

# Environmental Groups Have Sued Large German Companies To Reduce Their Products' CO<sub>2</sub> Emissions

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## Takeaways

- Environmental groups have sued four large German companies, seeking to alter their products and activities to comply with climate goals far stricter than those set by German law.
- The cases derive in part from a decision last year by Germany's Federal Constitutional Court, which found a major environmental statute unconstitutional in part, saying its near-term emissions were too lax, thereby constraining the options of future generations to combat climate change.
- By asking courts to impose the plaintiffs' detailed environmental prescriptions on businesses, the suits present significant separation-of-powers issues.
- The plaintiffs face serious hurdles proving that the defendants contributed significantly to a harm and are in a position to alter overall emissions by others.

## Current Environmental Suits: From BMW to Wintershall

Members of environmental groups brought numerous suits last year aiming to set deadlines for companies to cease activities that indirectly or directly create greenhouse gases. In September 2021, members of the German non-governmental organization (NGO) Deutsche Umwelthilfe (Environmental Action Germany) filed lawsuits against BMW and Mercedes, and in November, Greenpeace brought a suit against Volkswagen. All of the suits are seeking court orders for the automotive makers to discontinue worldwide sales of cars with internal combustion engines by 2030 and, in the meantime, to sell only cars emitting up to certain levels of CO<sub>2</sub>. Deutsche Umwelthilfe also sued Wintershall Dea, a gas and oil producer, to bar it from developing any new gas and oil fields after 2026. The NGOs aim to use Germany's courts to impose new obligations on domestic companies related to climate change even though the defendants have complied with German law.

These suits differ from another pending climate change litigation: a Peruvian farmer's suit against German utility RWE seeking damages to cover the cost of

building a dam to protect his home from potential flooding from a glacial lake. He contends that RWE should bear 0.47% of his construction costs because this allegedly corresponds to RWE's share of global greenhouse gas emissions since the beginning of industrialization.

## Federal Constitutional Court Laid the Ground for Private Climate Suits

A Dutch court decision in 2021 ordering Royal Dutch Shell to reduce CO<sub>2</sub> emissions was one model for the German cases. However, the German suits draw directly from a March 2021 ruling of Germany's Federal Constitutional Court that found parts of the Federal Climate Change Act (the Act) unconstitutional on the ground that its emissions standards did not adequately protect the rights of future generations. The climate-related suits attempt to apply that ruling to private civil suits against corporations.

The court used the CO<sub>2</sub> budget approach followed by the United Nations' Intergovernmental Panel on Climate Change and the German Advisory Council on the Environment, which caps CO<sub>2</sub> contributions over time based on the maximum permissible temperature



threshold of the Paris Climate Accords. The court found that the national residual budget of 6.7 gigatons left in 2020 will be nearly completely depleted by 2030 at the rate of emissions permitted under the Act. On that basis, the court voiced serious concerns about the constitutionality of the CO<sub>2</sub> emissions allowed until 2030 because it permitted too much CO<sub>2</sub> to be emitted in this decade, creating an irreversible threat that would restrict the constitutionally protected freedoms of future generations. The court only refrained from a constitutional ruling on the effectiveness of the law's requirements for this time period because of the uncertainties inherent in the calculation of the residual budget, but it expressly reserved the right to demand even more strict reductions from legislators.

The court found that CO<sub>2</sub> reductions after 2030 were insufficiently regulated by the legislation and thus unconstitutional. In response to the ruling, legislators bolstered the Climate Protection Act comprehensively.

### **Suits May Conflict With Separation of Powers**

Deutsche Umwelthilfe and Greenpeace's claims are based on the emissions budget approach applied by the court. The plaintiffs calculated a residual CO<sub>2</sub> budget for German automakers.

However, by calling on the courts to order selected enterprises to restrict their sales or other activities, the suits raise serious issues about the separation of powers. If legislation to fight climate change is found to be insufficient, it is the legislator's responsibility to amend it.

In fact, a ruling by the Federal Constitutional Court in a similar situation cited the separation of powers. In light

of the extensive effects of nuclear power on citizens, nuclear energy policy was a fundamental issue that could only be addressed by the legislature, the court said. The same must be true for weighing constitutional rights in the context of the fight against climate change.

### **Proving Causation and Defendants' Control Over the Nuisance May Pose a Challenge**

The environmental suits will likely also have a difficult time satisfying basic civil law principles, and causality, in particular.

The cases against BMW, Mercedes, Volkswagen and Wintershall Dea, like the lawsuit against RWE, are based on the protection under civil law of absolute rights such as life, property, health and privacy. German law requires that the person against whom the claim is asserted must be a "disruptor" (*Störer*). In the current cases, this can only be a person who (a) sufficiently causes the nuisance directly or — in the case of vehicle emissions — indirectly through third parties and (b) is able to prevent such disruptions.

The plaintiffs must prove that, but for the contribution of these companies, the threatened disruption would not exist.

In light of the amount of global emissions, the comparatively infinitesimal contributions of the defendants to total emissions, as well as other factors such as the storage of CO<sub>2</sub>, it is questionable whether the plaintiffs can prove causation.

The second aspect, the controllability of the nuisance, is also highly questionable here. For instance, automakers are unable to control emissions from vehicles already sold. That is only within the power of car owners. Moreover, imposing restrictions

on the three defendant automakers might merely cause consumers to buy from other manufacturers.

Finally, the plaintiffs' calculations do not consider the effects of disproportionate CO<sub>2</sub> savings in other sectors, because they cannot forecast technical progress in the reduction of CO<sub>2</sub> many years into the future. Additionally, the calculation rests on a fixed allocation of the CO<sub>2</sub> budget to various industries.

### **Outlook for Potential Litigation**

Deutsche Umwelthilfe declared that it selected the defendants because (a) they are among the largest corporations in Germany, (b) they are active on a global scale and (c) they allegedly have not provided any (or sufficient) statements as to how they intend to adjust their activities to adequately protect the climate and individuals' constitutional rights.

The environmental suits filed to date are focused on the transportation sector, which undoubtedly causes CO<sub>2</sub> emissions on a large scale. However, according to the German Federal Ministry for the Environment, transportation's contribution is significantly smaller than that of energy and industry, and the building sector contributes nearly as much as transportation. This suggests that large Germany-based corporations from these other sectors — as well as the banks financing them — may soon find themselves facing similar suits.

See "[Climate-Related Securities Suits May Increase With New SEC Standards.](#)"