complaint in August 2020. Nestlé has compensated the Ardennes fishing federation for 475,000 euros and has undertaken to pay a public interest fine of 40,000 euros. A copy (in French) of the Public Interest Judicial Agreement can be found [here](#).

Other Public Interest Judicial Agreement for an environmental matter have been concluded between the Prosecutor's Office of local courts and companies that have been charged with environmental pollution, including carrying out work on a pond that endangered the habitat of various protected species, the pollution of a watercourse by a distillery, the accidental spillage of polluting waste, the pollution of a watercourse during the emptying of a container of a sawmill.

The list of all Public Interest Judicial Agreement can be found [here](#).

Vinci Construction Grands Projets indicted for alleged violation of migrant worker's rights in Qatar

Vinci Construction Grand Projets ("**VCGP**"), a subsidiary of the French construction group Vinci, was indicted on 9 November 2022 as part of a judicial investigation into the working conditions of employees on World Cup-related sites.

Three charges are being brought against VCGP: "*submission to working conditions or accommodation incompatible with dignity*", "*obtaining the supply of services from a person in a vulnerable or dependent situation, with unrelated remuneration*" and "*reduction to servitude*".

In 2015, a first complaint by the NGO Sherpa had targeted the construction group, before being closed without action in 2018. The investigation has been reopened in November 2019, due to the filing of civil party complaints by Sherpa and the Comité contre l'Esclavage Moderne, alongside twelve former employees of these sites.

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Germany

Regional Court of Stuttgart dismisses climate change action against OEM

The Regional Court of Stuttgart dismissed a climate lawsuit against Mercedes-Benz, which aimed at obliging the company not to sell combustion engines as of 2030. The ruling had been eagerly awaited, as it is the first German decision in climate change proceedings against companies after the Constitutional Court's landmark ruling on the unconstitutionality of the German Climate Change Act. Read more in our [blog post](#).

Green claims – label “climate neutral” without further clarification is misleading advertising

While the Higher Regional Court of Schleswig recently ruled positively on including the green claim "climate neutral" on waste bags (see [previous issue of the Bulletin](#)), the Higher Regional Court of Frankfurt now decided the opposite in a case against a company for ecological cleaning products: it has prohibited the company from labelling its products with the logo "climate neutral" ("*Klimaneutral*") without further explanations. According to the court, such a label could have a considerable influence on the consumer's decision to buy, which is why additional information must be provided on the basic reasons for claiming that the product is climate neutral.

The decision was issued in summary proceedings and cannot be appealed. Nonetheless, the German Federal Supreme Court will hopefully soon have the opportunity to rule on these controversial legal issues. An initiative at EU level could also provide legal certainty: earlier this year the EU Commission proposed to “prohibit making generic environmental claims without recognised excellent environmental performance which is relevant to the claim” and specifically listed “climate neutral” as an example of such generic environmental claims (read more in our [blog post](#)).

Greenwashing allegations in the financial sector

In Germany, financial institutions and financial services companies are increasingly facing accusations of greenwashing, spearheaded by the consumer protection association in the state of Baden-Württemberg (the *Verbraucherzentrale Baden-Württemberg*). Following two recent successes against investment fund managers, the association recently filed two greenwashing lawsuits against asset managers for using allegedly misleading sustainability claims in advertising: first, in late summer, proceedings have been initiated at the Regional Court of Stuttgart against an investment fund manager over sustainability claims made about an impact fund. Then, at the end of September, the association filed a greenwashing action against the largest German fund manager at the Regional Court of Frankfurt for allegedly misleading investors with green claims when marketing a climate tech fund.

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Portugal

Portuguese state sued over climate inaction

A Portuguese environmental organisation, which was incorporated at the end of 2021 with the specific purpose of resorting to legal action to tackle the climate crisis, has filed a lawsuit against the Portuguese state for its alleged failure to take adequate measures to stop climate change. The specific grounds of the claim are not yet known but relate to an alleged lack of appropriate and sufficient action to meet emissions targets, particularly in the execution of the Climate Law enacted in

late 2021.

This is the first case of its kind in Portugal and the same NGO has already disclosed that it will be targeting major private sector players next, in the oil and gas and industry sectors.

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United Kingdom

Advertising regulator finds that bank's adverts containing climate claims are misleading in precedent-setting case

The Advertising Standards Authority (ASA) has used a recent ruling to give guidance to banks and advertisers operating in the financial sector on how to communicate their climate and sustainability commitments. This decision will also be of interest more generally to businesses keen to minimise the risk of inadvertent greenwashing given the heightened scrutiny that continues to be given to green claims. Read more about the decision in our blog post [here](#).

London Bullion Market Association sued for deaths of two men at Tanzanian Mine

Reports indicate that the families of two deceased men, alleged to have been killed by Tanzanian police officers at the North Mara Gold Mine in 2019, have filed a claim in the High Court of England and Wales against the London Bullion Market Association (**LBMA**), claiming that the accreditation body is indirectly responsible for the killings.

The claimants reportedly allege that the LBMA's continued certification of gold from the mine negligently caused their deaths by giving the mine access to the London bullion market. The claimants purportedly assert that the certification implied that the authority itself had verified that the gold was not connected with human rights abuses, and that, by continuing to certify the gold, the LBMA had breached its common law duty of care to ensure that the two men were not subjected to human rights abuses.

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United States of America

Greenwashing and ESG litigation continues to proliferate in federal courts

Private plaintiffs continue to bring class-action greenwashing and ESG-related claims in federal court, under various theories of liability including federal securities laws, consumer protection statutes, and breaches of fiduciary duty.

Claims regarding carbon offsets have been a particular area of focus, with consumers recently bringing proposed class actions against a major airline and a major water retailer alleging that their claims of “carbon neutrality” are deceptive in light of the use of offsets. Plastics recycling has also been an area of significant activity, with a recent suit being brought in federal court against a major household goods producer relating to recyclability claims made on the packaging of disposable trash bags. And deceptive claims regarding emissions performance are at the heart of a recently-approved USD 80 million class action settlement brought by consumer groups against a major automobile manufacturer.

Social issues have also been a prominent area of focus for potential plaintiffs. In October 2022, a federal appellate court agreed to re-hear a shareholder derivative action brought against a major clothing retailer alleging that its Board breached its fiduciary duties and violated federal securities laws by failing to create meaningful racial or ethnic diversity on its board of directors and within its executive management team, despite making public statements about diversity. In the same month, consumers re-filed a proposed class action against a major chocolate manufacturer taking issue with certain sustainability claims made on product packaging in light of alleged child and forced labor in the company’s supply chain.

On 22 November 2022, the U.S. Securities and Exchange Commission (SEC) charged a prominent U.S. investment manager for policies and procedures failures involving two mutual funds and one separately managed account strategy marketed as ESG investments ([see SEC press release](#)). For about a year, the investment management team allegedly failed to have a written policy or procedure in place for ESG research, and once a policy was established, the team failed to follow it consistently. To settle the charges, the investment manager agreed to a cease-and-desist order, a censure, and a \$4 million penalty. This action underscores that, while the SEC’s rules do not currently prescribe any particular form of ESG policy, the SEC’s Climate and ESG Task Force is very focused on assessing whether an entity is complying with its own stated policies and procedures on ESG considerations, particularly where disclosures have been made to investors. This case highlights the importance of having adequate internal controls to enable registered companies to “walk the talk” on their publicly announced ESG policies, and financial institutions should be aware that similar cases (through tips or examinations) may be in the pipeline given that the SEC has prioritized this as a risk area of focus in examinations.

Municipal climate cases proceeding in state court with pending Supreme Court appeal

Municipalities and states across the United States have filed numerous claims against energy companies seeking damages for the impacts of climate change, including on nuisance and consumer protection theories of liability. Federal district and appellate courts have in recent decisions almost uniformly concluded that these cases should be allowed to proceed in state courts; however, a group of energy company defendants in October 2022 filed an appeal to the U.S. Supreme Court seeking a review of certain of the appellate decisions on the grounds that such cases should proceed in federal court. The energy company defendants were previously successful in a Supreme Court petition based on similar issues at an earlier stage of the cases.

NGOs challenge federal and state rulemaking on climate and ESG issues

NGOs and trade associations continue to bring suits challenging various federal and state environmental regulations. For example, in October 2022, NGOs asked an appellate court to revive their petitions challenging the Environmental Protection Agency's 2009 finding that certain greenhouse gases pose a danger to public health. Also in October 2022, a federal appellate court rejected challenges brought by state attorneys general to federal rulemaking on the "social cost of carbon". And in November 2022, a federal magistrate judge dismissed portions of a suit by energy trade groups challenging the Biden administration's executive order halting sales of oil leases on federal land and water.

At the state level, a group of gasoline and biofuel industry groups in October 2022 brought a challenge to California's climate change and vehicle electrification regulations set pursuant to a Clean Air Act waiver allowing the state to set stricter limits on greenhouse gas emissions by cars and trucks.

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Asia

SK Lubricants Co. faces action greenwashing in South Korea

Activist groups Solutions for Our Climate and Consumers Korea have brought separate claims to the Korea Fair Trade Commission alleging that SK Lubricants Co. is being misleading in using an unreliable carbon off-setting project to advertise its products as achieving "zero carbon emissions".

SK has said in its advertising that it was offsetting emissions by purchasing high-quality carbon credits from a reforestation project in Uruguay. However, Solutions for Our Climate and Consumers Korea claim that the carbon offsets from the Guanaré reforestation project are not credible (despite the fact that they have been certified by Verra, a carbon emissions standard) as they do not fulfil the additionality requirement, a key principle within voluntary carbon markets. This is because the trees were going to be planted regardless of the project, according to Texas-based carbon credit agency Renoster.

Solutions for Our Climate is accusing SK Lubricants of violating the Act on Fair Labelling and Advertising. The Korea Fair Trade Commission will now decide whether to go forward with an investigation.

SK E&S Co. removes carbon-free LNG claims from its marketing materials following greenwashing allegations

SK E&S Co., South Korea's largest private gas supplier (and another subsidiary of the SK Group) has said it has now edited certain marketing material to remove the assertion that LNG from the Barossa gas project off the northern coast of Australia would be "CO₂-free," and instead claiming it is a "low-carbon" gas. SK E&S Co made these edits in September 2022 following instruction from the environment ministry in March 2022 to disclose the facts about its environmental claims in greater detail in future advertisements.

In its initial marketing materials, SK E&S had claimed it would capture and offset the greenhouse gases produced while making LNG. However, the project will only partially remove emissions from the process and will not capture or offset the carbon dioxide released when the gas is burned.

By way of further context, in December 2021, the activist group Solutions for Our Climate (also referred to above) made a complaint to the Korea Fair Trade Commission alleging that SK E&S's claims in relation to the green credentials of the Barossa project was misleading. This was reported to be the first legal claim for greenwashing in South Korea against an energy company.

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Australia

ASIC takes first 'greenwashing' action against Tlou Energy Limited

Tlou Energy Limited (Tlou) has paid infringement notices of \$53,280 following an investigation by the Australian Securities & Investments Commission (**ASIC**) regarding statements made in two ASX announcements regarding its proposed Botswana power operations, including in an investor presentation. Broadly, ASIC's concerns were that statements made in the announcements were either not factually accurate, or if they related to future matters, they did not have a reasonable basis.

Tlou announced to the ASX that it denies it contravened the Corporations Act or ASIC Act, but paid the notices so the investigation would end and it could refocus on operations. The payment of an infringement notice is not an admission of liability. However, the action demonstrates current regulatory scrutiny of sustainability claims and in particular, the regulator's expectations about the level of internal modelling and investigations that will be undertaken before carbon transition plans are made public. Read more [here](#).

Australasian Centre for Corporate Responsibility expands greenwashing allegations against Santos

On 25 August 2022, the Australasian Centre for Corporate Responsibility (**ACCR**) announced that it filed 'significant' new and more detailed greenwashing allegations against Santos. The ACCR commenced proceedings against Santos in the Federal Court of Australia in August 2021, alleging the company had engaged in misleading or deceptive conduct in relation to representations about its climate targets in its 2020 annual report. Following additional information produced by Santos in the litigation discovery process, the ACCR has now extended its allegations of greenwashing against Santos to include the company's 2020 Investor Day Briefing and 2021 Climate Change Report. Read more [here](#).

Greenwashing complaint against Glencore

The Environmental Defenders Office (EDO), on behalf of The Plains Clans of the Wonnarua People and the Lock the Gate Alliance, has asked the Australian Competition & Consumer Commission (ACCC) and ASIC to investigate Glencore's

statements detailing its plan to achieve net-zero carbon emissions by 2050. The EDO alleges that Glencore's assertions that it is 'laying the foundations of a low carbon future' are misleading and that the company is in fact expanding coal production. UK-based law firm ClientEarth has asked the Financial Conduct Authority to cooperate with the Australian regulators in their response to Glencore. Read more [here](#) and [here](#).

Australia lends support to seeking International Court of Justice climate change opinion

Vanuatu is campaigning to secure support from the UN General Assembly to obtain an advisory opinion from the International Court of Justice (ICJ) on the legal obligations of states in relation to climate change. Climate activists note that an advisory opinion by the ICJ may be a particularly helpful tool in prosecuting cases on climate change. Vanuatu's initiative received endorsement by Pacific Island Forum ministers, including Australian Minister for Foreign Affairs Penny Wong. Read more [here](#), [here](#) and [here](#).

UN Human Rights Committee decides that Australia failed to protect indigenous persons from the effects of climate change

The UN Human Rights Committee (the treaty monitoring body of the International Covenant on Civil and Political Rights) has found that Australia failed to adequately protect Torres Strait Islanders against the adverse impacts of climate change and thereby violated their rights to enjoy culture and be free from arbitrary interferences with private life, family and home. The Human Rights Committee has asked Australia to compensate the complainants for the harm suffered, engage in meaningful consultations with their communities to assess their needs, and take measures to continue to secure the communities' safe existence on their respective islands. Read more [here](#) and [here](#).

Australian National Contact Point releases initial assessment on complaint against PanAust Limited

On 25 July 2022, the OECD Australian National Contact Point (**AusNCP**) released its initial assessment on a complaint brought by two NGOs against Australian copper and gold producing company PanAust Limited in relation to its proposed Frieda River Mine. Submitted in December 2021 on behalf of 2,638 indigenous residents from 64 affected villages in Papua New Guinea, the complaint alleged that PanAust Limited was not in alignment with Chapters III (Disclosure), IV (Human Rights) and VI (Environment) of the OECD Guidelines for Multinational Enterprises. The complaint includes allegations that development of the project failed to uphold affected indigenous communities' right to give free, prior and informed consent. The initial assessment found that the NGOs' claim met the admissibility criteria, including having (on its face) material and substantiated issues, and a link between the complaint and PanAust Limited's activities. The AusNCP now invites PanAust Limited to identify how it is addressing the NGOs' concerns consistently with the OECD Guidelines with the aim of reaching a mutually agreed resolution. If PanAust Limited does not engage with this process, the AusNCP will release a final statement and determination on the complaint. Read more [here](#) and [here](#).

Federal Court revokes environmental approval for Santos' Barossa Gas Project; appeal scheduled for November 2022

On 21 September 2022, the Federal Court of Australia (FCA) set aside an approval given by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) for Santos to undertake drilling activities as part of the Barossa Gas Project proposed in the Timor Sea. Justice Bromberg found that NOPSEMA should not have relied on Santos' environmental plan because the company failed to adequately consult with all relevant individuals, as required by the regulations. Santos has appealed the FCA's decision on a number of grounds, including, for the purposes of interpreting the regulations, who is a 'relevant person', and the standard by which NOPSEMA must be satisfied with the adequacy of an environmental plan when making a decision on whether to grant a permit. Chief Justice Allsop has expedited the appeal, which was heard on 15-16 November 2022. Read Bromberg J's decision [here](#).

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