The Complex Regulatory Context of Climate Litigation in the European Union

An EU law Perspective

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Purpose of this talk

**Question:**
What is the role of current and future climate litigation at EU level and at EU Member State level in view of the existing EU emissions reduction legislation?

**Position:**
*Implementation and enforcement matters even more than target-setting*

**Perspective / hypothesis**
Will (non-binding) recommendations from the European Commission indicating what Member States can do to strengthen their national policies contribute to the success of some eventual future national litigation?
The EU regulatory approach addressing climate change

EU has a complex but comprehensive package of climate laws

Which includes emission reduction targets: minus 20% in 2020 and minus 40% in 2030

Plus: Commission Proposal to codify climate neutrality by 2050

Plus: Commission Proposal to increase the 2030 target towards net 55%

Plus: European Parliament is in favour of a 60% reduction by 2030
June 2021:

Legislative proposals to implement the more ambitious target for 2030

Now:

Proposals and policy plans to set more ambitious targets for 2030 and 2050
Meanwhile:
Litigation against the EU and EU member states including the aim to increase the reduction efforts (selection)

At EU level:
- Carvalho and others (appeal)
- Forest / Biomass case (appeal)

At Member State level:
- The Netherlands: Urgenda
- Ireland: Friends of the Irish Environment case
- Germany: Farmers and Greenpeace v Germany
- France: The case of the century (To ENFORCE - not to step up more ambitiously)
- Other...

European Convention of Human Rights – so other than EU law - but against EU Member States:

Claim of four Portuguese children / young adults against 27 Member States and 6 other European States
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European Convention of Human Rights – so other than EU law - but against EU Member States:
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Court of Justice of the European Union is the highest authority in EU law
And answers questions on interpretation of EU law, and on the validity of EU acts – Thus far, however, no such questions from national courts (in cases below)
Main legislation for achieving emission reductions in the EU that NEEDS compliance

**Effort sharing:**
Binding emission reduction targets for member states

**Emissions trading:**
Gradual emission reduction (by means of a declining cap) obligatory for major industries and aviation (in Europe)
EU and the rule of law on paper
But non-compliance in practice ->
litigation needed to fill the compliance gap

Important obligations for emissions reduction are in hard law, both for member states and for emitters.

However, EU environmental law is generally characterised by compliance shortages (but it is not always easy to detect non-compliance...)

The car-emissions scandal should serve as a wake-up call, also for EU climate law commitments, for instance for EU ETS industries.

Enforceability of hard law standards is improved by means of the Aarhus Convention, but shortcomings still exist (article 9(3) AC).
Next to hard law: the (new) governance approach

-> Regulation 2018/1999 of 11 December 2018

Governance by means of obligatory national integrated climate and energy plans (for 2021 to 2030), and national long term strategies

in order to ensure an `ongoing dialogue between the Commission and the Member States and, where appropriate, between the Member States’ (para 54)
The European Energy Union and Climate Action Governance Dialogue

- Member states are obliged to develop plans – explaining their national policies- and long term strategies
- Obligatory content of the plans
- Consultation of the public has to take place

- The European Commission assesses the national plans and has the power to provide recommendations, which have to be taken in due account by Member States

Transparency Required and Enforcable
Enforceability of this soft approach?

The governance approach is a truly complex framework (see annex I and II to this presentation).

The way how it will operate has yet to be proven, but some elements (such as the obligation to submit a plan, and the content it needs to discuss) seem legally enforceable.

Importantly, the Commission gets the power, even the obligation in case the EU falls short of its aim, to provide recommendations to Member States, on the level of ambition of the plans, and on the national implementation, and Member states have to take due account (see annex II).

The Commission shall assess whether Member States have taken due account of certain recommendations.
Concluding perspective on future litigation in order to reach compliance and (better) implementation by Member States

Will the recommendations of the Commission provide some arguments for national litigation procedures trying to enforce better (and more ambitious) national policies?

- At least the judicial systems of The Netherlands and in Ireland seem to provide some opportunities given their national climate case law

This possible role of Commission Recommendations will *inter alia* depend on the level of detail with regard to how member states have to improve their policies

- But if this (very uncertain) legal effect will take place: then we see an increase of power of the European Commission, which needs to be further discussed in view of the rule of law and democracy, and its wider effect on the stability of the European Union itself – even while it is prosperous for the protection of the climate

The Commission may issue recommendations on the level of ambition of the draft integrated national energy and climate plans, on the subsequent implementation of policies and measures of the notified integrated national energy and climate plans, and on other national policies and measures of relevance for the implementation of the Energy Union.

‘Whereas recommendations have no binding force, Member States should nevertheless take due account of such recommendations and explain in subsequent progress reports how they have done so.”

If the Member State concerned does not address a recommendation or a substantial part thereof, that Member State shall provide and make public its reasons.

In addition, the Commission shall as appropriate issue recommendations to Member States to ensure the achievement of the objectives of the Energy Union. The Commission shall make such recommendations publicly available (art. 34).

The Commission shall assess whether Member States have taken due account of these Commission recommendations (art. 13).
Annex II: some selected articles of the Governance of the Energy Union and Climate Action Regulation

Article 30

Inconsistencies with overarching Energy Union objectives and targets under Regulation (EU) 2018/842

1. Based on the assessment pursuant to Article 29, the Commission shall issue recommendations to a Member State pursuant to Article 34 if policy developments in that Member State show inconsistencies with the overarching objectives of the Energy Union.

Article 34

Commission recommendations to Member States

1. The Commission shall as appropriate issue recommendations to Member States to ensure the achievement of the objectives of the Energy Union. The Commission shall make such recommendations publicly available forthwith.

Article 13:

The Commission shall assess whether Member States have taken due account of the Commission recommendations issued pursuant to Article 34.
Annex III
Observations on (the differences among) selected national court decisions

• The Urgenda court decision is unique, since a specific target is prescribed to the government, being more ambitious than EU law
  -> compliance with order is difficult (and what is influence of Covid-19)?
  -> no preliminary question on EU law (unfortunately)

• In Ireland, the plan is quashed in view of the 2050 objective as codified in Irish law
  -> What plan (with what emission reduction) would suit?
  -> How to develop a new plan in view of public participation?
  -> How quickly can that be done?
  -> Why no discussion of Effort Sharing Decision and flexibilities, nor of EU ETS?

• In Germany, no successful claim (yet) to step up ambition or to comply with ESD target
  -> national court refers to EU law, more particularly the Effort Sharing Decision and the possibility for the government to make use of it – no requirement to implement all required reductions in German territory