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Legal Opinion

The 2040 EU Climate Target – Legal benchmarks and obligations following from International Court of Justice’s Advisory Opinion on Climate Change

**Commissioned by
The Greens/EFA in the European Parliament**

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Summary

The EU is currently defining the interim 2040 reduction target under the EU Climate Law. This legal opinion analyses the legal requirements for the definition of the target following from the case law of the ICJ and the ECtHR. As the EU is exceeding any possible GHG budget under all possible reduction pathways, the 2040 target must represent the best feasible efforts to reduce domestic emissions while at the same time pursuing the most ambitious efforts to build up domestic (technical and natural) carbon removals and to contribute to emissions reduction efforts outside the EU:

- The International Court of Justice (ICJ) held in its recent Advisory Opinion (AO) that the **1.5°C target is binding under international law and that all parties to the Paris Agreement must pursue the highest possible ambition to make an adequate contribution to comply with this obligation**. Similarly, the European Court for Human Rights (ECtHR) stated in the *Klimaseniorinnen* decision that **States must provide respective targets and quantifications of remaining emissions** (with a reduced margin of appreciation).
- The European Scientific Advisory Board on Climate Change (Advisory Board) and the latest climate science make it abundantly clear that **all feasible reduction pathways will exceed even the most lenient (*per capita*) GHG budget that can be calculated for the EU** for limiting global warming to 1.5°C compared to pre-industrial levels with a chance of (only) 50% long before 2040.
- The setting of the 2040 target must take into account that **the EU and its Member States will exceed their fair share GHG budgets and thus accumulate “carbon debt”** before 2040. This means that their **obligations now comprise three independent pillars**: First, they must bring down **domestic emissions** as fast as feasible. Second, they must pursue the highest ambition in **enhancing both natural and technical domestic carbon removals** in a sustainable way to achieve net zero emissions and thereafter net negative emissions as soon as possible. Third, they must **contribute to emissions reduction efforts outside the EU**. All those elements are **cumulatively necessary**, and one cannot offset the other. This particularly means that neither domestic carbon removals nor international credits can be used to justify a lower domestic emissions reduction pathway than would be feasible.
- The Commission’s 2024 recommendation for a 2040 target of 90% emissions reduction is already highly problematic as it represents the lowest end of the Advisory Board’s recommendations and consequently does not represent the best feasible reduction pathway. **The Commission proposal to**

establish a 2040 target under the EU Climate Law published in July 2025 further lowers the ambition by allowing for 3% of emissions reductions to be realized by international offsets. It is thus clearly legally inadequate. It must be ensured that the (bare minimum) target of 90% net domestic emissions reductions cannot be diluted in such a way. There must be quantified targets for the three obligations mentioned above (domestic emissions reduction, domestic carbon removals, international emission reduction efforts) that each represent the highest ambition.

- **Failing to deliver a 2040 target in compliance with international and human rights would lead to severe legal risks and uncertainties.** It would expose the Member States to potential liability risks towards third countries and ripple through the European legal system. EU and Member State policies and administrative decisions that build on the 2040 target will face the risk of being overturned by courts. Similarly, private actors and companies will face legal uncertainty if they cannot rely on the lawfulness of EU targets in the context of regulation, business relationships and trade agreements.

A. Introduction

The recent Advisory Opinion (AO) of the International Court of Justice (ICJ) on States' obligations in respect of climate change¹ marks a groundbreaking development in international law. For the first time, the Court affirmed that the **1.5°C** temperature limit enshrined in the Paris Agreement **is legally binding**, while additionally grounding it in customary international law and States' due diligence obligations to prevent transboundary harm and protect human rights. The ICJ's AO consolidates and elevates the scientific consensus on climate risks into a concrete legal benchmark for State conduct, thereby reshaping the normative landscape of climate governance and accountability.

At the same time, the most recent climate science – most notably the findings of Forster et al.² – indicates that the remaining global carbon budget consistent with limiting warming to 1.5°C (50 % chance) is almost exhausted and will only last for around three more years if global emissions remain at 2024 levels. Already in 2023, the European Scientific Advisory Board on Climate Change (Advisory Board) concluded in its recommendations regarding the EU 2040 target³ that 1.5°C-compatible pathways and budgets for the time between 2030 and 2050 were already out of reach even under a (very “generous”) *per capita* allocation of the then remaining global budget. In other words: **the EU is effectively already exceeding its budget when setting the 2040 target.**

Against this stark backdrop, the EU faces the urgent task of defining its 2040 climate target as required by Art. 4 (3) of the EU Climate Law.

This short legal opinion analyses the implications of the ICJ's AO for the EU's forthcoming 2040 target setting, applying the legal benchmarks from the AO together with other landmark judgments, in particular *Klimaseniorinnen v. Switzerland* before the European Court of Human Rights (ECtHR). It explores how these decisions jointly articulate the binding nature and concrete content of Member States' climate obligations under international and European law, and what this means for the EU's duty to align its 2040 target with said obligations.

Beyond the legality of the 2040 target itself, **Section E** of this opinion examines the potential **legal implications and uncertainties** that would arise from the adoption of a legally inadequate 2040 target, including liability towards third State parties under international law as well as legal risks following from EU and Member State legislation building on an insufficient EU target.

¹ ICJ, Advisory Opinion 23 July 2025, Obligations of States in Respect of Climate Change, General List No. 187.

² Forster et al., Indicators of Global Climate Change 2024: annual update of key indicators of the state of the climate system and human influence, <https://essd.copernicus.org/articles/17/2641/2025/>.

³ ESABCC, Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050, p. 48.

B. EU legal framework for the EU 2040 target and current political discussion

The EU Climate Law sets the binding target of achieving climate neutrality in the Union by 2050 in order to realise the long-term temperature target set out in Art. 2(1)(a) of the Paris Agreement (Art. 1(1) of the EU Climate Law). In addition, the Regulation sets the equally binding interim target for 2030 of reducing net greenhouse gas emissions within the Union by at least 55% compared to 1990 levels (Art. 4(1) EU Climate Law).

In accordance with Art. 4 (3) to (5) EU Climate Law, the Commission is required to draw up a legislative proposal for a Union-wide climate target for 2040. At the same time, it has to publish an indicative greenhouse gas budget for the EU for 2030-2050 in a separate report, Art. 4(4) EU Climate Law.

In defining the EU interim target for 2040 under Art. 4(5) EU Climate Law, various factors must be considered. Prominently, however, the first factor is “the best available and most recent scientific evidence, including the latest reports of the IPCC and the Advisory Board” (lit. a)). The available information on the indicative remaining greenhouse gas budget must also be considered (lit. m)), which, in turn, “shall be based on the best available science”, and “take into account the advice of the Advisory Board“, according to Art. 4(4) sentence 2 EU Climate Law.

The referenced “Advisory Board” means the **European Scientific Advisory Board on Climate Change**, an expert body legally appointed under Art. 3 EU Climate Law. In its 2023 recommendation regarding the 2040 target and the remaining indicative greenhouse gas (GHG) budget, the Advisory Board has advocated for an EU-wide emissions reduction target for 2040 between **at least 90% and 95%** compared to 1990 levels and for an indicative greenhouse gas budget for 2030 to 2050 of 11 to 14 Gt CO₂ eq..⁴

In the cited recommendation, the Advisory Board emphasized that **such a target would not be compatible even with even a *per capita* allocation of the global budget or any concept of a globally fair share** of reduction:⁵

“The lowest feasible budget estimates from the scenarios assessed in this report are still higher than the equal per capita emissions allocations and other fair share estimates based on principles such as ‘polluter pays’ and ‘ability to pay’.”

⁴ ESABCC (note 3), p. 14 f.

⁵ Ibid, p. 48.

In other words: Even under the most ambitious feasible pathway (95% reduction by 2040), the EU's cumulative emissions will be higher than even the most lenient interpretation of the budget (*per capita*) would allow.⁶

The Advisory Board concluded that a 2040 reduction target up to 95 % would be feasible (though demanding on the higher end), and that the minimum ambition could be no less than 90% because emissions in all climate neutrality pathways exceed any GHG budget.⁷

Against this background, the Advisory Board formulates **three requirements** pertaining to the 2040 target:⁸

- Aim for the highest ambition in domestic emission reductions and sustainable carbon removals,
- Contribute to direct emission reductions outside the EU.
- Pursue sustainable net-negative emissions after 2050

Although outside of the scope of the legal opinion, it is worth noting that the Advisory Board's analysis also shows that emission reductions in 2030 could feasibly be increased to up to 70%,⁹ which would significantly reduce the gap between the EU's cumulative emissions and fair share GHG budgets.

Due to the emissions that have occurred in the time since the Advisory Board's 2023 report, it must be noted that the GHG budget presented in that report does not represent the "most recent science", as referenced in the EU Climate Law (see above). In addition to the Advisory Board's recommendation, EU legislators must also take the following into account: The latest findings on the global budget by renowned climate scientists Forster et al. (based on IPCC methodology)¹⁰ suggest that **even the global budget for the 1.5-degree target is almost exhausted**. The remaining global budget for keeping within a 50% probability of meeting the 1.5°C target is estimated at 130 Gt CO₂ at the start of 2025 and would be exhausted in just over three years if global CO₂ emissions remain at 2024 levels. Breaking down the global budget for the EU using a *per capita* approach would mean (assuming a share of 5.6 % of the world's population¹¹) a remaining total EU GHG budget of 7,28 Gt CO₂e starting 2025 – a far cry from the Advisory Boards' feasibility range of 11 to 16 Gt CO₂e between 2030 and 2050.¹²

⁶ Ibid, p. 48.

⁷ Ibid, p. 15.

⁸ Ibid., p. 15

⁹ Ibid., p. 10.

¹⁰ Forster et al., see above, note 2.

¹¹ https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en

¹² ESABCC (note 3), p. 47.

As a consequence of the small remaining carbon budget, the only remaining IPCC scenarios/pathways for 1.5°C now include overshooting 1.5° as a temperature threshold for quite some time, and assume carbon dioxide removal (CDR) to model how to take temperatures down through net-negative emissions after that.¹³

In its Communication of February 2024,¹⁴ the EU Commission proposed an EU-wide reduction target of 90% for 2040 compared to 1990 levels (Commission, Communication, p. 7). As an indicative greenhouse gas budget in connection with setting a reduction target of 90%, the Commission mentions in the communication – without clear commitment – a residual budget of 16 Gt CO₂ eq.¹⁵ The **Commission therefore already aimed at the lowest end** (in terms of the target) or even outside (in terms of the indicative budget) of the Advisory Board’s scientific recommendations in its 2024 communication. In its proposal for an amendment to the EU Climate Law, the Commission now even proposes that **up to 3% of 1990 EU net emissions could be offset by international credits, thus moving the proposed 2040 target outside the scope of the Advisory Board’s recommendations.**

C. The ICJ’s Advisory Opinion and its interaction with the ECtHR (Klimaseniorinnen)

The ICJ’s AO on climate change contains groundbreaking statements both on the content and the origin of State’s climate duties under international law.

As for the content of the Paris Agreement (PA), the ICJ unequivocally holds that the **1.5°C target** not only has “become the scientifically based consensus target under the Paris Agreement” but that it is also “the parties’ agreed primary temperature target” since the parties had referred to that threshold in following decisions (Glasgow Climate Pact, First Global Stocktake), thus making “subsequent agreements in relation to the interpretation of the Paris Agreement”.¹⁶ This means, *inter alia*, that the “highest possible ambition” of a party’s NDC is “not entirely left to the discretion of the parties” but must “relate to the object and purpose of the Agreement set out in Article 2, i.e. to hold the increase in the global average temperature to below 1.5°C”.¹⁷ NDCs must “be **capable of making an adequate contribution** to the achievement of the temperature goal”,¹⁸ meaning that Parties must *collectively* ensure that, “when taken together, [NDCs] are **capable of achieving** the temperature goal of limiting global warming to 1.5°C above pre-industrial

¹³ See further: Schlessner et.al. Overconfidence in climate overshoot, Nature Vol.634, p366–373 (2024)
<https://www.nature.com/articles/s41586-024-08020-9>

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Securing our future Europe’s 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society (COM/2024/63 final)

¹⁵ Ibid, p. 8.

¹⁶ ICJ (note 1), para 224.

¹⁷ Ibid., para 242.

¹⁸ Ibid., emphasis added.

levels”.¹⁹ The key role of the principle of common but differentiated responsibilities and respective capabilities further leads the ICJ to find that NDCs must take into account “historical contributions to cumulative GHG emissions, and the level of development and national circumstances of the party in question”.²⁰

In other words, a State does not comply with the PA by simply providing any NDC but “the content of the NDC is equally relevant to determine compliance”.²¹ The ICJ further emphasizes that “the standard of due diligence to be applied in preparing the NDCs is stringent”, meaning that “each party has **to do its utmost** to ensure that the NDCs it puts forward represent its **highest possible ambition** in order to realize the objectives of the Agreement”.²²

The Court bases its findings not only on the PA and climate treaties but also on **customary international law and human rights**. Rooting the reductions obligation in customary international law means, inter alia, that the reasoning also applies to countries that are not parties to the PA.²³ The general due diligence obligations to avoid significant harm to the environment apply, meaning *in concreto* that States “must take into account the best available science”²⁴ and put in place the “regulatory mitigation mechanisms that are necessary for the prevention of significant harm to the climate system”.²⁵ Also, „developed States, in the context of climate change, must take more demanding measures to prevent environmental harm and must satisfy a more demanding standard of conduct”.²⁶ The Court emphasizes that customary international law generally establishes “independent obligations” though at the moment “compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court (see paragraphs 174-270 above), suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate”.²⁷ Similarly, international human rights obligations, including the right to a clean and healthy environment,²⁸ also establish a free standing basis for mitigation duties that States have to take “into account when implementing their obligations under climate change treaties (...) and under customary international law”.²⁹

Throughout its opinion and both in the context of the climate treaties and of due diligence duties under customary international law, the ICJ emphasizes the

¹⁹ Ibid., para. 245, emphasis added.

²⁰ Ibid., para. 247.

²¹ Ibid., para 236.

²² Ibid., para 246 (emphasis added).

²³ Ibid., para 315.

²⁴ Ibid., para 278.

²⁵ Ibid., para 282.

²⁶ Ibid., para 292.

²⁷ Ibid., para 314.

²⁸ Ibid., paras 387 ff.

²⁹ Ibid., para 404.

obligations of international co-operation³⁰ as well as the principle of **common but differentiated responsibilities and respective capabilities**, for which historical contributions to cumulative GHG emissions, and the level of development and national circumstances are particularly relevant.³¹

Finally, the Court qualifies the States' climate protection obligations and in particular mitigation duties to prevent significant transboundary harm as *erga omnes obligations*, and that the responsibility for violations of one State may thus be invoked by any State.³²

The ICJ's AO confirms and underscores the requirements from the ECtHR's *Klimaseniorinnen judgement* from April 2024:³³

The ECtHR found that the "primary duty" for States is to "adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change".³⁴ This corresponds to the ICJ's **duty to regulate** under both the climate framework and due diligence obligations under customary international law (see above).

The ECtHR emphasized the necessity of defining targets and, in particular, a **fair share emissions budget** as a cornerstone of a State's due diligence obligations under the ECHR. Reduction targets and budget quantifications must be "in line with the overarching goal for national and/or global climate-change mitigation commitments".³⁵ The Court found that Switzerland had violated its obligations as it "allowed for more GHG emissions than even an 'equal per capita emissions' quantification approach would entitle it to use", thus assuming that equal per capita is the most "generous" legal approach to define a budget.³⁶ With respect to the point of reference for those commitments, the ECtHR referenced the **1.5°C target** as the relevant benchmark.³⁷ As the ICJ now unequivocally holds 1.5°C to be the binding target under international law, there can be no doubt that it is the relevant threshold for the obligations arising from the ECHR as well.

Both ICJ and ECtHR agree that **States' discretion is limited** when it comes to defining their contributions to the global temperature goal. According to the ECtHR, states have a reduced margin of appreciation when it comes to defining targets and underlying budgets.³⁸ This resonates with the ICJ's findings of a "stringent"

³⁰ Ibid., paras 260 ff., 301 ff.

³¹ Ibid., paras 247, 290 ff.

³² Ibid., paras 439 ff.

³³ ECtHR, Judgement 09 April 2024, Application no. 53600/20.

³⁴ Ibid., para. 545.

³⁵ Ibid., para 550 a) and b).

³⁶ Ibid., para 569

³⁷ Ibid., para. 558.

³⁸ Ibid., para 543.

due diligence standard in the context of NDC definition and customary law duties (see above).

In the end, both ICJ and ECtHR lead to the same result: the duty to pursue the highest possible ambition to keep 1.5°C in reach or to return under that threshold as quickly as possible. The ICJ takes the “highest possible ambition” requirement from Art. 4 (2) PA seriously and establishes the due diligence obligation to do the “utmost to ensure that the NDCs” reflect this ambition.³⁹ The same obligation follows from the ECtHR’s *Klimaseniorinnen* decision, which requires States to define targets and quantify emissions that are in line with international law. As the 1.5°C target is the authoritative benchmark under international law and as there is no 1.5°C fair share budget left for developed countries, there is no longer any relevant room for manoeuvre. On the contrary, NDCs, reduction targets and emissions quantifications of developed countries must reflect the (interim) breach of their 1.5°C obligations, as shown in the following.

D. Implications for the design and content of the EU 2040 target: dealing with budget exceedance and carbon debt

As described above, developed countries or regions, such as the EU, are inevitably exceeding their carbon budget compatible with 1.5°C. The Advisory Board concluded in 2023 that there is no feasible way to stay even within a *per capita* allocated GHG budget between 2030 and 2050. This is only exacerbated by the latest findings on the rapid dwindling of the global budget for 1.5°C (50 %), as presented above (see B.). To put it differently: **The EU is no longer managing a carbon budget, it is accumulating “carbon debt”.**

The concept of carbon debt⁴⁰ has been introduced as a reaction to the depletion of “fair share budgets” for developed countries. It applies the “common but differentiated responsibilities and capabilities” approach to the challenge of at least minimizing overshoot. In essence, the concept of carbon debt means CDR and international mitigation obligations beyond reaching emissions reductions and net zero emissions domestically.⁴¹ **Accounting for carbon debt means that countries that cannot stay within their fair share (or even *per capita*) budget must contribute to emissions reductions elsewhere (internationally) and reach net negative emissions in the long run (domestically).**

The carbon debt approach helps to define States’ obligations set out by the ICJ and the ECtHR once the fair share budget is gone. As shown above, the ICJ holds the 1.5°C-target to be the binding benchmark under international law and the legal standard against which NDCs and due diligence obligations under customary

³⁹ ICJ (note 1), paras 246, 270.

⁴⁰ See, e.g., Pelz et al., Using net-zero carbon debt to track climate overshoot responsibility, <https://doi.org/10.1073/pnas.2409316122>.

⁴¹ Ibid.

international law are measured, and which must be pursued with the highest possible ambition. Similarly, the ECtHR requires States to define targets and quantify emissions reductions in line with international obligations, with only limited margin of appreciation. Those obligations cannot be met by simply reducing domestic emissions if there is no Paris-compliant CO₂ budget left. Rather, **in addition to the continuing and strict obligation to reduce domestic emissions with the highest possible ambition** and to reach climate neutrality, further responsibility must be assumed for the carbon debt accumulated by contributing to the overshoot. This means, firstly, a **duty to contribute to global emissions reductions**, as part of the duty of international cooperation, which has been emphasized by the ICJ both in the context of the climate treaties and customary international law.⁴² In fact, this duty has also been stressed by the German Constitutional Court in *Neubauer*.⁴³ Secondly, **sustainable net negative emissions** are necessary in order to “repay” accumulated carbon debt.

This approach is already reflected in the Advisory Board’s recommendation for an EU 2040 target. As presented above (see B.), the Advisory Board recognises that the EU does not have any fair share budget left and therefore identifies **three pillars that are cumulatively necessary**:⁴⁴

- 1) Aim for the highest ambition in domestic emission reductions and sustainable carbon removals,
- 2) Contribute to direct emission reductions outside the EU
- 3) Pursue sustainable net-negative emissions after 2050

Pillar 1) is the most relevant in the context at hand, as it directly concerns the definition of the 2040 target. Pillars 2) and 3), however, are also important for the definition of a target in compliance with international law and human rights. This is because all pillars are equally important for climate compliance of a carbon-indebted EU, therefore all of them must be pursued with utmost ambition, and they cannot be played off against each other.

Concretely:

- **The 2040 domestic emissions reduction target must reflect the highest possible ambition, i.e. it must do anything feasible (“best possible means”).** Such a “best possible means”-approach to quantify allowed emissions and translate them into targets had already been argued in the EU

⁴² ICJ (note 1), paras 214 ff., 301 ff., 364

⁴³ BVerfG Order of 24.03.2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html

⁴⁴ ESABCC, Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050, p. 48 f.

Carvalho case in 2015 and has been discussed since.⁴⁵ In the face of both the impossibility to keep within even a *per capita* 1.5°C budget and the duty under international law and human rights law to pursue this target with the highest possible ambition and quantify remaining emissions, such a “best possible means”-approach is now unavoidable on the EU level. As the Advisory Board assumed a feasibility range between 88% and 95%, the Commission’s proposed 90% target is already at the lower end of feasibility and, according to the Advisory Board, the lowest justifiable target when taking equity considerations into account. Already on the basis of the Commission’s 2024 recommendation, it would have to provide justification as to why it would represent the EU’s highest possible ambition – even more so as the Commission assumes in its impact assessment that a “baseline” reduction of 88% would already be achieved by just continuing existing measures.⁴⁶ As the Commission now even proposes to allow 3% of domestic reductions to be “achieved” by international offsets (see above, B.), the **Commission’s proposal falls out of scope of the Advisory Board’s recommendations and any adequate reduction ambition under international and human rights law.** It is below what is feasible (the Advisory Board’s feasibility range begins at 88% domestically, while the Commission now aims at effectively 87% (international offsets deducted). This is exacerbated by the fact that the 2030 already did not represent the highest possible ambition (75% according to the Advisory Board, see above, B.).

- **The highest possible ambition is necessary for both emissions reductions and carbon removals within the EU.** There are stand-alone obligations to curb emissions as quickly and comprehensively as possible and to achieve the highest possible domestic carbon removals. This means that **carbon removals cannot be used to justify any lowering of ambition regarding emissions reduction.** This already follows from the strict interpretation of the “highest possible ambition” standard by the ICJ (see above). Taking the EU’s carbon debt into account, it also follows from the fact that sustainable net negative emissions as soon as possible are necessary for compliance with international law and human rights. Achieving sustainable negative emissions will take time, and technical solutions are still fraught with many technological uncertainties. Nonetheless, in the current situation, permanent removal capacity should be scaled up now, as the Advisor Board recommends.⁴⁷ At the same time, capacities of such

⁴⁵ E.g., Winter, Climate Protection before the European Court of Human Rights: The KlimaSeniorinnen and Duarte Agostinho Cases in Perspective, *aöRV* 84 (2024), 457 (490 ff.).

⁴⁶ Commission Staff Working Document, Impact Assessment Report Part 1. accompanying the document “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Securing our future Europe’s 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society (SWD(2024) 63 final), p. 24.

⁴⁷ ESABCC, Scaling up carbon dioxide removals Recommendations for navigating opportunities and risks in the EU.

technologies are limited and the only proven concept on a larger scale are natural sinks, which themselves are negatively affected by increasing extreme weather events. It is therefore crucial to **build up CDR capacities, both technology and natural sinks, as fast as possible and in a sustainable way – in addition to and independent from emissions reductions.** Against this background, the practice to formulate EU-wide targets for both emissions reductions and carbon sinks (as has been done for 2030), while at the same time limiting the contribution of net removals to the emissions reduction target (Art. 4 (1)(3) EU Climate Law) should be continued from a compliance perspective. It is necessary to **both quantify the highest possible ambition for CDR targets and to ensure that CDR cannot be used to water down domestic emissions reductions ambition.**

- **Carbon offsets from outside the EU cannot be counted towards domestic EU targets.** Any mechanism under Art. 6 PA, for instance, cannot relax the “highest possible ambition” standard to bring down domestic emissions. This is already reflected in the wording of Art. 6 PA, which holds that voluntary cooperation may be used “to allow for higher ambition”, not to in any way compensate for lower domestic ambition. In the current carbon debt situation, such additional ambition is now legally required. The EU’s fair share of the global budget has been used up, and any emission further increases the carbon debt. Therefore, **contributing to EU-external emission reductions is an additional requirement** under international and human rights law (see above).

All in all, the 2040 target must reflect and assume responsibility for the fact that the EU is not entitled to any emissions budget anymore but that it is in carbon debt. This does not mean that from now on all emissions are illegal and a violation of international law and human rights. But it does mean that the **EU must provide justification for any emissions it still allows and additionally has to reduce its carbon debt by supporting third countries in their emissions reduction efforts and by preparing sustainable net-negative emissions in the long run.** This follows from the strict due diligence standard that both ICJ and ECtHR apply to the definition of reduction contributions to keep the global 1.5°C-target. The fact that the EU (and most likely the world) already operates in an overshoot scenario means an increased burden of justification for any further domestic emissions allowed, while at the same CDR and international emissions reductions are needed to repay carbon debt. **As for the 2040 target, this means that any lagging behind the already problematic Commission 2024 recommendation would be a clear violation of existing law.**

E. Legal Risks and Uncertainties from an Inadequate 2040 Target

Adopting an inadequate 2040 target would have severe practical implications and result in considerable legal uncertainties for the EU, its Member States and private

actors. This is because an inadequate target will almost certainly lead to inadequate climate action and thus to a violation of the duty to regulate under international and human rights law (see above, C.).

This leads to the following legal risks and uncertainties:

- **An insufficient 2040 target may indirectly lead to Member State liability towards third State parties under public international law.**⁴⁸ The ICJ holds that general rules apply and “that responsibility for breaches of obligations under the climate change treaties, and in relation to the loss and damage associated with the adverse effects of climate change, is to be determined by applying the well-established rules on State responsibility under customary international law”,⁴⁹ firmly rejecting the argument that liability claims could be excluded by the climate treaties as *leges speciales*. The Court also identifies some potential internationally wrongful acts that might give rise to State responsibility, “including fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies”.⁵⁰ **An insufficient 2040 target will significantly increase the risk of internationally wrongful acts by its Member States** as Member States will align their national climate policies with EU targets. This is particularly true where Member States implement EU climate policies which are based on an inadequate 2040 target. **A 2040 target which violates the obligations following from the ICJ’s AO on duties under climate treaties, customary international law and human rights therefore increases Member States’ liability risks towards third State parties.** The ICJ emphasizes that breaches of the international law applicable to climate change “may give rise to the entire panoply of legal consequences provided for under the law of State responsibility”, including a duty of performance, a duty of cessation and reparation.⁵¹ This could lead to judgements requiring stricter targets, specific reduction orders and includes financial compensation and damages, which the ICJ has already awarded in the past for the breach of due diligence obligations to prevent significant (transboundary) harm to the environment.⁵²
- **An inadequate 2040 target will create significant legal uncertainty for any EU legislation that is built upon such a target,** thus completely failing to provide its intended guiding function. The dimensions of the

⁴⁸ The EU itself cannot be sued by third State parties before the ICJ. This does not, however, in any way change the EU’s legal responsibility, as it is a party to the Paris agreement and is subject to human rights obligations, as well as obligations under customary international law.

⁴⁹ ICJ (note 1), para 420.

⁵⁰ Ibid., para 427.

⁵¹ Ibid., paras 445 ff.

⁵² E.g., ICJ, Judgement of 16 December 2015, Document Number 152-20151216-JUD-01-00-EN (Costa Rica vs. Nicaragua).

potential effects cannot be overstated. The 2030 target, for instance, has served as a basis for numerous EU legislative acts (ETS, ESR, LULUCF, and more or less the entirety of the Fit for 55-package). It is well established that international treaties (such as the PA) and customary international law are an integral part of the Union’s legal order (cf. Art. 3(5) TEU and 216(2) TFEU) and **binding on EU secondary law**. According to the European Court of Justice (ECJ), “by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union”;⁵³ under Art. 3(5) TEU the EU “is bound to observe international law in its entirety, including customary international law”.⁵⁴ All EU legislative acts that directly or indirectly implement or refer to a 2040 target that violates the duties under international law set out above, are therefore potentially subject to actions for annulment (Art. 263 TFEU) by Member States or even individuals. As for individuals (and NGOs), it appears questionable whether the ECJ’s restrictive approach under the *Plaumann* doctrine⁵⁵ can be upheld against the background of the ICJ’s opinion that climate change duties are also rooted in human rights law and the ECtHR’s jurisprudence on NGO standing in the particular circumstance of climate change under the ECHR.⁵⁶ Additionally, the issue of compliance with international law could be brought before the ECJ via the national courts under Art. 267 TFEU, which already points to uncertainties on the Member State level.

- **Legal uncertainties trickle down to Member State legislation and administrative decisions that build upon an inadequate 2040 target.** This is because the 2040 target, just as the 2030 target, will inform a lot of Member State (transposing and self-standing) legislation as well as administrative decisions, e.g., on infrastructure permits etc. While a 2040 target will not justify insufficient action in the Member States as EU environmental legislation shall not prevent any Member State from maintaining or introducing more stringent protective measures (Art. 193 TFEU), the EU 2040 target (and following EU legislation) will factually have a strong influence on national climate policies. For instance, the German Climate Protection Act (*Klimaschutzgesetz – KSG*), though a self-standing national law, serves the purpose, *inter alia*, to ensure compliance with European targets (§ 1 KSG). The purpose of the law must be considered by authorities in their planning and decision-making on the administrative level (§ 13 KSG). This illustrates that, if the wrong course is set at EU level (namely, targets that are in violation of international law), this will lead to **uncertainty in the**

⁵³ ECJ, Judgement 21.12.2011, C-366/10, para. 50.

⁵⁴ *Ibid.*, para 101.

⁵⁵ In the climate context see ECJ, Judgement 25.03.2021, C-565/19 P.

⁵⁶ For the latter see ECtHR (note 33), paras 489 ff.

legal systems of the Member States, even when applying provisions that are merely indirectly connected to EU law. If, for instance, an administrative decision to permit an infrastructure project, bases its reasoning regarding climate effects on EU targets or derived national targets that are inadequate under international law, this might be successfully challenged in court for using an insufficient legal standard. Such problems are likely even more prevalent in Member States that do not have their own climate governance law but are more directly guided by EU law.

- **An insufficient 2040 target will also introduce legal uncertainties at the level of private entities.** Private actors would already be strongly affected by the problems described above, as they operate under EU and national legislation and generally trust EU legislation to provide a reliable legal framework for (business) decisions. In general, the duty to regulate under international and human rights law includes the duty to regulate companies.⁵⁷ The EU has begun to do so, *inter alia*, by demanding that private companies develop and implement transition plans compatible with the Paris Agreement under the **CSDDD or CSRD**.⁵⁸ For instance, companies preparing their transition plan must pursue the global 1.5°C target in line with the Paris Agreement. At the same time, they will look at targets under the EU Climate Law for guidance. The European Sustainability Reporting Standards (ESRS) refers to both Paris Agreement and EU Climate Law, holding that “the undertaking is expected to provide a high-level explanation of how it will adjust its strategy and business model to ensure compatibility (...) with the limiting of global warming to 1.5°C in line with the Paris Agreement (...) and the objective of achieving climate neutrality by 2050 with no or limited overshoot as established in Regulation (EU) 2021/1119 (European Climate Law)”.⁵⁹ This implies that the requirements of the Paris Agreement and the EU Climate are aligned. If this is not the case, companies are confronted with different standards and effectively cannot rely on the EU targets when preparing their transition plans. The problem of competing standards is also present in the **finance sector**, where the **ECB** requires banks to embed climate-alignment considerations into their credit-risk frameworks and capital planning. According to ECB guidelines, banks’ credit underwriting policies should assess whether counterparties’ business models and transition plans are compatible with the Paris

⁵⁷ ICJ (note 1), para. 282: „These rules and measures must regulate the conduct of public and private operators within the States’ jurisdiction or control...”

⁵⁸ It should be noted that any backpadding on those obligations would in itself raise climate compliance issues as it would constitute a regression in the ambition to work towards the 1.5°C target and to minimize overshoot.

⁵⁹ Commission Delegated Regulation (EU) 2023/2772, ESRS E1 AR 1.

Agreement's 1.5 °C pathway,⁶⁰ while referring to alignment with the EU climate goals in other publications.⁶¹

- **Duties for private companies to observe international law** may also exist on the national level of the Member States. For instance, Art. 25 of the German Constitution (*Grundgesetz – GG*) stipulates that general rules of international law – including customary international law – are directly binding upon private individuals, including companies. The Federal Constitutional Court holds that this provision transforms obligations initially directed at states to norms that have to be respected by private entities, if such a transformation is compatible with the substantive content of the norm (as is the case regarding customary law obligations to prevent transboundary environmental harm in the context of climate change). Moreover, international and human rights law can constitute a statutory prohibition (“*Verbotsgesetz*”) under § 134 of the German Civil Code.⁶² International and human rights law also inform tort law standards, as most prominently articulated by the Hague District Court’s judgement against Shell; the general duty (though not the specific remedy) was confirmed by the Court of Appeals;⁶³ similar proceedings are pending in Germany and other Member States. For private companies, EU targets and follow-up (EU and national) legislation should generally convey an orientation of what can be expected of companies as well. This, however, is not the case if the targets and follow-up legislation are themselves violating international law. If a private company operates in a legal framework that respects and sufficiently implements international law, it will comply with international law as well just by adhering to said framework. If, however, the legal framework violates due diligence obligations under international law, it cannot provide such orientation.
- Legal uncertainties can finally result with regard to **Free Trade Agreements** (FTAs), which nowadays regularly include “Trade and Sustainable Development” chapters as a standard component. Such clauses are not only binding upon the contracting countries entering into an agreement with the EU, but likewise on the Union itself. A breach of the EU’s obligations under international climate law, such as the setting of an inadequate 2040 reduction target, would therefore constitute a breach vis-à-vis its trade partners. While the legal consequences of a breach of climate obligations vary from FTA to FTA, it would expose companies that are depended on favourable trade concessions to considerable risks. For example, Art. 26.16 of the EU-New Zealand FTA allows for the imposition of sanctions in case one party

⁶⁰ ECB, Guide on Climate-related and Environmental Risks, 2020.

⁶¹ ECB, Risks from misalignment of banks’ financing with the EU climate objectives,

⁶² Armbrüster, in: MüKoBGB, 10th ed. 2025, § 134 para 57, citing the ECtHR as an example.

⁶³ See District Court of the Hague, judgement 26 May 2021, ECLR:NL: RBDHA:2021:5339; and Court of Appeal The Hague, judgement 12 November 2024, ECLI:NL:GHDHA:2024:2099, para 1.

fails to comply with the climate-related commitments under the agreement. Going even further, the EU-UK Trade and Cooperation Agreement considers compliance with the Paris Agreement an “essential element” of the treaty (see Arts. 764, 771 TCA) thus allowing parties to suspend or terminate the treaty in case of a material breach. Therefore, compliance with the Paris Agreement is in the interest of European companies and the European economy at large. Even before a trade partner would decide to impose economic sanctions, it is to be expected that European companies will factor in the regulatory risk resulting from a misaligned EU 2040 target, thus further weakening competitiveness and adding to inflationary pressures persistent in the common market.

In summary, an insufficient 2040 target would indirectly expose the Member States to potential liability risks towards third countries and would ripple through the European legal system, creating legal uncertainty for EU and Member States legislators, the administrative body and European companies alike.