Trends and Developments

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ESG Trends in 2024 in The Netherlands

Last year, the firm reported that 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 2024, this trend has accelerated and decelerated simultaneously. While an anti-ESG trend may be visible across the pond in the United States and is looming in Europe, the European Union has until recently accelerated its efforts to mitigate climate change and to emphasise the role corporations should play in the transition to a more sustainable society. For instance, the adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) may have a profound impact on companies for years to come.

These are legal trends as much as they reflect societal shifts. In 2018, building upon the groundbreaking Urgenda decision against the Dutch State, Milieudefensie, (Friends of the Earth) went after Shell seeking a reduction obligation. After having been ordered by the court to reduce its CO_2 emissions (Scope 1, 2 and 3) by at least net 45% at the end of 2030 (compared to 2019), Shell appealed the first instance decision. On 12 november 2024, the Court of Appeal fully overturned the first instance judgement and all of Milieudefensie's claims have been rejected. However, in summary, the Court did conclude that companies such as Shell have an obligation to take measures to counter dangerous climate change. In addition, Milieudefensie announced that it will initiate proceedings against the Netherlands' biggest bank, ING, arguing that banks and other financial institutions have an absolute emission reduction and strict disengagement obligation. Outside of the court room, NGOs such as Amnesty International and climate activist groups also seem to focus their actions on the financial sector. For example, climate activist Extinction Rebellion joined the action by defacing ING office locations, as well as forcing closures of museums that receive sponsorship from large companies.

On the political front in the Netherlands, the tide seems to be turning. After a right-wing government was installed, questions have arisen about the support for further emission reduction measures. While the new government officially maintained its commitment to the 2030 (55% GHG emission reduction compared to 2005) and 2050 (net zero) climate targets, it emphasised in its government programme that no new, additional requirements on top of EU requirements will be introduced. Existing requirements of this kind will be scrapped as much as possible. The budget available for climate-related measures has decreased significantly and various measures introduced previously have been abolished or postponed. Consequently, the main independent advisory body to the government recently concluded that reaching the 2030 climate goals have become extremely unlikely with current implemented policy.

The polarisation of the climate debate is contributing to making it harder for the various stakeholders to compromise. While the Netherlands was traditionally known for its consensus-driven culture, the debate is now hardening. A recent illustration of this phenomenon is the withdrawal of the trade unions as supporting parties of the Dutch Corporate Governance Code. The unions have resigned from the Corporate Governance Committee because they are dissatisfied with the role of employers' umbrella organisation VNO-NCW and VEUO (which represents the interests of listed companies), arguing that the Committee has degenerated into a vehicle focused on "unlimited self-regulation, satisfying shareholders and profit maximisation".

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2024 And Beyond As Pivotal Years for Climate Transition Planning

Introduction

The key developments currently happen 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 2022 respectively 2024. Both pieces of regulation put significant emphasis on reporting on and execution of climate transition planning from a mitigation perspective.

At the same time and as global temperatures have hit records in 2024, transition planning from the adaptation perspective – ie, climate risk management – is gaining attention. Lastly, further regulation stemming from the EU Green Deal plays a role in supporting the green transition.

Disclosures on climate change

In the coming months, the first wave of CSRD reports will come to life. After the CSRD's adoption in 2022, the first wave of companies in scope should be obliged to draw up a sustainability report under the CSRD for the financial year 2024. However, as is the case in many other member states, the Netherlands has missed the implementation deadline for the CSRD as, in view of the legislative process so far, it is uncertain whether the CSRD will have been implemented in Dutch law before the end of the current financial year. As the companies in scope have been preparing their CSRD reports already, the publication of "CSRD-like" reports is expected, irrespective of whether the CSRD will be enacted by early 2025, but how this will enfold is still to be seen.

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 the limiting of global warming to 1.5°C in line the with 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 must explain why this is the case, including a forward-looking analysis of the conditions that could lead to conclude that climate change is material in the future. 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) provides for 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 provide 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 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: (i) time-bound targets on 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; (ii) a description of decarbonisation levers identified and key actions planned to reach the targets referred to in point (i), including, where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies; (iii) an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and (iv) 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 of in 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 very much unclear. Article 22 CSDDD provides that companies reporting on a climate transition plan (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 and the Commission's FAQ sheet seems to suggest that the "deemed compliance" only pertains to part of the CTP obligation. It is expected that many of these aspects will be crystallised in 2025 and beyond.

Substantive obligations on both aspects, climate transition planning and due diligence were also laid down in an initiative 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, before moving forward with the Dutch initiative bill. The authors do not envisage any specific Dutch legislation on climate transition planning other than the implementation of the CSDDD into national law. On 18 November 2024, the draft bill implementing the CSDDD in the Netherlands was published. In line with current government policy the draft implementing bill does not contain any provisions other than those necessary for minimum implementation of the CSDDD. It is open for public consultation until 29 December 2024.

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 regulations 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 addition to regulations focusing on transition planning from a mitigation perspective, there is an increased focus in the market on climate change adaptation (ie, managing physical risks 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 on the management of ESG risks. Both these Guidelines and general views on the managing of ESG risks in the financial sector will likely be further developed in the coming years.

In the Netherlands, a similar trend is emerging amongst Dutch regulators. In recent years, they 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, there is expected to be significant debate about the ambit and substantive meaning of Article 22 CSDDD and its interplay with other pieces of regulation in coming to 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. It is in the authors' view necessary for the effectiveness of the obligation, 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. None of these evident questions have been answered in the FAQ issued by the European Commission by the end of July 2024, and will likely only be debated and crystallised 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 are all 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 been done globally in the field of transition planning, the authors 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) to be 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 carbon capture and storage (CCS).

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 framework within CTPs operate and provide commonality among them.

Expansion of stakeholder model, stakeholder engagement and activism

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.

Under Dutch law, boards of companies have a high level of discretion in identifying and weighing stakeholders' interests. Neither shareholders nor other stakeholders can file a derivate suit on behalf of the corporation against the directors for not having properly considered the interests of the various stakeholders. This wide discretion of the board is illustrated by the fact that the Dutch Corporate Governance Code states that it is entirely at the discretion of the board whether to engage with stakeholders. This approach to engaging with stakeholders is likely to come under increasing pressure. The CSRD already expects the board to engage with stakeholders, and the CSDDD will make this mandatory for various parts of the due diligence process. These developments will have their impact in the boardroom, both in terms of the preparation of the decision-making process and in terms of the communication with stakeholders on the decisions taken.

Institutional investors also increasingly value stakeholder engagement, particularly as part of their stewardship role. In a recently published green paper, Eumedion, the organisation representing the interests of Dutch institutional investors, calls on companies to show a positive attitude towards an open, constructive dialogue with institutional investors and other stakeholders.

Parliament recently passed a motion calling on the government to examine how the traditional Dutch Rhineland model, in which all stakeholder interests are to be taken into account, can be better safeguarded in legislation and protected from Anglo-Saxon influences. However, unlike the Green Paper, this motion seemed to be motivated more by the idea that shareholders have too much influence on company policy.

Furthermore, 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 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 become a trigger for sustainability-related litigation. Historically, the primary users of annual reports have been those with a financial interest in the company such as shareholders, bond holders 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 as 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 the policies of their subsidiaries (control) 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 that have detrimental impacts on 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 personal liability of directors is high. A serious fault of 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 its 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. In doing so, this will likely result in further crystallised frameworks that allow for a more objectified determination of a company's obligations in this respect. The authors' hope is that this will make regulation on the topic more effective and the obligation better suited to be executed by companies.