

Trend Report

ESG litigation in the Netherlands

Over the past years, environmental, social and governance aspects of business have played an increasingly dominant role on the agenda of boards all over Europe. Also for Dutch boards so-called ESG related items were on the top of their agendas. Such ESG matters not only appeal to corporate social responsibility, but also impact investor appetite and market perceptions. Recent developments show that Dutch courts may be receptive to private enforcement of ESG matters through litigation. How will this emergence of ESG litigation impact Dutch business?

ESG and Dutch business

Dutch corporate law upholds a stakeholder-oriented model. In fulfilling their duties, Dutch boards need to act solely in the interests of their company, which is determined by observing all relevant stakeholder interests with a view on long-term value creation. Relevant stakeholders include shareholders, employees and creditors, but wider societal interests arguably also have to be taken into account beyond the obligation to act in accordance with specific public laws. Accordingly, ESG topics such as carbon emission goals, sustainable supply chains and diversity & inclusion can fit well within this stakeholder-oriented model. Dutch boards have significant discretion in how such stakeholder interests are weighed and so enforcement options are often limited.

Recent regulatory developments, however, indicate that ESG will soon have a more formal position in Dutch corporate law. Examples of such developments include the following:

- **Dutch Corporate Governance Code**
On 21 February 2022, a proposal to update the Dutch Corporate Governance was published. ESG plays an important role in this update. Notably, the current proposal provides that companies need to adopt an ESG policy and imposes related disclosure obligations.
- **Corporate sustainability due diligence**
On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence. The proposal aims to foster sustainable and responsible corporate behaviour throughout global value chains. As part thereof, it is

proposed that companies are required to identify and prevent, end or mitigate adverse impacts of their activities on human rights and on the environment.

- **Child Labour Duty of Care Act**

The Child Labour Duty of Care Act, which is expected to enter into force in 2022, imposes certain human rights due diligence obligations on companies that sell goods or provide services to Dutch end-users to ensure that those goods and/or services were not produced using child labour. The Child Labour Duty of Care Act also imposes related disclosure obligations.

- **Sustainable Finance Disclosure Regulation**

The Sustainable Finance Disclosure Regulation is part of the European Commission's action plan for financing sustainable growth. This Regulation aims to improve the disclosure of information to end-investors, on the sustainability impacts of investment policies and decisions by financial market participants.

Private enforcement in the Netherlands

So far, ESG litigation in the Netherlands has focused largely on climate change. In 2019, the Dutch Supreme Court ruled in favour of Dutch foundation Urgenda in an action seeking to force the Dutch State to reduce carbon emissions. The Supreme Court based its judgment on the UN Climate Convention and on the Dutch State's legal duties to protect the life and well-being of citizens in the Netherlands, which obligations are laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).

The Urgenda case also prompted other parties to take private enforcement actions. Notably, a number of parties, including Friends of the Earth Netherlands (*Milieudefensie*), brought a class action claim against Shell. These claimants argued that Shell takes insufficient action to reduce its CO₂ emissions as well as those of its suppliers and customers. On 26 May 2021 the Hague District Court ordered Shell, both directly and via its group companies, to limit its CO₂ emissions by at least net 45% at the end of 2030, relative to 2019 levels. Shell has since appealed this decision and that appeal is currently pending. On 25 April 2022, Friends of the Earth Netherlands threatened to pursue director liability claims against the Shell directors if they would fail to adhere to the District Court's judgment.

The Shell case has drawn further attention to ESG topics and related private enforcement instruments in the Netherlands. Friends of the Earth Netherlands continues to take a prominent case in pursuing actions. On 13 January 2022, Friends of the Earth Netherlands published an open letter calling on 29 companies to publish a climate plan that would reduce their CO₂ emissions by 45% by 2030 compared to 2019 (similarly to the Shell case). Friends of the Earth Netherlands has indicated that it may pursue litigation against companies that fail to meet its demands.

The future of ESG litigation in the Netherlands

On 1 January 2020 a new Dutch act came into force clearing the way for collective actions for damages (the *Wet Afwikkeling massaschade in een collectieve actie*; or WAMCA for short). Reference is made to our March 2019 [newsletter on the new WAMCA](#). Under this new statutory regime, it has become possible for a representative entity to bring a collective action in the Netherlands on an opt-out basis, including claims for monetary damages. It is our expectation that in the future the WAMCA will also be used to bring ESG related litigation.

Among others such litigation may include topics like zero emission goals, sustainable supply chains, sustainable finance and the disclosures made on these topics. In view of the clear incentive for companies to present strong and ambitious ESG-related goals and visions set off against the newly introduced – sometimes unclear or, at the least, ambiguous regulations – there may be a risk of such disclosures being labelled incorrect or misleading, especially if goals set are not met in the future.

Meanwhile, alternative avenues to pursue ESG litigation are also being explored. Notably, there is some debate on the use of inquiry proceedings to pursue ESG enforcement. These are proceedings before a specialised court, the Enterprise Chamber of the Amsterdam Court of Appeal, concerning corporate governance issues within a company and its affiliated entities. Certain interested parties may seek an inquiry into, and obtain relief to remedy, such issues. At this time, it is unclear whether this would include ESG related issues. If this would be the case, inquiry proceedings could arguably also allow for public enforcement if such proceedings are brought by the advocate general on behalf of the public prosecutor.

Considerations for Dutch boards

What would a Dutch board need to consider when dealing with litigation risks related to ESG topics?

With the increased importance of ESG aspects of doing business, companies should generally take a proactive and transparent approach to ESG. Failing to do so may expose the company and its directors to (class action) ESG litigation. To limit such exposure, we suggest the following:

- **ESG Policy**

Companies should have a clear ESG policy in place that is tailored to their activities and primary ESG risks associated with such activities. Adequate mechanisms should be in place to ensure due implementation and periodic assessment of such policy.

- **Disclosures and transparency**

ESG-related information should where possible be proactively disclosed to stakeholders of the company. Such disclosures should be realistic, to mitigate the risk of tort claims related to alleged misleading disclosures or PR-related exposure resulting from 'greenwashing'.

- **Company culture**

ESG is more than a compliance exercise. Companies should be mindful of their company culture and promote sustainable and socially responsible conduct. Programs focused on the company's culture and a proper tone at the top help to ensure such culture throughout the company.

For more information, please reach out to your Loyens & Loeff contacts: Mijke Sinninghe Damsté, Bastiaan Kemp and Philippe Hezer.

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