

**EU Forum for Judges for the Environment 2017**  
**Climate Change and Adjudication Questionnaire**  
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**The Finnish Report**

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**Climate Change in Legislation**

**1. How (if at all) has climate change and issues related to it been incorporated into legislation in your jurisdiction?**

- Do they feature in the constitution; legislation; delegated acts?

*Section 20 of the Finnish Constitution* includes a general clause on the environment. According to the section, nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public administration must endeavour to safeguard for every person the right to a healthy environment and an opportunity to participate in decision-making to his or her living environment.

*The Climate Change Act (609/2015)* entered into force on 1 June 2015. The purpose of the act is to establish a framework for the planning of climate change policy in Finland, to enhance and coordinate the activities of state authorities in planning measures and to strengthen the opportunities of the Parliament and the public to participate in the planning. The goal of the planning system is to ensure that the total

emissions of greenhouse gases into atmosphere is reduced in Finland by at least 80 per cent by 2050 compared to 1990 levels.

The planning system consists of a long-term (to be adopted at least every ten years) and a medium-term climate change policy plan (to be adopted at least once every government term), and a national adaptation plan (to be adopted at least once every ten years). An annual climate change report shall be prepared every year.

The act applies to state authorities. The climate change policy plans are coordinated and prepared by different ministries: the Ministry of Economic Affairs and Employment is responsible for the long-term climate change policy plan, the Ministry of the Environment for the medium-term climate change policy plan, and the Ministry of Agriculture and Forestry for the national adaptation plan for climate change. The government shall monitor implementation of the climate change plans. If necessary, the government decides on additional measures required to reach the goals.

The act gives the Parliament and the public better possibilities for participating in and influencing the planning of the Finnish climate change policy. In addition, the act contains provisions on the appointment of a multidisciplinary expert body called the Finnish Climate Panel.

The EU Emissions Trading Directive has been implemented through the current *Emissions Trading Act* (311/2011). In addition, *the Aviation Trading Act* (34/2010) was adopted to implement requirements for the

aviation. The EU directive on the geological storage of carbon dioxide (2009/31/EC) has also been implemented with a separate *act* (416/2012).

Furthermore, the use of the market based mechanisms of the Kyoto Protocol is regulated by *the Act on the Use of the Kyoto Mechanisms* (109/2007) and the *Decrees* (913/2007 and 915/2007) relating thereto.

Climate related issues are also implicitly taken into account in relation to a number of environmental acts. For instance, one of the objectives of the Environmental Protection Act (527/2014) is to combat climate change. Moreover, climate aspects are integrated with decision-making in several sectors, such as transport, energy production, agriculture, forestry and land-use planning.

- Which levels of government have been involved in these legislative processes?

The Government and the Parliament make the most important decisions on climate policy. Parliament approves Finland's international commitments and legislative acts according to the Constitution.

Since 2003, the Finnish Government has appointed a ministerial working group on energy and climate policy. The working group is a preparatory body comprising representatives from the Ministry of Economic Affairs and Employment, the Ministry of the Environment, the Ministry of Transport and Communication, the Ministry of Agriculture and Forestry, the Ministry of Education and Culture, the Ministry for Foreign Affairs, the Prime Minister's Office and the Ministry of Finance.

The Government adopted the current National Energy and Climate Strategy on 24 November 2016. The strategy outlines the actions that will enable Finland to attain the targets specified in the Government Programme and adopted in the EU for 2030, and to systematically set the course for achieving an 80–95 per cent reduction in greenhouse gas emissions by 2050. In 2014, a Parliamentary Commission prepared “Road map 2050”, guiding Finland’s journey towards a carbon neutral society. Building a carbon neutral society requires action at all levels. The medium-term climate change policy plan 2030 based on the Climate Change Act is now open for public comments. It will probably be submitted by the Government to the Parliament in August 2017.

- What have been the catalysts for these legislative developments (i.e. EU law, international law, political agitation etc.)?

Finland's national climate change legislation has evolved gradually. The catalysts for legislative developments have been implementation of international conventions, mainly the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement and of the EU climate change policies and legislation. In addition, Finland has adopted climate change legislation, such as the climate change law, on national basis.

## **2. How do the structures of government affect legislation related to climate change?**

- Is one or several institutions assigned to act on climate change within your legal system? To what extent do these overlap and diverge?

The Ministry of the Environment has the administrative responsibility for the climate change negotiations and acts as the national focal point for the United Nations Framework Convention on Climate Change. The preparatory work for the National Energy and Climate Strategy is led by the Ministry of Economic Affairs and Employment.

The climate change policy plans prepared pursuant to the Climate Change Act are coordinated and put together by different ministries. The Ministry of Economic Affairs and Employment is responsible for the long-term plan, the Ministry of the Environment for the medium-term plan and the Ministry of Agriculture and Forestry for the national adaptation plan. The preparation of the medium-term plan is coordinated with the Government's energy and transport policy.

Statistics of Finland is responsible for compiling the Finnish greenhouse gas inventory while the Finnish Environment Institute (SYKE), the Finnish Forest Research Institute (Metla), MTT Agrifood Research Finland the VTT Technical Research Centre of Finland participate in the preparation of the inventory. The Energy Authority is the competent authority and the registry authority for the national emissions trading registry under the EU ETS and the Kyoto Protocol.

- Is the separation of legislative, executive and judicial powers in initiating and implementing climate policy clear in your jurisdiction?

Yes. The general principles on the separation of legislative, executive and judicial powers apply to climate policy, too.

- Is climate change legislation affected by the legal powers of different levels of government in your jurisdiction?

Finland is not a federal state but a unitary state. Finland is divided into 311 municipalities (2017). In addition, the self-governing province of the Åland Islands is an autonomous, demilitarised, Swedish-speaking region of Finland. Municipal authorities play an important role in the implementation of mitigation and adaptation measures, for instance, in relation to land-use planning, transport and waste management.

Furthermore, the Centres for Economic Development, Transport and the Environment (ELY Centres) are responsible for the regional implementation and development tasks of the government. The current 15 ELY Centres prepare environmental strategies to guide regional environmental and land-use planning.

One example of the innovative regional work is the Carbon Neutral Municipalities project (HINKU project). It brings municipalities, businesses, citizens and experts together to create and carry out solutions to reduce greenhouse gas emissions. The municipalities involved are committed to reduce emissions more extensively and rapidly than EU targets and schedules would require. The project seeks to create solutions that have both economic and social benefits and environmental advantages.

## Climate Change Litigation

### **3. Can climate change laws in your jurisdiction serve as basis for judicial action?**

- Is this basis, or the lack of such basis, seen as legally novel or not?

The abovementioned climate acts - *the Emissions Trading Act*, *the Aviation Trading Act*, and *the Act on the Use of the Kyoto Mechanisms* - contain provisions on judicial review. In addition, it may happen that climate related arguments are raised in connection with cases concerning environmental acts even though such acts do not include specific provisions on climate change. Such arguments have been raised, for instance, in relation to peat production, land use planning and forest protection (see below).

- What role does European Union law play in this regard?

The *Emissions Trading Act* and the *Aviation Trading Act* are based on the EU Emissions Trading Directive. Also, the *Act on the Use of the Kyoto Mechanisms* is partly based on the EU legislation.

### **4. Has climate change, and related issues, given rise to court cases in your jurisdictions?**

- If so, what type of cases (i.e. are they related to specific pieces of legislation or to something else)?

Most typical cases linked specifically and directly to climate change in the Finnish Supreme Administrative Court (SAC) have been cases on emission trading. The first round of cases was based on the emissions trading term 2005-2007, and the decision of the Council of State to adopt the national plan concerning the emission rights for individual plants led to 11 appeals to the SAC. Two of the decisions were published as precedents (SAC 2005:46-47). In 2009, a case concerning sanction fee for exceeding the allocated emission rights was published (SAC 2009:78). The precedent SAC 2011:36 dealt with amendment of the emission permit of an industrial plant.

The newest case was based on commission's directives and decisions concerning the emissions trading term 2013-2020. On the basis of these acts, the Finnish Ministry of Economic Affairs and Employment had allocated emission rights to individual installations. Four appeals were directed to the SAC who decided to ask for preliminary ruling of the ECJ especially on the validity of the acts of the Commission (SAC 2014:163, C-506/14, and SAC 2017:22). The ECJ replied that article 4 and annex II (cross-sectoral correction factor) to Commission Decision 2013/448/EU were invalid; otherwise no factors of such a kind to affect the validity of the relevant acts had been revealed. However, the temporal effects of the declaration of invalidity were limited so as to enable the Commission to adopt the necessary measures. The decision has now led to new EU legislation in the field. Interestingly, the ECJ ruling is estimated to result in allocation of fewer emission rights to industry (including those companies who appealed to the SAC)!

- How frequently do climate change claims come to court by comparison with other environmental law cases in your court?

Issues or arguments linked to climate change are presented every now and then in several types of environmental cases. As mentioned above, examples can be found in appeals against environmental permits for peat production. Frequently, environmental NGO's try to get the permit annulled, because peat production as an activity is hazardous for the climate. Both Vaasa Administrative Court and the SAC by way of an example, in SAC 2016:36) have consistently held that in an individual environmental permit case greenhouse gas emissions and more generally climate effects caused by peat production cannot be regarded as environmental pollution referred to the definition paragraph of the Environmental Protection Act. Even if combating climate change has been mentioned as an objective both in the previous Environmental Protection Act (86/2000; implementing the IPPC Directive) and the present Environmental Protection Act (527/2014; implementing the IE Directive), it has been clearly the intention behind the legislation that climate effects cannot be regarded as relevant pollution in single permit cases. The acts and their permit systems are based on the idea of concrete polluting effects, capable of causing harm in real estates in the area of impact of the polluting activity.

Climate change is sometimes mentioned in many other types of cases, e. g. in cases concerning land use planning. One interesting case was about the legality of a local detailed plan, where the building material was according to the plan provisions to be almost exclusively wood (SAC 2015:56). The municipal decision to adopt the plan was appealed first to the regional administrative court and further to the SAC, by the Association of Concrete Industry and a private person! One of the arguments was that the plan decision was based on an erroneous

assumption of climate friendliness of use of wood for building. The decision was upheld.

Also in rare cases concerning hydropower production, arguments in favour of the project may have been based on the idea that if the project is not permitted, the energy will be produced with fossil fuels.

- What types of legal issues are raised in these cases (i.e. matters of private law, constitutional law, administrative law, international law etc.)?

The issues raised in these cases belong, given our court is the SAC, most often to the field of administrative law. International law is, of course, in the background as emission trading is based on international and EU arrangements. In certain cases, also issues of constitutional law have been put forward (e.g. in the abovementioned SAC 2011:36 arguments of unconstitutionality on the basis of protection of the property and freedom to engage in commercial activity).

- Does the type of legal issue affect, if at all, which court hears the case?

In Finland, there are two main systems of courts, ordinary courts for civil and criminal cases (including damages for environmental pollution, as a rule, and environmental crime) and administrative courts for cases concerning administrative law issues. Hence, most often legal issues concerning climate change are heard by administrative courts.

- Do rights-based claims feature in these cases?

Thus far, arguments based on human rights or on the rights of the coming generations have not been on the forefront.

- How central is the issue of climate change when it is raised in these cases?

In other than emission trading cases, its significance is marginal.

### **Climate Change Adjudication**

#### **5. How easily resolvable are the legal questions raised in these different cases?**

- Do these cases involve the application of conventional legal concepts? If so, how straightforward is the application of these concepts to climate change?
- Do these cases involve the application of new legal doctrines? If so, from where have these doctrines been derived?
- How do concepts of causation affect climate change actions in your jurisdiction?

Even if one of the objectives of the Environmental Protection Act (86/2000, now repealed by the Act 527/2014 bearing the same name) was to combat climate change and otherwise to support sustainable development, the act, and its environmental permit system, was not (and was not even intended to be) a major tool in the battle against climate change. The act was enacted to implement the IPPC Directive and its main focus was directed to prevent and control harmful emissions into the environment, be it air pollution, water pollution, noise, or pollution caused by waste.

The act was applied to activities that lead or may lead to environmental pollution. According to the act, pollution refers to such emission or deposit of a substance, energy, noise, vibration, radiation, light, heat or odour caused by human activity in the environment that either alone or together with other emissions: a) causes harm to health; b) causes harm to nature and its functioning; c) prevents or materially hinders the use of natural resources; d) decreases the general amenity of the environment or degenerates special cultural values; e) reduces the environment's suitability for general recreation purposes; f) damages or harms property or its use; or g) constitutes a comparable violation of the public or private good.

Hence, the effective field of application was delimited to emissions spreading out of an installation and, hence, can be felt as a nuisance in a near-by real estate or other area. The (permit) system is not designed for greenhouse gas emissions whose effects cannot be tracked to a certain area – it is irrelevant where a unit of carbon dioxide or methane will be emitted into the atmosphere. The location of the emitting source, which is crucial in an environmental permit system, does not play any role when greenhouse gas emissions are at stake.

Therefore, the effective field of application, based on structures and concepts behind the system of the act, is narrower than one could think by reading its objectives. Of course, many instruments of the act have an indirect impact on climate change (e.g. general principles concerning the use of the BAT, Government Decrees on certain types of activities and their emissions, etc.). Still, we need other types of tools to combat climate change than a system based on individual environmental permits.

One more concrete example that illustrates the field of application of pollution control law can be found in SAC 2011:12. The majority (votes 4-3) held that an independent and direct permit provision concerning the use of energy, in order to ensure the energy efficiency of the activity, could not legally be based on the Environmental Protection Act. The reasoning was based on the (narrow) texture of the section providing the types of different permit provisions, *travaux préparatoires* of the act, and also the effect of the IPPC Directive was given weight. However, the minority came to an opposite conclusion on the basis of the very same legal materials!

- Has your court issued any preliminary ruling concerning climate change laws, or to relate issues to the EU court? If not, why not?

Yes, see above ch. 4 (SAC 2017:22).

## **6. How straightforward is the resolution of factual issues in cases on climate change?**

- Is there disagreement among the parties over the factual issues? If so, what types of disagreements are there?
- Do the factual issues require reference to specialist evidence? If so, how is that evidence submitted to the court?
- How do the rules of evidence affect climate change actions in your jurisdictions?
- How do the factual issues affect the resolution of legal questions in these cases?

In the rare cases concerning climate change decided by our court, factual issues have not normally been very important or debated. As there is only seldom a

solid legal base for appeals linked to combatting climate change, the factual issues do not even appear at this stage.

However, it is worth mentioning that in cases concerning the Environmental Protection Act (and the Water Act), the SAC has for historical reasons a panel consisting of five legally trained judges and two expert councillors for the environment who are trained scientists or engineers, typically holding a doctor's degree. Hence, the court is in principle capable to assess also specialist evidence by itself in the written procedure. Unfortunately, the law does not allow us to use the expert judges in e.g. emission trading cases.

Rules of evidence in the administrative procedure are rather flexible, and the court can overweigh all the material brought in the case file freely, in order to convince itself about the facts. We do not even like to use the expression "burden of proof", unlike in the civil and criminal procedure. Obviously, the decision can only be based on facts and materials which have been communicated all of the parties.

## **Climate Change and Access to Justice**

### **7. Who are the parties bringing climate change actions?**

- What role do individuals play in bringing actions relating to climate change?
- What role do NGOs play in bringing climate actions?
- What role does industry play in bringing actions relating to climate change laws?
- Does industry make claims under different or the same set of laws as NGOs?

In Finland, there is no specific system enabling climate change actions. Cases linked to climate issues can be brought to courts by those who have standing in a given case type.

E.g. in cases under the Emissions Trading Act, the Ministry allocates, based on the EU quota and decisions by the European Commission, emission rights to individual plants of the emissions trading sector. The decision can be appealed to the SAC. On the basis of the Administrative Judicial Procedure Act, standing belongs only to the parties, i.e. those to whom a decision is addressed or whose right, obligation or interest is directly affected by a decision. In practice, obviously, only the enterprises who are the opinion that they have been allocated less emission rights than their fair share, can appeal against the decision.

The same applies to decisions made by the emissions trading authority (Energy Authority). These decisions, including granting and revoking emission permits, are, in essence, rather technical and have no clearly detectable environmental impact. In these cases, the competent court to hear the case in the first instance is the regional administrative court and, ultimately, the SAC (in some cases after a leave to appeal).

Under the Environmental Protection Act, right of appeal pertains to: 1) parties; 2) registered associations or foundations whose purpose is to promote environmental, health or nature protection or the general amenity of the environment and whose area of activity is subjected to the environmental impact in question (i.e. environmental NGOs); 3) the municipality where the activity takes place and other municipalities subjected to its environmental impact; 4) the state supervisory authority and the municipal environmental

protection boards where the activity takes place or located in the area of impact;  
5) other authorities supervising the public interest in the matter (nature protection, cultural heritage, fisheries, roads and communication networks, etc);  
6-7) certain organisations of the indigenous Sami people in the northern part of Finland.

This implies that not only environmental NGOs, but also individuals living in the area of impact of a polluting plant, have a wide access to court under the pollution control law. But, as noted above, the law does not enable taking into account of arguments for mitigating climate change.

#### **8. How do legal rules in relation to the bringing of an action affect the ability to bring these cases?**

- How do domestic rules on standing affect climate change litigation?
- How do costs rules affect climate change actions?
- Are there any other impediments to parties bringing climate change claims?

See the answer above (7.).

As for the costs, the court fee is 250 euro in the regional administrative court and 500 euro in the SAC. But if you win the case, even partly, you free from the fee.

In environmental litigation, private individuals or NGOs only seldom will be obliged to pay an industry's costs for the trial (lawyers' reward etc.). They can also appeal without using a trained lawyer. This all means that the costs are moderate.

## Climate Change and Remedies

### **9. What is the range of remedies available to national courts in climate change cases?**

- What is the breadth of the court's discretion in choosing a suitable remedy?

The Finnish system is not based on use of different remedies. In the field of administrative procedure, decision of an authority can be appealed to a court, normally to the regional administrative court in the first place. The court assesses the legality of the decision on the basis of the claims and arguments put forward by the appellant (but is not strictly restricted only to the arguments by the parties).

If the decision contradicts with the law, the court can quash the decision wholly or in part or even amend it to some extent (e.g. under the Environmental Protection Act). The case can also be remanded back to the authority or lower court.

- What is the availability and level of financial penalties?

By the Emission Trading Act, a sanction fee (100 euro/CO<sub>2</sub>-equivalent ton) for exceeding the individual emission rights can be inflicted on the installation who does not return as many emission rights as it has emitted in the preceding year. (See also SAC 2009:78, referred to under 4. above).

- What types of injunctive relief are available?

The court can always, in a pending case, order that the decision of the authority or a lower court shall not take effect before the case is solved. Other types of intermediate orders are also possible under the Judicial Administrative Procedure Act (e.g. that even a quashed decision by the Ministry to allocate emission rights shall be in force until the Ministry has made a new decision).

#### **10. What types of issues are raised about remedies in climate change cases?**

- How straightforward is the application of remedies in these cases?
- Does the relationship between private law and public law affect remedies in climate change-related claims?

See the previous answers.

As most climate change-related cases shall be appealed to administrative courts, obviously, claims made are predominantly based on public law. Even sanction fees are dealt with by administrative courts, but of note is that the preconditions based on the European Convention on Human Rights shall be taken into account.