

ESG AT THE HEART OF RISK MANAGEMENT

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Stakeholder activism

European
directives

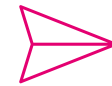
National
legislation

ESG on
board
agenda

Sustainability
policy

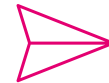
Reporting
on ESG

I. Regulatory framework on ESG



NFRD/Taxonomy to CSRD

- Covers around 50,000 companies
- Double materiality concept
- Third party assurance
- EU sustainability reporting standards
- Management report and digital tagging



Corporate Due Diligence Directive

- Applies to large EU and non-EU companies
- Obligations to carry out due diligence and to act on findings
- Directors' duties
- Sanctions for non-compliance
- New civil liability regime allowing direct claims by individuals who suffer harm due to company's failure to comply



1. European Legislative Initiatives

- March 2018: the European Commission launched the **Action plan on sustainable finance**
 - Three objectives:
 - 1.To reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;
 - 2.To manage financial risks stemming from climate change, environmental degradation and social issues;
 - 3.To foster transparency and long termism in financial and economic activity.
 - Four key features of the measures
 - 1.A unified EU classification system ('taxonomy');
 - 2.Investors' duties and disclosures;
 - 3.Low-carbon benchmarks;
 - 4.Better advice to clients on sustainability.
- Relevant ESG-legislation:
 - Non-Financial Reporting Directive (2014/95/EU) ("NFRD")
 - EU Taxonomy – Taxonomy Regulation 2020/852
 - **Corporate Sustainability Reporting Directive ("CSRD")**
 - Sustainable Finance Disclosure Regulation ("SFDR")
 - **Proposal for a Directive on Corporate Sustainability Due Diligence ("CSDD")**



2. Directive 2014/95/EU - Non-Financial Reporting Directive (NFRD)

- Lays down the rules on disclosure of non-financial and diversity information by certain large companies.
- Currently applies to “**large public-interest companies**”
 - “large”: > 500 employees **AND** 1) balance sheet total exceeding EUR 20 million **OR** 2) a net turnover exceeding EUR 40 million;
 - “public-interest company”: defined in article 1:12 BCCA – *i.e. listed companies, insurance companies, credit institutions and central securities depositories*
- Obligation to include non-financial information in the annual management report related to:
 - environmental matters
 - social matters and treatment of employees
 - respect for human rights
 - anti-corruption and bribery
 - diversity on company boards
- Includes:
 - a brief description of the undertaking’s business model;
 - a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
 - the outcome of those policies;
 - the principal risks related to those matters linked to the undertaking’s operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas and how the undertaking manages those risks;
 - non-financial key performance indicators relevant to the particular business
- Transposed into the Belgian legal system by the Act of 3 September 2017 on the disclosure of non-financial and diversity information by certain large companies and groups – now incorporated in the BCCA



3. Taxonomy Regulation

- Introduces an EU-wide **classification system** to determine whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable
- **Article 8 of the EU Taxonomy Regulation** establishes **additional mandatory disclosure obligations**:
 - Obligation for companies that fall under the NFRD to **disclose information** to the public on how and to what extent an undertaking's activities are **associated with environmentally sustainable economic activities**
 - Specifies **key performance indicators** that non-financial undertakings must disclose related to turnover, capital expenditure and operational expenditure
 - In-scope companies are required to publish sustainability indicators from **1 January 2022**
 - Obligation for the Commission to adopt a delegated act = **Taxonomy Article 8 Delegated Act** of 6 July 2021
 - Specifies the content, the methodology and the presentation of the KPIs that both financial and non-financial undertakings are required to disclose under article 8 of the Taxonomy Regulation
- The scope of undertakings subject to article 8 of the Taxonomy Regulation and the Delegated Act will adjust automatically to the changes brought to the NFRD by the **CSRD** as and where relevant



4. Corporate Sustainability Reporting Directive (CSRD)

- **Amendment to the Non-Financial Reporting Directive (NFRD)**

- **Timing**

- Adopted by the Commission on 21 April 2021 – currently submitted to the EU Parliament and Council who have reached a provisional political agreement.
- Adopted on 10 November 2022
- 18 months after entry into force: EU Member States will be required to implement the CSRD.
- Sustainability reporting obligations will start applying:
 - 1 January 2024 for companies already subject to the NFRD (report in 2025 on FY 2024)
 - 1 January 2025 for large companies that are not presently subject to the NFRD (report in 2026 on FY 2025)
 - 1 January 2026 for listed SME's, small and non-complex credit institutions and captive insurance undertakings (report in 2027 on FY 2026)

- **Scope**

- **All “large” companies:** > 250 employees on average during the financial year **and** a balance sheet total in excess of 20 million euros
or
a net turnover in excess of 40 million euros.
- Listed SMEs (but not listed micro-entities)
- Consolidation: **EU Parent undertakings** of a “large group” (*i.e.*, groups exceeding the threshold of the CSRD, on a consolidated basis) will be required to publish a consolidated sustainability statement with respect to their entire group. Their subsidiaries will then be exempted from the obligation to issue such individual statement.
- Non-EU companies with securities listed on EU market → equivalence
- Non-EU companies generating a net turnover of €150 million in the EU and with at least one subsidiary or branch in the EU → requirement to provide a sustainability report (from 1 January 2028)



4. Corporate Sustainability Reporting Directive (CSRD)

• Reporting format

- The sustainability information will have to be included in **companies' management report**.
- Requirement to report according to mandatory EU sustainability reporting standards.
 - By 30 June 2023: a first set of standards specifying the information to be reported.
 - By 30 June 2024: a second set of standards specifying complimentary and sector-specific information.
- Electronic format (EU Single Access Point)
- **Audit of reported information.**

• Content of the sustainability reporting obligations

- Ensuring that companies publicly disclose adequate information about the sustainability risks and opportunities they face, as well as the impacts they have on people and the environment = double materiality principle
- More detailed than NFRD
- Effects of value chain + effects of own activities
- Publication of a strategy
- Bigger emphasis on intangible assets
- Past financial year + future facing outlook



4. Corporate Sustainability Reporting Directive (CSRD)

- **Sustainability statements must include the following:**
 - A brief description of the undertaking's **business model and strategy**, including:
 - The resilience of the undertaking's business model and strategy to risks related to sustainability matters;
 - The opportunities for the undertaking related to sustainability matters;
 - The plans of the undertaking to ensure that its model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement;
 - How the interest of the undertaking's business model and strategy take account of the interests of the undertaking's stakeholders and of the impacts of the undertaking on sustainability matters;
 - How the undertaking's business strategy has been implemented with regard to sustainability matters;
 - A description of the **targets** related to sustainability matters set by the undertaking and of the **progress** the undertaking has made towards achieving those targets;
 - A description of the **role of the administrative, management and supervisory bodies** with regard to sustainability matters;
 - A description of the undertaking's **policies** in relation to sustainability matters;
 - A description of:
 - The **due diligence process** implemented with regard to sustainability matters;
 - The principal actual or potential adverse impacts connected with the undertaking's **value chain, including its own operations, its products and services, its business relationships and its supply chain**;
 - Any actions taken, and the results of such actions, to prevent, mitigate or remediate actual or potential adverse impacts;
 - A **description of the principal risks** to the undertaking related to sustainability matters and how these are managed;
 - Indicators relevant to the disclosures referred to in points (1) to (6).



5. Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD)

- Published by the EU Commission on **23 February 2022**
- **CSRD**: focuses on disclosure obligations and related accountability rules
CSDD: supplements the CSRD by requiring modifications of national corporate legislation
- Companies will be required to:
 - **Integrate** due diligence into the company's policies
 - **Identify** actual or potential adverse human rights and environmental impacts
 - **Prevent, mitigate and remediate** potential and actual adverse human rights and environmental impacts
 - **Establish and maintain** complaint procedures
 - **Monitor** the effectiveness of the company's due diligence policies and measures
 - Publicly **communicate** on due diligence
- UN Principles on Business and Human Rights (2011) and OECD Due Diligence Guidance for Responsible Business Conduct (2018) as guiding and inspirational resources
- Member States will have to designate one or more **national administrative authorities**
 - Responsible for **supervising** the new rules: requesting information and carrying out investigations
 - May impose **finances** and **interim measures**, and **order cessation of infringement** in case of non-compliance
 - **Victims** will be able to take **legal action** for damages



5. Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD)

- Scope
 - Companies formed under **MS law**:
 1. > 500 employees on average & worldwide turnover > EUR 150 mln in the last financial year; or
 2. > 250 employees on average & worldwide turnover > EUR 40 mln in the last financial year & at least 50% generated in one or more sectors of high risk
 - Companies formed under **law of a third country**:
 1. turnover > EUR 150 mln in the EU in the last financial year
 2. turnover > EUR 40 mln in the EU in the last financial year & at least 50% generated in one or more sectors of high risk
 - **Sectors of high risk**:
 - i. the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;
 - ii. agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;
 - iii. the extraction of mineral resources regardless from where they are extracted, the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products
- Accompanying measures that apply to **SMEs** that are present in the value chains of in-scope companies



6. What does this mean for SMEs?

- Non-listed SMEs fall outside of the scope of the **CSRD**
- Listed SMEs with securities admitted to trading on an EU regulated market (other than micro-undertakings) fall within the scope of the **CSRD**
 - Opt-out for listed SMEs will be possible until 2028, meaning that they will be exempted from the application of the directive
 - A specific set of EU sustainability reporting standards for SMEs is being developed – SMEs that fall outside of the scope of the CSRD might choose voluntarily to use these
- SMEs fall outside of the scope of the **CSDD**, but:
 - CSDD does have an impact on SMEs that are present in the value chains of in-scope companies
 - Obligation for both Member States and companies falling within the scope to provide support to SMEs that are present in the value chains of companies

II. ESG & Litigation – Creating a climate for hard law initiatives



Shell climate case winner targets dozens more companies

Dutch activists warn 30 groups from BP to Unilever to slash emissions or risk legal action

Nestlé CEO accused of aiding the killing of ‘defenseless children and mothers’ by refusing to stop doing business in Russia

BY CHRISTIAN HETZNER

Deliveroo debacle exposes venture capital’s ESG blindspot



1. ESG case law in Belgium and France

- VZW Klimaatzaak v Kingdom of Belgium & Others
 - Similar to the *Urgenda-case*, however the Court declined to issue an injunction ordering the government to set the specific emission reduction targets requested by the plaintiffs
 - Appeal by VZW Klimaatzaak – to be continued on 14 September 2023

- BNP Paribas served notice by NGOs Oxfam France, Friends of the Earth France and Notre Affaire à Tous
 - They cite '**la loi sur le devoir de vigilance**', which obliges large French companies to identify risks and prevent serious environmental and human rights violations that may result from their activities
 - BNP Paribas accused of not applying the law in the area of climate change, by continuing to finance oil and gas projects
 - The bank has three months to comply with the law, otherwise the NGOs will refer the matter to the Paris court
 - First step towards the first climate litigation case in the world to target a commercial bank for its high-risk activities in the oil and gas sector

2. ESG case law in The Netherlands

Urgenda Foundation v. State of the Netherlands (2015)

- Claim by environmental group and 886 Dutch citizens against Dutch State to require it to do more to prevent global climate change
- Tort claim – Dutch State has a duty to take climate change mitigation measures
- ECHR – art. 2 (Right to life) and 8 (Right to respect for private and family life)
- Global problem, but Dutch State is responsible for 'its part'
- First decision by any court in the world ordering a state to limit greenhouse gas emissions for reasons other than statutory mandates
- Confirmed by court of appeal (2018) and Supreme Court (2019)
- Follow up litigation?



Source: www.urgenda.nl

2. ESG case law in The Netherlands

Milieudefensie et al. v. Royal Dutch Shell plc. (2021)

- Shell has an “obligation of result” to reduce CO2 emissions generated worldwide by its group’s operations (scope 1)
- Shell has a “significant best-efforts obligation” to reduce CO2 emissions generated worldwide by its business partners (scope 2 and 3)
- Reduction of CO2 emissions of 45% by 2030 (compared to 2019)
- Shell’s policies are incompatible with the reduction obligation implying an “imminent violation”
- Appeal Shell – written rounds submitted, hearings 2023/2024



Source: www.shell.com

2. ESG case law in The Netherlands

Possibly a contagious effect in relation to ESG-claims against companies

➤ Investments

- September 2021: Fossielvrij NL announces action against ABP in relation to their fossil fuels investment policy
- October 2021: ABP announces to stop with investments in fossil fuels

➤ Reduction CO2 other companies?

- January 2022: open letter Milieudefensie to 29 other companies to reduce their CO2 emissions by 45%

➤ Greenwashing

- July 2022: Fossielvrij NL starts proceedings against Dutch airline KLM over advertising campaign



Source: www.flyresponsibly.klm.com/



3. ESG – D&O liability

Starting points

- Primarily responsibility and liability company
- External vs. internal liability
- High threshold – (personal) ‘serious blame’
- No US style (derivative) shareholders claims

But

- Greenwashing? Disclosure / misleading information in annual accounts?
- Internal liability – new corporate governance code (2023)?
- Liability for not adhering to court rulings (Milieudefensie)?



4. Class actions in The Netherlands - WAMCA

- New act for class actions as per 1 January 2020
- Applicable to class actions relating to:
 - events on or after 15 November 2016
 - that are brought after the WAMCA has taken effect on 1 January 2020.
- Opt-out basis (for Dutch residents)
- Including claims for monetary damages
- To be used in ESG litigation?

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