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ESG litigation risk in Europe

Why companies, their directors, and insurers should take notice

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Product liability in a changing world

Contents

To address these challenges, CMS insurance experts from multiple jurisdictions will discuss:

As environmental, social, and governance (ESG) principles gain prominence in corporate decision-making, they are also becoming focal points for litigation and regulatory scrutiny. The rise of activist litigation and greenwashing claims highlights the growing risks for companies, directors, and their insurers.

Meet the panel

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Introduction

- International ESG regulation continues to evolve such as the EU omnibus proposal
- ESG litigation risk is impacted by a combination of specific ESG regulation (often an EU level) and other developments in local legal systems (e.g. local laws/regulation on greenwashing, corporate reporting, directors' duties, parent company liability, etc
- The variety of regulations can be challenging for businesses operating internationally especially in highly regulated sectors such as asset management. For example, in addition to the EU SFDR, in the UK the FCA has introduced an anti-greenwashing rule and rules on ESG labels for funds
- Activist claims (often initially against governments) continue to test legal boundaries which in turn impacts litigation against corporates
- At the same time, there are some signs of an ESG backlash

ESG in Germany - Overview

Under German law, no specific obligation for management to act sustainably or in compliance with ESG.

BUT: Management has a general obligation to act lawfully and to ensure that the company's internal organisational structure complies with the law. This includes e.g.

- CSRD reporting obligations
- Supply Chain Act (LkSG)
- Greenwashing

ESG in Germany - Overview

Non-compliance can result in

Claims for damages by third-parties; e. g.

- Indemnity for unlawful business actions in case of misleading advertising (strict standards of the BGH)
- Indemnity for investment fraud if publications in connection with financial products or securities contain incorrect information in this regard
- Prospectus liability for incorrect, incomplete or misleading material information in the prospectus of a security or fund

Fines

Note: Questionable if companies can take recourse against governing bodies for imposed fines ! (BGH → EuGH)

Climate claims in Germany

In Germany, private individuals or non-governmental organisations (NGOs, e. g. Deutsche Umwelthilfe, Germanwatch) are trying to use climate claims to enforce climate protection measures against

The government

- There are judgements where the government was legally convicted
- Significant cases: BVerfG 2021 (Unconstitutionally of the Climate Protection Law (KSG)) and OVG Berlin-Brandenburg 2024 (final conviction of the Ministry of the Environment for insufficient climate protection measures)

or

Companies

- Climate claims against companies have, so far, been unsuccessful
- Significant case: Saúl v. RWE (no decision has been made yet; the last taking of evidence was on 19th of March 2025)

Increased liability risks due to Greenwashing

Current (and future) legal situation regarding Greenwashing claims

Germany

Legal basis: particularly (among others) the German Act against Unfair Competition (UWG)

- Misleading commercial practices, Sec. 5 UWG
- Transparency requirement, Sec. 5a, 5b UWG
- To specific legal requirements for advertising with environmental claims

Example: claim "climate neutral“

- Can be achieved not only through emission-free production but also through compensation
- Transparency requirement demands that consumers have to be informed about e.g. compensation measures and the scope of GHG accounting

EU

Directive of Empowering Consumers for the Green Transition (Directive (EU) 2024/825)

- Must be transposed into national law by March 27, 2026, and applied from September 27, 2026
- Aims to protect consumers from being misled by communications relating to the environmental, social, or circularity aspects of a product, including goods and services

Green Claims Directive (proposal)

- Obligations on how companies must substantiate, verify and communicate environmental claims before using them

Increased liability risks due to Greenwashing

Legal consequences and liability for Greenwashing claims

Company

Obligation to cease and desist, Sec. 13 UWG
- Includes duty to recall

Regulatory fines, Sec. 19 UWG
- Up to 4 % of annual turnover

Compensation for damage, Sec. 9 UWG
- Requires intent or negligence
- Includes damages arising for competitors as well as consumers

Confiscation of profits, Sec. 10 UWG

Directors & Officers

Internal: Sec. 43(2) Act of Limited Liability Companies (GmbHG) / Sec. 93(2) Stock Corporation Act (AktG)
- Liability includes all damages for company resulting from Greenwashing campaigns
- Benchmark: ordinary businessman: directors & officers must act in accordance with the law and create an internal organizational structure that ensures the legality of its actions

External: Sec. 9 UWG

Liability for direct actions and failure to prevent violations committed by the company

Increased liability risks due to Greenwashing

German case law

Extensive case law in Germany

Especially affected: claim "climate neutral" but also other sustainability claims, e.g. "green", "unlimited recyclability" and "100 % compostable"

Almost **all branches of industry** are affected; examples:

- Long-distance bus travel (BGH, I ZB 26/24)
- Sweets (BGH, I ZR 98/23)
- Vinegar cleaner (LG Stuttgart, 53 O 169/22)
- Investment trust (LG Stuttgart, 36 O 92/21 KfH)
- Heating oil (LG Konstanz, 7 O 6/21)
- Lamps (OLG Hamm, 4 U 57/21)

No case law regarding Greenwashing committed by **insurance companies** yet

Sources: OLG Düsseldorf, 20 U 72/22; LG Stuttgart, 53 O 169/22; OLG Düsseldorf, 20 U 152/22 / BGH, I ZR 98/23; LG Karlsruhe, 13 O 46/22; LG Linz, 3 Cg 69/22k – 8; LG Karlsruhe, 13 O 46/22 KfH

ESG in Italy - Overview

EU Regulations on Environmental Protection

Key EU Directives (i.e. CSRD and CSDDD)

D. Lgs. no. 2024/125 implementing CSRD in Italy:

- Extension of the subject involved;
- Increase in the information to be provided;
- Mandatory inclusion of sustainability information in the management report;
- Dual materiality principle;
- ESG integration along the value chain;
- European reporting standards;
- Liability and fines.

EU Green Deal & Climate Neutrality Goals

Greenwashing practical cases

- Rising consumer and public awareness
- “Greenwashing” risks

Greenpeace vs. ENI - Allegations: ENI is responsible for **greenhouse gas emissions** greater than Italy's total emissions

Greenwashing activities
→ Lack of Jurisdiction

Eni Diesel + - €5M fine for improper use of “green” and “bio” labels.

Acqua Sant’Anna - €30,000 fine for misleading “Bio Bottle” claims, removal of products from market.

The impact of ESG regulation in Italy

Alviero Martini

Factual background

- Since September 2023, the police inspected eight factories of the company and identified 197 workers, 37 of whom were employed illegally, it was found that processing was taking place under exploitative conditions, in presence of serious violations of safety in the workplace, as well as housing the workforce in dormitories built illegally and in unethical sanitary conditions

Allegations

- No verification of the entrepreneurial capacity of the contractors
- No inspections to assess the conditions of workers and working environments.

Dior and Armani

Factual background

- Prosecutors in Milan uncovered workshops where underpaid workers, often immigrants who were in the country illegally, produced leather bags then sold to Armani and Dior for a tiny fraction of their retail price.
- Investigations were carried out by the Italian antitrust authority for misleading conduct of the companies in violation of the Italian Consumer Code

Allegations

- No verification of conditions of workers and working environments.
- Exploitation of labour with very low production prices

The impact of ESG regulation in Italy

ESSELUNGA

Factual background

- The company employed workers in the group's logistics who in fact worked for the large company, but they were employees of cooperatives, consortia and other companies, the so-called ‘*labour pools*’, which were born and died in a short time, leaving debts.

Allegations

- Fraud on the ‘illicit supply of labour’ in the logistics sector of the group

Future Trends connected to ESG

1) Litigation arising from extreme weather events

2) Cases concerning short-lived climate pollutants: methane, black carbon soot, tropospheric ozone, and hydrofluorocarbons

3) International litigation between states

4) Litigation focused on biodiversity

5) Duties of the governments to protect from further climate impacts

Source: Global trends in climate change litigation: 2023 snapshot (published by the Centre for Climate Change Economics and Policy)

The Netherlands - Overview

EU Legislation Implementation Status

- CSRD
- CSDDD

ESG Litigation Climate

- The Netherlands continues to be an important forum for ESG litigation

Greenpeace v. Dutch State (ECLI:NL:RBDHA:2025:578)

The Hague District Court sides with Greenpeace

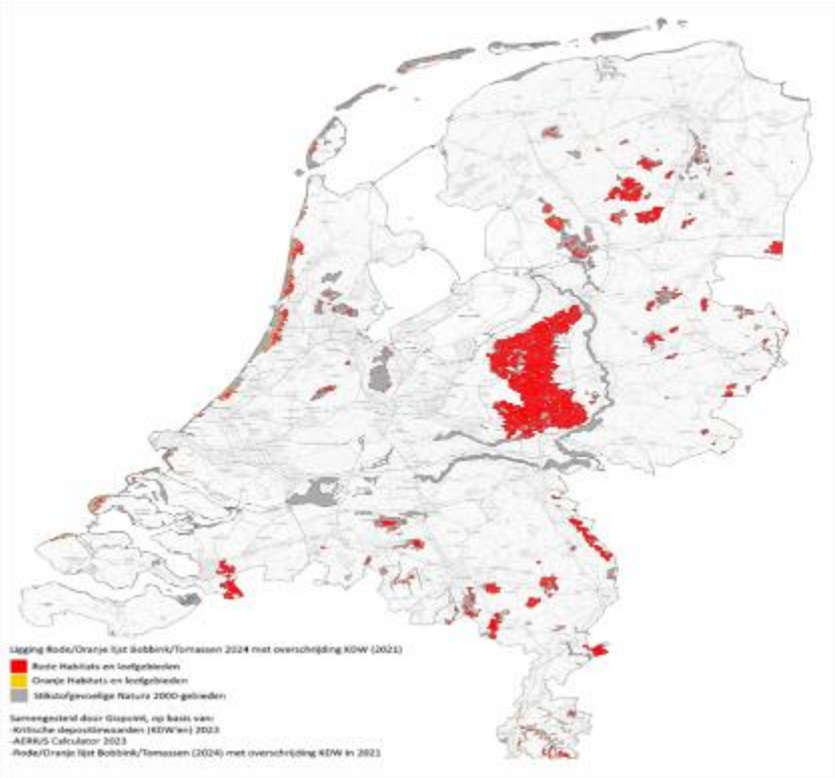
The Dutch State i.a. failed to meet its statutory nitrogen reduction target for 2025 and will very likely not meet its 2030 target, which constitutes a tortious act against Greenpeace

The Dutch State is ordered to comply with its reduction targets by 2030 and to prioritise protection of vulnerable nature

Remarkable: EUR 10m penalty payment awarded

Complementary to Urgenda case

Emissions versus biodiversity



Source: www.rechtspraak.nl (website Dutch judiciary)

Milieudefensie v. Shell (ECLI:NL:GHDHA:2024:2100 – English translation)

The Hague District Court sided with Milieudefensie (2021)

Shell was ordered: "(…) *to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels*"

The Hague Court of Appeal rejects claims of Milieudefensie

Scope 1 & 2: Shell is on track with reducing its emissions – no impending violation of a legal obligation

Scope 3: No legal obligation for Shell to reduce Scope 3 emissions by general standard of 45%

Obiter dictum: Milieudefensie has no legal interest in its Scope 3 emissions reduction claim – were Shell to stop selling, other parties would step into the void

Implications and next steps

Rabobank v. Greenpeace (ECLI:NL:RBAMS:2024:7219)

Greenpeace campaign against Rabobank

Activists unfurl gigantic "Wanted" banner in Amsterdam financial district, holding CEO of Rabobank CEO responsible for deforestation

Rabobank and CEO seek injunction

Prohibition on future violation of CEO's portrait rights and other individuals associated with Rabobank, along with removal/retraction of Greenpeace's statements

Amsterdam District Court

Injunction is denied. Action groups such as Greenpeace enjoy an elevated level of protection for freedom of expression

Source: www.greenpeace.org

Conclusions

- Compliance with ESG regulation will remain complex particularly for large corporations operating internationally and in regulated sectors
- While not all activist (and other ESG) claims are successful, companies and directors may incur significant costs in defending such claims representing a potential exposure for PI and D&O insurers
- Greenwashing claims remain a significant risk across many jurisdictions and underwriters may wish to ask about the internal verification processes in place where claims of ESG compliance are central to an insured's business model
- ESG litigation risk may be heightened by other legal developments, such as the growth in class actions

Questions

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