SPEECH

“Come hell or high water”: addressing the risks of climate and environment-related litigation for the banking sector

Keynote speech by Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the ECB Legal Conference

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Introduction

It is a pleasure to welcome you to Frankfurt and to the ECB’s Legal Conference. Arriving this morning and seeing such a large gathering of lawyers – attentive, curious and pleased to see old friends again – I am reminded of the “**back-to-school**” feeling after the summer.

I hope my intervention today can channel that energy towards the major challenge of our time: the climate and environmental crises. After all, summers now are very different from those we may remember from our youth.

Some Europeans faced hell this summer. Record-breaking heatwaves scorched the Mediterranean. Forest fires claimed lives and destroyed homes in Greece. And residents in northern Italy and central Europe were hit by extreme flooding. Meanwhile, similar disasters have been unfolding worldwide. Canada is experiencing its worst wildfire season on record. Wildfires in Hawaii killed more than 100 people. And recent flooding in China is thought to have displaced over one million people. Without human-induced climate change, these events would have been virtually impossible.[1] Back in 2015 Mark Carney spoke about the **tragedy of the horizon.**[2] Eight years on, we have arrived at that horizon. The tragedy is upon us and it has started to unfold.

Today is therefore an appropriate moment to recall one of the key channels through which Mark Carney anticipated that the financial sector – and financial stability – would be affected by the climate crisis: **liability risk.** And by that I am referring to climate and environment-related litigation.

A recent UN report observed that climate-related litigation is central to efforts to compel both governments and corporate actors to pursue more ambitious climate change mitigation and adaptation goals.[3] While governments were the most common targets of such litigation in the past, cases are now also increasingly being filed against corporates.

For supervisors and banks alike, this is becoming a major source of risk that needs to be properly anticipated and addressed. And it is particularly important at a time when non-financial but also financial companies, including banks, are becoming the direct targets of such litigation. This brings me

to the key message of my remarks today: litigants are coming after the banks, "**come hell or high water"**[4]. And the banks need to be prepared.

The ECB's Legal Conference is the perfect forum to discuss this topic for two reasons. First, it is about the role of lawyers – and of courts – in the fight against the climate and environmental crises. Second, as banking supervisor, the ECB finds that banks still need to make significant progress in increasing their awareness of climate and environment-related litigation risk, and they need to be better prepared to address this risk.[5]

Climate-related litigation and its impact on the financial sector – new reports by the Network for Greening the Financial System

The rise in climate-related litigation should not come as a surprise. The Network for Greening the Financial System[6] (NGFS) already identified it as an emerging source of risk for the financial sector back in 2021.[7] And in fact, I also spoke about it at the ECB Legal Conference two years ago.[8] Since then, the number of cases has exploded. Globally, some 560 new cases have been filed since 2021.

Against this backdrop, last Friday the NGFS published two new reports on climate-related litigation. The first provides an update on this trend and considers how it may affect banks and the financial sector.[9] The second looks at how this risk needs to be addressed from a supervisor's perspective.[10]

Expanding precedents – from States to companies

As the NGFS report shows, litigation first targeted **States**.

One of the first landmark cases was the Urgenda case in the Netherlands in 2019. The Dutch Supreme Court ordered the Dutch Government to take more ambitious action to reduce its greenhouse gas emissions. The success in the Urgenda case has since been replicated in cases before the highest courts in France, Ireland and Germany – though naturally with different legal arguments, tailored to each legal system. These cases against States are often referred to as "systemic" climate cases[11] and have been launched in no fewer than 34 jurisdictions worldwide.[12] The cases bring about and accelerate changes in policy, while also providing clarity on duties and responsibilities. But they are also an increasingly important source of transition risk for the economy and the financial sector, as they can lead to rapid court-mandated pivots in public policy aimed at reducing greenhouse gas emissions across the economy.

Moreover, we have recently seen a remarkable increase in **cases against corporates**. Litigation has been launched against a wide range of companies across various sectors of the economy. Fossil fuel and energy companies have been obvious targets, but also car manufacturers, airlines, food companies and producers of concrete and plastics. A wide variety of legal arguments are being used as the basis for such claims.[13] We are seeing claims for **damages under tort law**, for breaches of **corporate due diligence laws** and for **greenwashing**[14]. And we are also increasingly seeing non-governmental organisations (NGOs) buying shares in companies, so that they can subsequently

attempt to make the directors personally liable for **breaching their fiduciary duties** to adapt the company to the climate transition.

A telling aspect of this trend is the strategic approach that these litigants take: their lawyers build their cases on the arguments and experiences of peers in other jurisdictions, cooperating through cross-border networks while also developing jurisdiction-specific arguments and strategies. A line of argument that has been successful in one jurisdiction does not necessarily lead to a similarly successful outcome in another, but some arguments have been replicated in multiple countries.

As an example, consider a legal strategy that has proven to be particularly potent in recent years. Once a case against a State has established that the fundamental rights of citizens have been violated, we have seen subsequent cases use this as a basis to argue that private companies also have **a duty of care under civil law to protect citizens' fundamental rights.** In practical terms, this means a duty to have a realistic and credible plan to reduce their greenhouse gas emissions. In the Netherlands, this was a winning argument in the first-instance decision in the case against Shell[15]. The Court ordered Shell to reduce its emissions by 45% by 2030, compared with 2019 levels, across all activities and all jurisdictions in which it operates.[16] A similar line of reasoning is being used in a case against the Italian company Eni and its shareholders.[17]

These cases are particularly interesting because they do not focus on damages. Rather, they look at the individual firm's contribution to global emissions and their duty to do their "fair share" to reduce them. In the Shell case, for example, the district court found that while the Paris Agreement is not binding on companies per se, they nevertheless have an obligation to comply with the emission reduction pathway established by the Intergovernmental Panel on Climate Change.

The Shell case is currently under appeal. But if the decision by the district court were to be affirmed by the highest court, it could establish a legal obligation under Dutch law for all corporates to proactively reduce their emissions in a way that is aligned with the objectives of the Paris Agreement. This would have major repercussions and would quite frankly be revolutionary. Such a duty is not currently priced into, nor part of, firms' business and transition plans. Up to now, the focus on liability risk has involved looking at actions for damages, and the assumption has been that this risk is somewhat remote, because causation has been difficult to establish. This assumption may turn out to have provided a false sense of security. First, because attribution science may make it easier to prove causation.[18] And second, because Shell-like "fair share" cases take a different approach and don't need proof of causation.

In any event, these cases pose obvious risks for the financial sector. Companies may face significant direct and indirect financial losses. We are not only talking about the costs of damages, fines, legal costs and the impact on the company's share price.[19] There could also be potential risks to a company's viability if a ruling were to result in unexpected adaptation costs or outright stranded assets that had not been priced in. Such a ruling would have an impact on the defendant in the specific case, other companies in the same sector and the banks that finance them.[20]

The next frontier: banks and the financial sector

However, banks will not only be affected indirectly – they may well be sued directly, too. In fact, this is already happening. Litigants are turning their attention to the financial sector, with the idea that if they sue the banks, they can "turn off the taps" of funding to high emitters.[21]

We are already seeing the first examples. There have been cases brought against financial institutions for greenwashing, as well as cases brought against the trustees of pension funds. We have even seen the first case taken directly against a bank under corporate due diligence legislation in France for its role in financing the expansion of fossil fuels.[22]

And we can't exclude that, in some jurisdictions, litigants will go for the jugular. Like in the Shell case, they could argue that banks also have a duty of care under civil law to protect fundamental rights – and that they must have plans in place to reduce emissions in line with the Paris Agreement and the European Climate Law. In other words, plans to reduce their emissions by 55% by 2030, compared with 1990 levels, and to immediately stop financing new fossil fuel exploration.[23]

Who is bringing climate litigation?

Part of the reason we must take this risk seriously is because the litigants – in these cases the plaintiffs – have proven to be serious players. Most cases are brought (or supported) by NGOs. We aren't talking about activists turning up outside courtrooms with cardboard placards. No, the litigants in these cases are sophisticated and use their transnational networks to build precedents across borders. They are well funded, well connected and well organised.[24] And they can – and do – hire the best and brightest lawyers in the field.

How can banks address climate-related litigation risk?

Let me now turn to the practical part of this speech – or the **homework,** if I may again draw on the "back-to-school" analogy. How can banks properly address and mitigate climate-related litigation risk? And how can prudential supervisors guide them?

There are two strands of thought here.

The first is the bread-and-butter guidance. In 2020 the ECB published its Guide on climate-related and environmental risks.[25] This guide contains several expectations that can help to address climate-related litigation – within existing categories of risk. These include the need to evaluate litigation risks, define tasks and responsibilities relating to climate risk and conduct climate-related due diligence. With its 2022 thematic review[26], the ECB went a step further, setting institution-specific remediation timelines for meeting the expectations by the end of 2024, including intermediate deadlines of the end of last March and the end of this year. We also provided a compendium of good practices implemented by supervised banks, including practices to address climate and environment-related litigation risks.[27]

I recently asked the CEOs of some of our supervised banks to do me (and themselves) a favour. I suggested to ask their general counsels how closely they are following developments in climate and environment-related litigation. Is Urgenda a household name? Has the Shell case been analysed in depth, and have the possible repercussions for the bank been discussed in detail in board meetings?

Have the avenues for possible direct litigation against banks been considered? Has the coverage of personal liability insurance for board members been checked in case their bank was found to be subject to the same obligations as Shell was in first instance and – second – in breach thereof? Today I will repeat this message to all CEOs, their general counsels, and to all executive and non-executive board members of the banks under our supervision: get up to speed with this trend and mitigate the associated risks for your institution.

Some banks have already started to consider climate-related liability risk, and a few have started to quantify possible losses. One example of good practice relates to how banks calculate a client's credit risk. Some include liability risk as a factor when rating their clients' probability of default to better price in this type of risk. Another bank assessed reputational risks, including those related to potential greenwashing and financing of polluting industries, by defining a set of scenarios and mapping the possible affected stakeholders and the profit and loss area that would be most affected. In a second step, the bank then used specific case studies to quantify the possible losses that could arise. Another good practice is to mitigate the risk of greenwashing by ensuring adequate disclosures, by considering this risk in the governance framework, and by conducting regular compliance checks.

Another positive example is that if, through its climate and environment-related due diligence exercises, a bank identified climate and environment-related litigation risks for its client (and thus potentially greater credit and reputational risk for the bank itself), it sets up an action plan to address these risks. This action plan could include asking the client to adopt best practices in its sector or, if this avenue is unsuccessful, limiting its business relationship with the client.

Supervisors have homework to do too. The NGFS report on micro-prudential supervision of climate-related litigation risks published last Friday sets out additional potential options for supervision. It emphasises the need for supervisors to take a risk-based approach, which can include performing a materiality assessment of risks at the broader jurisdictional level or a more granular exposure analysis at entity level.

We shouldn't forget that central banks and supervisors may also be the targets of climate and environment-related litigation, either to ensure that they are doing their part to protect fundamental rights and facilitate compliance with the Paris Agreement or to ensure that they are fulfilling their duties in terms of financial stability or consumer and investor protection.[28]

The importance of Paris-aligned transition plans

The second strand of thought is the well-known saying "if you fail to plan, you plan to fail". Banks need to be aware that in certain jurisdictions the impact of climate-related litigation could dig right down into the viability of their business models. And given the determination of the NGOs, and their knack for forum shopping – choosing the jurisdiction most likely to provide a favourable verdict –, we don't know how many banks they will be aiming for. **To address this source of litigation risk, the best advice I can give is that banks should start putting in place their Paris-aligned transition plans.**

By this, I don't mean a slick advertising campaign with glossy photos of rainforests – that is just a recipe for greenwashing accusations. I mean realistic, transparent and credible transition plans that

banks can and actually do implement in a timely manner. Having such plans in place requires banks to ensure they have accurate, granular data; that they conduct a robust materiality assessment; that they integrate transition planning into their internal discussions and strategic decision-making and that they establish proper internal governance to this effect. With these elements in order, banks should be able to communicate how they are positioning themselves throughout the transition to a climate-resilient and sustainable economy. This would demonstrate the degree to which they are doing their "fair share". Moreover, a transparent and credible transition plan should enable stakeholders to fully understand the risk environment in which a bank operates. Therefore, clearly articulating the processes and actions related to the transition plan should also significantly contribute to reducing litigation risk.

This is particularly important when we look at the feedback loop between climate and environment-related legislation and litigation.[29] It is only a matter of time before bank transition plans become mandatory under EU law. There are now three pieces of legislation in the pipeline that will require banks to put transition plans in place: the Corporate Sustainability Reporting Directive, the proposed Corporate Sustainability Due Diligence Directive and the recent Capital Requirements Directive proposal.[30] This new legislation alone could prompt further climate litigation, with litigants finding additional legal bases for their claims.

Of course, no one – not supervisors, not legislators, and not the courts – can expect individual companies or banks to single-handedly solve the climate crisis. However, based on emerging case-law and the ever-more stringent legislation on transition plans, we can no longer afford the luxury of simply assuming that individual companies do not have a duty to do their "fair share" in the fight against climate change. Banks and supervisors alike must – if only as a precaution – manage the risk of the higher courts finding that this is already a binding duty today.

Environment-related litigation

One last point: today I have mainly used the phrase climate-related litigation, which is focused on reducing greenhouse gas emissions. But we shouldn't be blind to other trends, such as the rise in environment-related litigation more broadly. As alarm at the decline in nature and biodiversity grows – with some considering that humanity has become a weapon of mass extinction[31] – we can expect litigants to turn to the courts, drawing inspiration from their successes in the area of climate. There have already been several cases seeking to hold supermarkets, food producers and even a bank accountable for deforestation in the Amazon.[32] This trend is likely to gather momentum as legislation on supply chains enters into force – the Deforestation Regulation and the proposed Corporate Sustainability Due Diligence Directive being two key examples. And arguments about companies' duty to do their "fair share" to protect fundamental rights by reducing greenhouse gas emissions could also be applied to mitigating other types of environmental degradation.

Conclusions

Let me conclude.

We have arrived at the horizon of the climate crisis, and at the horizon of climate and environment-related litigation risk. Banks still have a lot of homework to do to address this risk, in terms of both meeting the ECB’s supervisory expectations and putting transition plans in place.

This is all the more important given that litigants may increasingly target banks and the wider financial sector, with the aim of driving funding away from carbon-intensive sectors and towards the transition. We need to take action now to anticipate and mitigate this source of risk.

But I would like to end on a more personal note by returning to the legal professionals that have gathered here today.

Lawyers might sometimes see themselves as the upholders of tradition rather than the drivers of change. They might not necessarily see their work – with pen and paper, in front of a computer or in the courtroom – as having a dramatic physical impact on the world, much less saving the planet. But with climate and environment-related litigation, it’s different. The lawyers involved in these cases – be it as counsel, judges, or academics – see that urgent change is needed to protect humanity, by holding society to the commitments of the Paris Agreement, and to protect citizens’ fundamental rights, using the rule of law to achieve these goals.

It brings to mind the poem “Digging” by Seamus Heaney, in which he reflects on whether his creative endeavours could bring the same value to society as his ancestors’ work digging the land to plant and harvest food. He reflects on how to balance his wish to honour his forebears with his drive to follow his own way, using a pen instead of a spade. Heaney concludes: “Between my finger and my thumb, The squat pen rests. I’ll dig with it.”

Lawyers today are also taking up their pens to support the world on a Paris-aligned path. Their pens set in motion the pens of judges. And the pens of judges may well induce real change. Banks must manage all their material risks, including their climate and environmental related litigation risks. Come hell or high water.

1.

World Weather Attribution (2023), “Extreme heat in North America, Europe and China in July 2023 made much more likely by climate change”, 25 July.

2.

This phrase describes the fact that the catastrophic impacts of climate change will be felt beyond the traditional horizons of most actors, who thus have limited incentives to mitigate it. See Carney, M. (2015), “Breaking the tragedy of the horizon – climate change and financial stability”, speech at Lloyd’s of London, London, 29 September.

3.

UN Environment Programme (2023), *Global Climate Litigation Report: 2023 Status Review*, 27 July.

4.

This phrase was coined in the 19th century to describe the gritty determination of the pioneers making their way across the United States to carve out a better future for themselves, undeterred by obstacles

and dangers. The phrase can equally be used to describe the determination of climate activists to use the justice system to fight the climate crisis – and the hell and high water that crisis is already generating.

5.

ECB Banking Supervision (2022), *Walking the talk: Banks gearing up to manage risks from climate change and environmental degradation*, November; and ECB Banking Supervision (2022), *Good practices for climate-related and environmental risk management*, November.

6.

Since its foundation in 2017, the NGFS has grown from eight to 127 members, encompassing central banks and supervisors from five continents. The purpose of the NGFS is to help strengthen the global response that is required to meet the goals of the Paris Agreement and to enhance the role the financial system plays in managing risks and mobilising capital for green and low-carbon investment in the broader context of environmentally sustainable development.

7.

NGFS (2021), *Climate-related litigation: Raising awareness about a growing source of risk*, November.

8.

Elderson, F. (2021), "When you need change to preserve continuity: climate emergency and the role of law", speech at the ECB Legal Conference 2021, Frankfurt am Main, 25 November.

9.

NGFS (2023), *Report on climate-related litigation*, 1 September.

10.

NGFS (2023), *Report on micro-prudential supervision of climate-related litigation risks*, 1 September.

11.

Systemic climate litigation refers to climate-related lawsuits that are lodged against governments and that challenge the overall effort of a State or its bodies to mitigate or adapt to climate change.

12.

Setzer, J. and Higham, C. (2023), *Global trends in climate change litigation: 2023 snapshot*, Grantham Research Institute on Climate Change and the Environment, 29 June.

13.

See footnote 12.

14.

While there is no common international definition of greenwashing, the three European Supervisory Authorities (European Banking Authority, European Securities and Markets Authority and European Insurance and Occupational Pensions Authority) recently defined greenwashing as "a practice where

sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants." See European Banking Authority (2023), "ESAs present common understanding of greenwashing and warn on related risks", 1 June.

15.

The case is so significant that it will be immortalised in song at the Dutch National Opera next spring.

16.

Including both its own emissions and end-use (i.e. scope three) emissions.

17.

Greenpeace Italy et. Al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A. For further resources, see the Global Climate Change Litigation database.

18.

Attribution science attributes the detrimental impacts of climate change to the actions of an individual entity. In a lawsuit this can help to establish both standing and causation. See Stuart-Smith, R.F., Otto, F.E.L. and Wetzer, T. (2022), "Liability for Climate Change Impacts: The Role of Climate Attribution Science", in De Jong, E.R. et al. (eds.), *Corporate Responsibility and Liability in Relation to Climate Change (Intersentia 2022)*, 30 September.

19.

Sato, M. et al. (2023), "Impacts of climate litigation on firm value", *Working Papers*, Grantham Research Institute on Climate Change and the Environment, 23 May.

20.

Solana, J. (2020), "Climate change litigation as financial risk", *Green Finance*, Vol. 2, No 4, pp. 344-372; Setzer, J., Higham, C., Jackson, A. and Solana, J. (2021), "Climate change litigation and central banks", *Legal Working Paper Series*, No 21, ECB, December.

21.

See footnote 12.

22.

Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas.

23.

Heemskerk, P. and Cox, R. (2023), "Bancaire klimaataansprakelijkheid onder invloed van duurzaamheidswetgeving", *Maandblad voor Vermogensrecht*, No 3, pp. 93-106.

24.

Peel, J. and Markey-Towler, R. (2021), "Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases", *German Law Journal*, Vol. 22, No 8, pp. 1484-1498; Hodgson, C. (2023), "The money behind the coming wave of climate litigation", *Financial Times*, 5 June.

25.

ECB Banking Supervision (2020), *Guide on climate-related and environmental risks*, November.

26.

ECB Banking Supervision (2022), *Walking the talk: Banks gearing up to manage risks from climate change and environmental degradation*, November.

27.

ECB Banking Supervision (2022), *Good practices for climate-related and environmental risk management*, November.

28.

See, for example, ClientEarth v. Financial Conduct Authority and ClientEarth v. Belgian National Bank.

29.

See footnote 12.

30.

NGFS (2023), *Stocktake on Financial Institutions' Transition Plans and their Relevance to Micro-prudential Authorities*, May. See also Opinion of the European Central Bank of 6 June 2023 on the proposal for a Directive on corporate sustainability due diligence (CON/2023/15) (OJ C 249, 14.7.2023, p. 3).

31.

Guterres, A. (2022), "Secretary-General's remarks at the UN Biodiversity Conference – COP15", 6 December.

32.

Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas.