



Climate Dispute Risks for (Swiss) Companies

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Key Take-aways

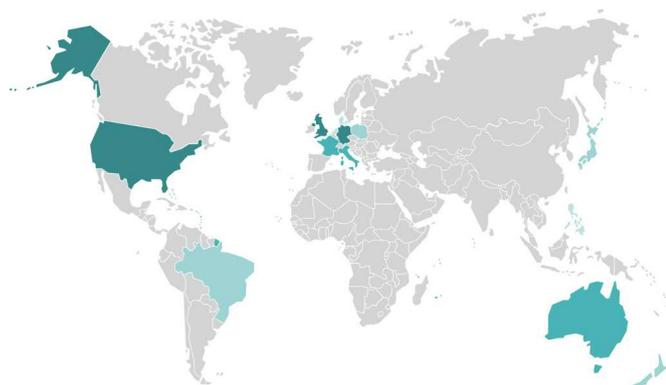
- 1.** Climate litigation against businesses has become a global phenomenon and there has been a surge in cases in Europe in recent years.
- 2.** Plaintiffs are developing novel arguments and theories to overcome procedural and substantive hurdles.
- 3.** Switzerland is likely to see climate actions against companies and directors similar to those brought in Germany, the Netherlands, the UK and France.

In the first edition of our ESG Disputes Reporter Series, we provide an overview of the global climate litigation landscape for businesses, with a special focus on the climate dispute risks faced by Swiss companies and their directors.

Since the adoption of the Paris Agreement, climate litigation is on the rise, with a marked increase in lawsuits being filed in just the last two years. Not only is the number of cases growing globally, the range of actors involved is expanding. While most actions are still brought against governments, there is an upsurge in climate litigation against businesses. Companies operating in emissions-intensive industries, but also increasingly those in the financial sector, including banks, asset managers and other financial entities, are under growing public scrutiny and pressure to do their part in reducing emissions with a view to achieving the transition to net zero, and are facing targeted climate litigation based on new theories of liability. The US continues to be the hotspot for such litigations, but there has been a surge in cases in Europe, with high-profile actions or investigations against major companies such as Shell and its board of directors, Total, RWE, DWS (Deutsche Bank's asset management arm), and a number of car manufacturers, among others.

Switzerland has not (yet) followed this climate litigation trend and is generally perceived as a non-litigious jurisdiction. At the date of this publication, there is no publicly known case where a company has been directly sued for acts or omissions related to its carbon emission targets or environmental obligations more generally. However, Switzerland has recently enacted reporting obligations on environmental and social matters. It remains to be seen whether the new legislation or other recent developments will change the climate litigation landscape in Switzerland.

1. Global climate litigation landscape against companies



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Data source: US and Global Climate Change Litigation Database by The Climate Change Chart

Jurisdictions globally with ongoing or recent climate litigations against companies and directors.

1.1 Jurisdictions

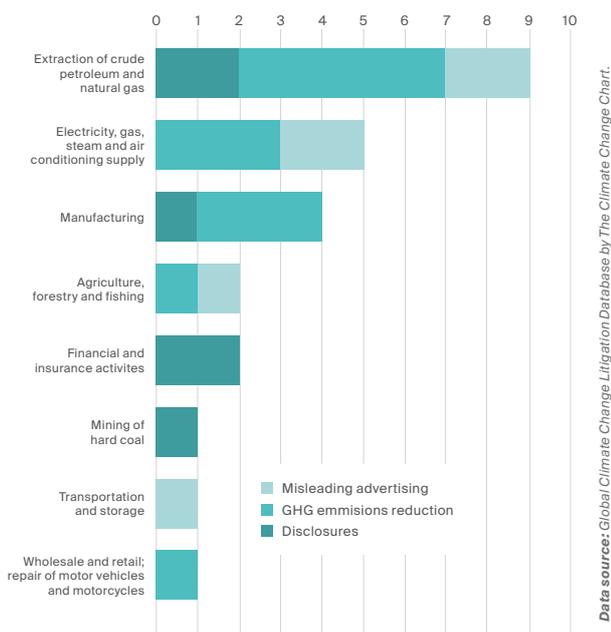
The **United States** is the jurisdiction with the highest number of climate cases against companies and directors worldwide. Numbers are on the rise in further jurisdictions such as Australia and Indonesia.

In **Europe**, Germany has seen the highest number of emissions reduction cases, with three actions brought against car manufacturers and another two against companies in the electricity supply and oil and gas sectors. Groundbreaking decisions – such as the May 2021 *Millieudéfensie et al. v. Royal Dutch Shell plc.* decision in the Netherlands – have been rendered that may lead to an increase in litigation in the coming years. Climate cases have also been brought against companies in France, Italy, Denmark and Poland; and in March 2022, shareholder NGO ClientEarth brought an action before the English High Court against Shell's board of directors in a case that could set a precedent for climate derivative claims against company directors.

1.2 Industries

Globally, climate actions have mainly targeted companies in **emissions-intensive industries** such as oil and gas extraction.

In Europe, climate actions are also being brought against companies in the sectors of (i) electricity, gas, steam and air conditioning supply, (ii) manufacturing, (iii) agriculture, forestry and fishing, and (iv) **financial services and insurance**. Moreover, cases are on the rise against companies in the mining, transportation and retail industries.



Number of cases related to greenhouse gas emission reduction and misleading reporting, advertising or disclosures per industry in Europe.

1.3 Litigants

Climate cases against companies in Europe are being initiated predominantly by **NGOs and individual plaintiffs** supported by NGOs. For example, Milieudefensie and multiple other NGOs brought an action alongside more than 17,000 citizens against Royal Dutch Shell plc. in the Netherlands to seek a ruling that Shell must reduce its emissions by 45% by 2030 in line with the Paris Agreement. Germanwatch, an NGO that "advocate[s] for a political, economic and social framework which can ensure a future for the people of the South" is currently assisting Peruvian farmer, Mr. Luciano Lliuya, in a lawsuit against Germany's largest electricity producer RWE AG, alleging that due to its emissions, the company bears responsibility for the melting of mountain glaciers near to Mr. Lliuya's hometown in Peru, which puts his land at risk of flooding.

A number of actions have also been initiated by **shareholders** against the companies in which they participate. NGOs and individuals are even acquiring

shares with the specific aim of bringing such actions. NGO ClientEarth, for example, has acquired shares in both Polish energy company Enea and (as mentioned above) in Royal Dutch Shell and has invoked shareholders rights to bring actions against the board of those companies in Poland and the UK, respectively, in order to challenge climate-related decisions, strategies or policies, or the failure to implement such strategies.

Regulatory and supervisory authorities, too, are increasingly scrutinizing and taking action against companies for their climate-related disclosures and advertising. For example, the relevant authorities in the UK and in Italy have ruled against RyanAir, Shell, and ENI for purportedly making misleading statements about the environmental performance of their activities or products in advertising campaigns. More recently, the U.S. Securities and Exchange Commission and Germany's supervisory authority BaFin have initiated investigations against Deutsche Bank's asset management arm, DWS, for allegedly overstating the environmental, social and governance rating of its investments.

1.4 Types of climate actions

While there is a wide range of actions being brought against companies and directors in relation to climate change and the transition to net zero, they mostly fall within two broad categories: (i) actions relating to a company's greenhouse gas emissions and (ii) actions relating to the (mis) communication of climate-related information.

1.4.1 Emissions-related actions

Actions are being brought against companies with a view to establishing responsibility for damages caused by greenhouse gas emissions and to compel companies to restrict future emissions and their impact.

One of the leading cases seeking to **establish liability** for climate impact caused by emissions is the German case *Luciano Lliuya v. RWE AG* mentioned above. Mr. Lliuya contends that RWE is a major contributor to the greenhouse gas emissions causing climate change and as such, liable for the fact that a lake near his hometown in Peru is on the brink of overflowing due to the melting of a glacier, creating a flood risk to his land. Mr. Lliuya is seeking a contribution from RWE towards the cost of draining the lake and setting up flood protections, based on principles of German civil and tort law. Although the lower court dismissed the action, the Higher Regional Court of Hamm made an order that the claim should proceed to the evidence stage, which is currently ongoing.

Cases have been brought in Germany, the Netherlands, the UK and France with a view to compel companies to **curb future emissions**.

Three German car manufacturers are currently facing separate legal **actions** in Germany in relation to their carbon emissions. The plaintiffs argue that the car manufacturers' failure to clearly and irreversibly commit to phasing out the

sale of cars with internal combustion engines by 2029/2030 infringes the fundamental right to climate protection and the rights and freedoms of future generations. A similar [action](#) has been brought against oil and gas company Wintershall Dea AG where the plaintiff is requesting the court to order the company to tighten its carbon emissions target and to cease extracting natural gas and crude oil nationally and internationally by 2025. In all four cases, the plaintiffs are basing their actions on the German Federal Climate Protection Act of 2019 (amended in 2021) and a recent decision of the German Federal Constitutional Court ([Neubauer v. Germany](#)) where the court accepted that Germany has a limited total CO2 emissions budget at its disposal. The plaintiffs against the car manufacturers are also relying on the Paris Agreement and German tort law, and seeking injunctions prohibiting the car manufacturers from placing internal combustion engine vehicles on the market after 2029/2030. All four cases are still ongoing.

Cases have been brought in Germany, the Netherlands, the UK and France to compel companies to curb future emissions.

In the [Millieudéfensie et al. v. Shell](#) case in the Netherlands, a Dutch court ordered Shell to reduce its emissions by 45% by 2030, on the basis that Shell had an 'unwritten standard of care' under Dutch law. The court sided with the plaintiffs (which relied on Articles 2 and 8 of the European Convention of Human Rights) to find that climate change is a human rights matter and that companies have a duty to respect human rights. The court further ruled that *"respecting human rights is not a passive responsibility: it requires action on the part of businesses"* and that the consequences of climate change is a human rights threat to Dutch residents and those of the affected local area. This decision, handed down in May 2021 (but which is currently under appeal), has been extensively reported on and is likely to have an impact on litigations in other jurisdictions.

Following the ruling against Shell in the Netherlands, NGO ClientEarth [announced](#) in March 2022 that it had started legal action against the board of directors of Shell in the UK. ClientEarth alleges that Shell's board is in breach of its duties under the UK Companies Act for having failed to adopt and implement a climate strategy aligned with the Paris Agreement. ClientEarth is currently awaiting a response from Shell following the notification of its claim.

In 2018, in the case [Notre Affaire à Tous et al. v. Total](#), French NGOs, alongside French local governments, called out French energy company Total for allegedly failing to include adequate greenhouse gas emissions reductions targets in its 'vigilance plan' under the 2017 French Law on the Duty of Vigilance. In 2020, relying on that same legislation and on the French Environmental Charter, the NGOs and local

governments filed a lawsuit to compel Total to publish a new vigilance plan that should include an undertaking to adopt appropriate measures to reduce its greenhouse gas emissions. The Nanterre judicial court is due to hear the case after a jurisdictional challenge by Total was rejected.

1.4.2 Climate actions related to (mis)communication of climate-related information

The second broad category of climate actions relates to the (mis)communication of climate-related information, be it by providing false or misleading information on environmental performance – also known as "greenwashing" – or by failing to disclose climate risks. There has been a sharp increase in this type of case in the last two years. These cases are brought by private parties, including shareholders and consumers, or by regulatory or supervisory authorities.

For example, the Commonwealth Bank of Australia faced an [action](#) by two of its shareholders in relation to its alleged **failure to disclose business risks related to climate change**, including a potential investment into a controversial coal mine. The plaintiffs alleged that the bank had violated the Australian Corporations Act of 2001 and sought an injunction to stop the bank from making the same omissions in its future annual reports. After the bank acknowledged the risks of climate change and pledged to estimate the risks of the bank's business, the plaintiffs withdrew their action in 2017. The same plaintiffs brought another [action](#) against the bank in 2021 seeking access to further documents relating to the bank's reported involvement in several gas and oil projects. That case is still pending.

There has been a sharp increase in greenwashing cases in the last two years.

DWS is currently under investigation by German regulator BaFin, due to allegations that it has been marketing sustainable financial products as more sustainable than they in fact are and therefore mis-selling products. A raid was conducted on DWS and Deutsche Bank premises in May 2022. The German public prosecutor's office is pursuing the investigation, including as to whether the alleged **greenwashing** could amount to prospectus fraud.

The Advertising Standards Authority in the UK has issued rulings against [RyanAir](#) and [Shell UK Ltd](#) for making misleading claims about the environmental performance of their activities or products in advertising campaigns. RyanAir was prohibited from continuing a campaign in which it claimed to be "Europe's Lowest Fares, Lowest Emissions Airline", while Shell was prohibited from stating that its Shell Go+ scheme allowed customers to "Drive carbon-neutral".

2. Climate litigation risk for companies and directors in Switzerland

2.1 Current landscape

Swiss courts have so far been called to consider climate-related issues only in a limited number of cases, including (i) an action (currently pending before the European Court of Human Rights) brought by the Swiss NGO "Senior Women for Climate Protection" against the Swiss government demanding that the federal authorities correct the course of the Swiss climate policy to limit global warming to a safe level; and (ii) two criminal [cases](#) concerning climate activists protesting against a major Swiss bank, where the court examined whether the activists (charged with trespassing and property damage) could rely on the defense that they were acting under a "state of necessity" due to the urgency of climate change. In both criminal cases, the lower courts recognized the existence of a state of necessity related to the dangers of climate change, but were overruled on this point by the higher courts, including the Swiss Federal Supreme Court.

For the time being, however, there is no publicly known case where a **company** has been directly sued for acts or omissions related to its carbon emission targets or environmental obligations in Switzerland.

This might be explained to some extent by Switzerland's **non-litigious culture**, which was recently highlighted in the debate surrounding the Responsible Business Initiative (RBI). The RBI, if adopted, would have created a legal basis for Swiss parent companies to be held liable for human rights violations and environmental damage caused by their foreign subsidiaries. Opponents of the initiative spoke of a potential "tsunami" of human rights and climate-related litigation, and this perceived threat was one of the driving factors for the ultimate (narrow) rejection of the initiative.

Following the rejection of the RBI, legislation was adopted by the Swiss Parliament in 2021 introducing **reporting obligations** for large, public interest companies (such as listed companies, banks and insurance companies) on environmental and social matters, as well as specific supply chain due diligence and reporting obligations in relation to minerals and metals originating from conflict-affected areas and to child labor for companies domiciled in Switzerland. As a consequence of the introduction of these new reporting obligations, Swiss companies face increased exposure to climate litigation, especially by shareholders.

In 2021, in accordance with the requirements of the Paris Agreement, the Swiss Federal Council adopted Switzerland's long-term Climate Strategy, which sets out climate policy guidelines and establishes strategic targets for key sectors for achieving the net-zero target by 2050.

Other developments are taking place in the regulatory context. In 2021, the Swiss Financial Market Supervisory Authority FINMA carried out several on-site inspections of supervised financial institutions, looking at the

management of funds with a focus on sustainability, and subsequently published guidance on preventing and combatting **greenwashing**. Moreover, the State Secretariat for International Finance has been instructed by the Swiss government to work with FINMA on the need to regulate in order to prevent greenwashing and come up with proposals by this autumn. However, a parliamentary initiative to include a specific provision on greenwashing in the catalogue of unfair advertising practices under the Swiss Unfair Competition Act was very recently rejected.

Swiss companies face increased exposure to climate litigation, especially by shareholders.

2.2 Potential exposure

Given the rapidly evolving landscape of both regulation and litigation, the question arises as to whether Swiss companies could soon face similar actions to those, described above, that have been brought in other jurisdictions – including in some of Switzerland's immediate neighbors.

2.2.1 Litigants

As seen above, climate actions against companies are predominantly being brought by NGOs, individual plaintiffs (often with the support of NGOs), shareholders and regulatory and supervisory authorities.

Under Swiss law, whether or not **NGOs** can bring a climate action will depend on their legal form (association or foundation), on their membership and on their statutory purpose, as well as on the type of action. Associations can only appear as a party before courts if this serves to achieve their statutory purpose and is in the interest of (most of) their members, and similar restrictions apply to foundations. These hurdles may stand in the way of NGOs themselves bringing climate actions in Switzerland, at least when it comes to claims for monetary relief – although in the past special purpose vehicles have been set up specifically to overcome existing restrictions. In any event, NGOs can support individual plaintiffs in bringing such claims, including by funding the costs of their legal representation.

Shareholders can bring actions under Swiss law against the company itself (mainly by challenging shareholders' resolutions) or against its directors (direct or derivative action). While such actions would traditionally be heard in state courts, Swiss companies may, from 1 January 2023, include an arbitration clause binding their shareholders in their articles of association, meaning that future climate actions could end up being subject to arbitration.

Regulatory and supervisory authorities can carry out investigations and take enforcement action against companies, provided there is a sufficient legal or regulatory

basis. Under the Unfair Competition Act, the Swiss state itself may take action against a company to protect public interests. As far as FINMA is concerned, its scope of action is limited for the time being, mainly because specific sustainability-related transparency obligations and an effective legal basis are currently lacking. However, this could soon change with the introduction of new regulatory measures.

Plaintiffs could rely on novel arguments developed in other jurisdictions before the Swiss courts.

2.2.2 Types of actions

Given the developments set out above, the possibility that Swiss companies and their directors could face emissions-related actions, or actions related to greenwashing or a failure to disclose climate-related information is no longer remote. However, the plaintiffs in such cases would face several hurdles, both procedural and substantive.

Tort-based claims would require demonstrating that an absolute right (such as the right to physical integrity) or, if the damage claimed is purely economic, a specific protective norm (*Schutznorm*) has been breached. There is currently no fundamental 'right to climate' under Swiss – or international – law that could directly be relied on by plaintiffs, and in any event such a right would in principle not have a horizontal effect and therefore not create obligations for Swiss corporations. However, it is worth remembering that plaintiffs in other jurisdictions have faced or are facing similar hurdles and are finding novel arguments based on a combination of tort law and fundamental rights to overcome them – the *Milieudefensie et al. v. Shell* case in the Netherlands being the leading example. Moreover, Switzerland is one of five countries to sponsor a draft resolution presented to UN Member States on 27 June 2022 aimed at recognising the right to a safe, clean, healthy and sustainable environment as a human right.

The introduction of ESG reporting and due diligence requirements (mentioned above) means that directors of Swiss companies are at an increased risk of facing civil liability actions based on **Swiss company law** (Article 754 of the Swiss Code of Obligations), especially by shareholders. However, plaintiffs would have to demonstrate that a failure to fulfill reporting or due diligence obligations resulted in a damage either to the company (in a derivative action), or to themselves (in a direct action). Demonstrating loss and causation is a significant hurdle in any climate litigation, which is also faced by plaintiffs in other jurisdictions – for example in the *Luciano Lliuya v. RWE AG* case in Germany – and developments in neighboring countries should therefore be monitored closely.

If companies are required under the new legislation to produce an **ESG report**, that report is subject to mandatory approval by the shareholders' meeting. Shareholders may consequently seek to challenge the resolution approving the ESG report if they consider that it fails to disclose climate-relevant information or includes misleading statements on the climate performance of the company's activities or products.

There are indications that Swiss authorities intend to take a more aggressive stance when it comes to climate-related information provided by financial institutions and other regulated entities. As mentioned above, FINMA may soon have a mandate to effectively prevent **greenwashing** if new regulatory bases are adopted. Individual consumers, consumer organizations and competitors may also bring court proceedings against companies based on the Swiss Unfair Competition Act in case of greenwashing in marketing communications, or make a complaint to the Swiss commission for fair communication (*Schweizerische Lauterkeitskommission / Commission Suisse pour la Loyauté*). However, demonstrating that claims made in an advertising campaign as to ecological or climate-related performance are misleading is often difficult, and the advertising campaign may be over by the time a decision is rendered.

3. Conclusions

The landscape of climate litigation against companies and their directors is rapidly changing, with a number of cases currently pending in Europe that could have an impact well beyond national borders. Although some actions rely on specific climate-related legislation, in many cases they are based on more general legal principles, which the courts are being asked to interpret and apply in light of international and soft law instruments such as the Paris Agreement, the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

Only a handful of those actions have reached the stage of a final ruling, and it remains to be seen how many will ultimately be successful. Irrespective of their outcome, however, the impact of such actions on a company is significant, both in terms of resources and reputation.

Novel arguments and theories developed in cases brought in France, Germany, the UK and the Netherlands, for example, could be relied on by plaintiffs before Swiss courts. Swiss companies and their directors are therefore well advised to stay abreast of international developments, especially those in neighboring jurisdictions, and take action to review their individual exposure to climate litigation.

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