

Trends and Developments

Contributed by De Brauw Blackstone Westbroek (Amsterdam - HQ)

2024 AND BEYOND AS PIVOTAL YEARS FOR CLIMATE TRANSITION PLANNING

Overview

In the area of climate change regulation, the year 2024 will be remembered for, likely, the adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) and, notably, article 22 included therein. On the basis of this provision, Member States will have to implement into national law an obligation for companies in scope to adopt and implement a climate transition plan (CTP).

In the Netherlands, the process of adopting CSDDD has garnered a great deal of attention. After all, over the past years, the Netherlands has become the battleground of several key climate change cases. In the Urgenda decision in 2019, the Dutch Supreme Court confirmed the appeal judgment in which the Dutch State was ordered to reduce greenhouse gas (GHG) emissions in the Netherlands by 25% compared to the baseline year 1990. Two years later, in the Shell decision, the Hague District Court ordered Shell to limit or cause to be limited the aggregate annual volume of all CO₂ emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels. Shell appealed the decision. The decision in appeal was rendered on 12 November 2024 and overturned the first instance decision. Although the Court of Appeal found that it could, for various reasons, not order Shell to reduce its scope 1, 2 and 3 GHG emissions, the Court did confirm that pursuant to its societal duty of care, Shell has the obligation to contribute to emission reduction.

In light of this, the coming years will likely be pivotal regarding climate transition planning obligations in the Netherlands. In this contribution, we will discuss:

- the status of affairs in both the national transition planning and corporate transition planning in the Netherlands; and
- our expectations for 2025 and beyond.

NATIONAL TRANSITION PLANNING

Together with the European Union and its other Member States, the Netherlands signed the Paris Agreement on 22 April 2016 and ratified the Paris Agreement on 28 July 2017. The Netherlands thereby committed to ensuring that the global average temperature increase stays well below two °C compared to pre-industrial levels while aiming to limit warming to 1.5 °C. In line with this commitment, the European Union has made its long-term climate objective – achieving a climate-neutral European Union by 2050 with an intermediate target of reducing net GHG emissions by at least 55% by 2030 compared to 1990 levels – legally binding by the adoption of the European Climate Law.

The adoption of the European Climate Law was followed by the so-called "Fit for 55" package. This package consists of proposals for revising and updating European Union legislation to ensure that the European Union's objectives can be met. According to the Commission's estimate, the "Fit for 55" package, when fully implemented, may enable the European Union and its Member States to overachieve its reduction target of at least 55% by 2030.

In the EU nationally determined contribution (NDC), the Netherlands is marked to reduce its emissions from 2005 levels by 2030 by 48%. The Dutch national climate targets are laid down at the national level in the Dutch Climate Act (*Klimaatwet*), which implements the European Climate Law and provides a net-zero target for the Netherlands in 2050 and an interim target of 55% GHG emission reduction in 2030 compared to 1990. Besides these objectives, the Dutch Climate Act obliges the Dutch state to adopt a national transition plan every five years, publish a progress report every two years and report on the climate policies and effects thereof annually. Accordingly, the Dutch Climate Plan 2021-2030 was published in 2019, and an updated

version of the Dutch Climate Plan (*Integrale Nationale Energie- en Klimaatplan*) was submitted by the Minister in June 2024.

National elections preceded this June 2024 update in November 2023. The elections resulted in a right-wing coalition that, on 16 May 2024, presented its agreement of principles (*Hoofdlijnenakkoord*). The Minister mentions this agreement of principles in the updated Climate Plan in June 2024 and announces that the impact of the newly elected Dutch government's plans will be assessed and reported on in March 2025.

We expect that existing plans and measures will continue to be implemented in the Netherlands to reduce GHG emissions. Additional measures might be necessary. However, the current political landscape raises the question of how far-reaching such measures will be. Although the newly installed government has emphasised its commitment to the 2030 and 2050 climate targets, its government program (*regeerprogramma*) emphasised that no new, additional national requirements on top of EU requirements will be introduced. Existing requirements of this kind will be scrapped as much as possible. Likewise, the budget available for climate-related measures has decreased significantly, and various measures introduced previously have been abolished or postponed.

CORPORATE CLIMATE TRANSITION PLANNING

Introduction

In addition to the EU NDC and national plans to reduce GHG emissions, 2024 saw many developments that will further focus on corporate climate transition planning in the coming years. The key developments are currently happening in the field of corporate reporting and substantive climate transition planning through the by-now-well-known Corporate Sustainability Reporting Directive (CSRD) and CSDDD adopted in 2023 and 2024, respectively. Both pieces of regulation put significant emphasis on reporting on and execution of climate transition planning from a mitigation perspective

(see sections Disclosures on Climate Change and Transition planning from the mitigation and adaptation perspective below).

At the same time, as global temperatures hit records in 2024, transition planning from the adaptation perspective – ie, climate risk management – is gaining attention (see section Ancillary Regulation). Last, further regulation stemming from the EU Green Deal plays a role in supporting the green transition (also see Ancillary Regulation).

Disclosures on climate change

In the coming months, we will see the first wave of mandatory CSRD reports come to life. The CSRD was adopted in 2023, and the first wave of companies in scope will be obliged to draw up a sustainability report under the CSRD for the financial year 2024.

Companies reporting under the CSRD are obliged to make disclosures on their plans to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5 °C in line with the Paris Agreement. The European Sustainability Reporting Standards (ESRS) provide that, should climate change not be a material topic for the company (based on the double materiality assessment laid down in the ESRS), the report explains why this is the case and when the company expects climate change to become a material topic. The first wave of CSRD reports that become available in early 2025 will likely provide interesting insights into when companies deem climate change to be a material topic from an impact materiality perspective or financial materiality perspective.

The ESRS E1 (Climate Change) in itself provides a robust reporting standard that is worth an integral read. Notably, disclosures under E1-1 on transition planning and E1-4 on target setting will likely be the most scrutinised, as disclosures on these topics may prove to be relevant for many users of the CSRD report and will, over time, provide a robust picture of companies' transition planning efforts, milestones, impediments and achievements –

also with a view on the CSDDD that will create climate transition planning obligations for companies in scope from 2027 onwards.

Transition planning from the mitigation and adaptation perspective

The CSDDD was adopted on 5 July 2024. In addition to the extensive due diligence obligations laid out therein inspired by soft law instruments such as the OECD Guidelines, article 22 of the CSDDD requires companies in scope to adopt and put into effect a transition plan for climate change mitigation. This transition plan must aim to ensure, through best efforts, that the company's business 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 and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities. The transition planning obligation is hence focused on mitigation (ie, efforts to prevent dangerous climate change).

The design of the transition plan for climate change mitigation referred to in the first subparagraph shall contain:

- (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for scope 1, scope 2 and scope 3 GHG emissions for each significant category;
- (b) a description of decarbonisation levers identified and key actions planned to reach the targets referred to in point (a), including, where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies;
- (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and

- (d) a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation.

Although many EU-based companies already had transition plans in place for their activities, either in part or as a whole, and had voluntarily disclosed emission reduction ambitions, this imminent obligation has put climate transition planning high on the agenda of companies and their boards.

Many aspects of article 22 CSDDD have rapidly become a topic of intensive debate, while key components of the obligation – and essentially the obligation as a whole – are still unclear. Article 22 CSDDD provides that companies reporting on a CTP under the CSRD are deemed to comply with the obligation laid down in Article 22 CSDDD. However, apart from the fact that 'deemed compliance' does not provide clarity on the substantive best efforts requirement, the ESRS do not answer pertinent points of climate transition planning and target setting for GHG emissions. We expect many of these aspects to be crystallised in 2025 and beyond (see section Principled discussions around 'best efforts' obligations and content of CTPs).

In addition, the OECD Guidelines were expanded in June 2023 to include climate change as a topic companies should perform due diligence on. Here, too, the full extent of the requirements under the OECD Guidelines is unclear, for example, whether climate change is regarded to have an adverse impact on which companies should perform due diligence. That means that companies should ensure that they are not linked to, contributing to, or causing climate change, while that approach does, in our view, accurately address the reality that not one company or activity is causing climate change. The alternative, qualifying emissions as such to be the adverse impact, equally does not seem fit for purpose. After all, not all emissions as such are undesirable or not in line with the global and national ambitions reflected in the Paris Agreement, and the approach would cause essentially anyone involved in business to be, at least, linked to adverse impacts.

Hence, a lot will likely be debated and hashed out in the coming years to find the norm appropriate to address the issues these instruments wish to tackle. At the same time, it is clear that urgent action will be crucial to mitigate and adapt to climate change. We see companies within the scope of the CSDDD already stepping up their efforts in light of their existing and imminent obligations.

Substantive obligations on both aspects, climate transition planning and due diligence, were also laid down in a draft bill on corporate social responsibility in the Netherlands, but the Dutch legislator made the conscious choice to await the outcome of the adoption process of the CSDDD. We do not envisage any specific Dutch legislation on climate transition planning other than the implementation of the CSDDD into national law. This is particularly because the explanatory memorandum to the draft implementing bill dated 18 November 2024 also recommends withdrawing the previous draft bill on corporate social responsibility. In addition, and as will be discussed in the section Principled discussions around 'best efforts' obligations and content of CTPs below, the decision in appeal in the matter of Friends of the Earth Netherlands (*Milieudefensie*) against Shell was rendered on 12 November 2024. The first instance ruling in which Shell was ordered to reduce its scope 1, 2 and 3 GHG emissions was overturned. Nevertheless, *Milieudefensie* has announced that it will move forward with its anticipated litigation against the ING group.

In addition to regulation focusing on transition planning from a mitigation perspective, we see an increased focus in the market on climate change adaptation (ie, managing physical and transition risks caused by climate change). The new banking package (CRR III/CRD VI) includes several updates relating to climate change and climate risks. In addition, between January and April 2024, the European Banking Authority (EBA) conducted its consultation round on Guidelines for managing ESG risks. Both these guidelines and general views on the management of ESG risks in the financial sector will likely be further developed in the coming years.

The ESRS also require companies to report on their management of sustainability risk, and in particular, climate risk - corresponding with the notion laid down in the Dutch Corporate Governance Code GCG, which provides that companies are expected to properly manage risks associated with their business. This, in connection with the notion that boards ought to have proper knowledge about these risks, will also, in the Netherlands, likely increase scrutiny on the plans companies adopt to manage their climate risk.

Ancillary regulation

The foregoing pieces of regulation are, of course, interlinked and supplemented with other regulations adopted as part of the Green Deal - and the Fit for 55 package - focused on emission reduction, such as EU ETS and CBAM, as well as topical regulation on inter alia deforestation, single-use plastics, and green claims. This framework of regulations should combat climate change in several ways and through several types of policies.

In the Netherlands, a similar trend is emerging amongst Dutch regulators. In recent years, these regulators have issued guidelines on sustainability matters and have communicated that battling, eg, greenwashing and enhancing the availability of reliable and accessible information on businesses' sustainability matters in the Dutch economy will be one of their priorities in the coming years. Other priorities of the Dutch regulators include the acceleration of the energy transition by monitoring energy networks and suppliers as well as the integration of sustainability aspects in operation and risk management by regulated entities.

EXPECTATIONS FOR 2025 AND BEYOND

Principled discussions around 'best efforts' obligations and content of CTPs

In the coming months, we expect significant debate about the ambit and substantive meaning of article 22 CSDDD and its interplay with other pieces of regulation to develop a coherent framework through which companies' obligation to adopt and implement a CTP can be distilled.

To start, it will be necessary to further understand the extent of the best efforts obligation included in Article 22 CSDDD and on what basis it is to be determined which efforts can be expected and demanded from companies in scope. The complex and individual nature of this obligation also emerges from the decision of the Hague Court of Appeal on 12 November 2024 in the *Shell/Milieudefensie* case. The Court found that it could not derive Shell's individual obligation to reduce its reported scope 3 emissions from the global average reduction percentage as claimed by *Milieudefensie*. The Court considered that it was lacking insight into Shell's customer base and questioned the effectiveness of the reduction norm as asserted by *Milieudefensie*. In our view, it is necessary for the effectiveness of the obligation included Article 22 CSDDD, and a prerequisite from the viewpoint of the principle of legality that further guidance is provided on this obligation. For example, it is unclear on what basis companies should determine the emission reduction they will seek to achieve through their CTP and what risk appetite they can show in doing so. It is further unclear whether the obligation can shift and become more stringent in case the 1.5 °C goal of the Paris Agreement is deemed to require more invasive action in the future.

Further, terms such as "compatible with", "where appropriate", "significant category", and "conclusive scientific evidence" are not further explicated in the CSDDD or elsewhere. It is unclear whether a CTP can be compatible with the transition in the sense of article 22 CSDDD by predominantly relying on technological developments and emission reduction outside the company, elsewhere in the economy. The CSDDD is silent on the conditions under which (or "where") setting an absolute emission reduction target is considered "appropriate" and when a set of emissions is considered to be a "category" and whether a category is determined to be significant on an absolute basis or a relative basis. All of these evident questions have yet to be answered in the FAQ issued by the European Commission by the end of July 2024 and will likely only be debated and crystallised in the coming years. The guidelines foreshadowed in the CSDDD on the obligation under article 22 CSDDD are only expected in July 2027.

The year 2025 will also be the year against which many Dutch companies have formulated their first incremental emission reduction target. It remains to be seen whether the reductions envisaged by these companies have been achieved, although it is clear that climate transition planning is on the radar of Dutch businesses.

Refinement and better quality of methodologies and transition pathways

In line with the foregoing and the intensive work that is done globally in the field of transition planning, we also expect that in 2025 and beyond, existing guidance on transition planning, carbon calculation methodologies and emission reduction target setting will be updated and enhanced.

The year 2024 saw the Science Based Targets Initiative (SBTi) under intense scrutiny for its internal governance following the position it had taken on offsetting to meet scope 3 reduction targets. Such principled discussions will likely continue in 2025, including debate on credits, offsetting methods, reliability thereof, and other methods such as CCS.

We also expect methodologies to allocate and calculate emissions will be further developed and enhanced on the basis of progressing scientific and economic insights into the suitability and applicability of these methodologies.

Likely, more data will become available in the coming years due to, in any case, CSRD reporting starting over FY2024 in 2025 and other disclosure mechanisms such as SBTi and CDP, which can support data availability, quality and integrity outside the European Union. This, taken together, will hopefully provide more tangible guidance on the framework within which CTPs operate and provide commonality among them.

Expansion of stakeholder model and activism

Another development we expect for 2025 and beyond is that climate transition planning will find its way into Dutch corporate law. Operating under the stakeholder model, directors of Dutch companies do not exclusively owe a fiduciary duty to the company's shareholders as such but, rather, to the company and its enterprise – the latter not only comprising the shareholders' interests, but the interests of other stakeholders too (eg, creditors, employees and others). Moreover, this generally requires boards to focus on the long term.

As the range of stakeholders and their priorities continues to evolve, directors will have to make more policy choices while balancing apparent conflicting interests: the interests of shareholders in a profit margin, the interests of the company's direct stakeholders in its long-term success, and the interests of the wider public and future generations in sustainable business operations. This raises the fundamental question of to what extent the pursuit of more 'sustainable' business practices in a manner that goes beyond the company's strict legal obligations is permissible if these practices do not directly benefit the company's direct stakeholders, such as its shareholders. Even though the company's strategy is, in principle, the prerogative of the board, it cannot be excluded that a continued disregard for sustainability may, in the future, give rise to litigation on the company's affairs and management, whether by shareholders or by other stakeholders such as NGOs.

The disclosures made pursuant to the CSRD may further trigger sustainability-related litigation. Historically, the primary users of annual reports have been those with a financial interest in the company, such as shareholders, bondholders and other creditors. With the CSRD, however, the target group of annual reports (at least as far as sustainability information is concerned) has been broadened to include "civil society actors, including non-governmental organisations and social partners, which wish to better hold undertakings to account for their impacts on people and the environment". As the Dutch Enterprise Chamber is the competent authority for enforcing reporting obligations, these actors may also be considered stakeholders with sufficiently legitimate interest to initiate reporting proceedings before the Enterprise Chamber and challenge a company's CSRD

report. This necessitates clear positions on what qualifies as a legitimate interest and to what extent the CSRD and ESRS allow discretionary powers for boards with respect to their sustainability disclosures.

Impact on Liability Regimes

Civil liability for sustainability issues may also gain further traction in the coming years. Established case law provides that access to information (knowledge) and active involvement of parent companies in their subsidiaries (control) policies give rise to a duty of care and liability towards the subsidiary's contractual creditors. Similarly, courts may be willing to consider the responsibility of parent companies for the acts or omissions of subsidiaries in relation to their sustainability objectives. As a result of the CSRD, parent companies will receive an increasing amount of sustainability information on both their own activities and those of their partners in the value chain. Parent companies will be expected to apply appropriate due diligence processes and take action when negative impacts are identified. This may particularly hold true for impacts detrimental to the climate, such as deforestation.

In addition, NGOs appear to be actively campaigning to hold directors responsible for their organisations' environmental and societal impact. Likewise, insurers see an uprise in ESG-driven D&O liability. Under Dutch law, the threshold for directors' personal liability is high. A serious fault on the part of the directors is required. At the same time, however, it cannot be ruled out that in certain cases, a court may conclude that the company's processes and the directors' actions were so inadequate as to give rise to liability. Process integrity is likely to reduce the risk of liability based on a say-do gap, and clear views of the company on how it wishes to conduct its climate transition planning from both a mitigation and an adaptation perspective will be key.

Concluding remarks

The year 2025 – and beyond – will, in the context of climate change regulation, likely be characterised as the years in which principled discussions are held about the responsibilities in this respect of individual

companies. This will likely result in further crystallised frameworks that allow for a more objectified determination of a company's obligations in this respect. Our hope is that this will make regulation on the topic more effective and that the obligation will be better suited to be executed by companies.

Authors

De Brauw Blackstone Westbroek is an independent and international law firm deeply rooted in the Netherlands since 1871. The firm's practice covers a wide range of practice areas, comprehensively covering clients' needs with significant international operations. De Brauw act as lead counsel in high-end transactions, disputes and regulatory enforcement matters, coordinating the work from Amsterdam or our offices in Brussels, London, Shanghai and Singapore. The firm acts both independently and co-operatively with other top-tier independent firms across the globe, among whom are Best Friends – a network of top European law firms.

Casper Nagtegaal specialises in complex business transactions, advising clients on corporate law and governance. He has extensive experience assisting companies with cross-border transactions, spin-offs, and securities offerings, particularly focusing on governance topics such as board responsibilities, sustainability, corporate governance codes, shareholder meetings, and financial disclosures. Casper is a fellow of the Radboud Business Law Institute at Radboud University and lectures on corporate law there. He co-authored a leading commentary on the Dutch Corporate Governance Code and frequently publishes in his field of expertise.

Davine Roessingh is one of our litigation partners and heads De Brauw's climate and sustainability expertise group, which focuses on climate change, sustainability and ESG-related matters. Davine has a commercial and corporate litigation practice that is comprised of arbitration and litigation, including enforcement and execution matters.

Davine holds a UNEP FI certification in Climate Risk, sits on the Advisory Board of the Oxford Net Zero Policy and Regulation Hub, lectures at the VU on International Arbitration Law and corporate law for the Grotius Academy, and regularly publishes and lectures clients' executive boards and supervisory boards on the full spectrum of climate and sustainability topics.

Michelle Massart has a broad litigation practice, with a particular focus on corporate litigation and commercial disputes. Michelle's expertise includes disputes relating to joint ventures, collaboration agreements and M&A transactions.

Michelle has represented a wide range of Dutch and international clients in legal proceedings before the Dutch courts, including before the Enterprise Chamber in Amsterdam, on complex contractual matters. Michelle also has extensive experience in arbitral proceedings under the rules of arbitration institutions such as the ICC and NAI. In addition, she has been involved in a number of setting-aside proceedings in relation to arbitral awards, as well as recourse and enforcement proceedings.

Sebastian Hinse is an expert in international commercial arbitration and cross-border litigation, representing major corporations in arbitral and Dutch court proceedings. He advises clients on sustainability and climate legislation, frequently lecturing at Erasmus University Rotterdam on corporate governance, sustainability reporting, and related responsibilities. Previously, he worked in De Brauw's Finance & Restructuring team, specialising in corporate finance, debt restructuring, banking, and capital markets. He has advised listed companies, private equity firms, and financial institutions on cross-border transactions and debt restructuring. Sebastian also regularly teaches on the topics of international corporate governance and ESG at Erasmus University.

Lisa Langendijk Lisa is an associate in De Brauw's litigation and arbitration practice. She has extensive experience in energy and climate-related matters.

Business Card

Burgerweeshuispad 201	Tel:	+31 20 577 1771
1076 GR Amsterdam	Fax:	+31 20 577 1775
	Email:	Info@debrauw.com
	Web:	www.debrauw.com

