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RESEARCH ARTICLE

Private law, private international law[1] and public interest litigation

Stephanie Law[1], Jo Shaw[2], Jonathan Havercroft[1], Susan Kang[3] and Antje Wiener[4,5]

[1]University of Southampton, University Road, Southampton SO17 1BJ, United Kingdom
[2]University of Edinburgh, Old College, South Bridge, Edinburgh EH8 9YL, United Kingdom
[3]CUNY John Jay College of Criminal Justice, City University of New York, 524 West 59th Street, New York, New York, NY 10019, United States
[4]University of Hamburg, Faculty of Business, Economics and Social Sciences, Von-Melle-Park 5, 20146 Hamburg, Germany
[5]University of Cambridge, Hughes Hall, Cambridge CB1 2EW,United Kingdom
Corresponding author: Stephanie Law; Email: s.law@soton.ac.uk

Abstract

Private actors and institutions, and by extension private law itself, are increasingly being forced to reckon with a multiplicity of challenges that extend beyond the domain of private law as it is traditionally conceived. They reflect threats to the global constitutional order and liberal constitutionalism, and threats to individual and collective fundamental rights and constitutional values. As a result, the role of private law in framing and facilitating the development of the global economy and globalization often does not fall within the direct purview of public international lawyers. This editorial aims to examine the role of private law in the litigation and enforcement of public interests against the background of the public/private divide. This is done in light of the increasing role adopted by private actors, including corporations, beyond the private realm.

Keywords: climate change; consumer law; private law; public international law; public-interest litigation; strategic litigation

I. Introduction

Private actors and institutions, and by extension private law itself, are increasingly being forced to reckon with a multiplicity of challenges that extend beyond the domain of private law as it is traditionally conceived. These crises have stemmed *inter alia* from the urgency of

[1]For the purposes of this editorial, the notion of private law is understood to encompass both substantive private law and private international law; the latter provides for a set of procedural rules governing the resolution of international or cross-border civil disputes before national courts, namely on jurisdiction, applicable law and the recognition and enforcement of foreign judgments. See further, T Pfeiffer, 'Private International Law' (2008) *Max Planck Encyclopaedia of Public International Law*, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1458>.

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the necessary transition to sustainable, environmentally-conscious private consumption in light of the climate emergency,[2] from the mitigation of economic inequality in the context of increasingly powerful global supply chains and from digitalization and platformization.[3] They reflect threats to the global constitutional order and liberal constitutionalism, and threats to individual and collective fundamental rights and constitutional values.[4] Such challenges include, for example, allegations of human rights violations, including forced labour, modern slavery and human trafficking,[5] environmental degradation[6], climate change and sustainability,[7] among others. In line with the so-called public/private law divide, such challenges might traditionally be deemed to fall to the realm of public ordering and public law, outside of the scope of private law. The public/private divide is a social construct, long established and long criticized,[8] and developed differently according to nationally distinct practices of the law. In a nutshell, the divide conceives of public and private law as distinct areas of regulation and governance, with the former being deemed to be intimately tied to the state and state interests and the latter regulating relations between individuals, whether natural or legal persons.

As a result, the role of private law in framing and facilitating the development of the global economy and globalization often does not fall within the direct purview of public international lawyers. This editorial aims to examine the role of private law in the litigation and enforcement of public interests, against the background of the public/private divide. This is done in light of the increasing role adopted by private actors, including corporations, beyond the private realm. On the one hand, it is necessary to outline private law's 'complicity' in emerging global crises against the background of the shrinking role of the state, and the harmful impact that private business activities may have on the protection of public interests, including the environment, sustainability and human rights. On the other hand, the limitations of conventional public international law in dealing adequately with global crises (whether ecological, economic or social), which create a public interest burden, require greater attention to be paid to the increasingly central role that private actors and private law enforcement may occupy in law and global governance.[9]

Public law is traditionally understood to govern relationships between individuals as citizens and public institutions acting in their public, as opposed to private, capacity, while public international law 'in a nutshell … is a set of legal norms pertaining to the international community and to the cooperation between international legal subjects'[10]

[2]S Kang, J Havercroft, J Eisler, A Wiener, and J Shaw, 'Climate Change and the Challenge to Liberalism' (2023) 12 *Global Constitutionalism* 1.

[3]With concerns arising from the unprecedented power attributed to 'big tech' companies, their promotion of surveillance capitalism and its use as a tool to shape and control markets and societal behaviour in a way that threatens autonomy, privacy and democracy. See further, S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Ingram, New York, 2019).

[4]A Wiener, AF Lang Jr, J Tully, MP Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1, 3.

[5]See, for example, *Limbu and Others v Dyson Technology Ltd and Others* [2023] EWHC 2592 (KB).

[6]See, for example, *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20.

[7]See, for example, *Milieudefensie v Royal Dutch Shell PLC* NL:RBDHA:2021:5339.

[8]See, for example, M Rosenfeld, 'Rethinking the Boundaries Between Public Law and Private Law for the Twenty-first Century: An Introduction' (2013) 11 *International Journal of Constitutional Law* 125, 125.

[9]See, for example, M Bartl, Towards Transformative Private Law: Research Strategies, Amsterdam Law School Legal Studies Research Paper No. 2023-11, 1.

[10]S Besson '*Theorizing the Sources of International Law*' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 163–85, 167.

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– that is, states and international organizations.[11] As such, public international law has generally been concerned only with private individuals in the context of the international protection of human rights. Private law, as traditionally conceived, establishes core legal rights and obligations and delineates key powers of enforcement in regulating horizontal private relationships, including contracts between legal or natural persons. In so doing, private law provides a legal framework for the facilitation and regulation of relationships between private parties, whether natural (i.e. individuals), legal (companies, corporations, associations) persons or public actors engaged in legal relations in their private capacity, and whether in a domestic or international context.[12] On the face of it, private law continues to be confronted primarily with legal problems and challenges traditionally conceived as falling within the ambit of its four core building blocks, namely within the law of (civil) obligations (including contract, tort and unjust enrichment or restitution), family law, property law and the law governing corporations and other legal persons. Thus, private law governs questions such as the enforcement of contractual or non-contractual civil obligations, and the compensation for breach or wrongdoing, the governance of familial relations between private individuals, including marriage, divorce and the rights of the child, succession, the transfer of property rights and the conditions, power and liability of vehicles operating as legal persons.

Throughout the nineteenth and twentieth centuries, as private law itself has developed beyond these spheres, it has generally been accepted that private law must also be understood to encompass regulatory fields that touch upon concerns of a broader public interest, including consumer and labour law.[13] These norms operate to ensure weaker (private) parties are afforded legal protection, with the aims of rebalancing a disequilibrium of power, facilitating substantive (as opposed to material) equality and ensuring that such imbalances of power do not undermine the protection of an individual's fundamental rights.[14] To these ends, particularly over the course of the past ten years, private law has been confronted with the long-running consequences of the global financial crisis, including *inter alia* contract terms providing for unfair rates of interest, credit provision and widespread instances of mortgage default leading to eviction and homelessness.[15] In this context of regulatory private law, the foundations of public interest litigation through private law mechanisms can be identified; this increasingly looks to the enforcement not

[11]See A von Bogdandy *et al*, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115, 118.

[12]In both a domestic and international setting, with private international law (or the conflict of laws) providing a framework for the resolution of cross-border, private law disputes.

[13]See, for example, H-W Micklitz, 'European Regulatory and Private Law – Between Neoclassical Elegance and Postmodern Pastiche', in M Kuhli and M Schmidt (eds), *Vielfalt im Recht* (Duncker & Humblot, Berlin, 2022) 75–99.

[14]Indeed, the processes of private law's materialization, constitutionalization and socialization, at both the domestic and supranational levels, entails that private law is not only to be understood as facilitating the promotion of individual freedom and private autonomy in situations of formal equality, nor as 'distinct or self-standing legal orders but are rather embedded in a higher legal order, the national constitution, against which the values underpinning private law can be measured'; see H-W Micklitz (ed), *The Constitutionalization of Private Law* (Oxford University Press, Oxford, 2014), 1).

[15]See, for example, Case C-415/11 *Aziz* EU:C:2012:700; see further, H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the UCTD' (2014) 51 *CMLR* 771, 800 and C Mak, 'Reimagining Europe Through Private Law Adjudication' in C Mak and B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart, Oxford, 2023), 63–77, 72–74.

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only of the rights and interests of those individuals who are party to the litigation but also to the protection of the collective public interest and satisfaction of broader societal objectives.[16]

II. Trends towards the privatization of law and global governance

As private law is increasingly being confronted with crises that bring to the fore concerns arising in the public interest, the so-called public/private divide is necessarily called into question. The blurring of the public/private divide and the challenges to which it gives rise are not in themselves novel, but stem from trends towards privatization. Privatization takes many forms;[17] they can be understood, for the purposes of this editorial, as largely stemming from efforts towards market liberalization, facilitated by the (apparent) free market ideologies of the 1980s and as a result of the consequences of the adoption of austerity politics of the post-2000s financial crises. It should be noted that the role of private parties in law-making and enforcement, as well as in the undertaking and facilitation of state interests, is not in itself new. One might refer to the role played by merchants in the creation of the *lex mercatoria*,[18] or that played by companies such as the East India Company[19] in facilitating efforts towards the solidification of imperial power. For our purposes, one can consider the increasing role of private actors in undertaking public, governmental or state functions; one might consider, among the privatization of state utilities including for example, communications, transport and water, the gap filled by private military and security companies in the realm of defence and national security[20] or the privatization of law-making and enforcement through private law-making, standard-setting[21] and dispute-resolution, and ultimately the facilitation of justice through private means, including the role played by private dispute-resolution entities.[22]

Indeed, in light of its scope and function, private law undoubtedly has (long had) a key role to play in the regulation of economic as well as legal, political and societal relationships, providing a framework for the resolution of disputes through a variety of both public and private enforcement mechanisms (including state courts as well as commercial arbitral institutions). Indeed, as Katharina Pistor writes, globalization is largely private,

[16]On the notion of strategic litigation, see further K van der Pas, 'Conceptualising Strategic Litigation' (2021) 11 *Oñati Socio-Legal Series* 116.

[17]For a general overview, see A Mills, 'The Privatisation of Private (and) International Law' (2023) 20 *Current Legal Problems* 1, 1–3.

[18]See, for example, AC Cutler, *Private Power and Public Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, Cambridge, 2003), esp 108–40.

[19]See, for example, M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press, Cambridge, 2021), 559–621.

[20]See AC Cutler and S Law, 'Regulating Private Military Security Companies by Contract: Between Anarchy and Hierarchy?', in AC Cutler and T Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge, London, 2017), 255–75.

[21]On the notion of transnational private regulation, engaging different actors, legal forms and instruments including in the regulation of transnational commercial conduct, see F Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36 *University of Pennsylvania Journal of International Law* 875.

[22]On the role of private dispute-resolution entities in content moderation in platform governance, see, for example, P Ortolani and EC Goanta, 'Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts' in X Kramer et al (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar, Cheltenham, 2022), 192–216.

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advanced by private law, private actors and in particular private law instruments, relying on the key traditional cores of freedom of contract and party autonomy;[23] similarly, as Marija Bartl elaborates, markets themselves – domestic, regional and global – are social constructs that are legally constituted, and thus a reflection of political choice[24] as well as of global inequality and power structures. Trends toward privatization, and economic globalization have reinforced these roles of private law and solidified its place at the international level in context of the evolution of economic globalization. These endeavours, in broadly envisaging a limited role for states and an expanded role for private actors, encompass a shift in both the nature and the extent of public functions undertaken by private parties in accordance with, and within, the legal framework shaped by private law principles, creating novel relationships between state bodies and private actors, as well as between private actors and those natural or legal persons for whom these roles are undertaken, and blurring the lines of (state) responsibility.[25] Against this background, the increasing relevance of private law also stems from an absence of a determinative political desire by states and international organizations to agree on enforceable commitments that bind both states and non-state actors through hard international law.[26]

Moreover, the challenges – and indeed crises – that society, states, individuals and markets face today have opened up scope for a turn by advocates and activists to private law, notwithstanding that these global crises extend beyond the traditional boundaries of private law. There are many examples of the global constitutional order 'turning' towards private international legal solutions to deal with broader unresolved questions of globalization. For example, traditionally questions of labour regulations and rights were promoted through more public legal instruments such as the International Labour Organization, which has a body of conventions and treaties that create binding obligations on ratifying member states.[27] However, given states' inability or political unwillingness to enforce labour rights and standards, activists and civil society members have turned directly towards multinational corporations to promote changes.[28] Global events reveal the immense vulnerability of workers in the global economy, such as the tragic

[23]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton, NJ, 2019).

[24]M Bartl, *Private Law and Political Economy*, Amsterdam Law School Legal Studies Research Paper No. 2023-06, 2–3.

[25]Mills examines in particular the challenges to the boundaries of public and private law, and international and domestic law – whether public or private – in the context of state responsibility and international investment law; see further A Mills, 'The Privatisation of Private (and) International Law' (2023) 20 *Current Legal Problems* 1.

[26]The discussion of 'hard' and 'soft' law in international law and governance, hard and soft law instruments in the design of legal regimes, their interaction, impact and effectiveness has been subject to a considerable body of literature, and extends far beyond this editorial. The concepts are not dichotomous, but reflect a spectrum along which international legal norms may rest, according, for example, to Abbott and Snidal (KW Abbott and D Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organisation* 421, 423). Generally, while 'hard' law concerns norms that are legally binding, 'soft' law refers to norms that are not legally binding but may lead to binding treaty or customary international law. In the context of business and human rights, see S Joseph and J Kyriakakis, 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power' (2023) 36 *Leiden Journal of International Law* 335, 337.

[27]SL Kang, *Human Rights and Labor Solidarity: Trade Unions in the Global Economy* (University of Pennsylvania Press, Philadelphia, 2012).

[28]S Hertel, 'The Paradox of Partnership: Assessing New Forms of NGO Advocacy on Labor Rights' (2010) 24 *Ethics & International Affairs* 171.

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collapse of the Rana Plaza in Bangladesh, which led to increased consumed scrutiny of clothing retailers for their norm-violating practices, with less pressure on sovereign states such as Bangladesh to respond to the humanitarian disaster and loss of 1500 garment workers' lives.[29] The main debates over the legal and political response concerned whether such agreements should be voluntary or legally enforceable. The global governance of the workers' rights regime has largely turned towards principles, corporate voluntary commitments, and a promotion of private responsibility over public (state) obligations, as evidenced by the United Nations' Global Compact and its status as a premier social responsibility instrument in the early 2000s.[30]

While such a preliminary conclusion on the turn to private law entails a reluctance to suggest that private law itself is necessarily adequate or fit for purpose, it also opens up the scope, and indeed necessitates a critical examination, of how private law might be engaged, alongside other areas of law, in tackling and responding to these novel challenges. In so doing, it is submitted that these trends offer an opportunity for the revitalization and exploitation of the transformative function and power of private law,[31] which entails an exploration of the ways in which private law can and should be used not only to 'maintain the status quo' but also to facilitate its transformation. Below, we unpack an example of the way in which challenges arising from the ecological crisis may be tackled through private law mechanisms, both procedural and substantive (and particularly through consumer law enforcement). The promise of engaging national courts, the limitations of private law mechanisms including the limited scope of standing in relation to jurisdiction, the piecemeal nature of substantive private law and opportunities for further reform are highlighted.

Enforcing 'climate-washing' claims through EU consumer law

In the absence of concrete action, reflecting a lack of ambition on the part of national governments to address the risks and consequences of climate change – particularly post-Paris 2015[32] – and the challenges to liberal constitutionalism to which the environmental crisis gives rise, another turn by advocates and activists towards private law is identifiable. This is reflected in the use of strategic climate change litigation before national courts and administrative authorities, which utilizes private law norms to litigate against the largest transnational fossil fuel corporations. These claims generally aim to impact corporate behaviour regarding climate change, influence government bodies to further regulate corporate activities in the field and even – simply but importantly – to raise awareness among the public about the responsibility of these corporations for large-scale emissions. Some questions surrounding corporate liability for inadequate disclosure of information by corporations concern due diligence and financial risk reporting surrounding climate change, and the provision of misleading statements concerning corporate or governmental commitments to mitigate climate

[29] B Vanpeperstraete, 'The Rana Plaza Collapse and the Case for Enforceable Agreements with Apparel Brands' in M Saage-Maaß *et al* (eds), *Transnational Legal Activism in Global Value Chains* (Springer, Cham, 2021), 137–69.

[30] P Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457.

[31] A term engaged by the Amsterdam Centre for Transformative Private Law; see <https://act.uva.nl/act/our-mission/our-mission.html>; see further Bartl, *Towards Transformative Private Law* (n 9).

[32] Kang et al 'Climate Change and the Challenge to Liberalism' (n 2).

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change.[33] Others still concern the provision of misleading information on corporate human rights impacts (and potentially violations of human rights protections),[34] misleading advertising and deceptive communications and unfair commercial practices towards consumers by corporations.[35] The example of the use of consumer law can be used to examine this turn, and explore the blurring of the public/private divide, in further depth. Under the broad heading of so-called greenwashing or climate-washing claims,[36] actions have been brought before national courts and national administrative authorities within a multiplicity of national legal systems.

Greenwashing or climate-washing claims may encompass the claims of companies or governments that their products, services, processes or business are environmentally friendly, '[which] as a whole, or omits or hides information, to give the impression they are less harmful or more beneficial to the environment than they really are'.[37] These claims may be false, or misleading, obscure or facilitate the inadequate disclosure of information and may be used as PR tactics of both companies and governments. Various statements concerning 'climate neutrality' and 'net zero', among others, made by both companies and governments, can be identified in the aftermath of the 2021 report of the Intergovernmental Panel on Climate Change (IPCC) and the recognition of the need for a commitment to (net) zero emissions by 2050, in order to meet climate change goals following the Paris Agreement.[38]

Climate-washing claims are deemed to be problematic to both public and private interests for three key reasons: (1) they allow companies and governments to maintain a kind of status quo while claiming they are doing better as regards climate change challenges, generally for the purposes of commercial or political gain; (2) they arguably create harmful economic and social deadlocks, first by detracting attention away from companies that are deemed to be making effective changes while second, through the undermining of sustainability, effectively establishing that we can take and consume more than can be sustained; and (3) from a consumer perspective, consumers and investors are

[33]See L Benjamin et al, 'Climate-Washing Litigation: Legal Liability for Misleading Climate Communications', Policy Briefing, The Climate Social Science Network (January 2022), available at <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf>; D Stammer et al (eds*), Hamburg Climate Futures Outlook 2021: Assessing the Plausibility of Deep Decarbonization by 2050, Cluster of Excellence – Climate, Climatic Change, and Society (CLICCS), Hamburg*, available at <https://www.fdr.uni-hamburg.de/record/9104>.

[34]See, for example, R Chambers, 'Litigating Corporate Human Rights Information' (2023) 60 *American Business Law Journal* 111.

[35]The Sabin Centre for Climate Change Law maintains a useful database of US and global litigation before national and international courts, as well as requests for advisory opinions of regional and international courts; it is available at <https://climatecasechart.com>; non-US cases brought against corporations in respect of misleading advertising currently number 56 claims, available at <https://climatecasechart.com/non-us-case-category/misleading-advertising>.

[36]'Climate-washing' is used here as a broader term than 'greenwashing' to reflect the notion that in the context of climate change such claims may encompass concerns that extend beyond traditional natural environmental concerns.

[37]Competition and Markets Authority, *Guidance on Making Environmental Claims on Good and Services*, available at <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>.

[38]Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis: Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2021).

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deemed to be misled by being denied the necessary information to make informed decisions as to whose products they should consume, or in whose company or government they should invest.

Greenwashing or climate-washing claims are particularly interesting as they are being brought before both national courts and national administrative authorities (and in particular advertising authorities). They encompass complaints against a breadth of corporate and state actors. Claims have been brought concerning statements made by companies operating in a variety of fields (notably including, but not limited to, corporations in the fashion retail and consumer goods sectors, fossil fuel companies, transport, financial and investment companies) as well as national and regional governments (including, for example, a since-withdrawn claim by ClientEarth against the Belgian National Bank for buying bonds issued by high-polluting corporations under the European Union's Corporate Sector Purchase Programme).[39] These cases are being initiated by civil society organizations and consumer protection associations; these private advocates and activists strategically utilize the enforcement of civil and commercial law and, more specifically, consumer protection law to challenge the climate and greenwashing claims made by companies and governments in respect of their sustainability, adherence to climate targets and endeavours to net zero.

It is worth further exploring the legislative and procedural law framework that facilitates such claims to examine how such cases may undermine the public/private divide, the need for further legislative reform and the limitations of private law actions in enforcing public interests, such as climate change. The following example will focus on the scope for climate washing claims to be brought under the auspices of the European Union's consumer protection framework, namely Directive 2005/29/EC on Unfair Commercial Practices (UCPD).[40] Consumer law does not preclude companies from making claims regarding their sustainability, or about the environmentally friendly nature of their products and services; however, consumer law does preclude companies from making misleading statements, which are deemed to unfairly impact consumers in their relationships with companies as they undermine the scope for consumers to make informed choices about the legal (generally, contractual) relationships into which they enter and with whom, the types of goods or services they buy and the trust they place in companies.[41]

Bringing a consumer law claim entails both procedural and substantive considerations, each of which poses challenges in the context of climate change litigation. Regarding procedure, two key preliminary issues arise, each of which reflects challenges to the use of private law in this domain: standing (the party entitled to bring a claim) and jurisdiction (the determination of the court or authority with competence to hear and resolve the claim). Consumer claims may be cross-border, in the sense that the alleged violation of consumer law potentially impacts consumer citizens in multiple national legal systems. This will likely be the case in relation to climate-washing claims. For example, KLM's allegedly misleading claims to 'Fly Responsibly' are likely to impact consumers

[39] See further, ClientEarth, 'We're Withdrawing our Case against the Belgian National Bank', available at <https://www.clientearth.org/latest/news/we-re-withdrawing-our-lawsuit-against-the-belgian-national-bank>.

[40] As amended by Directive (EU) 2019/2161 of 27 November 2019 on better enforcement and modernization of Union consumer protection rules.

[41] For further data and explanation on consumers understand or indeed misunderstand green claims, see BEUC, 'Getting Rid of Greenwashing: Restoring Consumer Confidence in Green Claims' (BEUC, Brussels, 2020), 3–4.

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across Europe, if not globally.[42] However, with regard to both standing and jurisdiction, the applicable legal framework tends to render such claims national. As regards standing, it is difficult for individual consumers to bring claims against transnational corporations due to limited resources. As such, consumers tend to rely on civil society organizations, including consumer protection associations; under the UCPD, such organizations have standing to bring actions before national courts or administrative authorities.[43] The rules allocating jurisdiction to national courts, applicable within the European Union, in the context of cross-border disputes are found in the Brussels I bis Regulation.[44] The Regulation provides for special rules of jurisdiction in consumer law claims (in Article 17),[45] which afford an additional level of protection to consumer litigants, allowing them to sue in the courts of their 'home' legal system. However, these rules cannot be relied upon by consumer protection authorities; as such, claims tend to be initiated before the national courts or administrative authorities of the 'home' legal system of the corporation. The Regulation does currently provide for a specific jurisdictional basis for environmental claims.[46] The limitation of the cross-border rules of jurisdiction in the Brussels I bis Regulation results in the application of national jurisdictional rules; the application of national procedural rules may also be problematic regarding matters of standing, as claims are arguably domesticated. For example, in a claim brought by a group of NGOs against Total, the standing of the British NGO ClientEarth to intervene in the case was denied in a decision on admissibility.[47] As such, the enforcement of consumer law – even mass, cross-border violations – generally takes place within a single national legal system.

With regard to matters of applicable substantive law, European consumer law rules, principally taking the form of directives, must be implemented into the domestic law of Member States.[48] The UCPD applies to commercial practices 'directly connected with the promotion, sale or supply of a product' that occur before, during and after a business-to-

[42]*FossielVrij NL v KLM* ECLI:NL:RBAMS:2023:3499, brought before the Amsterdam District Court alleges that KLM's 'Fly Responsibly' campaign violates the UCPD, to the extent that the advertisement suggests the airline's CO_2 compensation and alternative fuel scheme renders airline travel sustainable; a positive decision on admissibility has been made, while KLM has since pulled its advertisement.

[43]Recital 21 and Article 11, UCPD and under Directive 2020/1828 on representative actions for the protection of the collective interests of consumers.

[44]Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[45]See further, S Law, 'Jurisdiction Over Consumer Contracts' in M Requejo Isidro (ed), Brussels I bis: *A Commentary on Regulation (EU) 1215/2012* (Edward Elgar, Cheltenham, 2022), 241–85.

[46]However, the jurisdictional basis for tort law claims, in Article 7(2) Brussels I bis Regulation may be used in relation to such claims.

[47]See, for example, the case of *Greenpeace France and Others v. TotalEnergies SE and Others* in which the claimants purport to establish the jurisdiction of the Tribunale judiciaire de Paris, on the tort law ground of jurisdiction, namely Article 46 of the French Code of Civil Procedure, to invoke a claim based on the UCPD.

[48]A brief note on the limitations of the consumer protection framework and the delineation of consumer law enforcement; in terms of the substantive framework, the so-called consumer acquis, most substantive consumer law derives from secondary EU law, namely minimum harmonization directives, and is implemented within national legal systems as domestic law, binding as the result to be achieved, per Article 288 Treaty on the Functioning of the European Union. In respect of the procedural law framework, the European Union generally lacks competence in enforcement, leading to a limited body of EU procedural law (the exception being EU rules of private international law, and two pieces of legislation that recently have come into force as part of the Commission's New Deal for Consumers: a directive on representative actions (Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (including public regulators); and a regulation on cooperation between national authorities responsible for

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consumer transaction has taken place (Article 2(d) UCPD); as such, unlike other pieces of consumer legislation – the trigger for which is the existence of a business-to-consumer contract – the UCPD (in the form transposed within national legislation) is applicable regardless of whether or not a consumer contract exists. The Directive establishes a prohibition on unfair commercial practices; those practices included in Annex 1 encompass a 'blacklist', with all deemed to be unfair (per Article 5(1) UCPD). In the alternative, the Directive provides for the identification of practices that, on case-by-case basis, can be deemed to be 'misleading' (per Articles 6 and 7) or aggressive (Articles 8 and 9) acts or omissions, while Article 5(2) provides for a safety net that encompasses those practices which can be deemed to be 'contrary to the requirements of professional diligence' or a practice that 'materially distorts or is likely to materially distort the economic behaviour' of the average consumer. The UCPD itself, it should be noted, does not provide for specific rules on greenwashing or climate washing claims. As such, Annex 1 does not include such claims in its blacklist, with the result that such claims are not precluded if they are not unfair to consumers – that is, if they are not misleading, aggressive, contrary to professional diligence or likely to distort the economic behaviour of consumers. In respect of enforcement, Member States are obliged to ensure that 'adequate and effective means exist' (in line with the doctrine of procedural autonomy) to allow 'persons or organizations with a legitimate interest in combating unfair commercial practices, including competitors' to bring legal actions before national courts or competent administrative authorities (Article 11(1)). Courts and administrative authorities are empowered to issue injunctive relief per Article 11(2), as well as effective, proportionate and dissuasive penalties, while consumers shall have access to 'proportionate and effective remedies', including compensation for loss, price reduction or the right to the termination of contract (Article 11a).

In the absence of specific rules on greenwashing, it has been recognized that further guidance is required on what constitutes potentially unfair green claims;[49] the Guidance establishes that green claims may constitute misleading acts or omissions per Articles 6 and 7, or fall under the safety net of Art 5(2); 'green claims must be truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner' (Guidance, para 4.1.1.2), while traders must have evidence to support green claims (Article 12). One of the challenges arising in the context of the continued application of the UCPD concerns the methodology and transparency of claims pertaining to the environmental and social impact of goods, products and services.

Further reform has thus been proposed; in March 2023, the Commission adopted a Proposal on a Green Claims Directive (COM/2023/166 final),[50] which aims to establish new rules on explicit environmental claims ('voluntary, in textual form or on environmental label') and to prohibit false or misleading claims (existing as well as future – for example, on becoming 'carbon neutral') as regards companies' environmental and social impact, as well as obsolescence (durability and reparability of products) (Article 1). The Proposal also aims to establish clear criteria for how companies should prove their environmental claims and labels (Articles 3 and 4), establishes conditions for such claims and a requirement that labels must be checked by an independent and accredited verifier

the enforcement (Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws).

[49]European Commission, Guidance on the Interpretation and Application of the UCPD (C/2021/9320).

[50]These proposals form part of the European Commission's Green New Deal and Circular Economy Action Plan.

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(Article 10), and aims to provide for new rules on the governance of environmental labelling schemes to ensure they are solid, transparent and reliable (Article 8). Importantly, an amendment is made to the so-called blacklist in Annex 1, which includes a blanket prohibition of generic claims – for example, alluding to products as being eco-friendly, green or carbon neutral. As regards enforcement, the Proposal provides for a surveillance system for the monitoring such claims; in accordance with Article 14, Member States should designate competent authorities (courts or administrative authorities, in accordance with Article 13) with powers to monitor the market, to access documents, data or information from natural or legal persons, to investigate ex officio, to require traders to adopt adequate and effective remedies, to adopt injunctive relief and impose penalties per Article 17 as well as to undertake compliance monitoring (Article 15). Natural or legal persons or organizations with legitimate interests should also be empowered to submit complaints to competent authorities, and access courts to 'review the procedural and substantive legality' of competent authorities' decisions/failures to act in accordance with Article 16.

IV. Is there a blurring of the public/private divide through consumer law enforcement?

The developments in the field of consumer law are to be welcomed. One might question, however, whether this example truly reflects a breakdown or a blurring of the public/private divide. Primarily, while the UCPD has been engaged in claims against climate-washing brought by NGOs, the consumer law community still awaits a final judgment in relation to such claims from a national court. The limitations of substantive private law, and in particular its sectorial approach to regulation, as well as the limitations of procedural private law, including the absence of a clear and specific jurisdictional basis in the Brussels I bis Regulation affording standing to individuals or organizations with legitimate interests in the context of cross-border litigation, potentially limit the transformative power of private law in dealing with such challenges.[51] Nevertheless, the reforms proposed by the European Commission regarding green claims suggest that the EU institutions envisage further scope for private law mechanisms to be engaged in tackling the climate crisis, and in particular in utilizing civil society bodies, consumer protection associations and consumer law with the goal of upholding the public interests inherent in the field of environmental protection and sustainability. There is therein an acknowledgement of the complicity of private actors in the climate change crisis, and of the limits of public international law alone in ensuring that state and non-state actors, including corporations, adopt sustainable business practices and policies. Indeed, there is recognition of the responsibilities of both corporations and consumers in facilitating sustainable private consumption, and of the duties of corporations to ensure that consumers are empowered to make decisions to these ends. The trend towards the privatization of law and enforcement in the field of climate change is by no means absolute and, as noted above, it is not submitted that private law is adequate in itself to protect the public interest in this domain. Green or climate-washing claims continue to

[51]There is scope for further reform at the EU and international levels, particularly in respect of jurisdictional rules: Article 77, Brussels I bis envisages reporting on the application of the Regulation, and it is suggested that a jurisdictional basis for environmental claims in civil and commercial matters could be introduced into the Regulation with this reform.

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form just one dimension of climate change cases being brought against states and non-state actors at the national, regional and international levels, including before national courts, regional human rights courts, UN Treaty Bodies and the International Court of Justice.[52] What is identifiable, it is suggested, is what has been deemed to be a co-occurrence of public and private law regulation and governance, which transcends the question of what regulation is public and what is private, and instead focuses on an examination of the conduct and responsibilities of public and private actors in the protection of global public interests.[53] Such a framing of the public/private divide in the context of climate-change litigation would reinforce the recognition of the need for a drive towards sustainable private consumption and a recognition of the responsibilities of corporate actors in facilitating this shift.

[52]See Kang et al 'Climate Change and the Challenge to Liberalism' (n 2); M Murcott and E Webster, 'Litigation and Regulatory Governance in the Age of the Anthropocene: The Case of Fracking in the Karoo' (2020) 11 *Transnational Legal Theory*144; SC Aykut, A Wiener, C Zengerling and J Bähring, 'Climate Litigation as a Social Driver Towards Deep Decarbonization I: A Framework and a General Assessment' in (2024) *Carbon and Climate Law Review,* Special Issue on Climate Law and Litigation: Considerations of Carbon Neutrality, Attribution and Justice (in press).

[53]J Mende, 'Corporate Human Rights Responsibilities: Rethinking the Public-Private Divide' (2023) 41 *Nordic Journal of Human Rights* 255, 264.

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