

Newsletter **ESG Update**

The Hague Court of Appeals Ruling in Milieudefensie et al. v. Shell – a Landmark Decision in Corporate Climate Litigation The recent decision has major implications for corporate climate change litigation globally – this Newsletter summarises the key points of the judgment.

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The Appeals Court refuses to impose a specific CO₂-reduction order, but confirms corporate climate responsibility in general

Overtuning the District Court of The Hague's unprecedented decision of 2021, the Appeals Court of The Hague's decision can be seen as a reality check for transnational climate litigation against corporations. While not imposing a specific CO₂-reduction order, the judgment reiterates that corporations do in principle have a legal obligation to contribute to climate change mitigation.

1. Background

Around the globe, climate change litigation against corporations is on the rise (for further details, please refer to our [ESG Update 7/23](#)). The case of *Milieudefensie et al. v. Shell* in the Netherlands is a landmark case in climate change litigation against companies, attracting worldwide attention. On 26 May 2021, the **District Court of The Hague** handed down an unprecedented decision, ordering Royal Dutch Shell, the (then) parent company of the Shell group, to reduce its CO₂ emissions by at least 45% until 2030 (relative to 2019 levels). The injunction, or reduction order, was formulated by the District Court to encompass the full range of CO₂ emissions generated by the entire Shell group, including direct (Scope 1) as well as indirect (Scope 2 and Scope 3) CO₂ emissions. Shell filed an appeal against the decision.

Later in 2021, pending the appeal against the District Court's decision, the shareholders of Shell approved the change of the company's name to Shell plc and the relocation of the headquarters from the Netherlands to the UK. In 2023, environmental charity Client Earth filed a **derivative suit** against the board members of Shell with the High Court of England and Wales. The plaintiff,

supported by various large institutional investors, advanced the argument that the members of the board of Shell plc had **failed to adequately address climate-related risks**, pointing to a lack of sufficient emissions reduction targets in the short and medium term. However, the High Court declined to permit the case to proceed to trial, determining that the plaintiffs had not met the threshold for establishing a *prima facie* case.

2. Legal Basis for the Case

The legal basis invoked by the plaintiffs in *Milieudefensie et al. v. Shell* is a broadly formulated '**social standard of care**' enshrined in the Dutch Civil Code (Art. 6:162). Both the District Court and the Appeals Court interpreted this open-ended standard in light of several factors including climate science and various sources of law not normally considered directly applicable to corporations including the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**; see our [ESG Update 11/23](#)) and the UN Guiding Principles on Business and Human Rights (**UNGPs**). The judges further had regard to human rights, specifically the right to life and the right to respect for private and family life under the European Convention for the Protection of Human Rights and

Fundamental Freedoms (ECHR, Art. 2 and 8) and the International Covenant on Civil and Political Rights (ICCPR, Art. 6, 17), respectively.

3. The Appeals Court Decision

On 12 November 2024, the Court of Appeal upheld the appeal, quashing the District Court's decision, denying the claims of Milieudefensie et al., and ordering the plaintiffs to pay the (moderate) costs of the proceedings and the respondents' attorney fees. An appeal in cassation may be filed with the Dutch Supreme Court.

4. Key Points

The main question to be assessed by the Appeals Court was whether, on the basis of the social standard of care invoked by the plaintiffs, an obligation on Shell arises requiring the company to reduce its CO₂ emissions by a certain percentage.

4.1 Climate Change and Human Rights

In assessing whether human rights are relevant in determining the standard of care owed by Shell, the Court had regard to relevant precedents in public climate litigation, namely *Urgenda v. The Netherlands* (Supreme Court of the Netherlands), the recent European Court of Human Rights ruling in *KlimaSeniorinnen v. Switzerland*, case law in jurisdictions outside of Europe, as well as various resolutions and reports of UN bodies, including UN General Assembly Resolution 76/300 recognising the human right to a clean, healthy and sustainable environment.

Reflecting on these sources, the Court found that 'there can be no doubt that protection from dangerous climate change is a human right'. While the primary responsibility rests with legislators and governments, the Court said, companies may also have a responsibility to counter dangerous climate change (see also below, 4.2).

4.2 Indirect Horizontal Effect of Human Rights

In the context of human rights, the Court made several notable considerations. While recognising that governments are primarily responsible to protect citizens from violations of their fundamental rights, the Court acknowledged that under Dutch law (and EU law), fundamental human rights may also be invoked, to some extent, by citizens in their relationships with private actors such as companies (**indirect horizontal effect**). Accordingly, fundamental human rights may be used to interpret open standards such as the social standard of care invoked by the plaintiffs. In applying the indirect horizontal effect to climate change, the Court drew on the OECD Guidelines (which since their 2023 update contain specific recommendations concerning climate change), the UNGP, as well as several initiatives (e.g., the ISO Net Zero Guidelines of 2022 and the Race to Zero initiative).

For the Court, there was no doubt that climate change is 'the greatest issue of our time'. It said it was an established fact that 'fossil fuel consumption is largely responsible for creating the climate problem' and that addressing climate change is 'something that cannot wait'. In sum, the Court concluded that companies like the respondent **have an obligation to limit CO₂ emissions** (and thus a responsibility for achieving the targets of the Paris Agreement), even if this obligation is not explicitly enshrined in the (public law) regulations of the jurisdictions in which the company operates.

4.3 Effect of Climate Legislation in the EU

The Court acknowledged that based on the EU Green Deal and the Fit for 55 package, a considerable amount of EU legislation has been passed. This includes, in particular, the EU Emissions Trading Scheme Directive, as amended, the Corporate Sustainability Reporting Directive (CSRD) (see our [ESG Update 6/24](#)),

and the Corporate Sustainability Due Diligence Directive (CSDDD). The Court took note that the regulatory framework has tightened in the period between the District Court's ruling in 2021 and 2024.

The respondent argued that there is no room for adjudication by a civil court. Rather, decisions on CO₂ emissions reductions require a balancing of interests that can only be achieved by the legislator. The legislator did not enact a specific requirement for companies to achieve CO₂ emissions reductions by a given date. The Court of Appeals rejected this line of argument. It held that the legislative measures are not exhaustive in and of themselves. Accordingly, the Court held, the regulatory framework, while relevant, does not *preclude* a duty of care based on the social standard of care (Art. 6:162) on an individual company to reduce CO₂ emissions. The Court held that companies have a 'general' obligation (social duty of care) to reduce their emissions, which goes beyond simply adhering to specific regulations.

4.4 New Investments in Oil and Gas

The plaintiffs argued that Shell's current policy of investing substantially in new oil and gas field causes carbon lock-in effects (due to the long payback period of oil and gas infrastructure) and is not compatible with the Paris Agreement. While recognising this issue, the Court considered the question to be outside of the scope of the proceedings.

4.5 Obligations regarding Scope 1 and 2 Emissions

The plaintiffs' claim for a reduction of 45% emissions until 2030 (relative to 2019 levels) was not granted by the Court. The Court observed that Shell has set (and largely achieved already) a Scope 1 and 2 emissions reduction target for 2030 equivalent to that claimed by the plaintiffs. The judges were not convinced by the argument that there is a threat of Shell failing to achieve its targets.

4.6 Obligations regarding Scope 3 Emissions

Scope 3 emissions, meaning indirect emissions other than from purchased electricity (Scope 2), account for the vast majority (about 95%) of Shell's total CO₂ emissions (in particular, emissions from the use of sold fossil fuels). Recognising that Shell does not have full control over its Scope 3 emissions, the District Court had imposed a so-called 'best effort'-obligation to reduce Scope 3 emissions by 45% until 2030. The Appeals Court acknowledged a broad consensus that, **at the global level**, net zero emissions by 2050 and net -45% by 2030 as an interim target are required to limit average temperature increase to 1.5°C. However, the Court found that it cannot determine a specific percentage by which Shell must reduce its emissions. In the Court's view, the global pathway is not designed for the purpose of being applied to individual companies. Rather, different reduction pathways are appropriate for different sectors (and countries). In other words, the Court found it inadequate to apply the global reduction pathway to an individual company whose emissions are spread across several sectors. *Obiter dictum*, the Court rejected Shell's argument that it has no influence on its Scope 3 emissions. In turn, the Court was not convinced about the **effectiveness** of a (hypothetical) reduction order on Shell, thus denying that the plaintiffs have a **legal interest** in the claim concerning Scope 3 emissions.

4.7 Result

While recognising that Shell, a major fossil fuel company, has a 'special responsibility' to contribute to climate change mitigation, the Court rejected imposing a specific percentage (45% or any other percentage) by which Shell must reduce its emissions. Therefore, the appeal was upheld.

5. Implications and Outlook

Milieudéfensie et al. v. Shell is a pilot case that attracts worldwide attention. A particularly interesting aspect is that the case is located at the intersection of public international law, international standards on responsible business conduct (the OECD Guidelines and the UNGP), and private law. The standard of care relied upon by the plaintiffs is broadly equivalent to similar legal requirements in other jurisdictions, making the case generally transferrable to those jurisdictions.

While quashing the District Court's unprecedented reduction order of 2021, the Court of Appeals reiterated, in unequivocal terms, that major emitters have a **legal responsibility to contribute to climate change mitigation**. This marks the first time globally that an Appeals Court finds in favour of such a novel legal duty. Further, the Court justified its **refusal to impose a specific reduction order** on the basis that there was *currently* a lack of consensus for translating a global pathway to net zero into an individual pathway for a single company (in this case, a group of companies). Accordingly, if such a consensus were to emerge in the future, it is conceivable that a court would impose a reduction order. In any event, it seems likely that the matter will be taken to the Supreme Court of the Netherlands.

For Swiss companies, it is advisable to closely monitor the subsequent developments in this case, as well as other significant climate change proceedings currently underway in Germany (e.g., *Lliuya v. RWE*), France, Switzerland, and other jurisdictions. For a comprehensive perspective, the implications of developments in **public climate litigation** (against governments and governmental agencies), such as those from the recent ruling of the European Court of Human Rights in *KlimaSeniorinnen v. Switzerland*, must also

be considered (see our [ESG Update 4/24](#)). The evolution of climate change litigation has significant implications for the potential **materiality of climate litigation risks** of a company. These risks must be evaluated and, when applicable, disclosed in accordance with emerging sustainability reporting frameworks, such as CSRD. Furthermore, they are pertinent to the formulation of corporate **net zero strategies**, the development of **transition plans** and the setting of **targets**, as well as related corporate communications. Notably, under Swiss law, companies are required to achieve net zero greenhouse gas emissions until 2050 at the latest (Art. 5 Climate and Innovation Act, in force as of 1 January 2025).

Environmental, Social and Governance (ESG) & Sustainability have become key strategic issues for companies and their boards. The transition to more sustainable business practices presents both challenges and opportunities for companies. Walder Wyss can help you navigate the complex and rapidly evolving ESG & Sustainability landscape. See [here](#) for more information.

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