

Investor Briefing:

The case against Shell

Friends of the Earth Netherlands v Royal Dutch Shell plc

Summary

- Shell recently announced its net-zero strategy, which it says supports the goals of the Paris Agreement.
- At the same time, Shell is rigorously defending a claim brought by a group of NGOs and over 17,000 private citizens in the Netherlands, to legally require the company to adopt a Paris-aligned emissions reduction trajectory.
- The claim is a striking example of the types of novel litigation that companies will face if they do not properly manage climate risk.
- The first judgment in the proceedings is due on **26 May 2021**.
- At Shell's AGM just eight days earlier, on 18 May 2021, investors will have the opportunity to vote on the company's 'Energy Transition Plan'.

Background

1. On 11 February 2021, Royal Dutch Shell Plc (**Shell**) announced its "*accelerated drive for net-zero emissions*" with a "*customer-first strategy*". In announcing that strategy, Shell also committed to a form of the '*Say on Climate*' initiative,¹ agreeing to give its shareholders an annual advisory vote on the progress made under its 'Energy Transition Plan', starting at this year's AGM, and updating the plan

¹ <https://www.sayonclimate.org/>

itself every three years. The company's net-zero strategy, it says, "*supports the most ambitious goal of the Paris Agreement on climate change to limit the global temperature rise to 1.5°C*".²

2. It might be seen as strange, then, that Shell is, at the same time, rigorously defending legal proceedings brought to achieve the very same goal. Those proceedings have been brought in the Netherlands by a number of Dutch NGOs and more than 17,000 individual co-claimants. At its core, the claim asks the Court to **order** Shell to expedite its reduction of greenhouse gas emissions – in particular, to reduce its CO2 emissions by **45%** by the year 2030.³
3. A 45% reduction by 2030 (compared to 2010 levels) is the standardised pathway of the Intergovernmental Panel on Climate Change (**IPCC**) to limiting the global temperature rise to 1.5°C. That, of course, is the "*most ambitious goal of the Paris Agreement*" to which Shell was referring – but Shell's 'road to net zero', by contrast, currently has its 2030 target at **20%**, not 45%. Even then, that is not 20% of absolute emissions, but a 20% reduction in "*net carbon intensity*";⁴ and the company has opted to exclude its petrochemicals business⁵ from its Scope 3 net zero target, as well as some of its large fossil fuel trading operations.
4. In that light, Shell's rigorous defence of the claim in the Netherlands becomes less mysterious. But the claim is, on any reading, a striking example of the types of novel litigation that will continue to beset companies which 'talk the talk' on climate transition, but do not 'walk the walk'.

The claim against Shell

5. The claim was filed in April 2019. Factually, it is founded on Shell's contribution to climate change: the company is, the claimants say, by far the largest contributor to climate change in the Netherlands, and responsible worldwide for the production of twice as many greenhouse gases as the entire Netherlands combined. Climate change presents an immense and imminent danger for humanity; the claimants say that Shell is fully aware of this, and yet still knowingly refuses to make a proportionate contribution to the prevention of that danger.
6. The legal basis for the claim is twofold:
 - a. First, that Shell has a duty of care under Dutch civil law not to 'negligently endanger'. This is the Dutch "basement hatch doctrine":⁶ similar to the bar proprietor who negligently endangers his customers by leaving a basement hatch open, Shell is negligently endangering the claimants, and us all, by refusing to adopt a proportionate climate policy; and
 - b. Second, that Shell owes a duty of care in light of the indirect horizontal effect of human rights treaty provisions – in particular, Articles 2 and 8 of the European Convention on Human Rights

² <https://www.shell.com/media/news-and-media-releases/2021/shell-accelerates-drive-for-net-zero-emissions-with-customer-first-strategy.html>

³ Compared to 2019 levels. The claimants also request a 72% emissions reduction by 2040; and 100% by 2050.

⁴ An absolute reduction refers to the total quantity of greenhouse gas emissions being emitted, i.e. the salient driver of climate change. Carbon intensity, by contrast, compares the amount of emissions to a unit of economic output.

⁵ Which supplies approximately 17 million tonnes of petrochemicals per year.

⁶ 'Basement Hatch Ruling', Dutch Supreme Court (5 November 1965) [ECLI:NL:HR:1965:AB7079]

(on the right to life, and the right to respect for private and family life). The claimants further substantiate their claim by reference to the Paris Agreement, as well as certain soft law, such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and the principles drawn up by the UN Global Compact.

7. In this way, the claim mirrors the so-called *Urgenda* case, which also proceeded on these two causes of action.⁷ In that case, the Dutch Supreme Court upheld Urgenda's claim in 2019, ordering the State of the Netherlands to reduce greenhouse gas emissions by at least 25% by the end of 2020, as compared with 1990 levels. That decision was an unexpected victory for the claimants, and Friends of the Earth Netherlands is being represented by the same legal team that acted for Urgenda.
8. The fact that the Friends of the Earth claimants are now seeking to apply this reasoning (particularly on the human rights plane) to a private company is novel, and not without complexity. Despite that legal complexity, however, the point at issue is simple: whether Shell has violated its civil law duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change.

Broader context

9. The claim comes at a time when the EU Commission is committed to tabling EU-wide environmental and human rights due diligence legislation by June 2021 – 'hard' law on companies' human rights and environmental obligations. Such legislation would legally require businesses to identify and assess human rights and environmental risks and impacts, both in the company's own operations and throughout its supply chain. Companies will also be required to take action to mitigate or prevent those risks and impacts. Sanctions would apply for non-compliance; significantly, it is expected that business' contributions to climate change will be included in the law.

Next steps

10. The Hague District Court is scheduled to hand down its (first-instance) judgment in the claim on **26 May 2021**. Undoubtedly, that judgment will be appealed; and like *Urgenda*, it is very possible that the claim will end, in a few years' time, at the Dutch Supreme Court.
11. But with Shell's AGM only a week prior to the first-instance judgment, on 18 May, the stakes are high. Even if the company doesn't commit to a proportionate climate strategy at its AGM, it may well be ordered by the Court to do so in future – with all of the negative PR, reputational and stranded asset risks that would entail. As investors engage with Shell ahead of the AGM, and consider how to vote on the climate-related resolutions on the ballot, they would be wise to bear this in mind.

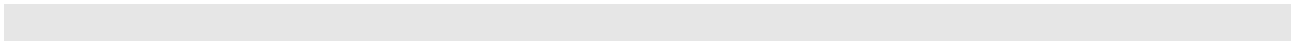
⁷ *Urgenda Foundation v State of the Netherlands* [ECLI:NL:HR:2019:2007]

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