

Rechtsanwälte Günther

Partnerschaft

Rechtsanwälte Günther • Mittelweg 150 • 20148 Hamburg

Michael Günther * (bis 31.12.2022)
Hans-Gerd Heidel * (bis 30.06.2020)
Dr. Ulrich Wollenteit *¹
Martin Hack LL.M. (Stockholm) *¹
Clara Goldmann LL.M. (Sydney) *
Dr. Michéle John *
Dr. Dirk Legler LL.M. (Cape Town) *
Dr. Roda Verheyen LL.M. (London) *
André Horenburg *
John Peters
Victor Görlich
Dr. Johannes Franke

¹ Fachanwalt für Verwaltungsrecht
* Partner der Partnerschaft
AG Hamburg PR 582

Mittelweg 150
20148 Hamburg
Tel.: 040-278494-0
Fax: 040-278494-99
www.rae-guenther.de

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Mitarbeiterin: Jule Drzewiecki
Durchwahl: 040-278494-11
Email: drzewiecki@rae-guenther.de

Constitutional complaint 2024 Greenpeace e.V. and Germanwatch e.V. Legislative omission in the transport sector violates fundamental rights

Summary

1.

Three years ago, the Federal Constitutional Court (BVerfG) made a fundamental decision in its "Climate Decision" of March 24, 2021: Firstly, the German state must make its contribution to achieving the temperature targets of the Paris Agreement (Paris Agreement). Secondly, it must initiate the necessary processes in a timely manner and must not unilaterally shift the burden of reduction into the future. The European Court of Human Rights (ECtHR) also confirmed this in April 2024: Legislators have extensive climate protection obligations at regulatory and implementation level.

Despite this, climate protection measures in Germany are partly very slow to get off the ground and considerable opportunities have been missed since 2021. This is particularly true in the **transport sector**, which has missed its targets in the past and is still not even close to being on an adequate transformation path.

Buslinie 19, Haltestelle Böttgerstraße • Fern- und S-Bahnhof Dammtor • Parkhaus Brodersweg

Hamburger Sparkasse
IBAN DE84 2005 0550 1022 2503 83
BIC HASPDEHHXXX

Commerzbank AG
IBAN DE22 2008 0000 0400 0262 00
BIC DRESDEFF200

GLS Bank
IBAN DE61 4306 0967 2033 2109 00
BIC GENODEM1GLS

If effective measurements in this sector are further delayed, the constitutionally necessary reductions (Art. 20a of the Basic Law (GG)) can **only** be achieved **with radical future cuts in civil liberties**. These cuts will hit **certain groups of people particularly hard**: People with low incomes who are dependent on individual mobility because they live in the countryside or are physically impaired. They are threatened with massive restrictions on their mobility and the associated liberties through regulatory bans (e.g. driving bans and car decommissioning) and/or prohibitive CO₂ prices if the transport sector does not change course immediately.

2.

Against this backdrop, five people whose future liberty is under particular threat are lodging a constitutional complaint against the continued **failure of the Federal Government and the Bundestag (Federal Parliament) to take effective climate protection measures in the transport sector**. All of the complainants have only a low income and are dependent on individual mobility: Four of them live in rural areas with poor or no access to public transport, and one complainant is dependent on a car due to her disability. If the transformation in the transport sector continues to be delayed, they risk being cut off from mobility altogether as a result of the radical measures that will be necessary in the future: This is because they will neither be able to switch to public transport nor finance exorbitant CO₂ prices or even an e-car.

In the alternative, the complainants demand at least **cross-sectoral effective climate protection measures** in order to give the transport sector some "breathing space" - even if, according to their view set out in detail in the constitutional complaint, sufficient help from other sectors is actually no longer possible.

With them the two plaintiffs, Greenpeace and Germanwatch, are taking action with the constitutional complaint, which, based on the findings of the European Court of Human Rights (ECtHR) in the Klimaseniorinnen ruling, are authorized to assert climate protection instead of many and for many of those affected.

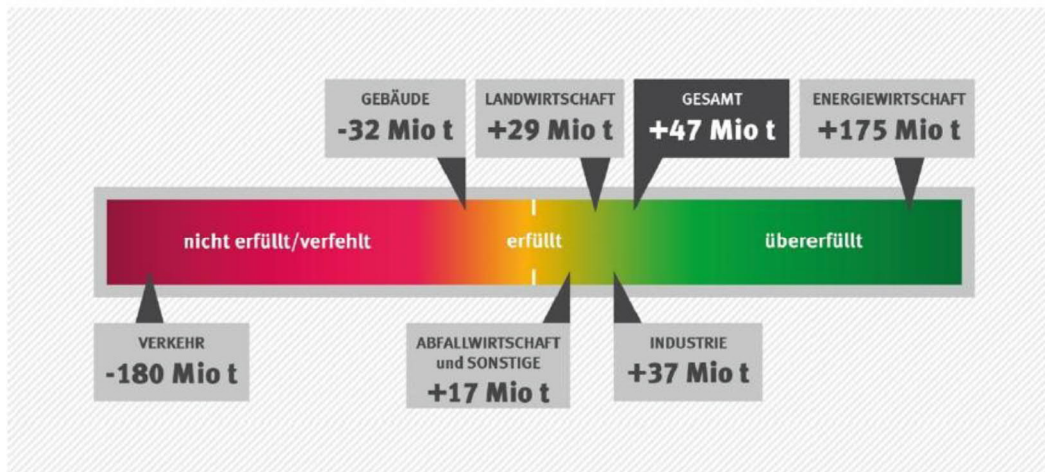
3.

The transport sector has consistently **failed to** meet its **sector targets** over the past three years. The Minister responsible, Mr. Wissing, did not submit the immediate action programmes required under the old legal situation, or only in a completely inadequate form. The High Administrative Court (Oberverwaltungsgericht – OVG) of Berlin-Brandenburg has already judged this conduct to be **unlawful** and ordered the Federal Government to submit sufficient emergency programs. There is no effective immediate action program for transport - instead, the current amendment to the Federal Climate Act (Klimaschutzgesetz, KSG) has abolished the binding sector targets and the follow-up through sector-related immediate action programs. If this law remains in its current form, it will remove the pressure to act from the transport sector.

The complainants challenge this weakening of the KSG's control architecture with a separate constitutional complaint together with over 50,000 people (dated 13th September.2024).

4.

According to current **projections**, a transformation of the transport sector is not in sight in the future either. According to the 2024 projection data from the Federal Environment Agency (UBA), compliance with the overall budget by 2030 under the KSG seemed achievable again. However, this was only possible because the exorbitant shortfalls in the transport sector measured against the (now indicative, Annex 2a KSG) sector targets could possibly be made up by other sectors by this time. This is illustrated by the following UBA graphic ¹ which shows the projected overshoot or undershoot of the KSG sector targets by 2030 in million tons of CO₂ eq:



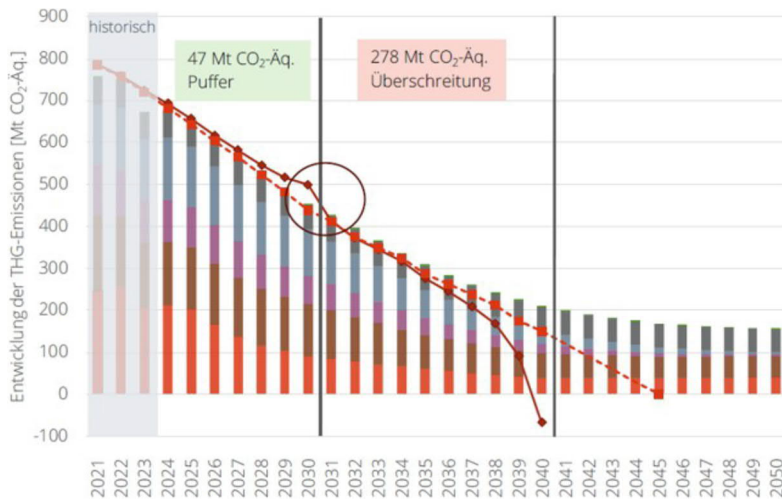
The Expert Council for Climate Issues (ERK) considers the UBA's estimates to be too optimistic and continues to assume (as it has for years) that the overall target for 2030 will be missed, to which the transport sector would then have contributed the major share.

According to the UBA projections, the situation **after 2030** looks even worse in general and in the transport sector in particular. By 2040, a cumulative target shortfall of 278 Mt² t CO₂ eq. is projected across all sectors; **the total KSG budget would already be used up before 2040**, as shown in the dark red line in the following graph, which drops sharply towards the end:³

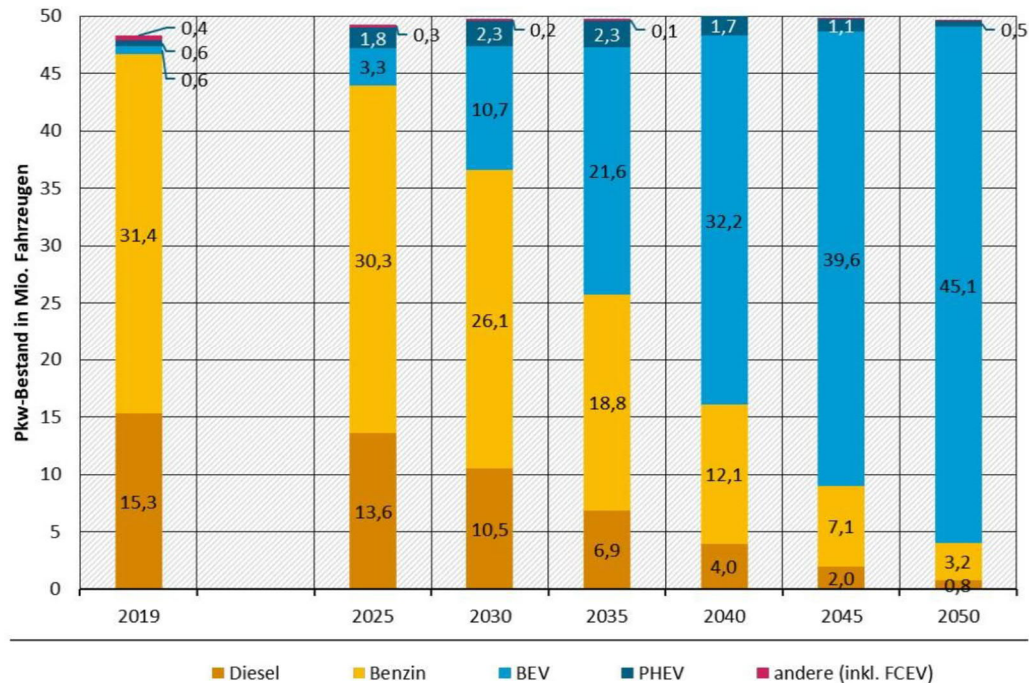
¹ UBA, Treibhausgas-Projektionen 2024 kompakt, p. 9, https://www.umweltbundesamt.de/sites/default/files/medien/11850/publikationen/thgprojektionen_2024_ergebnisse_kompakt.pdf

² Mt = million tons

³ ERK, Expert report on the review of the greenhouse gas projection data 2024, p. 74, https://expertenrat-klima.de/content/uploads/2024/06/ERK2024_Sondergutachten-Pruefung-Projektionsdaten-2024.pdf



The projections for the **transport sector** are particularly worrying. The current 2024 projection report not only projects the aforementioned overall gap of 180 Mt CO₂ eq. by 2030. Moreover, the actual changes are far too slow: 36.6 million pure combustion vehicles (out of a total of almost 50 million cars) are still expected to be on German roads in 2030, and 9.1 million (plus 1.1 million plug-in hybrids) in the climate neutrality year 2045:⁴

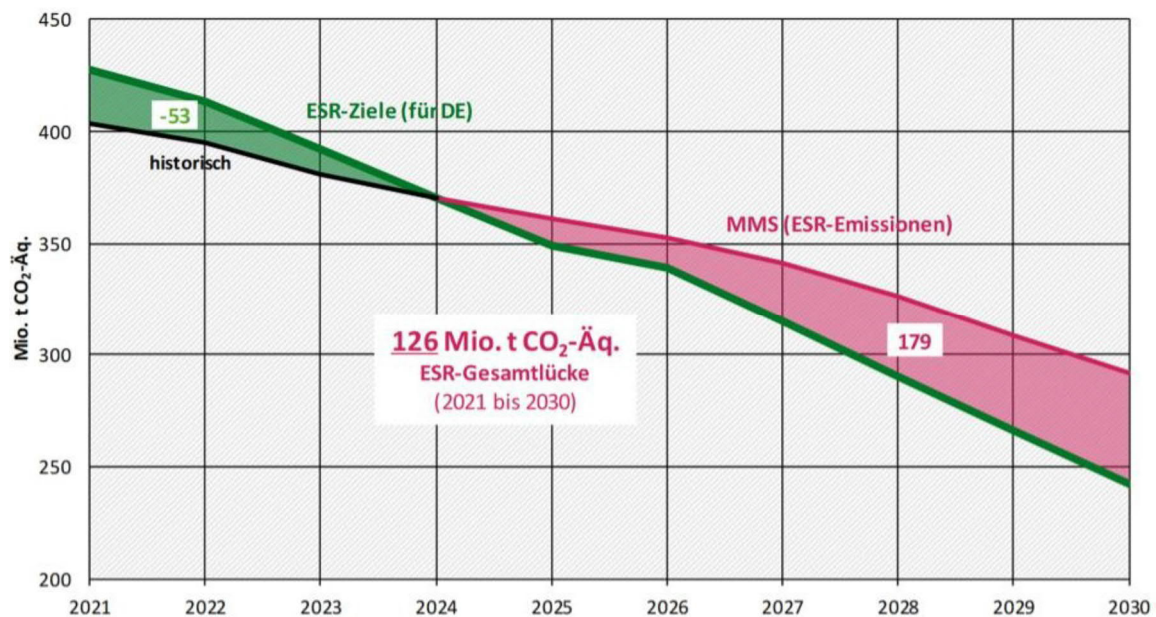


There is no realistic perspective on how such a high number of combustion vehicles can be operated in a climate-neutral way.

⁴UBA, Projection Report 2024, p 225, https://www.umweltbundesamt.de/sites/default/files/medien/11850/publikationen/projektionen_technischer_anhang_0.pdf

5.

EU law also sets requirements in connection with the decarbonization of the transport sector. The EU, and therefore also the transport sector, must be climate neutral by 2050. The *Effort Sharing Regulation (ESR)* sets reduction targets for the member states by 2030 for sectors outside the EU Emissions Trading System, including the building and transport sectors. Germany will foreseeably miss these targets, even according to the UBA's forecasts (which are clearly too optimistic according to the ERK) by 179 Mt CO₂ eq:⁵



It will hardly be possible to close this gap by purchasing emission allowances from other Member States, which is permitted under the ESR, because the vast majority of Member States are not "on track" and it is therefore foreseeable that there will not be sufficient supply available for the purchase.

7.

From 2027, the new EU emissions trading scheme for the buildings and transport sectors (**ETS 2**) will also come into effect. As there are also considerable deficits in climate protection in these sectors across the EU, there is a risk of massive **price jumps** in the price of CO₂ as demand significantly exceeds the legally limited supply: According to estimates, prices of 200 to 350 euros/ton of CO₂ by 2030 (currently: 45 euros/ton) are imminent if effective accompanying climate protection

⁵ UBA, Treibhausgas-Projektionen 2024 kompakt, p. 9, https://www.umweltbundesamt.de/sites/default/files/medien/11850/publikationen/thprojektionen_2024_ergebnisse_kompakt.pdf

measures are not implemented. This would⁶ result in an increase in petrol prices of around 43 to 86 cents/liter.⁷

It is obvious that this would lead to enormous social distortions. Conversely, the more accompanying climate protection measures are taken, the lower the demand (and therefore the price) for fossil-based individual mobility will be and the easier it will be to avoid rising prices (public transport, e-mobility, etc.).

8.

Against this background, the complainants argue that the ongoing failure to take effective climate protection measures in the transport sector has a **prejudicial effect** on their (mobility-related) future liberty. In the climate decision, the BVerfG ruled on the **framework law, i.e. the KSG**: The statutory reduction path must not exceed a CO₂ budget that is compatible with the Paris Agreement (Art. 20a GG).

This limited budget must also be distributed over time in such a way that mitigation burdens are not unilaterally shifted into the future - otherwise there is a risk of "full braking" with drastic interferences.

These principles are transferable to the **level of measures**: The CO₂ budget is in fact irreversibly eroded by the failure to take measures and today's emissions must be made up for in the future by all the more stringent measures ("full braking"). The BVerfG formulates this as follows in its the *Neubauer* decision :

*"The necessary restrictions on civil liberty in the future are already inherent in the generosity of current climate protection law. Climate protection measures that are currently **not taken** in order to spare freedom now will have to be taken in the future, possibly under even less favorable conditions, and would then curtail identical liberty needs and rights far more drastically."*⁸

Compliance with the Paris-compatible residual budget has fundamental constitutional status (Art. 20a GG) and is also required under human rights law according to the current case law of the ECHR. In addition, restrictions on liberty are already laid down in EU law - with priority of application – for example through the goal of climate neutrality by 2050 in the EU Climate Law and through ETS 2, which is absolutely necessary to achieve EU climate targets, with the resulting consumption-reducing price increases.

⁶ It is regularly assumed that mineral oil taxation will otherwise remain in place.

⁷ An increase of 10 euros/t CO₂ means an increase of around 2.4 cents/litre petrol and 2.7 cents/litre diesel net, see Agora Energiewende & Agora Verkehrswende, The CO price for buildings and transport, 2023 P. 12, https://www.agora-energiewende.de/fileadmin/Projekte/2023/2023-26_DE_BEH_ETS_II/A-EW_311_BEH_ETS_II_WEB.pdf. The statutory value added tax of 19% is added.

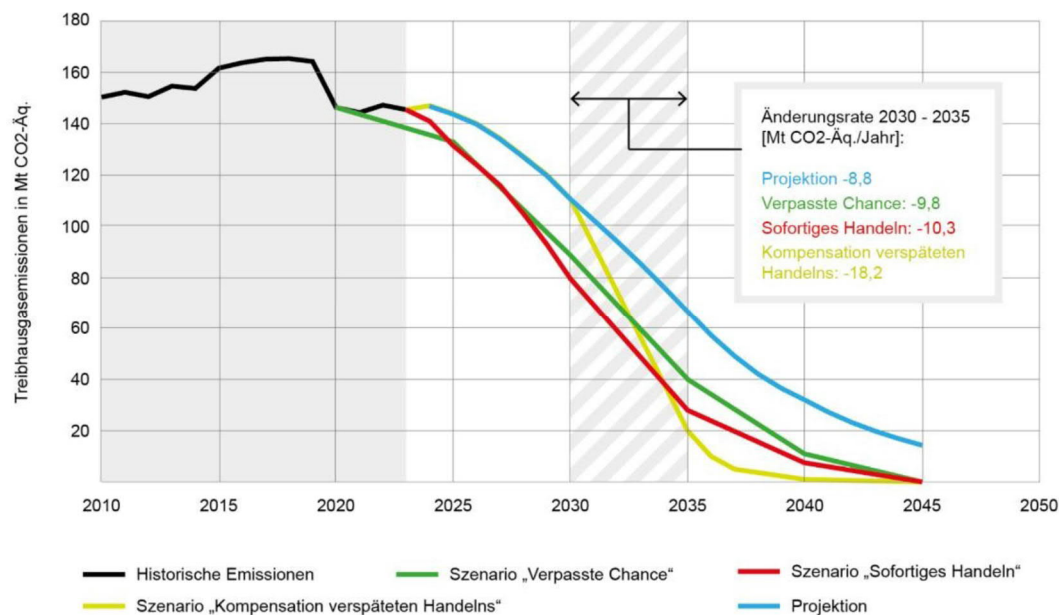
⁸ BVerfG, decision of 24.03.2021, 1 BvR 2656/18 and others, para. 120 (emphasis ours).

9.

The complainants substantiate the impending adverse effects in the transport sector and beyond in the event of continued inaction on the basis of a **scenario study** prepared by the complainants, which compares three scenarios:

- A counterfactual scenario ("missed opportunity") in which **2021**, i.e. immediately after the climate resolution, effective measures would have been taken in the transport sector (e.g. speed limit, reduction of climate-damaging subsidies, expansion of climate-friendly infrastructure);
- An "immediate action" scenario in which ambitious climate protection measures in the transport sector are introduced **now**;
- A "compensation for delayed action" scenario in which the **failure to act** continues **until 2030**. Based on previous experience and the reorganization of the KSG's control architecture, such a scenario is **to be acutely feared** because, as things stand at present, no ambitious follow-up control is necessary until 2030

The differences in the reduction paths that would be necessary to comply with the "sector budget" for the transport sector derived from Annex 2a KSG under the respective scenario are illustrated in the following diagram:



It is easily seen that the projections (blue) are far beyond all reasonable paths. It is also easy to see that the green path still possible in 2021 would have been much more "relaxed" than the red path, which is still possible at best. If we wait until 2030, emissions will have to fall rapidly thereafter - between 2030 and 2035 almost twice as fast as would have been necessary if action had been taken in 2021. In the "compensation for delayed action" scenario (yellow), the annual reduction rate for the transport sector is a staggering -18.2 Mt CO₂ eq/year compared to the current -

0.30 Mt CO₂ eq/year between 2020 and 2023 or -1.8 Mt CO₂ eq/year in relation to 2022/2023. Assuming the current statutory scenario (KSG amendment 2024) that no significant readjustment is required by 2030, the transport sector will have to reduce around 10 times faster per year between 2030 and 2035 as recently.

10.

These significantly diverging reduction rates, depending on the starting date, correspond to **measures of varying severity**. If action had been taken immediately after the climate resolution, a moderate increase in the CO₂ price to around 120 euros/tonne by 2030 would have been sufficient, and the ramp-up of e-mobility and the development of climate-friendly infrastructure could have taken place evenly. If effective measures are started now, a CO₂ price of around 250 euros/tonne will already be necessary in 2030 to achieve the same effects. Such prices are actually to be expected due to ETS 2 (see above). The ramp-up of e-mobility would have to pick up "abruptly" and infrastructure investments would have to increase significantly more. **However, radical measures such as the decommissioning of cars or driving bans can still be avoided.** If we wait any longer until 2030 - as is the case in the legal situation following the KSG amendment - this would no longer be avoidable. The shortcomings in the ramp up of e-mobility and infrastructure investments (rail, public transport) could then no longer realistically be made up for.

11.

A further delay in measures in the transport sector **cannot be offset by other sectors** either - at least not without unacceptable cuts being made there instead. The building sector is already lagging behind its targets - albeit to a lesser extent - so that compensation is not to be expected here. In industry and the energy sector, certain emissions are currently unavoidable, so that no significant "help out" is to be expected from this side either - on the contrary, technical solutions are already being planned for these sectors to help out⁹ (§ 3b KSG). The same applies to agriculture, which will only reduce its emissions by half by 2045, even in the most ambitious scenarios. According to current projections, natural sinks (forests and peatlands that absorb CO₂) are not expected to compensate for this; on the contrary, the land use sector threatens to be a source of additional greenhouse gas emissions by 2045, meaning that the relevant sink targets (Section 3a KSG) are currently far out of reach.

It would only be possible to compensate for the shortfalls in transport after 2030 through radical restrictions on liberties in other areas: for example, far-reaching interventions in consumer behaviour (food and consumer goods) and living conditions (living space). In the building and industrial sector, forced refurbishments would have to be carried out faster than necessary according to refurbishment cycles, and fossil fuel heating systems would have to be replaced before the end of their service life.

Although the complainants believe that immediate measures are constitutionally required in the transport sector in particular, they **alternatively** request immediate climate protection measures **across all sectors** so that the constitutionally prescribed CO₂ budget remains achievable while protecting civil liberties. These are necessary in any case in order to avoid the impending restrictions on freedom that are unacceptable from today's perspective.

12.

In all of this, the scenario study is based on the **emission quantities permitted** under the **KSG**. This is **already too generous under constitutional law**: the law allows emission quantities that far exceed the remaining CO₂ budget that the Federal Republic of Germany is (still) entitled to.

The German Advisory Council on the Environment (SRU) derives – expressly retaining its calculation method - a residual budget of 3.9 Gt CO₂ for the temperature threshold taken as a basis by the Federal Constitutional Court in the climate decision (1.75 °C with 67 % probability assuming a global *per capita* distribution) - this would already be used up by 2033 if the reduction path in the current KSG is adhered to. In a separate submission, the complainants argue that the emission quantities permitted by the KSG are not compatible with the Paris Agreement and violate the climate protection requirement.

Based on the SRU's current calculations, the intertemporal threats to liberty are even more serious than assumed for the constitutional complaint.

13.

In addition to the violation of their intertemporal liberty rights, the complainants also assert a violation of the **intertemporal safeguarding of equality (Art. 3 para. 1, para. 3 in conjunction with Art. 20a GG)**, which is to be recognized in addition to the intertemporal (general) safeguarding of liberty in the further development of the Climate Decision.

The measures threatened by the continued failure to take effective climate protection measures in the transport sector hit the individual complainants much harder than other groups in Germany who live in the city or are wealthy, for example. Other groups of people can avoid the impending restrictions (local public transport, electric cars) or pay accordingly (CO₂ price). In contrast, the complainants are threatened with mobility exclusion or mobility poverty.

This violates constitutional **participation rights** because, under the conditions of a shrinking CO₂ budget, the state must ensure that emission opportunities are not "burned up" prematurely at the expense (in the truest sense of the word) of those who need them most urgently. To put it bluntly, emissions made possible today by the company car privilege, for example, will make it de facto or economically impossible for people like the complainants to travel to work in the future.

In particular, the increase in the price of CO₂, which is already necessary and will become increasingly drastic if we wait any longer, threatens to create "freedom according to the size of your wallet". This violates the **principle of equality of burdens**, which, in the opinion of the complainants, must also apply to the distribution of transformation burdens - as already stated in the climate resolution itself with regard to intergenerational justice.

If effective climate protection measures are delayed any longer (even until 2030), it is no longer realistically possible to balance out burdens that are contrary to equality, or at best through a comprehensive state allocation and rationing of (mobility) freedoms, which would be most comparable to a war economy. This, in turn, would involve disproportionate restrictions on freedom from today's perspective.

14.

The required intertemporal protection of the complainants' fundamental rights cannot be achieved in any other way than through immediate measures in the transport sector and/or (alternatively) cross-sectoral measures. In particular, **action against the weakening of the KSG is not sufficient** to protect the complainants. It is true that the KSG amendment contains numerous debilitations of the control architecture, which are also challenged separately by the complainants.

However, an amendment to the framework law will not lead to what the complainants need: effective **climate protection measures that actually save CO₂** and open up alternative, emission-free mobility routes for the future. The past has shown that programs have either not been adopted or have only been adopted inadequately and that announced measures have not been implemented (e.g. reduction of climate-damaging subsidies). There is also no legal entitlement to the implementation of such programs, meaning that the complainants are not sufficiently helped by a mere improvement of the KSG.

15.

The obligation to actually introduce and implement climate protection measures also arises from the current case law of the ECHR. In order to comply with Art. 8 ECHR, the latter requires both the establishment of a Paris compatible level of protection and reduction path as well as its enforcement in reality. According to the case law of the ECHR, the complainant associations can assert the alleged violation of Art. 8 ECHR in a representative action.

Dr. Roda Verheyen
Attorney at Law

Dr. Johannes Franke
Attorney at Law

