

# Trends and Developments

## **Manifold ESG Trends in 2023 in the Netherlands**

As has been seen and experienced in recent years, dynamics in global society are shifting and the role of companies and the scope of their responsibilities towards society at large is under scrutiny. In the Netherlands, a jurisdiction in which the Rhineland stakeholder model paradigm is already traditionally applied, the notion that corporate accountability goes beyond the confines of an entity (and even beyond the borders of the group) is gaining more traction and wider application. This trend – together with the push for transparency concerning the impacts of companies on their (upstream and downstream) value chain and society at large under the Corporate Sustainability Reporting Directive, as well as the growing activism around climate change (mitigation) – has resulted in a full-packed 2023, in which legislative, judiciary, and political developments are triggering fundamental questions of law.

On the basis of the foregoing, the following key themes have emerged in Dutch ESG trends and developments in 2023:

- activism and (imminent) legislation concerning the scope of legal entities' and groups of companies/corporations' responsibilities and their duties of care;
- activism and (draft) legislation concerning emission reduction obligations and/or obligations to draw up an energy transition plan; and
- increased regulation and scrutiny on external communications to further push the sustainability agenda.

These are legal trends as much as they reflect societal shifts. In the Netherlands, 2023 has been a year of intensified activism outside the legal profession as well. Extinction Rebellion repeatedly occupied the A12 highway into The Hague. The annual general meetings of some of the largest Dutch listed companies were filibustered by activists. NGO *Milieudefensie* (Friends of the Earth Netherlands) continued its campaign against 29 of the largest Dutch companies, including financial institutions, publicly scrutinising and ranking the climate plans of these companies.

All in all, ESG trends in the Netherlands are taking place all around us and the dust is not settling yet. This article explores the above-mentioned three main developments in more detail.

## **Shifting Notion of the Role of Companies and Their Boards in a More Sustainable Future**

### ***Sustainable corporate governance***

Companies play an essential role in the transition towards a sustainable economy. Without their engagement, sustainability targets are unlikely to be met. However, how companies are to be forced or nudged towards playing their part has sparked extensive debates. One view, which has garnered substantial support in recent years, holds that corporate governance (ie, the way in which companies are governed and to what purpose) must be adapted and expanded in order to promote sustainable behaviour by companies.

Under the moniker “sustainable corporate governance”, various proposals have been put forth, both on a national and EU level. Although the more sweeping European initiatives aimed at making corporate governance more sustainability-oriented and Dutch academic proposals to mandate companies to define their “purpose” were significantly watered-down or failed to materialise altogether, a discernible trend towards integrating sustainability into corporate governance is evident.

As a clear proponent of the Rhineland corporate governance model, Dutch statutory and soft-law corporate governance has long taken a broader view of the *raison d’être* of companies. 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 business – the latter not only comprising the shareholders’ interests, but the interests of other stakeholders too. Moreover, as confirmed by the Dutch Supreme Court, this generally requires boards to focus on the long term.

December 2022 saw the new Dutch Corporate Governance Code (“the Code”) being unveiled, which expressly brought sustainability into the mix. As of 2023, listed companies are to be guided by the principle that “the management board is responsible for, among other things, sustainable long-term value creation”. The term “sustainable” was added to the otherwise

already employed wording. As explained in the Code, “sustainable” in this context refers to striking a “balance between the social, environmental and economic aspects of doing business”. While the term “long-term value creation” in the previous Code already sought to promote sustainable behaviour by the board, the explicit inclusion of the notion underscores and highlights its significance.

The Code is a soft-law instrument and only directly applies to listed companies, although courts have used it as inspiration to determine binding obligations for other companies as well. While “long-term value creation”, “sustainable” and “a balance” are all vague notions, which should afford discretion to companies and their management, recent case law (eg, the *Estro* decision by the Enterprise Chamber and the *Funda* decision by the Dutch Supreme Court) illustrates that this is certainly not unlimited. Board decision-making without giving due consideration to matters of sustainability, when relevant, may not be considered good corporate governance by the wider public or courts in the future.

However, in the authors’ view, caution is warranted – given that this trend assumes a more mechanic decision-making process than practice shows. It further raises fundamental questions as to whether the pursuit of a more “sustainable” business conduct is allowed if at the expense of the corporate interest of the company. In other words, questions may arise around the legitimacy of unsustainable choices that the board considered to be in the best overall interest of the company.

### ***Towards ESG due diligence***

The adoption of the Corporate Sustainability Reporting Directive (CSRD) and underlying sustainability reporting standards serves as the defining ESG legislative moment of the past year. As the disclosure obligations are set to take effect in 2024, respectively 2025, many companies are currently undertaking enormous efforts to prepare for disclosure.

Often mentioned in one breath with the CSRD are hard-law ESG due diligence obligations. ESG-targeted due diligence legislation has been adopted by Parliament both at an EU level (eg, the Deforestation Regulation) and the national level (eg, the Child Labour Due Diligence Act (*Wet zorgplicht kinderarbeid*), currently without an effective date). Moreover, both at an EU level (eg, the Corporate Sustainability Due Diligence Directive, or CSDDD) and the national level (eg, the Dutch Corporate Social Responsibility

(CSR) Bill (*Wetsvoorstel verantwoord en duurzaam internationaal ondernemen*)), proposals are pending that aim to establish ESG due diligence rules far broader in scope.

Effectively building on existing soft law (such as the OECD Guidelines) and the CSRD's requirement to obtain varied non-financial data from a company's operations or its value chain partners, the CSDDD and the Dutch CSR Bill would impose an obligation to implement due diligence measures in order to identify, prevent, mitigate, end, and account for negative human rights and environmental impacts. The proposals for the CSDDD and Dutch CSR Bill are – to varying degrees – relatively broad in scope, leading to (in the authors' view, justified) concerns that requiring companies to chase too many “negative effect” rabbits may leave them unable to catch the most vital ones. Indeed, insufficiently allowing companies to give precedence to the most salient issues will likely hamper the effectiveness of the envisaged due diligence obligations.

### ***Duty of care revisited***

Even without the CSDDD and Dutch CSR Bill initiatives, Dutch law already recognises the notion of duties of care where reasonable levels of information (access) and control meet – for example, on the basis of the well-known *Sobi/Hurks* and *Albada Jelgersma* decisions. Abstract norms – such as a “duty of care” – are an integral part of Dutch civil law. Recognising that it would be impossible and undesirable to establish a rigid, exhaustive set of rules, abstract norms help courts deliver justice based on individual cases and contemporary perspectives. Some advocate that these abstract norms also allow courts to step in when Parliament and the government are unable to reach a consensus or fail to do what is perceived to be necessary.

It is the abstract “duty of care” under tort that formed the foundation of the landmark *Shell* decision. In establishing *Shell's* concrete duty of care, the court considered various circumstances, including soft-law instruments such as the UN Guiding Principles and OECD Guidelines. It is also the abstract duty of care under tort that, according to several scholars, could frequently result in cross border-liability for a parent company in respect of material adverse effects on human rights or the environment that were caused by their subsidiaries or supply chain partners. The knowledge (or at least reasonable access to information) and active involvement of a parent company – which are core tenants of traditional parent company liability (ie, liability vis-à-vis contractual creditors of a subsidiary) – will increase as a

result of the CSRD and ESG due diligence regulation and thereby also increase the risk of liability, the common argument suggests.

Since the Shell judgment is under appeal and NGOs have indicated lodging further claims based on the duty of care under tort, 2024 and beyond may hold a watershed moment on the extent of an “ESG duty of care”. It also amplifies existential questions around the group of companies doctrine if duties of care are (too) easily assumed to exist at top holding level.

### ***Delicate balance between transparency and third-party reliance***

The days when the legal department’s involvement in external communication was only needed every so often are long gone.

“Greenwashing” now has its own dictionary entry and has captured the attention of regulators, while lawsuits relating to it have been brought. Both the Dutch Authority for Consumers and Markets (ACM) and Authority for the Financial Markets (AFM) issued sustainability claims guidelines and an EU Directive on Green Claims was proposed earlier in the year, as will be discussed.

However, external communications on ESG matters have also resulted in claims in instances beyond the more “conventional” issues around advertisements and market communications. A successful claim on the basis of external communications resulted in the G-Star judgment. There, the Amsterdam District Court held that the company’s externally communicated CSR policy was relevant in determining the rights and obligations of G-star vis-à-vis one of its suppliers – even in deviation of the explicit rights and obligations included in the applicable supply agreement.

As external communication on matters of sustainability (including non-financial reporting obligations) will increase, so might the imperative for companies to conduct a thorough review of their external communications.

### **Decisive Moments Ahead for Emission Reduction Obligations**

The world is in transition and the effects of climate change are noticeable not only physically, but also in regulation. The Netherlands, especially, has been a key jurisdiction for NGOs seeking to convert their campaigns and activism into litigation. In its 2019 ruling in the Urgenda case, the Dutch Supreme Court already decided that the Dutch State was under an obligation to

reduce its emissions by 25% by the end of 2020 against baseline year 1990. In 2021, the District Court of The Hague issued a landmark ruling on the actions brought by *Milieudefensie* and others against (then Royal Dutch) Shell. In the judgment, Shell was ordered to reduce its Scope 1, 2 and 3 emissions by 45% at the end of 2030 against baseline year 2019. As regards its Scope 1 and 2 emissions, the court found this to be an obligation of result, whereas the court considered it to be a “significant best-efforts obligation” with regard to Shell’s Scope 3 emissions. The judgment is currently under appeal. The question of whether the Shell decision can be applied to other companies as well – ie, whether the part concerning Shell’s emissions reduction obligation operates as a norm – is increasingly raised.

2023 has been a year in which the “transition plan obligation” and the “reduction obligation” remained uncertain yet heavily debated.

Subsequently, 2024 may well be the year in which the obligation to draw up a Paris-aligned transition plan – and, hence, the obligation to reduce greenhouse gas emissions – is further crystallised and laid down in legislation.

### ***Reporting on existing transition plans and targets under the CSRD***

After all, the Shell decision on appeal will be an important further indicator of where things stand in the Netherlands with regard to emission reduction obligations (and duties of care as a wider topic). Articles 19a and 29a of the Accounting Directive (Directive 2013/34/EU) as amended by the CSRD, the proposed CSDDD and its Dutch equivalent (the Dutch CSR Bill) all indicate that in-scope companies will be required to adopt a transition plan.

The CSRD’s preamble (No 30) explains that companies in scope of the Directive “should also be required to disclose any plans they may have to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the objectives of limiting global warming to 1.5°C in line with the Paris Agreement and achieving climate neutrality by 2050, as established in Regulation (EU) 2021/1119, with no or limited overshoot”. The further wording of No 30 and No 31 of the preamble can be read as suggesting that the obligation to disclose a transition plan not only exists for in-scope companies that already have one in place, but for all companies in scope.

The authors do not think that such can be intended by a Directive that concerns disclosure. The CSRD cannot be norm-setting outside the ambit of reporting obligations in itself. However, Article 19a (and, similarly, 29a) of the Accounting Directive are replaced by the CSRD with an obligation that the management report “shall contain (...) the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its 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 (...)”, which seems to presume that such plans are in place.

Dutch investor representative organisation Eumedion has called for the sustainability report drawn up under the CSRD to be subjected to a shareholder determination. This is but one of many examples of how different stakeholders are currently seeking to weigh in on the sustainability agenda of companies.

Reporting standard European Sustainability Reporting Standard (ESRS) E1 (Climate Change) (“ESRS E1”) also includes disclosure requirements aimed at creating sufficient insight into and understanding of the company’s carbon emissions and its reduction efforts. In drafting ESRS E1, the European Financial Reporting Advisory Group (EFRAG) clearly drew inspiration from existing disclosure mechanisms such as the Greenhouse Gas Protocol, the Carbon Disclosure Project, and the Science Based Targets initiative. Further disclosure rules will shape the extent and level of detail of carbon disclosures – for example, the SEC Proposed Climate-Related Disclosure Rule, the International Financial Reporting Standards’ IFRS S2 on Climate Related Disclosures, the Task Force on Climate-Related Financial Disclosures (TCFD) guidelines, and the recommendations in the report by the UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities. Consistency and data integrity will likely to be the focus of attention in the years to come.

### ***Role of transition plans in proposed regulation***

Article 15 of the EC proposal for the CSDDD stipulates that the company “shall adopt a plan to ensure that the business model and strategy of the company 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. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or

an impact of, the company's operations". This provision has naturally caught the eye of many is currently being debated between the EC, the European Council and the European Parliament.

In the Netherlands, after versions of the bill containing an obligation to reduce emissions by 55% by 2030 against baseline year 1990, the Dutch CSR Bill now "merely" includes an obligation to draw up a management risk plan (Article 2.4.1) in which "a company shall adequately address the identified potential and actual risks of adverse effects on human rights and , the environment and climate change and, to this end, shall prepare a plan of action to prevent, mitigate or eliminate those risks of adverse effects of its activities and those of business relations". Hence, companies are required to "adequately address" their adverse effects on "climate change" and prepare a plan of action to prevent, mitigate and eliminate those risks "and those of business relations". The following two points specifically deserve attention.

The proposed Dutch CSR Bill seems to be limited to addressing the impacts of the company on climate change (inside-out view) – but not vice versa (outside-in) – rather than adequately addressing the (physical and financial) risks and opportunities of climate change in the company's business model and strategy.

With the inclusion of the obligation to adequately address the potential and actual risks of adverse effects "of business relations", a Scope 3 reduction obligation seems to be the result.

These proposed obligations are groundbreaking in and of themselves. They will also trigger fundamental questions on corporate governance, such as:

- whether a transition plan is separate from the overall strategy of the company;
- to what extent boards will consult shareholders and stakeholders when drawing up the transition plan; and
- on which ancillary or related topics the general meeting or other stakeholders should be consulted.

The focus on the financial sector is expected to increase in this respect. First, the financial sector will see frontier work done in the field of climate risk and climate scenario analysis application. Climate (litigation) risk is already gaining attention from regulators and the financial sector at large, as



European Central Bank Executive Board Member Frank Elderson's "Come hell or high water" speech on 4 September 2023 showed when he stated: "The best advice I can give is that banks should start putting in place their Paris-aligned transition plans." Second, and as Elderson's speech also addressed, climate litigation is expected to shift focus to (financed) emissions. Litigation risk will also gain prudential relevance (see the Network for Greening the Financial System reports of 1 September 2023). In any case, the financial sector in the Netherlands is following suit. Around 50 banks, insurers, pension funds and asset managers have made a so-called "climate commitment", obliging them to draw up action plans by the end of 2022, including emission reduction targets for 2030 and actions to further the Paris Agreement. Such actions can include (a combination of) emission reductions, engagement, and the financing of greenhouse gas reduction projects.

Aside from and notwithstanding the foregoing, activism is growing in the Netherlands and several of the larger listed companies are under significant scrutiny from NGOs and the wider public. NGOs are not only pushing for companies to adopt emission reduction targets, but are also preparing to hold large corporates accountable for historic emissions. This is not limited to climate change; it also pertains to local air and water quality as well as biodiversity (see, for instance, Greenpeace's campaign against Rabobank).

Political pressure is mounting at the same time. On 22 November 2023, the Dutch general election will be held, in which former EC Executive Vice-President Frans Timmermans – famous for leading the EC's work on the Green Deal – is running as the candidate for two combined Left-leaning parties. Although the Dutch electorate has consistently elected a predominantly Right-leaning government in past elections, prevailing societal sentiments on social justice matters and the increasingly noticeable weather and climate changes may push a shift to the Left.

Several pieces of the same emission reduction puzzle are thus on the table. It may well be a matter of time before they fit. Predicting the future is, of course, a risky event in itself; however, the authors venture that failure to adopt a transition plan and set (Paris-aligned or otherwise sufficiently ambitious) reduction targets will be a rarity in a couple of years. On the flip side, and as previously mentioned, the question may well arise as to what extent boards of Dutch companies should be at liberty to define the company's strategy and business model in an "unsustainable" fashion if such is considered to be in the interest of the company.

## Ring-Fencing Obligations Around Managing Climate Risk

In the meantime, several “ring-fencing” obligations around climate change and climate risk are independently forcing companies to take the matter of climate change into account and adequately disclose their efforts and impacts in this field.

Another hot topic on the agenda for companies is greenwashing. Companies are facing increased scrutiny on all disclosures of “green” or “sustainable” ambitions and whether the way they present themselves on sustainability and climate change is reflective of reality. Both the AFM and the ACM have published guidelines on sustainability claims. The AFM’s guidelines aim to guide financial institutions and pension providers on how to make correct, clear and non-misleading sustainability claims. In a similar vein, the ACM aims to provide clarity on what makes sustainability claims compliant with unfair commercial practice rules and what could make these claims misleading to consumers. They include five rules of thumb and specific points to focus on for each rule.

Sustainability claims are an enforcement priority for the ACM. This could have serious implications for businesses operating in consumer-sensitive sectors – given that various investigations by the ACM have found claims such as “conscious” and “Ecodesign” to be too vague and, consequently, misleading.

The Dutch Advertising Code Committee (RCC) has also proven strict on misleading sustainability claims. As the threshold to bring complaints before the RCC is low, activists and ideologically driven claim vehicles are now using RCC procedures as a stepping stone for civil liability proceedings against companies – for example, the pending civil liability proceedings initiated by FossielvrijNL against Royal Dutch Airlines KLM were preceded by the RCC ruling that certain of KLM’s sustainability claims were misleading. Companies can mitigate risks by ensuring that clear, substantiated and concrete communication regarding their climate action does not omit relevant information, as the proposed EU Green Claims Directive also suggests.

## Authors

**De Brauw Blackstone Westbroek** is known as the leading international law firm in the Netherlands. Rooted deeply in the Dutch tradition of problem-solving and innovation, the firm offers high-end legal advice in corporate

transactions, disputes and regulatory enforcement. De Brauw's lawyers are widely recognised as leaders in their fields. Together, they form a strong collective, representing clients relentlessly pursuing excellence. On this basis, the firm's climate change and sustainability practice and track record in the field is second to none on each of the environmental, social and governance fronts. De Brauw's cross-expertise climate and sustainability group comprises experts from many of the firm's key areas of expertise and has handled matters at the forefront of legal developments in the financial sector, as well as renewable energy projects, governance and litigation.

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