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Newsletter

ESG Update

Klimaseniorinnen v. Switzerland – What are the Implications of the ECtHR's Landmark Climate Decision?

The historic ruling by the European Court of Human Rights, finding that Switzerland has not done enough to mitigate the effects of climate change, puts the spotlight on climate policy, carbon budgets and greenhouse gas reduction targets – with implications for businesses.

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The landmark judgment reaffirms the importance of solid carbon budgets and transition plans

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The European Court of Human Rights' (ECtHR) ruling increases the pressure for Switzerland and other member states of the Council of Europe to adopt appropriate legislation and measures to effectively address climate change, including by quantifying greenhouse gas emissions and meeting reduction targets. Businesses face similar challenges and will likely be affected by more stringent policies and possibly increased litigation risks.

I. The Decision

On 9 April 2024, in a near unanimous decision, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a landmark decision in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*. In an unprecedented ruling on a complaint brought by four individual women and a Swiss association of more than 2,000 elderly women above the age of 64 (*Verein Klimaseniorinnen*), the Court found that Switzerland has breached its positive duties under the European Convention on Human Rights (ECHR) by failing to take sufficient action to mitigate the adverse effects of climate change on human rights.

Specifically, the ECtHR held that there had been a violation of Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial) ECHR. The Court clarified that Article 8 includes a **right to effective protection** by the public authorities from the serious adverse impacts of climate change on lives, health, well-being and quality of life. According to the Court, the Swiss courts' failure to consider the compelling scientific evidence on climate change and to take the complaint seriously constituted a violation of Article 6.

On the same day as the *Klimaseniorinnen* ruling, the Court declared two other cases alleging government inaction on climate change (*Carême v. France; Duarte Agostinho and others v. Portugal and 32 others*) inadmissible on formal grounds (lack of victim status/non-exhaustion of domestic remedies).

The ECtHR's ruling was the first time an international court found a state in breach of its human rights obligations in the context of climate change. Following the decisions of various national Courts, most notably the Dutch Supreme Court in the *Urgenda* case in 2019, and developments at the UN level, the *Klimaseniorinnen* ruling reaffirms the recognition of **climate change as a human rights issue**.

II. Key Aspects

Standing: The Court found that the applicant association (*Verein Klimaseniorinnen*) had standing (*locus standi*) to bring a complaint about the threats posed by climate change in Switzerland on behalf of those individuals who could arguably claim to be subject to specific threats or adverse effects of climate change. However, noting that the threshold for victim status in climate change cases is especially high, and reiterating that the Con-

vention does not admit complaints that pursue a general public interest (exclusion of *actio popularis*), the Court declared the applications of the four individual applicants inadmissible.

Insufficient Climate Mitigation Action (Article 8): In substance, the Court found that the Swiss Confederation had failed to comply with its positive obligations under the ECHR in relation to climate change. There were critical gaps in the process of establishing the relevant domestic regulatory framework, including a failure to quantify national greenhouse gas (GHG) emission limits, through a **carbon budget** or otherwise. Switzerland had also failed to meet its previous GHG emission reduction targets.

Notably, the Court established a **five-step test** to assess whether the competent domestic authorities (legislative, executive or judicial branch) have remained within their margin of appreciation. The test examines whether the authorities have taken due account of the need to:

a. adopt general measures specifying a **target timeline** for achieving carbon neutrality and the total remaining carbon budget for the same timeframe (or other equivalent method of quantifying future GHG emissions), consistent with the overarching objective of national and/or global climate change mitigation commitments;

b. set out **intermediate GHG emission reduction targets and pathways** (by sector or other relevant methodologies) that are considered in principle capable of meeting the overall national GHG reduction target within the relevant time frames set in national policies;

c. provide evidence that they have duly **complied**, or are in the process of complying, with the relevant GHG reduction targets;

d. keep the relevant GHG reduction targets **updated** with due diligence, and on the basis of best available evidence; and

e. act in a timely, appropriate and consistent manner when devising and implementing the relevant legislation and measures.

While recognizing that national authorities enjoy a wide margin of discretion in relation to the implementation of legislation and measures, the Court held that the Swiss authorities had not acted in a timely and appropriate manner to devise, develop and implement the relevant legislation and measures. There had thus been a violation of Article 8.

Climate Science/Right to be Heard (Article 6): In the domestic proceedings, the Swiss Courts had declared the complaint inadmissible due to a lack of sufficient interest worthy of protection as required under Article 25a of the Federal Administrative Procedure Act (see Federal Tribunal, Decision BGE 146 I 145). The ECtHR held that Article 6 § 1 of the Convention was applicable to the complaint. It found that the Swiss courts had failed to provide convincing reasons as to why they considered it unnecessary to examine the merits of the applicant association's complaints. According to the ECtHR, the Swiss Courts had failed to consider the compelling scientific evidence on climate change and had not taken the complaints seriously. In this context, the Court stressed "the key role which domestic courts have played and will play in climate-change litigation" (para. 639). Based on these considerations, the Court found a violation of Article 6.

Court order: The decision is binding on Switzerland and must be respected by all other Council of Europe member states. In view of the complexity of the matter at hand and recognising of the wide margin of appreciation enjoyed by the state, the Court refrained from issuing detailed or prescriptive measures to be implemented by Switzerland to comply with the judgment. Nevertheless, the Court held that Switzerland is expected to comply with the requirements of the ECHR as clarified by the Court and under the supervision of the Committee of Ministers. In addition, the Court ordered Switzerland to pay the applicants the costs of the proceedings in the amount of EUR 80,000. However, there was no award of damages, as this had not been requested the applicants.

III. Implications for Businesses

Although that the decision is binding only on Switzerland, it will have implications beyond Swiss borders. In various ways, businesses may be affected indirectly.

Strengthening of Switzerland's Regulatory Framework: As a direct consequence of the ruling, Switzerland will need to review and, if necessary, amend its climate change policy. The Court indicates that this includes the adoption of a carbon budget, which in turn implies the setting of more ambitious targets for all relevant industrial sectors. The Court's intervention comes at a critical moment for Swiss climate policy, as the draft of the revised CO_2 Act (for the period after 2024) has just been finalised. It remains to be seen whether and how the *Klimaseniorinnen* decision will influence this debate. In the mid-term, possible implications for companies include more ambitious sectoral targets set by the government, higher CO_2 prices and a tightening of the regulatory framework in general.

Transition Plans and GHG Reduction Targets: The judgment stresses the importance of carbon budgets, climate policies and GHG reduction plans. The Court further clarified that once a member state has set its own targets, in line

with the Paris Agreement, and if it is capable of doing so, it must actually achieve them. While businesses face a different regulatory framework than states, they are currently facing similar challenges. Accordingly, the ECtHR's decision provides good reasons to ensure the robustness of businesses' transition plans and GHG reduction targets, including by using the five-step test as a possible guidance.

Litigation Risk: The ECtHR's decision generally indicates increased climate litigation risks. As experience in other jurisdictions shows, a final judgment against the state increases the likelihood of climate change-related legal actions against companies, including actions in tort, lawsuits brought by shareholders and greenwashing cases (see on this topic: Newsletter ESG Update July 2023).

Overall, *Klimaseniorinnen and others v. Switzerland* confirms the growing scrutiny of states' climate policies, which is now established as a human rights issue. Several other climate cases are on the Court's docket, including cases from Austria, Germany and Norway. In sum, both public entities and businesses are well advised to carefully consider the ECtHR's decision and its broader implications when developing their climate strategy and mitigation actions, and when assessing their needs in terms of litigation strategy.