



THE ESG REVOLUTION AND AND THE ROLE OF SENIOR LEADERSHIP

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The concept of “Sustainability” according to the UN Sustainable Development Goals (SDGs) and the EU CSRD/CSDDD

- *"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*
- UN World Commission on Environment and Development) is the most frequently quoted definition used by both the UN and the EU.
- The **17 SDGs** range from objectives such as ‘no poverty’ to ‘affordable and clean energy’ and recognise that action in one area will affect outcomes in others. Therefore development must balance social, economic and environmental sustainability i.e. sustainability is **integrated**.
- The **6th SDG**: ‘Clean water and sanitation’.
- **EU CSRD / CSDDD** instruments aim to promote responsible corporate behavior and ESG development and to **anchor** all human rights and environmental considerations in companies’ operations and corporate governance i.e. sustainability should be **embedded** across an entity’s entire value chain.

Historical evolution of ESG from Voluntary Guidelines to Mandatory Rules - **The Transformation of Business Activities on Public Interest Grounds**

02

The United Nations Guiding Principles on Business and Human Rights (UNGPs or the Ruggie Principles)

- Guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations proposed by UN Special Representative on business and human rights John Ruggie, and endorsed by the UN Human Rights Council in June 2011.
- Outlines 31 principles that apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.
- Rests on three pillars:
 - a) **Protect** – specifies the State's duty to protect human rights in the context of business operations. This requires States to set clear expectations for companies by enacting effective policies, legislation, and regulations;
 - b) **Respect** – outlines how businesses can identify their negative human rights impacts and demonstrate that they have adequate policies and procedures to address them eg. human rights due diligence and remediation mechanisms; and
 - c) **Remedy** – stipulates that when a right is violated, victims must have access to effective remedies eg. judicial and non-judicial grievance mechanisms, that are legitimate, accessible, predictable, equitable, transparent and rights compatible.

The Interaction between the CSRD, the CSDD and the SFDR – What are the ‘Regulatory Themes of the EU’s ESG Revolution?’

03

The CSRD and the CSDDD - the close conceptual connection between ESG reporting and ESG 'normative' due diligence

- On 5 January 2023, the Corporate Sustainability Reporting Directive (CSRD) entered into force.
- Incorporated into Icelandic law (through the EEA Agreement) by Act No. ____.
- The aim of the CSRD is to **modernise and strengthen** the rules about social and environmental information that companies have to report to ensure that investors and other stakeholders have access to **sufficient, reliable and comparable information** to assess investment risks arising from climate change and other sustainability issues.
- Obligation to report on both '*Financial Materiality*' and '*Impact Materiality*'.
- Financial Materiality - sustainability issues that create financial risks for the company.
- Impact Materiality - the company's impacts on people and the environment.
- Nexus between the reporting required under the CSRD and any assessment of the reasonableness, scope and adequacy of future due diligence conducted pursuant to the CSDDD.
- Double Materiality is therefore a key prism through which both CSRD and CSDDD must be viewed.
- Optimum strategy is to approach CSRD reporting with a clear focus on the CSDDD.
- What is required in terms of data collection, mapping and analysis is likely to be similar under both CSRD and CSDDD; it is vital the two approaches are consistent.

The Corporate Sustainability Due Diligence Directive (CSDDD) – A Transformative Shift in Business Regulation

Creates **mandatory obligations** for relevant companies to conduct human rights and environmental due diligence to **identify actual or potential adverse impacts** across their own operations, their subsidiaries' operations, and their value chains ['chain of activities'].

In this context, the Directive expressly envisages the development of preventive action plans and the imposition of contractual terms on business partners, and creates an obligation to bring actual adverse impacts to an end.

Value Chain ['chain of activities']: **Article 3(g)**

'value chain' means

- (i) activities related to, and entities involved in, the production, design, sourcing, extraction, manufacture, transport, storage and supply of raw materials, products or parts of a company's product and the development of a company's product or the development or provision of a service, and*
- (ii) activities related to, and entities involved in, the sale, distribution, transport, storage, and waste management of a company's products or the provision of services, and excluding the waste management of the product by individual consumers.*

The Corporate Sustainability Due Diligence Directive (CSDDD) – The Due Diligence Obligations

Companies are to be expected to comply with 4 due diligence obligations:

1. Implement **a specific due diligence policy** which contains: (i) a description of the company's due diligence approach; (ii) a code of conduct to be followed by company employees and subsidiaries; and (iii) a description of measures taken to extend the application of the code of conduct "*to business partners*".
2. Take appropriate measures to **identify** actual and potential adverse human rights and environmental impacts arising not only from their own operations, but also their subsidiaries' and the operations of established business relationships in their value chains.
3. Take appropriate measures to **prevent** potential adverse human rights and environmental impacts by means of: (i) a prevention action plan that is developed with stakeholders, (ii) seeking contractual assurance from counterparties, and (iii) refraining from entering into new relations with high-risk partners.
4. Bring to an **end or minimise** actual adverse impacts.

The Corporate Sustainability Due Diligence Directive (CSDDD) – The liability regime

Envisages:

- **Civil liability** of companies for failure to comply with the obligations in the directive.
- Still debate on whether ‘director’s liability’ will remain in the draft Directive.
- **A sanctions regime** to be imposed by each Member State which is “*effective, proportionate and dissuasive*”, including **pecuniary sanctions** “*based on the company’s net worldwide turnover*”, which “*shall be not less than 5% of the net worldwide turnover of the company in the business year preceding the fining decision.*”
- Will increase **dispute and litigation risk**: (1) Shareholder activism – AGM, (2) contractual and tort-based disputes, (3) public/regulatory enforcement and (4) climate change-type litigation (see below).

Directive was adopted by Parliament on 1 June 2023.

It is subject to further inter-institutional negotiations between the Commission, Council and Parliament on the final text of the legislation (an agreement is expected in 2024). The scope of the text is therefore still subject to change.

- CSRD reporting helps fulfil many SFDR reporting requirements eg. information on greenhouse gas emissions of investments that underlie financial products.
- Both incorporate the double materiality principle.
- CSRD's requirement of disclosing "*principal, actual, or potential adverse impacts connected with the undertaking's value chain*" leverages the same PAIs of the SFDR.

CSRD and ESRS

Reporting by companies on their sustainability risks and impacts from a double materiality perspective.

- Both to be applied in tandem by companies: CSRD provides sustainability reporting requirements while CSDDD outlines sustainability due diligence requirements.
- Both make use of the Ruggie Principles and the OECD Guidelines for Multinational Enterprises.

SFDR

Disclosure requirements for financial market participants to assist investors who are seeking to invest their money into companies and projects that support sustainability initiatives.

- SFDR requires reporting on due diligence policies with respect to PAIs of investment decisions on sustainability factors.

CSDDD

Mandatory due diligence on human rights and environmental impacts across an entity's supply chain.

The 'E' in ESG – General Trends in Climate Change Litigation – Focus on Europe

04

The Three Waves of Climate Litigation

Mid-1980s to mid-2000s

- A [relatively small number of cases](#) filed against governments, primarily in the US and Australia.
- Mostly consisted of challenges to individual policy decisions, including that the implications of greenhouse gas emissions had not been considered.

Early- to mid-2000s

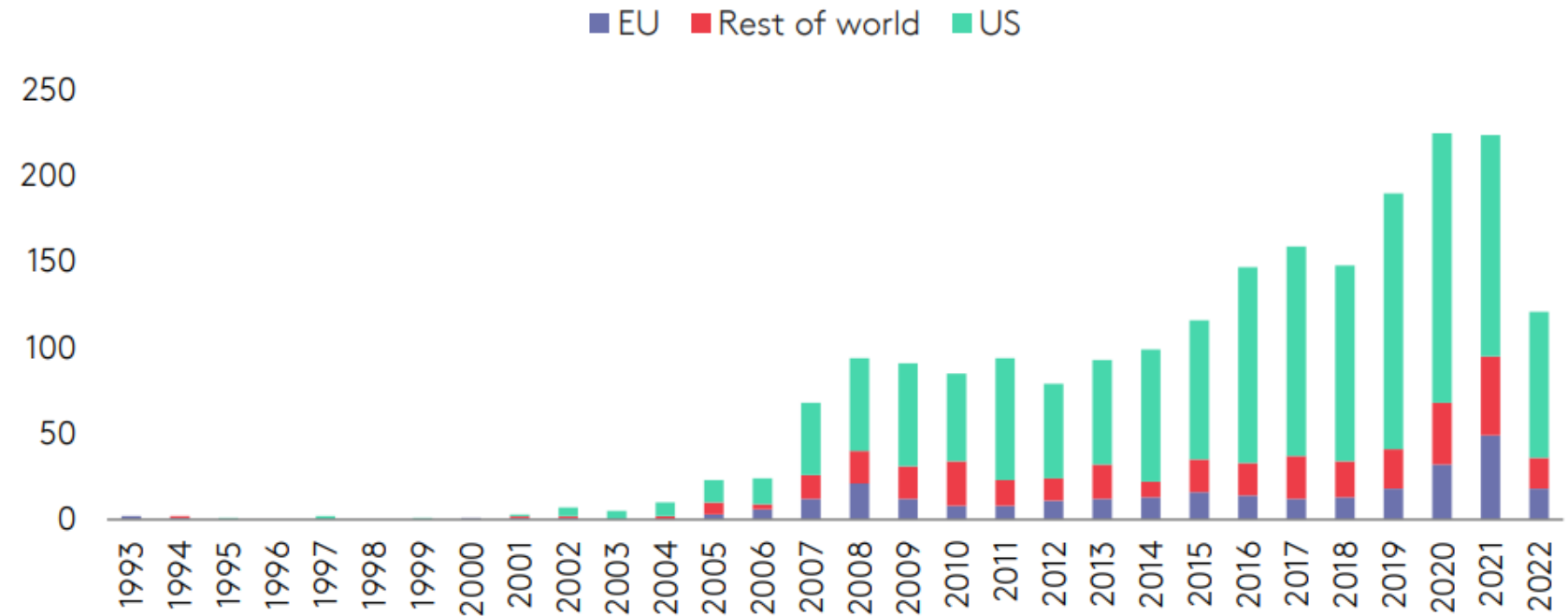
- An increase in public awareness, particularly following the [2005 Kyoto Protocol](#).
- A surge in litigation raising questions about the implementation of climate change legislation (including the EU ETS, discussed further below).
- First climate change litigation against corporate actors in the US.

2015 to present

- Further surge in climate litigation after signing of the [Paris Agreement in 2015](#).
- The use of human rights and constitutional law in strategic climate change litigation.

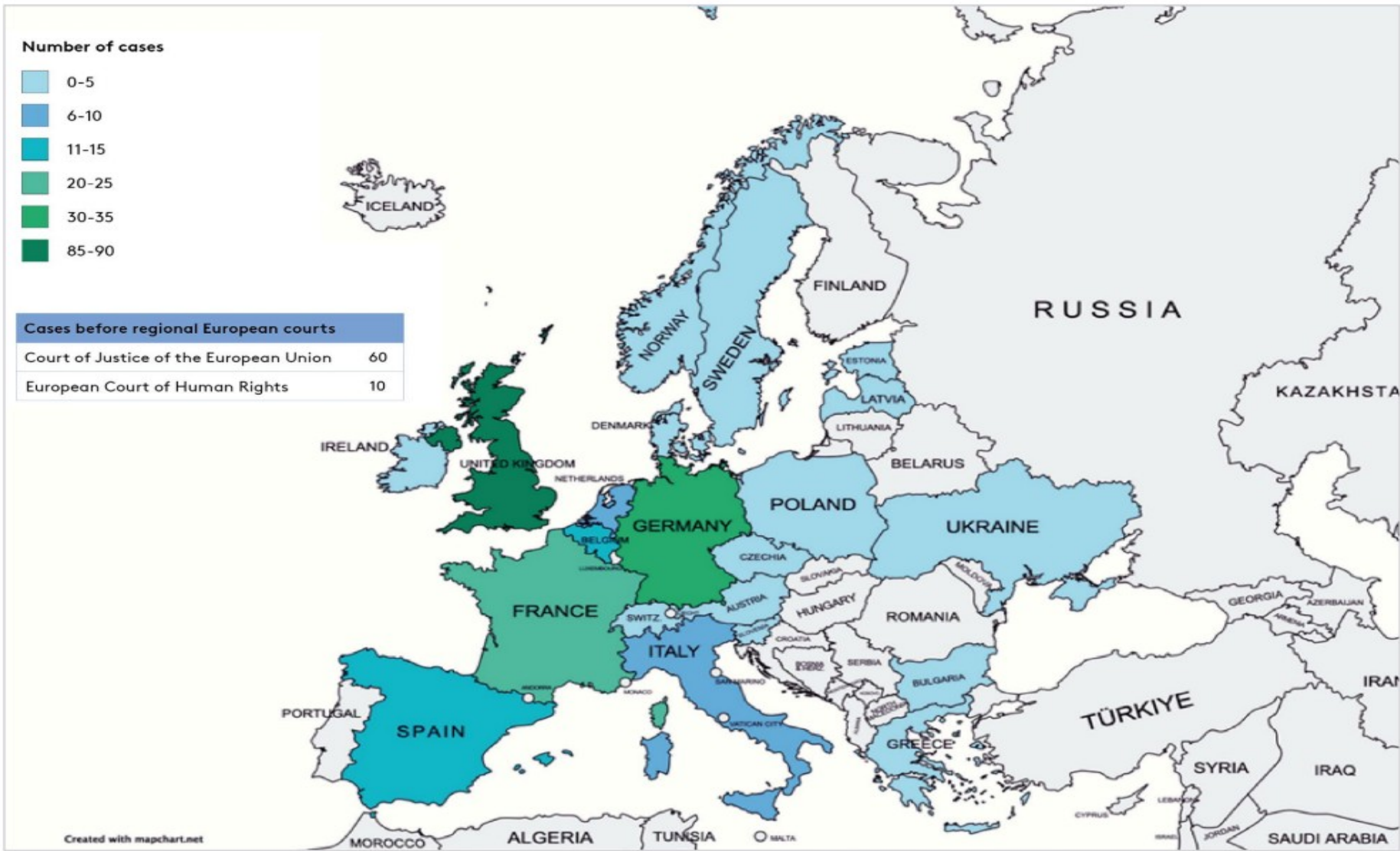
Number of Cases Filed Around the World, 1993 to Sept. 2022

Figure 3. No. of cases filed around the world, 1993 to 2022*



Map of Cases Filed in European Jurisdictions, 1993 to Sept. 2022

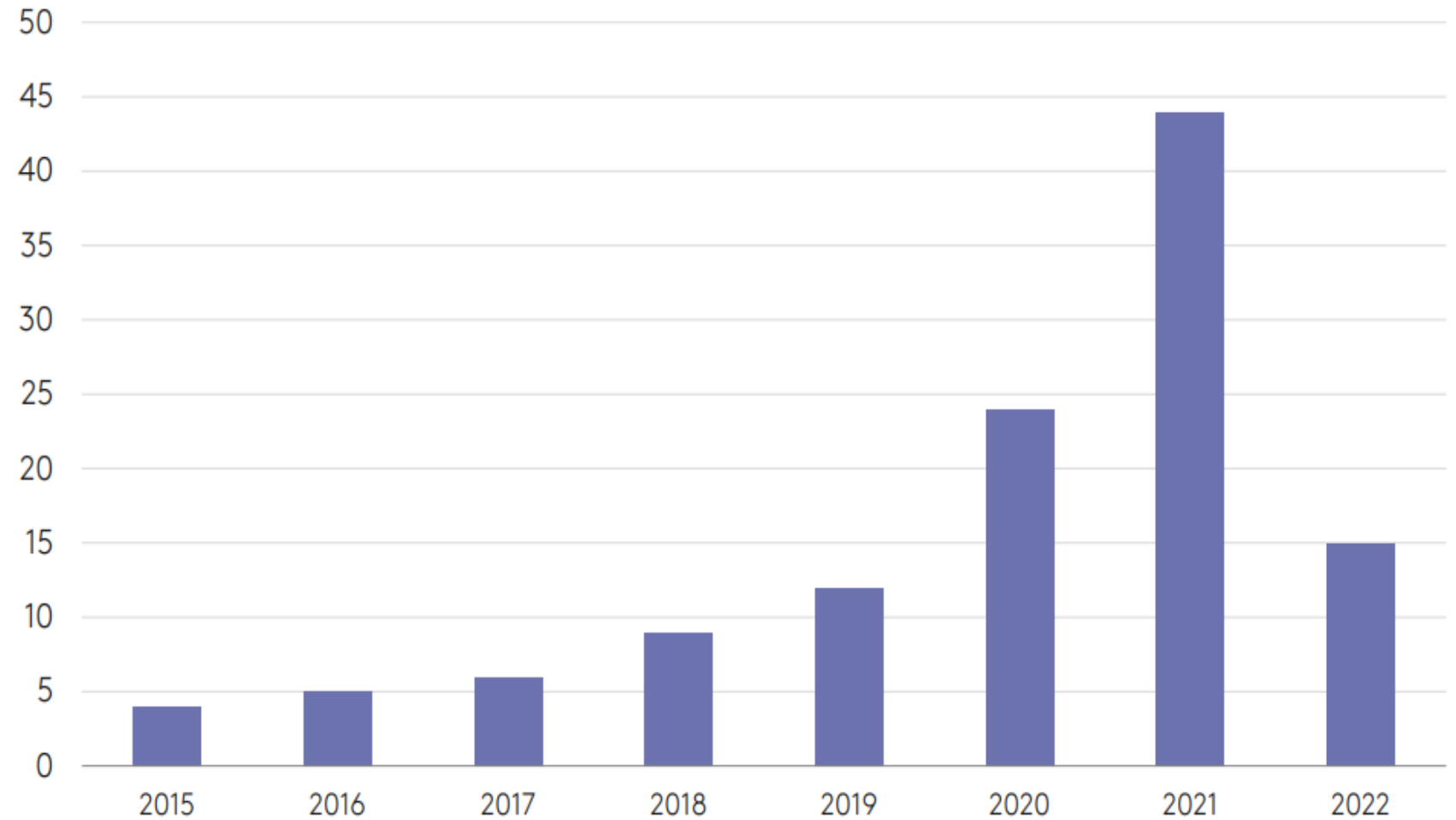
Figure 4. Map of cases filed in European jurisdictions, 1993 to 2022*



Source: LSE (Grantham Research Institute on Climate Change and the Environment), *Climate litigation in Europe*, December 2022, p. 10 (PDF). NB: Numbers run to 30 September 2022

Number of Strategic Cases in Europe, 2015 to Sept. 2022

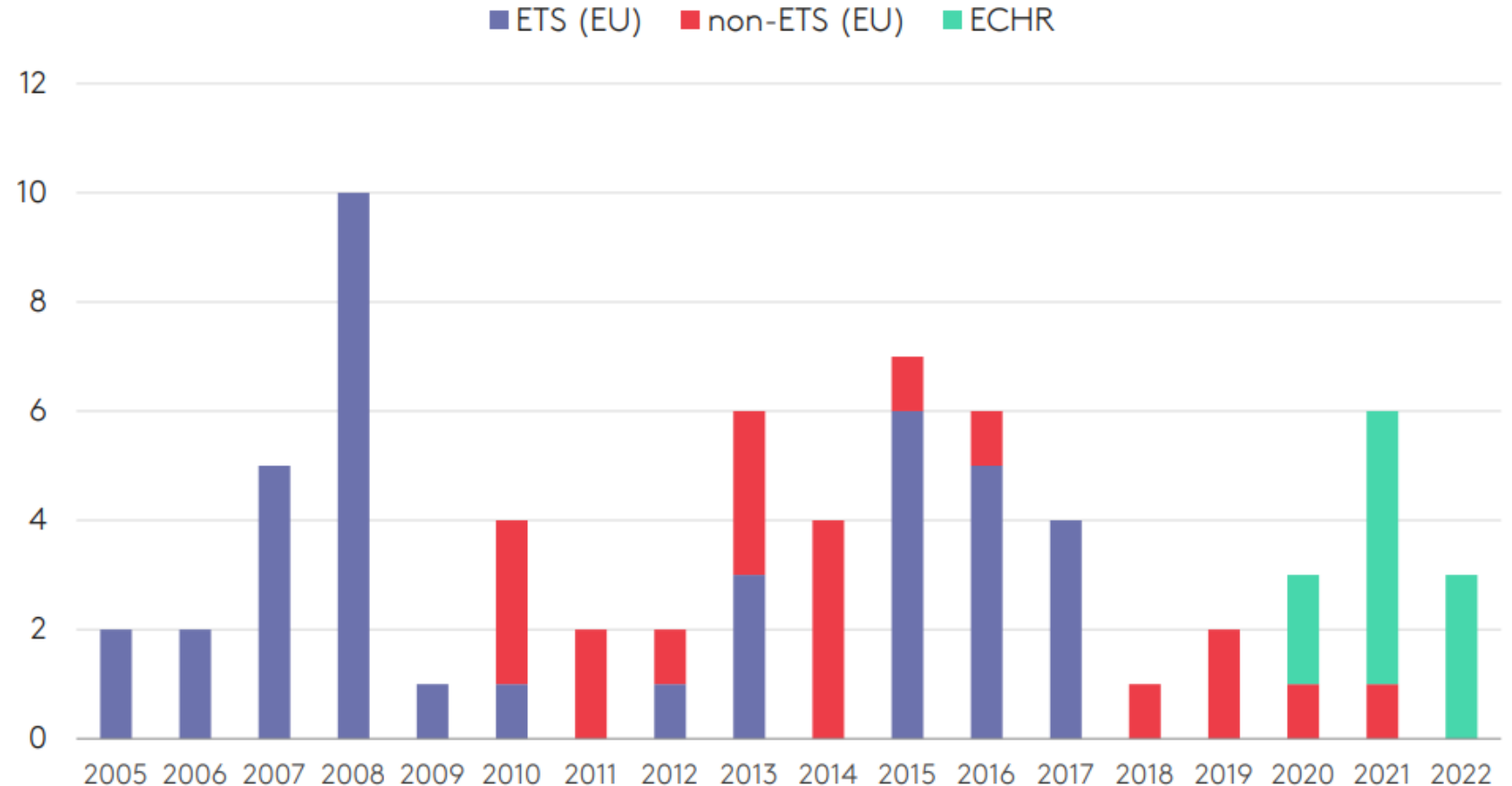
Figure 6. No. of strategic cases in Europe, 2015 to 2022*



Source: LSE (Grantham Research Institute on Climate Change and the Environment), *Climate litigation in Europe*, December 2022, p. 15 (PDF). NB: Numbers run to 30 September 2022

A Strategic Shift to the ECHR Due to Standing Issues at ECJ?

Figure 8. No. of cases filed before regional courts, 2005 to 2022*



Source: LSE (Grantham Research Institute on Climate Change and the Environment), Climate litigation in Europe, December 2022, p. 26 (PDF). NB: Numbers run to 30 September 2022.

Overview of Climate Case Before the ECHR

| Case Name | Current Status |
|---|--|
| <i>KlimaSeniorinnen and ors. v Switzerland</i> (Application no. 53600/20) | Hearing held on 29 March 2023, before the Grand Chamber. |
| <i>Carême v. France</i> (Application no. 7189/21) | Hearing held on 29 March 2023, before the Grand Chamber. |
| <i>Duarte Agostinho and Others v. Portugal</i> and 32 Others (Application no. 39371/20) | Hearing held on 27 September 2023, before the Grand Chamber. |
| <i>Uricchio v. Italy and 31 other States</i> (Application no. 14615/21) and <i>De Conto v. Italy and 32 other States</i> (Application no. 14620/21) | Adjourned, pending outcome in the Grand Chamber cases. |
| <i>Müllner v. Austria</i> (Application no. 18859/21) | Adjourned, pending outcome in the Grand Chamber cases. |
| <i>Greenpeace Nordic and Others v. Norway</i> (Application no. 34068/21) | |
| <i>The Norwegian Grandparents' Climate Campaign and Others v. Norway</i> (Application no. 19026/21) | |
| <i>Soubeste and 4 other applications v. Austria and 11 other States</i> (Application nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22) | |
| <i>Engels v. Germany</i> (Application no. 46906/22) | |

Legal Issues

- Justiciability of climate policy
- Victim status of applicants / causation
- Proximity element
- Extra-territorial jurisdiction
- Precautionary principle and principle of intergenerational equity
- Requirement for national contributions to global efforts in co-operation with other States
- Relevance of international environmental law, including e.g. the Paris Agreement, and the best available scientific evidence
- Relevance of international law on the rights of the child
- Requirement to exhaust domestic remedies in cases of urgency?

Inadmissible Cases

The Court have declared the following cases inadmissible on the grounds that the applicants were not sufficiently affected by the alleged breach of the Convention or its Protocols to claim to be victims of a violation.

- *Humane Being and Others v. the United Kingdom* (Application no. 36959/22)
- *Plan B. Earth and Others v. the United Kingdom* (Application no. 35057/22)

Possible legal and political of ECHR findings

- Is the outcome going to be a or a position of the Court? – The interaction between the ECHR and international soft law.
- between the ECHR and national courts – Who will take the lead? – Influence of certain national supreme and constitutional courts, primarily in the UK, France, Germany and Norway.
- Potential consequences of a finding that the member States have a to change domestic legislative framework:
 - Enlargement of national standing rules to give access to individuals and organisations;
 - Substantive changes to national environmental and tort laws, e.g. more flexible causality rules, further codification of environmental law principles such as the no harm principle, the precautionary principle, the principle of prevention, the polluter pays principle and principle of intergenerational equity;
 - Substantive changes to company law, enhancing director liability for failure to engage with climate change risk in their value chains;
 - National regulation of emission requirements of private undertakings;
 - Incorporation of Paris Agreement principles (e.g. limit of 1.5°C increase) into national laws and the Convention.
 - See, already, Proposal of the European Commission on a Corporate Sustainability Due Diligence Directive.

An aerial photograph of a dense, lush green forest. The canopy is thick and textured, with various shades of green. The text "GIBSON DUNN" is centered in the middle of the image in a white, bold, sans-serif font.

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