

Climate-related corporate obligations of the Volkswagen Group: Request for a declaration to cease and desist unlawful conduct

This is an English translation of the letter sent to Volkswagen on September 3rd 2021. The German original can be found here: <https://bit.ly/3mV05Hn>

Dear Dr. Diess,
dear executive board members,

We hereby declare that we are the legal representatives of

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2. **Roland Hipp**, c/o Greenpeace e.V., Hongkongstraße 10, 20457 Hamburg
3. **Clara Mayer**, c/o Greenpeace e.V., Hongkongstraße 10, 20457 Hamburg

Claimants 1 and 2 are executive directors of Greenpeace e.V. (pursuant to Section 26 of the German Civil Code (BGB)).

Greenpeace e.V. currently has more than 630,000 supporters and represents other private parties who are acutely affected by the consequences of climate change and future restrictions on their rights to freedom, their property rights, and their rights to life and health. These are, among others, owners of land used for agriculture and forestry.

In the climate lawsuit before the Administrative Court of Berlin (Case No. VG 10 K 412.18) alone, 213 people had Greenpeace represent them for the purposes of summons regarding specific rights violations caused by climate change.

Claimant 3, born 2001 is a nurse aid in a hospital and active in the Fridays for Future movement. She has given a speech at Volkswagen's 2019 annual general meeting, demanding the company to take appropriate climate protection measures. She has authorised Greenpeace e.V. as receiving agent to protect her personal address.

In the name of and on behalf of our clients, we draw your attention to the fact that the conduct of Volkswagen AG as regards its climate obligations has in the past been, and currently still is, unlawful.

The Volkswagen AG, which you manage as its CEO and executive board, and its subsidiaries and joint ventures (hereinafter also collectively referred to as “VW”) violate its duty of care and violate existing legal provisions for climate-friendly business practices. VW, therefore, poses a threat to the absolute rights, such as the property, health, and life of our clients, and their right to the future in the sense of the right to freedom as defined by the Federal Constitutional Court in Article 2, para. 1 of the Basic Law of the Federal Republic in its decision of 24 March 2021.

The violation of rights lies in the continuous release or production of attributable emissions of greenhouse gases, in particular, CO₂ without laying out and implementing the necessary strategy for the reduction of CO₂ within the company.

The transport sector is responsible for about a quarter of global CO₂ emissions. According to the International Energy Agency, passenger cars alone were responsible for 8.5 percent of global emissions in 2018. However, for example, emissions from transport in Germany fell by only 1 percent in 2020 compared to 1990 and rose globally by over 40 percent in the same period.¹ The VW’s global market share of passenger cars and light commercial vehicles is about 12 percent and it has therefore contributed significantly to this development.

Relevant product and environmental legislation, in particular type approvals and EU fleet requirements regarding CO₂ emissions in g/km, do not justify this.

Thus, the absolute legally protected interests of our clients, protected under sections 1004 and 823 of the German Civil Code (BGB), are infringed upon or threatened.

To avoid legal proceedings, we strongly advise you to align your business activities with the goals of the Paris Climate Agreement and, consequently, to immediately implement the minimum standards that can be established based on scientific findings and projections, and that can be tangibly and adequately specified in terms of your company’s obligations. These standards are described and named in detail below.

We call on you to issue a declaration that VW will comply with the requests formulated here and thus cease and desist from its current unlawful conduct. Moreover, we call on you, in the sense of the generally recognised right to information under Section 1004 of the German Civil Code (BGB), to explain to

¹ See Climatewatch, Historical GHG Emissions, https://www.climatewatchdata.org/ghg-emissions?breakBy=sector&end_year=2017&gases=co2§ors=transportation&start_year=1990 (28.08.2021).

us how you will implement the necessary reduction path to greenhouse gas neutrality.²

Should legal action nevertheless become necessary, we will request that

Volkswagen AG be **ordered**,

1. to reduce annual aggregated CO₂ emissions (Scope 1, 2 and 3) resulting from VW and its fully consolidated subsidiaries' development, production and sale of passenger cars and light commercial vehicles, as well as passenger car services, by at least 65 percent until the end of the year 2029, relative to 2018 levels, whereas methods and accounting principles have to be comply with the Greenhouse Gas Protocol of the World Resources Institute or comparable scientifically recognized standards.

2. to exercise continuous legal and actual influence on the joint ventures and shareholdings involved in the development, production and sale of passenger cars and light commercial vehicles, as well as passenger car services, in such a way that annual aggregated CO₂ emissions (Scope 1, 2 and 3) are reduced by 65 percent until the end of the year 2029, relative to 2018 levels, whereas the in Request 1 mentioned standards must be applied as well as the generally recognized principles of accounting.

3. to implement appropriate steps to ensure that throughout the Volkswagen AG – across all fully consolidated subsidiaries and brands involved in the development, production, sale of passenger cars and light commercial vehicles, as well as passenger car services, a maximum of 25 percent of all passenger cars and light commercial vehicles sold from 2021 to the end of 2029 are vehicles with internal combustion engines.

4. to exercise its legal and actual influence on the joint ventures and shareholdings involved in the development, production and sale of passenger cars and light commercial vehicles, as well as passenger car services, to keep the share of vehicles with internal combustion engines to the maximum percentage by the specified date as stated under Request 3.

5. to completely discontinue its sale of passenger cars and light commercial vehicles with internal combustion engines and the sale of passenger cars and light commercial vehicles with internal

² See Raff in *Münchener Kommentar BGB*, 8. Ed. 2020, § 1004, Rn. 242.

combustion engines by fully consolidated subsidiaries until the end of the year 2029 at the latest and beyond that to take appropriate measures across all entities to achieve emission neutrality by mid-century.

6. to exercise continuous legal and actual influence on the joint ventures and shareholdings involved in the development, production and sale of passenger cars and light commercial vehicles, as well as passenger car services, to ensure that the sale of passenger cars and light commercial vehicles with internal combustion engines is completely discontinued until the end of the year 2029 at the latest and beyond that to take appropriate measures across all entities to achieve emission neutrality by mid-century.

Grounds:

The Volkswagen AG is bound to comply with the climate-related duty of care obligations, notably to avert or remedy unlawful impairment of property and restriction of civil liberties of future generations.

That requires VW to align its corporate management based on scientific findings and projections to the objectives of the Paris Agreement of 12 December 2015, which now also have constitutional status and thus extend to civil law.

VW as a whole must, in particular, observe and acknowledge the absolute greenhouse gas budget still available and only generate the share of emissions it is entitled to in the global market. The current Sixth IPCC Assessment Report (AR6) has once again highlighted the knowledge of this and the limited time still available for transformation, including that of your field of business.

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I. The facts

Parties to the Paris Agreement, including Germany, commit to limit global warming to well below 2 degrees Celsius, and, if possible, to 1.5 degrees Celsius. Through the success of the constitutional complaint, which was lodged or supported by our clients et al., this goal has substantiated Article 20a of the Basic Law, thus acquiring constitutional status in Germany.³ According to this landmark decision, excessive emissions today and in the future interfere with the fundamental rights and legal positions of others.

To achieve the Paris target and to stop foreseeable nuisances, it is imperative that the state not only swiftly and effectively complete the necessary transformation,

³ See BVerfG, Decision by order of 24 March 2021 – Ref. 1 BvR 2656/18 et al. – para. 208.

but also that private sector stakeholders such as VW scale down their greenhouse gas emitting activities so that the global climate goal can be achieved.⁴ This was already recently decided by a court in a similar factual and legal position in the case against Royal Dutch Shell (RDS) in the Netherlands.⁵

RDS was ordered by the District Court of The Hague to limit the annual volume of all CO₂ emissions (Scope 1, 2 and 3)⁶ attributable to the Shell Group's operations and the energy products it sells, so that this volume is reduced by at least 45 percent net by the end of 2030, relative to 2019 levels.

The obligations also exist in German law because, also because – most recently through the climate decision of the Federal Constitutional Court – it has been legally recognised that the issue at hand is the total amount of greenhouse gases that may still be permitted to be released into the atmosphere. Widespread human rights violations and considerable infringement of legal positions protected under ordinary law can only be prevented if companies also accept their obligations, accept their share of responsibility and act accordingly. Climate science provides the sectoral forecasts based on this and defines the necessary standards. The Federal Constitutional Court has now raised this to the legal level of compulsory law.⁷

1. Science-based emissions reduction targets

The International Energy Agency (IEA) scenarios, which are commonly recognised standards, can provide the scientific basis for a corporation's climate policies and strategies. The Net Zero by 2050 scenario (NZE), a special report by the IEA, is particularly relevant.⁸

⁴ This has in the meantime become common consensus; see the joint declaration of 2019 by 73 parties to the UNFCCC and 786 companies on this subject, <https://unfccc.int/news/climate-ambition-alliance-nations-renew-their-push-to-upscale-action-by-2020-and-achieve-net-zero> (15 July 2021); see also footnote 3, no. 4.4.26.

⁵ See the Hague District Court, Judgement of 26 May 2021 – C/09/571932 / HA ZA 19-379, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> (7 July 2021).

⁶ The Greenhouse Gas Protocol (GHG Protocol) Corporate Accounting Standard is used here. It divides attributable emissions into three categories (scopes):

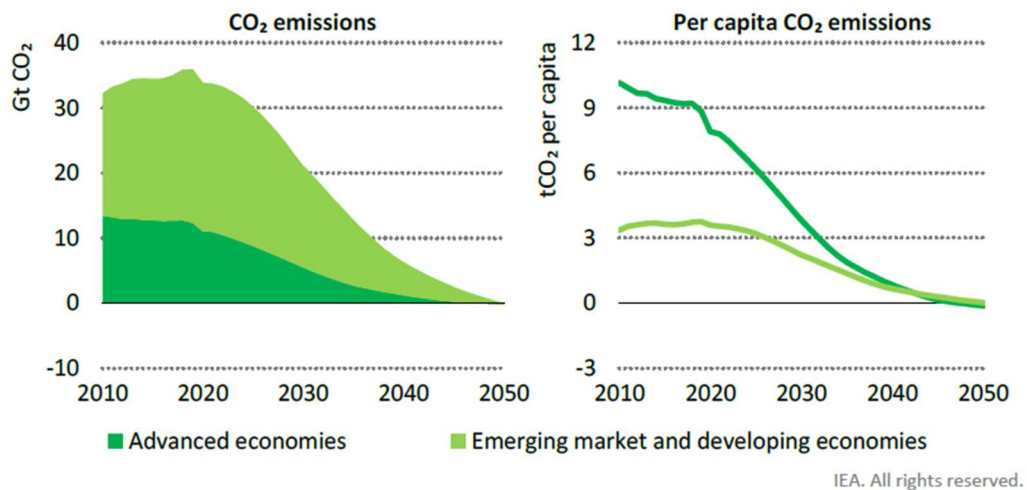
- Scope 1: direct emissions from sources that are partially or completely owned or controlled by an company or organisation.
- Scope 2: indirect emissions associated with the purchase of energy for the company or organisation's use (for example, electricity or district heat).
- Scope 3: all other indirect emissions, from the company or organisation's activities but are caused directly by third parties, in particular (upstream) suppliers or (downstream) consumers.

⁷ See Callies, in: ZUR 2021, pp. 355, 356: Strukturelle Kopplung von Klimawissenschaft und Recht. Die planetaren Grenzen sind rechtlich-absolute Leitplanken der Politik.

⁸ See results of the transport sector scenario: IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021, p. 131 ff.

In the NZE, the IEA describes the transformation necessary to achieve the 1.5-degree goal with a probability of 50 percent. It assumes that 500 gigatons of CO₂e of greenhouse gas emissions are still available globally.⁹ The current IPCC report confirms this but indicates that this amount could be reduced by up to 250 gigatons.¹⁰

Figure 1: Net global CO₂ emissions in the NZE scenario¹¹



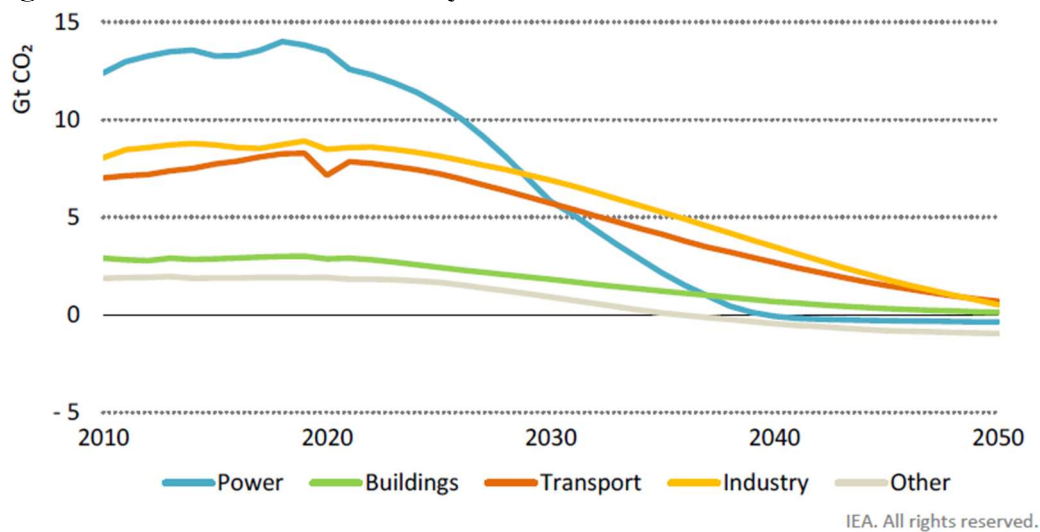
In addition, the IEA defines reduction pathways until 2050 for all energy-intensive sectors. These vary in their speed depending on the sector. While the NZE scenario assumes a CO₂ reduction of 60 percent for electricity generation by 2030 over 2020, the figure is 40 percent for the building sector and 20 percent for industry and transport, respectively. When differentiating the scenarios in detail, the IEA considers, among other things, the availability, maturity, and costs of technologies as well as varying framework conditions in different parts of the world

⁹ IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021 p.53

¹⁰ IPCC, Climate Change 2021: The Physical Science Basis – Summary for Policymakers, p. SPM 38.

¹¹ IPCC, Climate Change 2021: The Physical Science Basis – Summary for Policymakers, p. SPM 38.

Figure 2: Global CO₂ emissions by economic sector in the NZE scenario ¹²



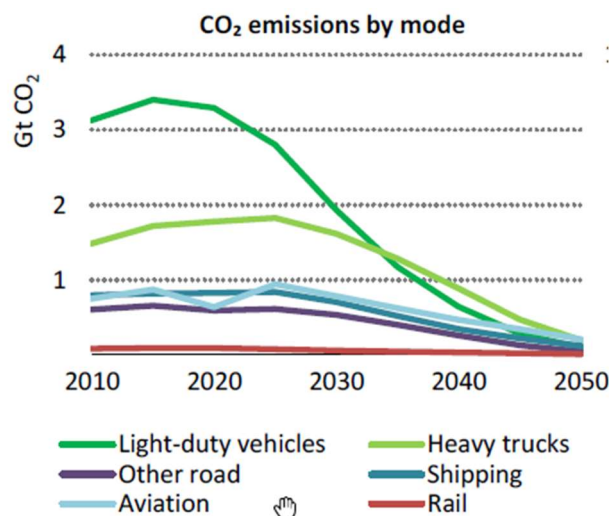
These sectoral scenarios consider technological feasibility and the availability of resources and then take the existing global budget and transform it into a framework within which states and companies can operate flexibly. The scenarios do not simply assume a linear reduction path for all sectors based on current consumption.

In the NZE scenario, fossil fuels may still be used to some extent in the transport sector in 2050; the emissions generated would be offset by removing CO₂ from the atmosphere (negative emissions). However, the IEA only foresees this possibility where no alternative technologies exist (such as aviation and ocean shipping), but not for light commercial vehicles and passenger cars. In the opinion of the IEA (as well as the IPCC), the expansion of the possibilities for the ‘use’ of negative emissions beyond these areas of application is not permissible, if only for precautionary reasons, since neither the large-scale use of such removal technologies nor the safe storage of the CO₂ captured is guaranteed.

The Dutch court also used the IEA scenario as a central benchmark in the case regarding the Shell Group’s compliance with reduction obligations. The basic principles applied by the court in The Hague in its ruling against Royal Dutch Shell can also be applied to the automotive industry.

¹² IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021 p.100

Figure 3: Global CO₂ transport emissions by mode in the NZE scenario¹³



Due to the uncertainties of the alternative sub-scenarios for the traffic/transport sector made transparent by the IEA, for which a scientifically accurate prognosis cannot yet be made, the All-Electric Case sub-scenario in the NZE is to be regarded as the most definitive scenario in this respect, and the one most likely to meet the Paris targets.¹⁴

This is because, NZE scenario itself, is based on the assumption that the measures it comprises, result in a carbon budget, which provides only a 50% chance to stay below the 1,5° C. Further insecurities would drop the chance of reaching this goal to under 50%, so that the most likely sub-scenario has to be chosen in order to keep the probability of the climate goals predominantly likely. This also means that for VW that the requested measures are the mildest remedy.

The IEA's NZE standard scenario assumes that the production of biofuel will increase nearly fourfold. That can de facto not be achieved. If we consider the indirect land use impacts of biofuels, their mitigation potential drops significantly and is even inverted, resulting in a negative value in the case of first-generation biofuels.¹⁵ The global potential for sustainably produced biofuels is limited so that the quantities available are to be used only where no alternative technologies exist, for example, in aviation. Moreover, the standard NZE scenario relies on the use of plug-in hybrids (in Scope 3). Studies show that the real-world consumption of plug-in hybrids is much higher than official type-approval values and that they,

¹³ IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021 p.132.

¹⁴ IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021, p. 140 f.

¹⁵ See European Environment Agency, 2020, Greenhouse gas emission intensity of fuels and biofuels for road transport in Europe, <https://www.eea.europa.eu/data-and-maps/indicators/greenhouse-gas-emissions-intensity-of-assessment> (15.08.2021).

therefore, do not have any significant mitigation potential compared to vehicles with conventional combustion engines.¹⁶ To exclude these unknowns, the IEA drafted the All-Electric Case which assumes the exclusive use of battery electric drives for decarbonisation in the passenger car and light commercial vehicle sectors at the same reduction speed as in the standard NZE scenario, thus rendering the standard NZE scenario and the older Sustainable Development Scenario (SDS) obsolete as benchmarks.

The requests formulated above apply the assumptions and requirements of the IEA All-Electric Scenario to the VW Group.

Requests 1 and 2 provide you with a precise reduction target for emissions for which the VW Group in its entirety is responsible by 2030. Request 2 formulates an obligation to endeavour applicable to joint ventures and shareholdings. Request 3 reflects the need, given the global budget, to limit the marketing of internal combustion engines even before 2030, while Request 4 again calls on joint ventures and shareholdings to observe their obligation to endeavour. Request 5 contains a cease-and-desist request for VW to refrain from marketing passenger cars and light commercial vehicles with internal combustion engines as of 1 January 2030; the content of Request 6 is the same but applies to joint ventures and shareholdings.

The claimants emphasise that this represents a conservative view and calculation because a) the IEA only assumes that the probability of meeting the 1.5-degree target is only 50 percent, b) the IEA scenario assumes major behavioural changes (such as a significant decline in motorisation levels and the use of cars in industrialised countries), in the absence of which even greater efforts in the move away from internal combustion engines would become necessary, and c) the figures used by VW (and which are therefore very optimistic) are used for Scope 1, 2 and 3.

These grounds for the above requests are based on the NZE standard.

Assuming a further increase in the global vehicle fleet to an anticipated 1.75 billion vehicles in 2030¹⁷ and real-world CO₂ emissions from global transport of 8.5 gigatons in 2019, as laid out in the relevant scenario, the IEA concludes that CO₂ emitted by this sector must not exceed 5.5 Gt in 2030 and 0.7 Gt in 2050.¹⁸ Due to technical transition hurdles in heavy goods vehicle (HGVs) traffic, which

¹⁶ Fraunhofer ISI and ICCT, 2020, Real-world usage of plug-in hybrid electric vehicles: Fuel consumption, electric driving, and CO₂ emissions. https://www.isi.fraunhofer.de/content/dam/isi/dokumente/cc/2020/PHEV_ICCT_FraunhoferISI_white_paper.pdf (22 July 2021).

¹⁷ See data on vehicle fleet in: IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021, p. 64, 134.

¹⁸ See IEA, Net Zero by 2050. A Roadmap for the Global Energy Sector, Special Report 2021.

will emit CO₂ over a somewhat longer period, emissions from passenger cars and light commercial vehicles (LCVs) must end by the late 2040s.

It should be noted that due to the useful life of passenger cars and light commercial vehicles, Scope 3 emissions¹⁹ are released over 15 years on average globally. That means that with a view to adhering to the global budget, sales must be stopped in good time, or at least a certain proportion of vehicles sold must be battery electric to be able to meet the required interim targets.²⁰ In addition, under Article 2 of the Paris agreement, greenhouse gas neutrality must be achieved worldwide by 2050, and in Germany, pursuant to Article 3 (2) of the Federal Climate Protection Act, as early as 2045.

For passenger cars and light commercial vehicles (LCVs), the IEA budget target requires that total emissions be cut by 41 percent by 2030. To achieve that, the global fleet must have roughly 620 million battery electric vehicles (BEVs) by 2030 as assumed in the IEA All-Electric Case. By 2050, the share of BEVs in the global fleet would have to be 100 percent.

The IEA expects global sales of passenger cars and light commercial vehicles to reach 100 million in 2030. Assuming a linear increase in sales from the 83.4 million forecast by IHS Markit for 2021, we can expect 817 million passenger cars and light commercial vehicles to have been sold worldwide by the end of 2029.²¹

With an average useful life of 15 years, the 6.8 million battery electric vehicles already in use today will still be part of the global fleet in 2030. To achieve the necessary 620 million battery electric vehicles in the fleet, 75 percent of the total number of passenger cars and light commercial vehicles sold from 2021 to 2029 must have a battery electric drive. In other words, in the same period, a maximum of only 25 percent of the vehicles sold should still be permitted to have an internal combustion engine. VW would achieve this by acting on Requests 3 and 4.

¹⁹ Category ‘emissions from use of sold products.’

²⁰ This is a very conservative estimate: the average age of vehicles in operation in the EU is 11.5 years, and in the USA 12.1. However, since the vehicle fleet has steadily increased over the past years, a longer useful life can be assumed. A study puts this at 18.1 years in Western Europe and 28.4 years in Eastern Europe. In other parts of the world (Africa, for example), an even higher average vehicle age and thus a higher average useful life can be assumed. See. <https://www.acea.auto/figure/average-age-of-eu-vehicle-fleet-by-country/>, <https://ihsmarkit.com/research-analysis/average-age-of-cars-and-light-trucks-in-the-us-rises.html> and <https://etrr.springeropen.com/articles/10.1186/s12544-020-00464-0> (21 July 2021).

²¹ See Global Auto Sales Expected <https://www.businesswire.com/news/home/20201217005798/en/Global-Auto-Sales-Expected-to-Gain-Momentum-Next-Year-83.4-Million-Light-Vehicles-to-Be-Sold-In-2021-According-to-IHS-Markit#:~:text=Global%20light%20vehicle%20production%20in,units%2C%20based%20on%20current%20analysis> (21 July 2021).

Based on this and the underlying global budget, the production of vehicles and light commercial vehicles with internal combustion engines must be fully discontinued by 2030 at the latest. This is specified in Request 5 (and for joint ventures and shareholdings in Request 6). In terms of the German market, this is logical because of Germany's goal of achieving greenhouse gas neutrality by 2045. For the global market, this phase-out deadline is necessarily justified by the fact that the average vehicle age of 15 years may be plausible for Germany but the length of useful life is significantly longer worldwide. Regardless of this, it must be taken into account that the IEA scenario is based on a probability of merely 50 percent, which means that it is very likely that the available budget has been overestimated. A timely phase-out in 2030 (in contrast to the 2035 phase-out currently proposed by policymakers, for example at the EU level)²² would ensure that the budget is met.

Scope 3 emissions make up 97.9 percent of the total emissions of the VW Group's passenger car and light commercial vehicle division. Science Based Targets Initiative (SBTI) certification of "well below 2 degrees Celsius" conformity exists for Scope 1 and 2 emissions, but there is no comparable certification for Scope 3 emissions. VW expresses the relevant targets in its so-called decarbonisation index (DKI), which indicates average CO₂ emissions per vehicle.

If Volkswagen adapted its Group strategy to the IEA's All-Electric Case, and discontinued all sales of passenger cars and light commercial vehicles with internal combustion engines as of 2030, and, if at the same time, we assume (conservatively)²³ the electricity mix described in the IEA's NZE scenario, the necessary reductions in the industrial sector, and the expected CO₂ reductions, particularly in battery production – the result would be a reduction in the CO₂ footprint of Volkswagen's passenger car and light commercial vehicle division of at least 65 percent. This is the objective pursued in Requests 1 and 2.

This goal is, as already stated above, in respect of the interests of VW the mildest remedy and at the same time in order to achieve the described climate goals of the Paris convention in perspective of the German tort law the only possible measure to stop infringing CO₂ emissions.

²² EU Commission, 2021, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2019/631 as regards strengthening the CO₂ emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition https://ec.europa.eu/info/sites/default/files/amendment-regulation-co2-emission-standards-cars-vans-with-annexes_en.pdf (1 July 2021).

²³ To determine the CO₂ intensity of the electricity mix projected by the IEA, the current CO₂ intensity of various electricity generation technologies was taken as a basis and further improvements were excluded. For batteries, an improvement in the greenhouse gas balance of one third was assumed, which is significantly below the progress achieved in the past decade.

2. Actual measures undertaken by VW

The targets as a standard of legally required conduct (see below) have not yet been met by VW, and the company has not remedied the ongoing violation of legally protected rights by announcing the implementation of an internal “climate strategy.”

a) Climate strategy completely off target

It is the declared goal of VW to contribute to limiting global warming to 2°C.²⁴ VW’s ambitions are at or above the maximum conceivable temperature rise under the Paris Agreement (“well below 2°C”). The Intergovernmental Panel on Climate Change (IPCC) recently warned again of the consequences of achieving only the 2°C target and issued an urgent recommendation for ambitious action to limit global warming to 1.5°C.²⁵ Moreover, VW’s target fails to satisfy the constitutional requirements of Article 20a of the Basic Law, at least to the extent that the value is specifically defined by legislation as being “significantly below 2° C.”²⁶ Establishing a target of 2° C rules out a significantly lower target. In this respect, it should be noted that the climate policies and strategies of VW as such are not in line with actual and legally adopted framework conditions.

b) Goals for 2030 widely off the mark

On 4 December 2018, Volkswagen announced a change of strategy at the Handelsblatt Automotive Summit. Referencing climate protection and the findings of the IPCC, Volkswagen presented its new shift towards electromobility.²⁷ At the summit, Volkswagen declared that the company would launch its last vehicle with an internal combustion engine around 2040. Today, VW no longer communicates this, therefore, the Group is now viewed as one of the car companies without a global phase-out date.²⁸

The strategy presented in 2018 did not consider the 1.5°C target and it was not based on the state of scientific knowledge at the time. An animated film produced

²⁴ See Volkswagen AG Sustainability Report 2020, pp. 10, 42, 48, 92

https://www.volkswagenag.com/presence/nachhaltigkeit/documents/sustainability-report/2020/Nonfinancial_Report_2020_e.pdf

²⁵ See <https://www.welt.de/wissenschaft/article232028539/IPCC-Weltklimarat-warnt-eindringlich-vor-Verfehlen-des-1-5-Grad-Ziels.html> (1 July 2021).

²⁶ See BVerfG, Decision of 24 March 2021 – 1 BvR 2656/18 et. al. – para. 208, 235.

²⁷ Handelsblatt “Volkswagen announces the end of the combustion engine”

<https://www.handelsblatt.com/unternehmen/industrie/auto-von-morgen/handelsblatt-autogipfel-volkswagen-kuendigt-das-ende-des-verbrennungsmotors-an/23715746.html> (1 July 2021).

²⁸ See Der Spiegel „So planen VW, BMW, Daimler und Co. den Abschied vom Verbrennungsmotor“ <https://www.spiegel.de/auto/vw-bmw-mercedes-und-co-wie-sich-die-autohersteller-vom-verbrennungsmotor-verabschieden-a-5af42a43-26b3-418e-8d83-421f223dec50> (01.07.2021).

by the IPCC and based on the IPCC Fifth Assessment Report published before the Paris climate agreement in 2013/2014 was used for the presentation. The Special Report on Global Warming of 1.5°C published in October 2018 was not considered. Adjustments made by Volkswagen since then have not remedied this situation.

The targets for 2030, as well as the overall strategy, are therefore indisputably inadequate if a global temperature target of 1.5°C is to be achieved in accordance with the Paris Agreement.

For the passenger car sector, Volkswagen AG states that the share of battery electric vehicle deliveries will be about 20 percent in 2025, increasing to about 50 percent in 2030.²⁹ A total of 26 million battery electric vehicles are to be sold by 2030.³⁰ No specific sales targets have been declared for the period thereafter. That in itself constitutes a violation of the duty of care obligations if the Federal Constitutional Court's definition of nuisance is observed, as the physical realities of the greenhouse gas budget have been disregarded and no targets set for the time after 2030. With an expected market share of 12 percent, the sales target of 26 million vehicles thus falls short of the All-Electric Case by 65 percent.

VW wants to reduce its Scope 1 and 2 emissions by 30 percent in absolute terms, thus achieving Paris conformity according to the Science Based Targets Initiative (SBTi) (see above). As regards Scope 3 emissions, the 30 percent reduction target cannot be compared, as it is not expressed in absolute values but in CO₂/km and relates only to the use phase (use of sold products).³¹ Volkswagen has verbally stated that it is aiming for a relative reduction of all Scope 3 emissions by 30 percent per vehicle.

Overall, the goals that VW has announced to reduce the Group's carbon footprint by 2030 will lead to a reduction of only about 26 percent, relative to 2018 levels. If we base calculations exclusively on the targets submitted to the SBTi, the carbon footprint will be reduced by a mere 19 percent. These calculations are based on the data provided by VW and the market growth of 6 percent assumed in the NZE scenario.

For VW's passenger cars and light commercial vehicles across all brands, these figures break down as follows: Scope 1 and 2 emissions will decrease from 7.77

²⁹ See Volkswagen AG, Leading the Transformation, p. 10, https://www.volkswagenag.com/presence/investorrelation/publications/presentations/2021/03/2021-03-16_Deep_Dive_Dahlheim.pdf (1 July 2021).

³⁰ See VW, press release of 13 November 2020, <https://www.volkswagen-newsroom.com/en/press-releases/volkswagen-group-raises-investments-in-future-technologies-to-eur-73-billion-6607> (1 August 2021).

³¹ See VW, press release of 22 September 2020 https://cw.volkswagenag.com/en/news/2020/09/volkswagen_group_sbti.html (2 August 2021).

million tonnes of CO₂e in 2018 to 5.44 million tonnes of CO₂e in 2030, while Scope 3 emissions will decrease from 427.53 million tonnes of CO₂e in 2018 to 317.23 to 347.48 million tonnes in 2030.

That means that the requisite CO₂ target for 2030 – as defined by the scientific standard set out in the IEA report cited above under 1. – will be exceeded by 160 to 190 million tonnes of CO₂e. Moreover, any specific steps to be taken after 2030 have not been outlined in any way.

VW is, therefore, not – as it has declared and described – on the way to fulfilling its obligations to take climate action to prevent the violation of the absolute and legally protected rights of third parties.

3. External reporting

As is already evident from the offsetting of the real emission values, there is a discrepancy between the targets and the target achievement data in VW's non-financial reporting in the form of the decarbonisation index (DKI), which seems untenable when measured against the principles of proper accounting. The absolute weight of VW's climate relevance lies in its Scope 3 emissions; the relevant targets, however, are not transparent.

Included in the DKI, but not adjusted, are the region-specific CO₂ emission predictions based on the applicable driving cycles, which in reality – at least within the scope of the EU requirements – are considerably higher (around 35 percent).³² If vehicle sales continue to rise and, as a result, VW's Scope 3 emissions *increase*, the DKI nonetheless enables VW to report a *reduction* in the CO₂ emissions value. That makes it possible to influence the values through extraneous factors. The decisive error here is that the residual CO₂ budget is an absolute value, while the DKI is a relative indicator.

This misconduct would be further remedied by implementing, announcing, and complying with the reduction path formulated in the requests.

II. Legal assessment

Claims are admissible for removal, omission or for appropriate action under sections 1004 and 823 of the BGB (analogous) as expressed in the announced requests.

³² See ICCT, From Laboratory to Road. A 2018 Update of official and 'real-world' fuel consumption and CO₂ values for passenger cars in Europe, p. 12.

1. Right of action respectively infringement of protected interests

Several of the affected parties we represent are owners of forest and/or agricultural land on which they pursue their professional and/or occupational activities. They are all directly affected in their property, as well as in their established business undertakings. Moreover, they, and a further unknown number of people, are also affected in their legally protected interests, such as the absolute rights to life, body, and health, which are protected under sections 1004 and 823 of the BGB. These are subject to intertemporal protection, as established by the Federal Constitutional Court (BVerfG).

The emissions attributable to VW contribute to global and local climate change, with all the consequences for property, health and life already established by the Federal Constitutional Court.³³ Heat waves and floods endanger life and health, as do all kinds of new illnesses. Property rights are threatened by events such as heat waves and droughts, Germany's forested areas are already under considerable stress, and an ongoing water scarcity makes the cultivation of agricultural land barely profitable.

The absolute rights explicitly protected in sections 1004 and 823 of the BGB (analogous) also provide the minimum protection of legal interests required by the state, as set out in the constitution.³⁴ The civil courts are called upon to enforce this protection, also in the context of the protection mandate set out in Article 20a of the Basic Law.

The requests of our clients are based upon three bases for a claim resp. legal dimensions:

An infringement of property as well as the right to life, body and health are **i)** already being infringed upon today, because the consequences of climate change in Germany are perceptible and attributable, a fact also already established by the Federal Constitutional Court.

In addition, **ii)** the aforementioned absolute rights under sections 823 and 1004 of the BGB are also protected in the intertemporal dimension – as pointed out by the Federal Constitutional Court – each on their own.³⁵

Thereafter, especially the notion of property in the German constitutional and civil law already today includes the conditions of the freedom of property of

³³ See BVerfG Footnote 3, para. 26 ff.

³⁴ See BVerfG NJW 1994, pp. 36, 38; BeckOK BGB/Förster, p. 58th edition 1 May 2021, BGB, Section 823 para. 88.

³⁵ This is also why with this no procedural violation of Section 259 of the Code of Civil Procedure is caused (ZPO – action for future performance), see also footnote 3.

tomorrow. If the intertemporal dimension of this right wouldn't be granted, a protection of property might be seen effective in an isolated view as of today, but the risk of a protection of near to nothing is imminent if these rights are not guaranteed over time and in the future.

Our clients see these rights infringed upon in their case and are able to demonstrate it.

Furthermore, **iii)** our clients invoke their right to the future respectively the freedom as a whole, as defined by the climate decision of the Federal Constitutional Court which has the force of law (sec. 31 para. 2 German code on court constitution of the Federal Constitutional Court/*Bundesverfassungsgerichtsgesetz, BVerfGG*) and which is protected as an "another right" under sections 823 and 1004 of the BGB.³⁶

This right also comprises the protection from private actions in horizontal legal relationships, through the legal concept of the indirect third-party effect of constitutional rights.³⁷

This is not primarily about the consequences of climate change, although they are closely related, but about the so-called 'emergency stop' – in other words, about the foreseeable and drastic interference in civil liberties in the future if greenhouse gas emissions are not reduced quickly. The Federal Constitutional Court has determined that the substantial depletion of what remains of the CO2 budget which is, according to scientific standards, still available, now already constitutes an infringement on civil liberties in the future. According to the court, fundamental rights in their intertemporal dimension protect the individual from threats to their freedom by unilaterally shifting the greenhouse gas reduction obligation placed on the state and all its organs by Article 20a of the BGB.³⁸

VW interferes directly with this legal right, in particular, by not specifying the company's course of action after 2030, with the obvious intention to generate emissions in excess of the existing budget, and by upholding its inadequate climate strategy. It is not conceivable that VW's interests will prevail.

Nor can it be objected that the protection of this legal position creates a general tortious clause through the back door, which would "render superfluous all specific and thus more accurate liability elements such as the general right of

³⁶ BVerfG, footnote 3, see also BGH, Decision of 25 May 1954 – I ZR 211/53 –, BGHZ 13, 334-341 – "Leserbrief"; see also Decision of 2 April 1957 – VI ZR 9/56, BGHZ 24, 72-83, para. 13; Decision of 20 May 1958 – VI ZR 104/57 –, BGHZ 27, 284-291, para. 4.

³⁷ BVerfG, Decision of 15 January 1958 – 1 BvR 400/51 –, BVerfGE 7, 198 [205 f.]; Decision of 19 April 2005 – 1 BvR 1644/00 –, BVerfGE 112, 332 [352]; Decision of 11 April 2018 – 1 BvR 3080/09 –, BVerfGE 148, 267-290).

³⁸ BVerfG, footnote 3, guideline 4 and para 183.

personality or the protection of the company." Not least due to the reference to the future and the positions specifically formulated in Art. 20a GG and by the BVerfG, as well as due to the other tortious criteria such as adequacy, there is a contoured, delimitable set of facts, which incidentally assumes a significance comparable to that of the classic general right of personality.

2. Capacity to be sued

The VW Group has full capacity to be sued for operations across the entire company resulting in the release of CO₂ emissions.

VW has a market share of roughly 12 percent and, according to the calculation above, emitted 375.38 million tonnes of CO₂ in 2020.³⁹ This conduct exceeds evidently a potential de minimis threshold.

The fact that the principle of separate legal existence under company law must also be observed under tort law has not been overlooked. In principle, it cannot be denied that the power to manage and control under or in accordance with Section 17 of the German Stock Corporation Act (AktG) does not always become a general duty of management in tort law.

However, it is a general legal principle of tort and company law that the avoidance of responsibility for attributable actions based solely on formal organisational structure cannot apply.⁴⁰ Similarly, spreading liability through corporate consolidation is not possible either. In any case, by the actual exercise of managerial powers through VWs 'Sustainability', 'CO₂', and 'Environment and Energy' steering committees created for this purpose, and by the Group Board of Management, Volkswagen AG, as the parent company, is the liable party in tort and the actions of its subsidiaries, which act upon its instructions, are directly attributable to it.⁴¹

The principles elaborated by the District Court of The Hague in the Shell case regarding this question are also applicable here, as is the fact that in the (still ongoing) Lluyia vs RWE case, the Higher Regional Court of Hamm⁴² assumes

³⁹ See I.2.b), Volkswagen AG Sustainability Report 2020, p. 88-89.
https://www.volkswagenag.com/presence/nachhaltigkeit/documents/sustainability-report/2020/Nonfinancial_Report_2020_e.pdf

⁴⁰ See BGH GRUR 1957, pp. 494, 498.

⁴¹ See Volkswagen AG Sustainability Report 2020, pp. 10, 42, 48 92; and ECJ, Judgement of 10 September 2009 - C-97/08 P, no. 58 – Akzo Nobel.

⁴² Higher Regional Court of Hamm, case no. I-5 U 15/17. For more information on the case history see the relevant court documents at <https://germanwatch.org/de/14198>. For the current state of the proceedings see Schirmer, *Klimahaftung und Kausalität – und es geht doch!* JZ 2021, publication pending.

RWE's general responsibility for the impact of emissions released by its (various) power plant companies.

3. Causal impairment and 'disturber' criteria

a) Nuisance

The nuisance must casually impair or threaten property or other legally protected rights.

It is likely to remain undisputed that the activities of the VW Group have already causally contributed to impairments of property and the restrictions of freedom that may become necessary in the future. The considerable amount of greenhouse gases generated by VW allow a scientific attribution of forest damage and water shortages in Germany, and provide an explanation for the significant rise in global warming that will far exceed the Paris targets should you continue to pursue your current business policies and strategies.

In detail:

According to its own figures, the carbon footprint of VW's passenger car and light commercial vehicle division alone in 2018 already amounted to 435.3 million tonnes (Scope 1-3).⁴³ If we take into account real-world emissions in the use phase, and if they are not – as in VW's calculation – based on official consumption values consistently below real-world values, VW's 2018 carbon footprint increases to 582 million tonnes.⁴⁴ That corresponds to more than 1 percent of global greenhouse emissions and exceeds Australia's annual greenhouse gas emissions (527 million tonnes of CO₂e).⁴⁵

If Volkswagen were to implement its reduction targets, the Group's carbon footprint in 2030 would still be 323 to 353 million tonnes – notwithstanding unrealistically low consumption values. But if VW were to adopt the IEA's All-Electric Case, Scope 1-3 emissions of its passenger car and light commercial vehicle division would be only 163 million tonnes in 2030.

The difference of 160-190 million tonnes corresponds roughly to the annual greenhouse gas emissions of the Netherlands (185 million tonnes of CO₂e),

⁴³ See Volkswagen AG Sustainability Report 2019, p. 70 f.

⁴⁴ See Greenpeace 2019, *Crashing the Climate: How the car industry is driving the climate crisis*. https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/gp_cleanairnow_carindustryreport_full_v5_0919_72ppi_0.pdf (20 July 2021).

⁴⁵ See greenhouse gas emissions for Australia in 2018 with LULUCF at https://di.unfccc.int/global_map (20 July 2021).

which is therefore obviously significant.⁴⁶ It is these emissions, which exceed any conceivable emissions budget, that constitute the nuisance in the legal sense. The action is the production and sale of vehicles and the consequences that result from their intended use (combustion of fuels that emit CO₂).

b) VW as a ‘Disturber’ and Duty of care

A ‘disturber’ (Störer) is a party who infringes on the rights of others, as defined under sections 1004 and 823 of the BGB, directly through their own conduct, through third parties or the condition of property or natural events.⁴⁷

Hence, VW is a ‘disturber’.

It is these emissions outside any conceivable emission budget that trigger the disturbance in the legal sense. The act is the manufacture and sale of vehicles and other business practices related thereto with the consequences that occur in the intended use (combustion of fuels with CO₂ emissions).

Specifically, its conduct violates its duty of care obligations, which, in itself, justifies assigning VW the status of ‘disturber’.⁴⁸

The obligation to conduct business in a way that mitigates climate change in line with relevant scientific standards can be derived from the obligations under company law regarding external reporting as well as the scope of the liability provisions under company law for managers of corporations (see, for example, sections 93 AktG and 43 GmbHG).

Apart from this, the obligation to adapt business activities to climate concerns can also be derived from general tort principles, insofar as this can be specified for the company. According to the established case law of the Federal Court of Justice (BGH), the party who creates a hazardous situation – regardless of its nature – is in principle obligated to take necessary and reasonable precautions to prevent harm to others to the extent possible. The party is discharged from this obligation if the degree of safety is achieved that is considered necessary by prevailing opinion in the relevant field.⁴⁹ A very similar provision is found in Dutch law,⁵⁰ and was applied by the court in The Hague to the Shell Group.

⁴⁶ See footnote 25; See greenhouse gas emissions for the Netherlands in 2019 with LULUCF at https://di.unfccc.int/global_map (20 July 2021).

⁴⁷ See Palandt, 80th edition, 2021, section 1004 para. 16 to 18.

⁴⁸ See, for example, BGH NJW-RR 2011, p. 739, para. 12.

⁴⁹ To cite just one example: BGH, NJW 2008, 3775, para. 9; Sprau in Palandt, BGB, 80th edition, 2021, Section 823, para. 45 ff. with further references.

⁵⁰ Article 162 of the Dutch Civil Code entitled ‘onrechtmatige daad’, or tortious act, and translates as:

This prevailing opinion is based on (among other things) the recognised standards of the IEA scenarios, which are reasonable and possible to implement (see below) and which are a scientific imperative. This obligation to observe the greenhouse gas budget has become a duty of care obligation since the Federal Constitutional Court issued a decision in this regard (Section 31 para. 2 BVerfGG) – if not earlier.⁵¹ The safeguarding of intertemporal fundamental rights is only possible through a joint effort by society as a whole.⁵² The protection of fundamental rights, in particular, indirect effect on private life – such as the protection provided under Article 2, para. 2 of the Basic Law – is a central element of duty of care obligations,⁵³ they are to be determined on a case-by-case basis and adjudicated by the civil courts in accordance with Article 20a of the Basic Law.

Moreover, when a company such as VW has a significant impact on the global climate – an impact comparable to that of a nation state, as described above – climate-related fundamental rights are directly applicable as external guide rails for potential action.⁵⁴ The conduct of VW has significant and far-reaching impact on the health and life of all those affected, on their future participation in society, and on their enjoyment of their property rights.

The company's conduct in its entirety has to be evaluated based on this standard of care. The company's current and ongoing conduct, and the business strategies and activities it has announced, indicate that it continues to violate this duty of care.

c) Obligation to achieve results

Given the absolute nature of the greenhouse gas budget, this duty of care, which is, in effect, designed to act as a standard of conduct, is transformed into an obligation to achieve results, in other words, the carbon footprint of a company must not exceed a specific threshold, which is to be determined individually. The requests are formulated accordingly and ensure strict compliance with the budget on the basis of scientific standards.

(1) A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.

(2) As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.

(3) A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

⁵¹ See also footnote 3.

⁵² See footnote 4.

⁵³ See BeckOK BGB/Förster, 58th edition, 1 May 2021, BGB, Section 823, para. 88 f., Neuner, in: NJW 2020, 1851, 1852.

⁵⁴ See BVerfG, NJW 2018, 1667, 1669, para. 41 ff.

Uncertainties remain on the path to achieving net zero emissions with respect to momentous and immeasurable disruptions of legal interests and it is possible to achieve greenhouse gas neutrality in 2050 in compliance with the Paris Agreement, but the danger is that before that can happen, total emissions will have increased to such an extent that the budget will ultimately be exhausted and the global temperature targets will, as a result, be unachievable. Therefore, duty of care also implies a standard of conduct (here as regards the joint ventures and shareholdings, and as regards sales activities before 2030).⁵⁵

This duty of effort can be scaled based on the size of the company, the company's impact on the climate, and the quantity of greenhouse gases already emitted, in observance of the principle of equality. Taking the IEA scenario as the minimum requirement for each company, the more control a company has (and has had in the past) over its compliance with the targets, the greater the effort it is required to make. In terms of its business activities and results, VW's impact on the global climate is comparable to a state's (see above). A particularly high level of duty of care must therefore be imposed on VW because the company has the potential of carrying out especially hazardous activities.⁵⁶ The standard of the IEA scenario as presented above can in contrast to that even be classified at the lower end of the obligation scale.

d) Specific standard of conduct

A separate, indicative violation of VW's duty to take climate action is also apparent in a specific feature of its strategy – which, moreover, in this form is no longer subject to managerial discretion.⁵⁷ Based on concrete criteria, it can be determined that across the entire range of models of the VW's brands, VW consistently markets and much more aggressively promotes the model that is drastically more inefficient than its low-carbon counterpart but that has essentially the same usage parameters.

These models are without exception sports utility vehicles (SUVs). According to calculations by the IEA, consumption and emissions of an average SUV are 25 percent higher than those of an average medium-sized car.⁵⁸ The SUV boom of the last ten years has been one of the most important contributors to the rise in global CO₂ emissions. From 2010 to 2018, emissions from SUVs alone were higher than the total of all emissions released by heavy industry. Only the power

⁵⁵ See above and footnote 4, no. 4.4.33.

⁵⁶ See also Gailhofer/Verheyen, *Klimaschutzbezogene Sorgfaltspflichten: Perspektiven der gesetzlichen Regelung in einem Lieferkettengesetz*, ZUR 2021, p. 402.

⁵⁷ See below II.5. Legal consequences

⁵⁸ See IEA World Energy Outlook 2019, p. 151.

sector released more emissions than SUVs.⁵⁹ Yet, VW has announced an SUV offensive aimed at achieving a massive increase in SUV sales: by 2025, 50 percent of all vehicles sold by VW are to be SUVs.⁶⁰

This is obviously in open contradiction to its obligation to take climate action and a specific violation of its duty of care.

From the outset, VW's liability for the subsidiaries it controls exists due to the exercise of managerial powers under company law specifically in respect to these subsidiaries' climate policies. Independently thereof, sufficient factual grounds exist to affirm a 'disturber' status.⁶¹

4. Unlawfulness, Section 1004, para. 2 of the BGB

The claim cannot be excluded. VW's conduct is unlawful according to Section 1004 of the BGB in that it interferes with property and future civil liberty rights. This is indicated by the impairment of property and the impairment of other legally protected interests and is substantiated by the degree to which VW violates its duty of care obligation.

There are no apparent legitimising authorisations, which would, in any case, be irrelevant given the impact of the nuisance on current and (the threat to) future situation, as it is not the unlawfulness of the conduct that is important, but the unlawfulness of the nuisance.⁶²

Overall, it is unreasonable to assume that the type approval of passenger cars and light commercial vehicles based on, among other things, fleet limits specified by the EU would lead to a fundamental exclusion of liability. On the one hand, the special legal provisions do not in themselves satisfy the standard indicated by the Federal Constitutional Court to safeguard the greenhouse gas budget still available. On the other hand, however, duty of care obligations under civil law cannot be equated with obligations under public law or the general requirements for the approval of products. The Higher Regional Court of Hamm has already emphatically stated this:

⁵⁹ See IEA, <https://www.iea.org/commentaries/growing-preference-for-suvs-challenges-emissions-reductions-in-passenger-car-market> (20 July 2021).

⁶⁰ See VW, press release of 25 October 2018, <https://www.volkswagenag.com/en/news/2018/10/volkswagen-expects-an-suv-share-of-50-percent-by-2025.html#> (1 August 2021).

⁶¹ See BGH NJW 2015, 2027, 2028, para. 14 and OLG Hamm, Decision of 1 July 2021 – I-5 U 15/17, p. 6 f.).

⁶² Established case law, see for example, BGH Decision of 4 December 1970, reference no. V ZR 79/68.

“It is in accordance with the legal system that even a person who acts lawfully must also be liable for any impairment of property they cause.”⁶³

5. Legal consequences

a) Extent to which the legal consequences are to be fulfilled

Legal consequences require that appropriate measures be taken, irrespective of whether the claim is a claim for removal or injunction. Generally, measures are not specified; they are selected at the discretion of the disturber. Measures must be based on current scientific knowledge.⁶⁴ The measures selected must be effective and proven.⁶⁵ As regards the automotive industry, the IEA’s Net Zero standard and its All-Electric sub-scenario reflect the current scientific status quo, as described above.

In this case, *specific* measures, as requested, are also covered by the claim, as these are the only measures apart from the cessation of operations⁶⁶ that can be taken to achieve the relevant minimum objectives required by the duty of care.⁶⁷ Thus, sections 1004 and 823 of the BGB (analogous) enable courts to issue direct orders requiring the disturber to fulfil its climate-related duty of care obligations.

As regards the targets up to 2030, orders will be based as requested on the drastic failure to meet the required targets (see above, I.2.b). As regards the period up to 2050, no suitable measures are evident or have been announced (see above, I.2.b).

The legal consequences will not be superimposed or superseded by state measures such as regulation, concessions, or duty to tolerate. Duty of care obligations exist independently of explicitly codified legal principles and can transcend them (see above).

The climate decision of the Federal Constitutional Court, as mentioned above, is the constitutional specification of a budget – the maximum amount of CO₂ that can still be released – thus imposing an obligation on all of society to observe

⁶³ OLG Hamm, reference and order to take evidence of 30 January 11 2017, reference no. I-5 U 15/17 - juris, guideline 1. Wagner completely fails to recognise this when he opines that socially adequate behaviour can be best determined by consulting specialist law, Wagner, *Klimahaftung vor Gericht*, 2021, p. 79f.

⁶⁴ See *Callies*, in: ZUR 2021, p. 355 f.

⁶⁵ See BGH NJW 2004, 1035, 1037, NJW 2005, 1366, 1367; BVerfG, Decision of 24 March 2021 – 1 BvR 2656/18 et. al. – para. 192-265, 162.

⁶⁶ See BGH, Decision of 22 October 1976 - V ZR 36/75 and BGH NJW 2004, 1035, 1036.

⁶⁷ Established case law since BGH NJW 1959, 936, 938.

said budget. That underlines the need for companies to have their individual obligations to take action, in addition to the state's regulatory duties.

Depending on the point of view, actual and existing nuisances, as well as VW's external reporting, could give rise to the claim of imminent infringement in the context of section 1004 of the BGB. Therefore, as far as relevant, not only is mere omission required, but also effective action to prevent potential impairments from occurring.⁶⁸ It follows that VW must do everything in its power to ensure that the targets are met.

Such a bottom-up duty of effort, which must also be considered, precludes business practices exemplified by the VW's own SUV strategy outlined above.

Given the facts of the case, the danger that VW will continue to sell internal combustion vehicles after 2030 is sufficiently real. However, in view of the aforementioned standards, and given the total emissions released during a vehicle's average useful life of (globally) 15 years, it is imperative that this be avoided (see I.). Managerial duties now enable the implementation of a group strategy to ensure that this obligation is met after the EU Commission announced a corresponding legislative initiative.⁶⁹ Competitors of the VW have already recognised this duty as well.⁷⁰

b) Reasonability

The measures are also reasonable according to the state of scientific knowledge (even before the publication of the IEA report cited above), which VW could have long made use of. According to the findings of the Higher Regional Court of Hamm, the fundamental consequences and interrelations of climate change have been known to major German companies since 1958. The senate therefore explains in its most recent guidance and evidence order⁷¹ that it will assert the presence of adequate causality as regards causal connections from 1958 on. The transition could therefore have been initiated a long time ago if lawful conduct had been adopted.

The claimants are aware that the implementation of these measures requires great cost and effort but do not view this as unreasonable. However, there is no protection of legitimate expectation of the status quo or in the context of reduction pathways that do not comply with the Paris agreement. This was again reaffirmed by the climate decision of the Federal Constitutional Court. In view of

⁶⁸ See BGH NJW 2004, 1035, 1037 and BGH NJW 2005, 1366, 1367.

⁶⁹ See "Fit for 55" package of legislative proposals, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3541 (3 August 2021).

⁷⁰ As of signing, Daimler plans to phase out internal combustion engines in 2030, as reported by the media.

⁷¹ OLG Hamm, guidance and evidence order of 1 July 2021, reference no. I-5 U 15/17, S. 5 f, unpublished.

the constitutionally binding greenhouse gas budget, there can be no protection of confidence in reduction paths that are incompatible with this budget. Rather, effective and early measures are in VW's own interest. State intervention to lower the emissions generated by car manufacturers is constitutionally necessary and will impact the VW all the more severely if it does not promptly change its business strategies, policies and activities.

Mr Diess, you have been aware of the importance of your company's decisions for the global climate ever since you stepped into your position as CEO. You have already announced that you will use the next ten years – in your view, the time remaining to achieve the Paris goals – to restructure the company.⁷²

The discretionary managerial authority of the CEO is, moreover, limited given the legal framework conditions outlined above and the duty of legality under company law. The alignment of VW's objectives with the declared corporate strategy of 'cash flow optimized transformation'⁷³ is not a valid reason to shape further business activities in a way that runs counter to the required climate goals.

III. Deadline for response and action

We call upon you to comply with the above requests and to implement the requested or necessary measures. We expect VW to submit an appropriate change of strategy (this right to information is recognised under Section 1004 of the BGB) and a corresponding declaration to cease and desist from generating emissions in excess of what the budget allows.

For this, we set a deadline of

29 October 2021

This is a generous deadline, which shows that we expect VW to address and seriously consider the violations of legal rights outlined here.

Our clients cannot reasonably be expected to wait any longer. In view of the little time left to ensure compliance with the global temperature target and the global greenhouse gas budget, a change of strategy must be implemented without delay.

We will advise our clients to take legal action should this not be forthcoming.

Sincerely

⁷² See Diess, LinkedIn, <https://www.linkedin.com/pulse/how-we-transform-volkswagen-herbert-diess/> (3 August 2021).

⁷³ See Volkswagen AG, Leading the Transformation, p. 11, https://www.volkswagenag.com/presence/investorrelation/publications/presentations/2021/03/2021-03-16_Deep_Dive_Dahlheim.pdf (1 July 2021).

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