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CLIENT ALERT

Differing Approaches to Climate Policies in the UK and US

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Recent court decisions on government climate policies on both sides of the Atlantic have the potential to impact future efforts to meet these targets and pressure on the private sector to do the same.

United Kingdom

On 18 July the UK High Court published its decision on three legal challenges heard together against the UK Government brought by Client Earth, Friends of the Earth, Good Law Project and environmental campaigner Jo Wheatley. The High Court found that the UK government's Net Zero Strategy, which sets out its plans to decarbonize the economy, does not meet its obligations under the Climate Change Act 2008 in particular in relation to carbon budgeting. Coming the day before the UK had its hottest day on record and with wildfires blazing across much of Europe, the timing could not have been much worse from a government perspective. The government will now have to update its climate strategy to include a quantified account of how its policies will achieve the climate targets based on a realistic assessment of what it actually expects them to deliver and present the updated strategy to Parliament for scrutiny.

The ruling has echoes of other recent court rulings across Europe including the Netherlands, France and Germany to the effect that not enough was being done with the requisite detail to meet binding commitments on climate change. This sort of judicial review of government action (or inaction) is perhaps easier in parts of Europe including the UK where these targets are laid down in statute.

By contrast, actions against corporates such as some of the oil majors, are largely based on tortious claims where it is arguably harder to prove a sufficient nexus, notwithstanding some high-profile decisions to the contrary in recent years.

It is also a reflection of the significant increase in use of litigation as a tool of environmental campaigners to achieve their goals. Depending on the jurisdiction and the basis of claim, it is clear that some challenges are much more likely to succeed than others.

United States

Meanwhile, the past two months have brought two notable developments in the climate space in the United States:

First, on 30 June, in *West Virginia v. EPA*, the U.S. Supreme Court decided that Section 111(d) of the Clean Air Act—a "catch-all" provision intended to regulate existing sources of pollutants not covered by other programs—did not provide the U.S. Environmental Protection Agency the authority to force "generation shifting," *i.e.*, the closure of fossil-fuel-fired power plants in favor of renewable sources of energy in an effort to reduce GHG emissions. Far from criticizing the federal government for achieving *too little* on the climate front, the Court expressed a healthy dose of skepticism about the Executive Branch's ability to curtail GHG emissions without clear guidance from the Congress. While hardly a fatal blow to EPA's authority, the decision

heralded the era of the "major questions doctrine," where agencies must think carefully before attempting to regulate in an area the Court may deem to have "vast economic and political significance."

Second, on 7 August, the U.S. Senate passed and sent to the House of Representatives the unassumingly named "Inflation Reduction Act," a legislative package that, while still worth hundreds of billions of dollars, represents a dramatically scaled-back version of what President Joe Biden hoped to achieve with his Build Back Better platform. This new bill, if enacted, would present a notable contrast to the UK's Climate Change Act 2008 because it does *not* set a net-zero target. Rather, it would attempt to reduce GHG emissions largely through financial and tax subsidies and incentives. A more circumspect approach, to be sure, but one that may evade "major questions" scrutiny from the U.S. Supreme Court, insofar as agencies are more likely to be doling out grant money to achieve the bill's aims than, for example, applying regulatory authority to impose caps on GHG emissions. At the same time, without a firm target it is unclear how progress would be measured and how quickly the market may respond. One potential result is that the focus will shift to those who are benefiting from the incentives to disclose their activities, and the U.S. Securities and Exchange Commission isproposing that regulated entities do just that. (Of course, any final rule out of the SEC may also face its own major questions challenge.)

To be sure, none of these developments are likely to stanch the flow of private litigation against governments and companies for their role in contributing to climate change. Indeed, ENGOs may be all the more emboldened to take action in the absence of binding governmental edicts. But the U.S. courts have thus far been inefficient vehicles for these suits, often either throwing them out entirely or taking years to work out thorny jurisdictional issues.

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With both countries still in the early stages of their attempts to lower GHG emissions, it remains to be seen whether either approach will achieve its intended goals. And plaintiffs will no doubt continue to seek out innovative ways of holding governments, and private business, accountable for what they perceive to be the most pressing issue of our time. With the pace of change increasing rapidly on many fronts, parties facing physical, financial and other risks related to climate change should monitor these developments and evaluate their impacts carefully.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Elizabeth B. Dawson
Counsel – Washington, D.C.
Phone: +1.202.624.2508
Email: edawson@crowell.com

Robin Baillie
Partner – London
Phone: +44.20.7413.0011
Email: rbaillie@crowell.com