LOYENS LOEFF

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Quoted

Sustainability reporting by listed and large companies
Transparent towards a sustainable economy

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In this edition

1. Introduction

In recent decades, sustainability has gained an increasingly prominent role in politics, society and business. Already since the 2000s, numerous voluntary standards and reporting frameworks have been developed by various organisations to facilitate sustainability reporting[1], which to a greater or lesser extent have been incorporated in practice. Meanwhile, legislators have also put the subject (very) high on their agenda. The European Union (**EU**) is clearly taking a pioneering role in this. In December 2019, for example, the EU presented its 'Green Deal' in which it expressed its ambition to make Europe the first climate-neutral continent. As part of the Green Deal, the EU presented a revised strategy for sustainable finance which builds on the Sustainable Growth Financing Action Plan 2018 (the **2018 Action Plan**). Under this Action Plan 2018, three European regulations[2] have already been adopted, which are aimed primarily at investors as well as the broader financial sector and which primarily address the ecological aspects of sustainability. With these regulations, the EU has given the financial sector an important role in driving the transition towards a sustainable economy. In first instance, that is. Recent proposals for new EU directives in the field of sustainability focus more on qualifying companies themselves, whether they are active in the financial sector or outside of it. As a result, more and more companies will be subject to (more) extensive sustainability legislation. Moreover, the proposed directives do not only focus on the ecological component of sustainability, but require a similar weighing of the other two components, social and governance. In other words, all three ESG pillars - Ecological, Social and Governance - will have to be addressed in the reporting.

The Dutch legislator has also been active in the field of sustainability legislation. Examples include the Dutch Gender Balance Act[3] which came into effect on 1 January 2022 and the Dutch Child Labour Due Diligence Act[4] which was published in the Dutch State Gazette on 13 November 2019 but has not yet come into effect. In addition, the initiative bill Responsible and Sustainable International Business Conduct Act[5] was published in March 2021.[6] On 27 May 2022, the Minister for Foreign Trade and Development Cooperation informed the Dutch Lower House that she is working on a draft bill on national legislation regarding international corporate social responsibility (*IMVO*).[7] The Minister indicated that this draft bill would include the aforementioned initiative proposal. It is expected that the internet consultation on the draft bill will commence after the summer of 2023.

Transparency is always highlighted in the (proposed) sustainability legislation as one of the means to achieve the formulated objectives. The idea being that, by requiring adequate reporting, the company management will provide information, and thus be accountable, to the stakeholders of the company, including shareholders, other (potential) investors, but definitely also employees and certain interest groups. This transparency will (better) enable these stakeholders to exercise their rights on an informed basis and thus contribute to the protection and promotion of these rights.

In this edition of Quoted, we zoom in on the transparency obligations under a number of these new and recently announced sustainability laws. We limit ourselves here to the regulations for listed and large companies[8], regardless of whether they are active in the financial sector. We, therefore, do not address the aforementioned

1 These include the *Global Reporting Initiative,* the *Sustainability Accounting Standards Board,* the *International Integrated Reporting Council,* the *International Accounting Standards Board,* the Task Force on Climate-Related Financial Disclosures, the *Carbon Disclosure Standards Board* and *CDP (*formerly the *Carbon Disclosure Project).*

2 This concerns the European Taxonomy Regulation (Regulation (EU) 2020/852), the Regulation on sustainability disclosures in the financial sector (Regulation (EU) 2019/2088, better known as the *Sustainable Finance Disclosure Regulation* or SFDR) and the Sustainable Benchmarks Regulation (Regulation (EU) 2019/2089).

3 *Wetsvoorstel evenwichtiger verhouding tussen mannen en vrouwen in bestuur en raad van commissarissen.*

4 *Wet zorgplicht kinderarbeid*. On this subject, see among others dr. S.J. Rombouts, *De vrijwilligheid voorbij? Vier vragen over Due Diligence wetgeving,* TAC, no 1, April 2020 (in Dutch).

5 *Initiatiefvoorstel Wet verantwoord en duurzaam internationaal ondernemen.*

6 See here for more information on this initiative proposal (in Dutch).

7 Letter from the Minister for Foreign Trade and Development Cooperation dated 27 May 2022, Reference BZDOC-841960807-34. Click here for this Parliamentary Letter (in Dutch).

8 What is meant by this differs per regulation. It is therefore important to always carefully check the scope of a (proposed) provision.

regulations introduced under the 2018 Action Plan[9]. Information obligations under consumer law are also not covered.

We will successively discuss the aforementioned Dutch Gender Balance Act (section 2), the proposal for an EU Directive on sustainability reporting (section 3) and the proposal for an EU Directive on corporate sustainability due diligence (section 4). Where relevant, we will also touch on other initiatives, such as the recently published proposal to update the Dutch Corporate Governance Code (the **Code**).

2. Diversity at the top

On 1 January 2022, a new Act came into force aimed at a more balanced ratio of men to women in the top management of large companies.[10] This law is a follow-up to the so-called target regime (*streefcijferregeling*) which applied to 'large' NVs and BVs from 1 January 2013 to 1 January 2020, as described below, on 'comply-or-explain' basis. However, this target regime and other initiatives to promote gender diversity at the top of Dutch business have had (too) little effect. The new Act, therefore, contains a stricter regulation consisting of the two elements described below. After five years, so in 2027, this new Act will be evaluated.

2.1 Target with reporting obligation for 'large' NVs and BVs

Firstly, a target regime again applies. Large' NVs and BVs must set appropriate and ambitious targets, in the form of a target ratio, to bring about a more balanced ratio of men to women on their management and supervisory boards, as well as among categories of employees in managerial positions (the sub-top) to be determined by the company.[11] To this end, the company must draw up a plan. Each year, within ten months of the end of the financial year, the company must report to the Social and Economic Council of the Netherlands (*Sociaal Economische Raad*, **SER**) on the target ratios set and the plan for achieving them. If one or more of the targets are not achieved, the company must explain this in its report to the SER. Large' NVs and BVs will have to report for the first time on the financial year 2022, meaning in 2023.

The target regime applies to NVs and BVs that are "large" legal entities according to accounting and reporting rules. This is the case if a company meets at least two of the following three criteria on two consecutive balance sheet dates: a (consolidated) balance sheet total exceeding €20 million, a (consolidated) net turnover exceeding €40 million and an average of at least 250 employees over the financial year.

A listed NV that also qualifies as a 'large' NV need only draw up target figures for the management board and the sub-top. As regards the supervisory board, such a listed NV is subject to the growth quota discussed below.

2.2 Appointment quota for supervisory boards of listed companies

Secondly, an appointment quota has been introduced for NVs whose (depositary receipts for) shares are admitted to trading on a regulated market in the Netherlands. The quota is therefore not applicable to NVs whose (depositary receipts for) shares are solely[12] admitted to trading outside the Netherlands or on an unregulated market in the Netherlands.[13] The size of such a listed company is not relevant. Nor is there a similar rule for listed BVs.

The appointment quota only relates to the composition of the supervisory board and reads as follows:

> 'As long as the supervisory board does not consist of at least one third of the members of men and at least one third of the members of women, a person whose appointment would not make the proportion of men and women on the supervisory board more balanced cannot be appointed as a supervisory board member.'

9 For a treatment of the transparency obligations imposed on the providers of financial products (such as AIFs, UCITS, individual portfolio management and investment advice) under the SFDR, see inter alia R.J. Boogaard, Classificatie van financiële producten op grond van artikel 8 en 9 SFDR, Financieel Recht, 01/2022 (in Dutch).

10 Kamerstukken II, 2020/21, 35 628, nr. 3 (in Dutch).

11 Section 2:166/267, paragraph 2 Dutch Civil Code (*Burgerlijk Wetboek*, **DCC**).

12 The quota does apply to an NV whose (depositary receipts for) shares are admitted to trading on multiple trading platforms, provided at least one of those trading platforms concerns a regulated market in the Netherlands.

13 Section 2:142b DCC.

An appointment in violation of the appointment quota is therefore null and void, although such nullity does not affect the validity of the decision-making process in which the relevant supervisory board member participated.
An exception is made, however, for a reappointment within eight years following the year of appointment. This rule also does not apply in the case of so-called exceptional circumstances, whereby such an appointment may be for a maximum of two years. An exceptional circumstance exists only if such an appointment or reappointment is necessary in order to serve the long-term interests and sustainability of the company as a whole or to ensure its viability.[14]

In the case of a one-tier board, the appointment quota is applied to (re)appointments of non-executive directors.

2.3 Proposal to update the Code

At the end of February 2022, the Corporate Governance Code Monitoring Committee (the **Committee**) published a consultation document[15] with proposals for updating the Code. The proposals are divided into four themes. One of them is 'Diversity and Inclusion', in which context the Committee follows up on the new legislation concerning a more balanced male/female ratio at the top and the sub-top of listed and large companies. However, the 'Committee's proposal broadens the subject of diversity by looking not only at gender but also at other aspects such as gender identity and ethnicity. The Committee makes the following proposals for amending the Code in this respect:

- The management board, the supervisory board and the executive committee should be composed so that there is a good balance between expertise, experience, competencies, personal qualities, age, gender identity, nationality, background, including cultural background, and – as regards the supervisory board – independence.
- Information about gender identity (rather than simply gender) should be included in the report of the supervisory board if a supervisory board member so requests.
- Companies should have a firmwide diversity and inclusion policy that covers all aspects and personal characteristics in which people may differ, including gender identity, age, ethnicity, occupational disabilities and sexual orientation.
- Information pertaining to the inflow, progression and retention of diverse talent within the organisation should be included when reporting on the diversity and inclusion policy.

The Code applies to all companies whose registered office is in the Netherlands and whose shares or depositary receipts for shares are admitted to trading on a regulated market or a comparable system (such as the *New York Stock Exchange*, *Nasdaq* or the *London Stock Exchange*) and all large companies whose registered office is in the Netherlands (balance sheet value > € 500 million) and whose shares or depositary receipts for shares are admitted to trading on a multilateral trading facility or a comparable system.[16]

3. Sustainability Reporting: From NFRD to CSRD

3.1 General content standard for management report

Under Dutch law, the management report of a company must provide a true and fair view of the situation as at the balance sheet date, the development during the financial year and the results of the legal entity and the group companies whose financial data have been included in its annual accounts. The management report must also, in accordance with the size and complexity of the legal entity and group companies, contain a balanced and comprehensive analysis of the situation as at the balance sheet date, the development during the financial year and the results. Where necessary for a proper understanding of the development, results or position of the legal entity and group companies, this analysis shall include both financial and non-financial performance indicators, including environmental and employee matters.[17]

14 Secton 2:142b paragraph 2 in conjunction with 2:135a paragraph 5 DCC.
15 See Proposals for updating the Corporate Governance Code | News Release | Corporate Governance Monitoring Committee (mccg.nl) for more background and a link to the consultation document (also available in English here). The consultation period ended on 17 April 2022.
16 Preamble of the Code.
17 Section 2:391, paragraph 1 DCC. For companies whose securities are admitted to trading on a regulated market within the EU, see also the further requirements as included in the Decree on the content of the management report (*Besluit inhoud bestuursverslag*).

3.2 NFRD

In 2014, the non-financial reporting directive (Directive 2014/95/EU, the **NFRD**) was adopted. Based on the implementation of the NFRD, in the Netherlands large public interest entities[18] (**large PIEs**)[19] are obliged to include a non-financial statement in their management report.[20] By means of the non-financial statements, these companies must offer transparency regarding their policies on environmental, social and personnel matters, respect for human rights and the fight against corruption and bribery, as well as the impact of these factors on their business operations and the main risks they face in this area. In addition, they must account for their diversity policy and the objective of that policy. In the Netherlands, the AFM supervises compliance with non-financial reporting by these large PIEs.

In addition to the obligations under the NFRD, on the basis of the European Taxonomy Regulation, the large PIEs must include in their (consolidated) non-financial statement information on how and to what extent the company's activities relate to economic activities that qualify as environmentally sustainable under the European Taxonomy Regulation.[21]

3.3 CSRD[22]

3.3.1 Reason for the amendment

Although the obligations under the NFRD represent an important step towards mandatory sustainability reporting, as part of the *Sustainable Finance Package* under the 'Green Deal', the European Commission adopted a proposal to revise the NFRD in April 2021. With the revision, the NFRD will be renamed the *Corporate Sustainability Reporting Directive*, or **CSRD**[23]. The term 'non-financial reporting' was no longer considered appropriate, because it would not do justice to the increased (and ever increasing) value attached to this type of information. For example, the European Commission noted that investors are increasingly aware that sustainability aspects can pose a risk to a company's financial performance. In addition, investment products that are linked to sustainability in one way or another have proliferated in recent years.[24] As already mentioned in the introduction, there is also an increasing amount of (European) legislation that requires companies to be more aware of the sustainability of their business in order to be able to account for it. Finally, society itself, in particular through certain non-governmental organisations and social partners, has become much more outspoken in the field of sustainability, prompting companies to be more accountable for the impact they have. Good examples hereof are the lawsuits against Shell in the Netherlands, but also the increasing number of (activist) shareholders with strong views on sustainability[25].

3.3.2 Objective of the CSRD

The objective of the CSRD is 'to ensure that there is adequate publicly available information about the risks that sustainability issues present for companies, and the impacts of companies themselves on people and the environment', according to the European Commission. This should result in the following:

> 'The proposal will help reduce systemic risks to the economy. It will also improve the allocation of financial capital to companies and activities that address social, health and environmental problems. Finally, it will make companies more accountable for their impacts on people and the environment, thereby building trust between them and society.'[26]

It is the express wish of the European Commission that the CSRD be consistent with other EU legislation in the area of sustainability, particularly the Sustainable Finance Disclosure Regulation and the European Taxonomy Regulation.

18 The term 'public-interest entity' (often referred to as PIE) is defined in Section 1, paragraph 1, sub l of the Act on audit firms supervision (*Wet toezicht accountantsorganisatie)*. A bank or insurer with its registered office in the Netherlands is a PIE, as well as a legal entity with its registered office in the Netherlands whose securities are admitted to trading on a regulated market in the EU.

19 A public-interest entity qualifies as 'large' if the average number of employees exceeds 500 for the financial year and it has a balance sheet value of more than EUR 20 million or a net turnover of more than EUR 40 million.

20 In the Netherlands implemented in Section 2:391, paragraph 5 DCC and the Decree disclosure of non-financial information *(Besluit bekendmaking niet-financiële informatie).*

21 Article 8 of the European Taxonomy Regulation.

22 See also our earlier briefing on the CSRD: EU Commission adopts proposal for a CSRD | Loyens & Loeff (loyensloeff.com).

23 For this contribution, we have looked at the amended proposal of 18 February 2022. It can be accessed here.

24 One can think of the substantial increase in green bonds, but also of the so-called sustainability-linked bonds.

25 See, for example, the NRC article of 2 November 2021 "Activistische aandeelhouders halen het klimaat erbij – vooral voor zichzelf - NRC" (in Dutch).

26 See page 4 of the Explanatory Memorandum to the proposed CSRD.

In addition, the European Commission hopes that the reporting standards to be drawn up under the CSRD will contribute to the standardisation of sustainability reporting, which will be aligned with various international initiatives such as the *Global Reporting Initiative and the Sustainability Accounting Standards Board.*[27]

3.3.3 Proposed amendments

The CSRD leads to the amendment of the following European legislative instruments: (i) the Accounting Directive, (ii) the Audit Directive and Audit Regulation and (iii) the Transparency Directive. The main changes the CSRD entails are:

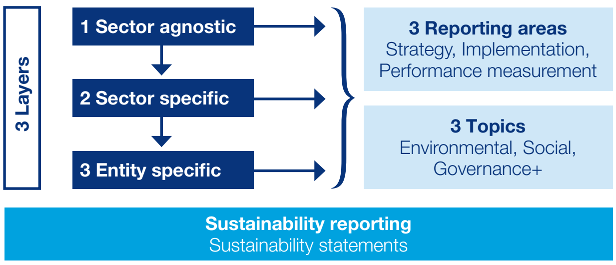
- Extension of the scope of the (sustainability) reporting requirements to all listed companies (including non-member country issuers with a listing on a regulated market in the EU)[28] and large non-listed companies (see further section 3.3.5).
- Extension and clarification of the content obligations of sustainability reporting.
- Introduction of a uniform set of reporting standards that will be mandatory throughout the EU.
- Introduction of a limited *assurance* statement on the sustainability report to be issued by the statutory auditor or, if desired, by another independent provider of *assurance* services.
- Obligation to prepare and make available the information digitally in XHTML format.

3.3.4 Proposed sustainability reporting

The proposed Articles 19a and 29a CSRD require sustainability reporting. This sustainability report must be included in a specific and clearly identified section of the management report. The information must discuss the sustainability aspects from two sides. This approach is also called the dual materiality perspective.[29] On the one hand, the management report must discuss the way in which sustainability aspects influence the development, the performance and the position of the company ("from the outside in"). In other words, to what extent do sustainability aspects pose a risk to the company? On the other hand, the information must provide insight into the impact of the company on sustainability aspects ("from the inside out"). This might include a description of the effects of the company's activities on environmental, social and personnel matters, but also to what extent the company contributes to respect for human rights and the fight against corruption and bribery. Moreover, the report is not limited to the sustainability of the company itself, but also covers sustainability in the (value) chain of which the company is a part. In order to give an impression of the information that must be included in the sustainability report, we have outlined the information obligations under the proposed Articles 19a and 29a CSRD in the Appendix to this publication. These information obligations are further detailed in the uniform set of reporting standards discussed below.

The European Financial Reporting Advisory Group (**EFRAG**) has been commissioned to prepare proposals to achieve the desired uniform set of reporting standards. In order to develop this, EFRAG has devised the architecture shown in the figure below:

Sustainability reporting architecture



(Source: EFRAG PTF-ESRS, 18 January 2022, Batch 1 working papers - Cover note and next steps)

In May 2022, EFRAG submitted draft proposals for these standards, the *European Sustainability Reporting Standards*, or ESRS, for public consultation.[30] These draft proposals contain not only detailed descriptions of the information to be included in sustainability statements, but also proposals for the way in which this information should be included. In short, companies covered by the CSRD will have to report annually on their strategy in relation to the three pillars of ESG as well as on their implementation and progress. This reporting must take place in the form of so-called sustainability statements drawn up in accordance with the ESRS. As mentioned, these sustainability statements must be included in the management report as a separate and clearly recognisable section.

27 See Recitals 37) and 44) of the proposed CSRD.
28 The proposed CSRD does provide an exemption for (listed) micro-enterprises.
29 Recital 25) proposed CSRD.
30 The consultation is open until 8 August 2022. The draft proposals can be consulted here.

In addition, Article 19a or 29a(2)(e) CSRD requires a description of the due diligence procedure applied with regard to sustainability aspects. This means that companies must follow a due diligence procedure, or *ESG due diligence*, to identify, prevent, mitigate and remedy the main actual and potential adverse impacts associated with their activities, and to indicate how they will address these adverse impacts. This ties in seamlessly with another proposed European directive which we will discuss in section 4 below.

3.3.5 Scope of the CSRD

As already mentioned, the proposed CSRD involves a considerable extension of the scope. For example, all companies listed on a regulated market within the European Union will be covered by the CSRD.[31] This, therefore, also applies to such listed companies incorporated under the laws of a state outside the EU.[32] In addition, all 'large' (non-listed) companies will also have to comply with the mandatory sustainability reporting. A company is 'large' if it satisfies at least two out of the following three criteria: its average number of employees exceeds 250 during the financial year, it has a balance sheet value of more than EUR 20 million and/or it has a net turnover of more than EUR 40 million. This is calculated on the basis of the company financial statements or, if it concerns a parent company, on the basis of the consolidated financial statements. The large PIEs that already fell within the scope of the NFRD will also continue to fall under the CSRD.

The CSRD will also apply to listed sma ll and medium-sized enterprises (**SMEs**)[33]. However, a simplified regime will apply to these SMEs in order to alleviate some of the burden on this type of enterprise. Based on the proposed Article 29c CSRD, the European Commission will provide specific sustainability reporting standards for SMEs. These specific standards will be proportionate to the capacity and characteristics of SMEs and will be reviewed at least every three years.

3.3.6 Expected time frame

At the time of writing, the CSRD is still expected to be adopted by the European Parliament and the European Council before mid-2022. The sets of reporting standards (drawn up by EFRAG) should be ready in 2023, but the aim is still that a first set of (general) standards will be adopted by the European Commission by 31 October 2022. As currently proposed[34], the obligations under the CSRD will apply as from the following dates:

- **1 January 2024** for companies already covered by the Accounting Directive (reporting in 2025 on the financial year 2024);
- **1 January 2025** for large undertakings currently not covered by the Accounting Directive (reporting in 2026 on the financial year 2025); and
- **1 January 2026** for listed SMEs, for small and non-complex credit institutions and for insurers (reporting in 2027 on the financial year 2026).

4. Sustainable corporate governance

4.1 Proposal for the CSDD Directive

On 23 February 2022, the European Commission published its proposal for a directive on Corporate Sustainability Due Diligence Directive (the **CSDD Directive**).

4.1.1 Main (transparency) obligation under the proposed CSDD Directive

The proposed CSDD Directive introduces obligations for qualifying companies with regard to actual and potential negative impacts on human rights and the environment with regard to their own activities, the activities of their subsidiaries and the activities in the value chain carried out by entities with which the company has an established business relationship. This is mainly detailed in the requirement for entities to exercise due diligence in respect of human rights and the environment, with the following six steps[35]:

a. integrating due diligence into their policies;
b. identifying actual or potential adverse impacts in accordance with Article 6;
c. preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;

31 An exception applies to micro-enterprises as defined in Article 3(1) of the Accounting Directive (Directive (EU) 2013/34).

32 This follows from the proposed amendment of Article 4 of the Transparency Directive (Directive 2004/109/EC) as included in Article 2 of the proposed CSRD.

33 As defined in Article 3(2) and (3) of the Accounting Directive (Directive (EU) 2013/34), as amended.

34 Article 5 proposed CSRD.

35 Article 4 proposed CSDD Directive.

d. establishing and maintaining a complaints procedure;
e. monitoring the effectiveness of their due diligence policy and measures; and
f. publicly communicating on due diligence.

The proposed CSDD Directive provides guidance on the implementation of these six steps, although they will be fleshed out in further regulations.

Transparency is also the final element in the proposed CSDD Directive, which already shows that the CSRD and the proposed CSDD Directive are complementary. However, the scope of the CSRD is more limited than that of the proposed CSDD Directive. Entities that are not required under the CSRD to prepare a sustainability report may still be required under the proposed CSDD Directive to report on the matters covered by the proposed CSDD Directive by means of a statement on their website. This statement must be published no later than April 30 of each year in respect of the preceding calendar year.[36]

The proposed CSDD Directive further requires EU Member States to provide for both administrative and civil sanctions and liability for non-compliance with the obligations under the proposed CSDD Directive.

Most of the obligations under the proposed CSDD Directive will have extraterritorial effect and therefore the proposed CSDD Directive will potentially (also) have a major impact on certain non-EU entities (see section 4.1.3 (b) below).

4.1.2 Introduction of sustainable corporate governance requirements

The proposed CSDD Directive was initially referred to as the Sustainable Corporate Governance Directive. Although the new name suggests otherwise, the proposed CSDD Directive does contain obligations that affect the corporate governance of the entities that will be covered by this directive. Such entities (except when they fall within the scope of the proposed CSDD Directive solely because they operate in high-risk sectors (see section 4.1.3 below)) must 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 limiting global warming to 1.5 °C, in accordance with the Paris climate agreement.[37] The proposed CSDD Directive also introduces a duty of care for directors, when fulfilling their duty to act in the best interests of the company, to take into account the impact of their decisions on sustainability issues, including, where applicable, the impact on human rights, climate change and the environment, including in the short, medium and long term. However, this duty of care will only apply to directors of entities if they are incorporated under the law of an EU Member State.

4.1.3 Scope of the proposed CSDD Directive

As currently proposed, the following entities will be covered by the CSDD Directive:

a. An entity formed in accordance with the legislation of an EU Member State and which fulfils one of the following conditions[38]:

    i. It had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared; or
    ii. Where the previous threshold is not met, it had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the following high-risk sectors:

        - the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;
        - agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;
        - the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products

36 Article 11 proposed CSDD Directive.
37 Article 15 proposed CSDD Directive. Incidentally, this obligation will not apply to entities incorporated under the law of a non-EU Member State to the extent that such entity.
38 Article 2 paragraph 1 proposed CSDD Directive.

(except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).

b. An entity formed in accordance with the legislation of a third country and which fulfils one of the following conditions[39]:

   i. it generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year; or

   ii. it generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors included in point (a)(ii) above.

The proposed CSDD Directive is unclear on the question of whether the net turnover must be calculated on the basis of the statutory or consolidated annual accounts. This is because the proposed CSDD Directive does not contain an equivalent of Article 29a of the CSRD. However, a calculation on a consolidated basis does seem (more) plausible to us. After all, this would be in line with other similar (European) regulations. In addition, a calculation on a stand-alone basis would make it relatively easy to remain below the relevant thresholds through multiple subsidiaries. It is to be hoped that this lack of clarity will be removed in the final version of the CSDD Directive.

4.1.4 Expected time frame

With the publication of the first proposal for the CSDD Directive at the end of February 2022, the legislative process has only just begun. Given the average length of the process, our expectation is that this directive will not be adopted until mid-2023 at the earliest. However, the proposed CSDD Directive contains the necessary far-reaching and sensitive issues, which will undoubtedly delay the process. After the CSDD Directive has been adopted, EU member states will have another two to four years (depending on the elements of the directive) to implement the new rules into national legislation.

4.2 Proposal to update the Code

The aforementioned proposal to update the Code also contains a proposal to allow ESG to play a (greater) role in the corporate governance of the listed companies to which the Code applies (for the scope, see section 2.3 above). This is seen as an important part of 'long-term value creation'. The Committee has therefore made the following proposals to (further) underline the importance of ESG:

- As part of their strategy for long-term value creation, companies should formulate a clear ESG strategy and set specific objectives.
- The ESG strategy, actions and results, including the impact on the production and value chain, should be accounted for in the management report.
- Shareholders, including institutional investors (pension funds, insurance companies, investment institutions and asset managers), recognise the importance of a strategy focused on long-term value creation.
- The interests of relevant stakeholders should be taken into account by the management board when determining the ESG strategy and, to that end, a policy for stakeholder dialogue should be drawn up, with the management board facilitating such dialogue.
- The management report should account for the culture, values and behaviour encouraged within the company and explain how a contribution is made to long-term value creation.

This part of the proposed update of the Code has received mixed responses. While a greater role of ESG in the corporate governance is generally supported, the proposed update of the Code is said to be insufficiently aligned with similar international initiatives, including the proposed CSDD Directive discussed above.[40] For example, the proposed extension under the Code would be less far-reaching than what is currently proposed for the CSDD Directive and as such there is a call for an increased extension to take a more pioneering stance. However, at the same time, others find an extension too premature and would prefer to await the international (in particular the European) initiatives and not get ahead of ourselves.

39 Article 2 paragraph 2 proposed CSDD Directive.

40 The latter, however, can be explained by the fact that when the proposal to update the Code was lodged for consultation, the proposal for the CSDD Directive was not yet published.

5. Concluding remarks

Transparency is an important link in achieving a truly sustainable economy. In addition, companies will have to exercise appropriate due diligence, or ESG due diligence, in the field of sustainability. After all, in order to produce an adequate and transparent sustainability report, a company will need to have the necessary information at its disposal. On this point, the due diligence obligations introduced under the proposed CSDD Directive and the reporting obligations under the proposed CSRD will undoubtedly reinforce each other. The aim is to achieve greater and, above all, better quality disclosure on the sustainability of companies.

The increase in sustainability reporting requirements and the other elements of the discussed (proposed) new legislation will not only affect the board rooms and compliance departments of a large(r) group of companies. Other stakeholders and regulators will also take a critical look at the new and more extensive sustainability reports. It is likely that, partly as a result of more and hopefully better information, more and more parties will take an (even) more assertive stance on the sustainability policy of a company, for example in preparation for or during a general meeting or in court.

The extraterritorial effect of the proposed directives, and in particular that of the proposed CSDD Directive, deserves special attention. Especially for international conglomerates that have a significant part of their operations in the EU (whether or not through one or more subsidiaries in the EU).

The number of legislative and self-regulatory initiatives in the field of sustainability is overwhelming. This does not make it easy for companies to comply with all these new (transparency) obligations. Certainly not for the companies that currently do not or not extensively report on sustainability. Despite the good intentions of the authors, there is a risk that, as a result of all these new laws and regulations, one will no longer see the wood for the trees.[41] Whatever the case may be, one thing is certain: more and more companies (listed or not) will have to get serious about their sustainability reporting in the near future.

41 In this sense, also compare the mixed reactions to the proposal by the US *Securities and Exchange Commission (SEC)* to introduce sustainability reporting requirements for listed companies.

Annex

Relevant Article from CSRD	Category	Required information
19a / 29a	Company (and, if applicable, value chain)	a. a brief description of the group's business model and strategy, including: i. the resilience of the group's business model and strategy to risks related to sustainability matters; ii. the opportunities for the group related to sustainability matters; iii. the plans of the group to ensure that the group'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; iv. how the group's business model and strategy take account of the interests of the group's stakeholders and of the impacts of the group on sustainability matters; v. how the group's strategy has been implemented with regard to sustainability matters; b. a description of the targets related to sustainability matters set by the group and of the progress of the group towards achieving those targets; c. a description of the role of the administrative, management and supervisory bodies with regard to sustainability matters; d. a description of the group's policies in relation to sustainability matters; e. a description of: i. the due diligence process implemented by the group with regard to sustainability matters; ii. the principal actual or potential adverse impacts connected with the group's value chain, including its own operations, its products and services, its business relationships and its supply chain; iii. any actions taken by the group, and the result of such actions, to prevent, mitigate or remediate actual or potential adverse impacts; f. a description of the principal risks to the group related to sustainability matters, including the group's principal dependencies on such matters, and how the group manages those risks; g. indicators relevant to the disclosures referred to in points (a) to (f).

Relevant Article from CSRD	Category	Required information
29b	Ecological factors	Strategy, implementation and execution in the field of: - climate change mitigation; - climate change adaptation; - water and marine resources; - resource use and circular economy; - pollution; - biodiversity and ecosystems.[42]
	Social and human rights factors	Strategy, implementation and execution in the field of: - equal opportunities for all, including gender equality and equal pay for equal work or work of equal value, training and skills development, and employment and inclusion of people with disabilities; - working conditions, including secure and adaptable employment, wages, social dialogue, collective bargaining and the involvement of workers, work-life balance, and a healthy, safe and well-adapted work environment; - respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the ILO fundamental conventions and the Charter of Fundamental Rights of the European Union.
	Governance factors	Strategy, implementation and execution in the field of: - the role of the undertaking's administrative, management and supervisory bodies with regard to sustainability matters, and their expertise and skills to fulfil this role or access to such expertise and skills; - a the main features of the undertaking's internal control and risk management systems, in relation to the sustainability reporting process: (ii) business ethics and corporate culture, including anti-corruption and anti-bribery; - political engagements of the undertaking, including its lobbying activities; - the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices.

42 These are the six environmental objectives under the European Taxonomy Regulation.

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