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Avosetta Questionnaire:

Climate Litigation

Cork, 28-29 May 2021

Although it is never easy, please keep your answers succinct – 2 pages max, excluding the questions.

[1] State of play at national level:

In your particular Member State, have cases been decided by the national courts, and / or are there cases pending before the courts, that aim to deliver better climate protection?

Are there "horizontal" cases between private parties and / or "vertical" ones between private parties and public authorities – or both? If yes, briefly characterise them.

Actions challenging public authorities could be aimed: (1) at high level target setting for greenhouse gas emission (GHG) reduction; or (2) at the taking of more concrete measures reducing emissions (such as emissions limits for automobiles); or (3) at projects causing emissions as a side effect (such as a new runway or highway).

Briefly indicate who are the claimants; what are the standing requirements; what is the objective of the action, and what is the reasoning on the substance of the case.

Well, it all depends upon how you define "climate litigation". There has been quite a lot of discussion about the possibilities to bring such an action in court, and one may distinguish two lines of reasoning.

The first is to challenge measures under the Climate Act (2017:720) in order to show that the package is insufficient to meet Sweden's commitments under the Paris agreement. This may be performed by a judicial review the governmental decision directly at the Supreme Administrative Court. Being a "traditionalist", this is the way I would recommend to someone who's willing to initiate a climate action. The problem with this avenue is the rather vague provisions in the Climate act and similar legal instruments.

The second is to undertake a private law action for damages or protective measures under the ECHR against the government for the same reasons. The drawbacks here are obvious; there is a long way to go with high costs (District Court – Court of Appeal – Supreme Court) and I think that the Swedish courts would be quite reluctant to find the "direct victim" link between the plaintiffs and the future effect, at least for now and until the ECtHR has decided on the Klimaseniorinnen and the Portuguese youngsters. In my view, there is a certain "romanticism" surrounding this kind of private law action, based on PR reasons more than

legal realism. But a rather old traditionalist may not be the first person to ask about the future development on this issue.

As for cases, we have two that are worth mentioning. In the Magnolia case, 178 youngsters and organisations sued Vattenfall for the company's selling out the German brown coal mines, claiming that the continued extraction would cause them future damage due to climate change. This action was dismissed in 2018 as manifestly ill-founded by the Stockholm District Court, a decision which was upheld by the Svea Court of Appel.

The second case raised much more attention and concerned the oil company Preem's application for an expansion of the refinery at Lysekil in the south of Sweden ("Preemraff"). The application – which was granted by the Land and Environmental Court in Vänersborg in September 2018 – aimed at the undertaking of the so-called Residue Oil Conversion Complex (ROCC) in order to convert crude oil to gasoline and diesel for sea transportation. With the building of the complex, the installation's discharges of carbon dioxides would increase from yearly 1,7 to 3,4 million tons, amounting to the largest source of such discharges in Sweden. This was however a fact which was not touched upon by the court, as these installations are covered by the Emissions Trading Directive 2003/87 and there is a provision in the Environmental Code (Chapter 16 sec 2) prohibiting any conditions on such discharges. The EPA, the Swedish Association for Nature Conservation and others appealed the permit to the Land and Environmental Court of Appeal and requested the court to remit the case to the Government. The Court met the request while still confirming the position of the lower court in a separate statement. While the case was handled within at the Governmental Offices, Preem withdraw its application in September 2020, pointing at new economic circumstances; https://preem-en.newsroom.cision.com/releasedetail.html?preem-withdraws-2016-environmental-permit-application&releaseIdentifier=96BF741CC27BCA28

Meanwhile, a governmental commission has proposed a reform of Chapter 16 sec 2 to align the provision to the EU ETS, restricting the prohibition to conditions on *limit values from direct discharges* of the relevant greenhouse gases from those installations. On this issue, the Summary of the Commission's report states the following:

The Inquiry makes the assessment that it is possible to set requirements to limit the quantity of fossil fuel used, and that this is also desirable so that governance via the Environmental Code will have a greater effect on Swedish greenhouse gas emissions. The EU's Emissions Trading Directive and Industrial Emissions Directive harmonize that emission limit values may not be set for activities in the EUETS if the purpose is to limit direct emissions of greenhouse gases included in the emissions trading system. However, the Inquiry has not found any legal impediments in EU law to setting other kinds of conditions than emission limit values under the Environmental Code's rules of consideration. The legal situation is unclear regarding how much scope Member States have to apply supplementary policy instruments to activities included in the EUETS, but the Inquiry makes the assessment that the scope is relatively substantial. The Inquiry therefore proposes amending the part of Chapter 16, Section2c and Chapter 26, Section 9 of the Environmental Code as well as Chapter1, Section11 of the Industrial Emissions Ordinance stating that conditions that aim at limiting emissions of carbon dioxide by regulating the quantity of fossil fuel used shall not be applied to activities included in the EUETS. An addition also needs to be made to Chapter24, Section20 of the Environmental Code to make conditions concerning the use of fossil fuel possible when the Inquiry's proposals have entered into

force. The wording of Swedish legislation should also be adapted so that term emission limit value is used everywhere.

[2] Interconnections between developments at national and supranational level:

Where relevant, please connect the national experience to date with developments in climate litigation at the supranational level (e.g. proceedings before the CJEU and the ECtHR).

As of yet, no such link can be found, although the interest is very high also from the courts…