

Insights and perspectives on governance,
disclosure & litigation

ESG Matters - 6 July 2023



This newsletter provides insights and perspectives on ESG-related governance, disclosure and litigation developments. Besides our overview of the latest information, this edition highlights the upcoming finalisation of the CSRD European Sustainability Reporting Standards and best practices on corporate sustainability reporting.

1. Highlight: Update on CSRD, changes to the ESRS and best practices

2. Spotlight on ESG developments:

- Governance
- Disclosure
- Litigation

1

Highlight: Update on CSRD, changes to the ESRS and best practices

CSRD: raising the bar on transparency

From 1 January 2024, the first companies that fall under the Corporate Sustainability Reporting Directive (“**CSRD**”) are subject to stricter transparency requirements in their annual reports. With this comes a need for uniform disclosure requirements and clarity on what to report. Undertakings will have to report on their sustainability performance according to the European Sustainability Reporting Standards (“**ESRS**”) framework. The CSRD moreover requires an external auditor to provide limited assurance on sustainability information. On 9 June, the European Commission published the draft delegated act containing these ESRS which is open for feedback until 7 July. The final standards are expected to be adopted in July 2023. For an overview of the scope and content of the CSRD, see our December 2022 [newsletter](#).

New draft ESRS – and changes to EFRAG’s technical advice

The European Commission based their draft ESRS on the previous draft ESRS framework prepared by the EU’s Financial Reporting Advisory Group (EFRAG) as published on 23 November 2022. The set-up of the draft ESRS has not changed. It still includes generic as well as specific reporting standards. Compared to the earlier drafts, the reporting requirements under the proposal are less extensive. In a recent [blog](#), we describe the proposed revisions that account for a 25% reduction in the reporting requirements. This reduction is meant to ensure proportionality and flexibility, especially at the start and for smaller companies.

Double materiality assessment

Different to the EFRAG proposal, the European Commission wants to subject all disclosure requirements to a double materiality assessment, except for the requirements specified in ESRS 2 on general disclosures. Previously, a lot more standards were automatically designated as material and consequently would have been mandatory. This has raised concerns as to whether the European Commission facilitates a significant setback in ambition allowing companies to leave out entire parts of sustainability disclosures. Furthermore, the reduction of reporting requirements is somewhat frustrating for financial undertakings subject to the SFDR that are largely dependent on data from CSRD reporting companies, as it will be more challenging for financial undertakings to obtain data if this proposal is adopted.

Less work for companies?

In our view, the assessment to be made does not become less extensive through the proposed reduction. As there is no prescribed boundary to determine when a sustainability topic is considered material or not, the complexity will likely increase. To avoid further legal exposure, companies will need to diligently determine and document their assessment, and must be transparent about the methodology applied. The materiality assessment remains mandatory, the result may be that not all companies have to disclose every sustainability-related key performance indicator which may not be relevant to their business.

What it means for you:

- If the proposal is adopted, companies must be able to explain how and why sustainability topics have been classified as (not) material. It is important to prepare for reporting according to the draft ESRS and diligently document the methodology and process to conduct double materiality assessments.
- Take note of examples of the good practices [found by the AFM](#) in their recent report in which they state that companies lag behind and encourage companies to take action right away. This report contains helpful best practices that are also relevant for companies that do not fall under direct AFM supervision. A good practice is to be transparent on any reporting methodology applied as well as the choices made in determining that methodology and to avoid a tick-the-box approach.

Contact our experts

Suzanne Kröner-Rosmalen |
Counsel Corporate Governance
+31 20 71 71 913
+31 6 29 63 70 19
Suzanne.Kroner@nautadutilh.com

Sascha Allertz | Senior Associate
+31 10 22 40 563
+31 6 46 92 92 30
Sascha.Allertz@nautadutilh.com

2

Spotlight on ESG developments



Governance



Updated OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

On 8 June, the [updated OECD Guidelines](#) for Multinational Enterprises on Responsible Business Conduct were released. Key updates include important recommendations on the alignment with internationally agreed goals on climate change and biodiversity, on due diligence and on the disclosure of responsible business conduct information. The adjusted Guidelines were adopted by 51 Ministers in the Ministerial Council Meeting and inter alia contain specific recommendations on Paris aligned absolute and intensity based CHG reduction targets including scope 3 emissions. According to the [press release](#), the 2023 update responds to urgent social, environmental, and technological priorities facing societies and businesses.



Information Note on UN Guiding Principles

In June, the UN Working Group on Business and Human Rights published its first [Information Note](#) on climate change and the UN Guiding Principles (UNGPs). The note explains how the UNGPs can help integrating the actual and potential impacts of climate change with other human rights-related impacts caused by, contributed to or linked with business activities. It may influence additional soft law duties for states and companies regarding their climate change-related impacts.




7th National SDGs Report 'The Netherlands develops sustainably'

The '[7th National Sustainable Development Goals Report](#) - The Netherlands develops sustainably' provides data from the government, local authorities and social sectors on the achievement of SDGs. The report shows both the positive developments and the challenges.



ESMA launches consultation on sustainability in suitability and product governance

As part of the EC's sustainable development initiative, MiFID II has been updated to integrate sustainability requirements for investment firms. The European Securities and Markets Authority (ESMA) subsequently updated its Guidelines on [suitability](#) and [product governance](#) requirements. On 16 June, ESMA published a [Call for evidence](#) on the evolution of the market and on how firms are



applying the new legal requirements. The aim is to gather input and views on consumer needs, industry initiatives and challenges on the topics of suitability and product governance and to ensure supervisory convergence.

Dutch Ministry submitted its Innovation Strategy for Aviation

On 13 June, the Dutch Ministry of Infrastructure and Water Management submitted its [Innovation Strategy for Aviation](#) to the Dutch Parliament with a view to reducing the negative impact of aviation on the climate and living environment. The strategy identifies opportunities to innovate and describes the role of the Ministry in this regard. The Dutch Parliament needs to decide whether it consents with the strategy.




Disclosure



ISSB issues first sustainability-related disclosure standards

On 26 June, the International Sustainability Standards Board (ISSB) issued its first two [sustainability standards](#). The standards will create a common language for disclosing the effect of climate-related risks and opportunities on a company's prospects, covering the general disclosure requirements (IFRS S1) and climate-related disclosure requirements (IFRS S2). Both standards are effective for annual reporting periods beginning on or after 1 January 2024, with earlier application permitted when they are applied together.



ICMA updates Climate Transition Finance Handbook and sustainability principles and publishes additional related documents

On 22 June, the International Capital Market Association (ICMA) issued an update of its Climate Transition Finance Handbook ([CTFH](#)) and an updated version of its Sustainability-Linked Bond Principles ([SLBPs](#)). In the [related press release](#), ICMA states that the updated CTFH integrates the progress by the market and the official sector on climate transition guidance and disclosures. ICMA concurrently provided further guidance, such as additional Q&As for green, social and sustainability bond securitisation.



EC publishes notice on Taxonomy Regulation and SFDR

On 16 June, the EC published a [notice](#) on the interpretation and implementation of certain legal provisions of the EU Taxonomy Regulation and links to the Sustainable Finance Disclosure Regulation (SFDR). It includes FAQs and addresses, amongst other things, the role of minimum safeguards in the Taxonomy Regulation, the definition of minimum safeguards under Article 18 and whether Taxonomy-aligned investments qualify as ‘sustainable investments’ under the SFDR.

Ecodesign Regulation: ENVI adopts approach

On 15 June, the Committee on the Environment, Public Health and Food Safety (ENVI) [adopted its position](#) on revising the EU’s ecodesign framework for sustainable products. [The proposal](#) aims to establish a framework for setting ecodesign requirements for sustainable products. The committee’s report is scheduled to be adopted during the July plenary sitting of the EU Parliament and will constitute Parliament’s negotiating position with EU governments on the final shape of the legislation.

EC publishes sustainable finance package

On 13 June, the EC published a new [package of measures](#) to build on and strengthen the foundations of the EU sustainable finance framework. The package aims to ensure that this framework continues to support companies and the financial sector, while encouraging private funding of transition projects and technologies.

EC publishes EU Taxonomy Delegated Acts

As part of the sustainable finance package, the EC published [the Environmental Delegated Act](#) (also amending the Disclosures Delegated Act). This act introduces technical screening criteria for economic activities that contribute substantially to one or more environmental objectives under the Taxonomy Regulation: (i) sustainable use and protection of water and marine resources; (ii) transition to a circular economy; (iii) pollution prevention and control; and (iv) protection and restoration of biodiversity and ecosystems. Furthermore, amendments to [the Climate Delegated Act](#) were published, establishing additional technical screening criteria for climate change mitigation and climate change adaptation for economic activities under the Taxonomy Regulation. Most of the provisions of these legislative instruments apply from 1 January 2024.



Proposed regulation on ESG rating activities

The sustainable finance package also includes a proposal for a [regulation on the transparency and integrity of ESG rating activities](#). The general objective of this initiative is to improve the quality of ESG ratings by (i) improving transparency of ESG ratings characteristics and methodologies; and (ii) ensuring increased clarity on operations of ESG rating providers and prevention of risks of conflict of interest at ESG rating providers' level.



EC publishes Q&A on sustainable finance package

On 13 June, the EC published [questions and answers](#) on (the new package of measures relating to) the sustainable finance framework.



EU Council agrees for industrial installations to provide better data on their environmental emissions

On 7 June, the European Council [agreed](#) to [the proposal](#) for a regulation on reporting of environmental data from industrial installations and establishing an Industrial Emissions Portal. The proposal aims to upgrade the European Pollutant Release and Transfer Register (E-PRTR). The main goal is to advance the Green Deal's zero pollution ambition by offering the public access to an integrated dataset on environmental emissions from industrial installations. The Council also amended the proposal, including postponement of the entry into force from 2025 to 2027.



Litigation



Global trends in climate change litigation: 2023 snapshot

On 29 June, the Grantham Research Institute published its 2023 report on '[Global trends in climate change litigation](#)'. This '2023 snapshot' signals a strong increase in climate litigation filed against corporates, as greenwashing cases against corporates are particularly on the rise (see the [previous ESG Matters](#)). While litigation strategies show parallels across jurisdictions, the diversity in cases and the complexity of arguments and claims in general seems to be increasing.



BEUC files complaint against airlines

On 22 June, the Association of National Consumer Unions in Europe (BEUC) and 23 national consumer groups launched a complaint against 17 European airlines to the EC and the European Consumer Protection Authorities Network. BEUC [calls for a legal investigation](#), maintaining that the airlines are misleading consumers through climate-related marketing claims. BEUC maintains, amongst others, that the airlines should cease their communications on sustainable flying and reimburse any green premiums paid by consumers.



General Court dismisses appeal against the inclusion of nuclear and natural gas within the EU Taxonomy

On 21 June, the General Court dismissed the action for annulment of Delegated Regulation 2022/1214 laying down the conditions under which nuclear and natural gas energy activities may be included in the list of economic activities covered by the Taxonomy Regulation ([Case T-628/22](#)). A Member of the European Parliament brought the action for annulment, claiming that that regulation infringed the Parliament's legislative competence and, therefore, his rights as a Member of the Parliament. In its order, the General Court considers that the applicant does not have standing to bring the action because his rights connected with the exercise of the Parliament's legislative competence are intended to be exercised only in the context of the Parliament's internal procedures and cannot therefore be regarded as directly affected by the adoption of Delegated Regulation 2022/1214.



AFM publishes draft guidelines regarding sustainability claims

On 12 June, the AFM has put the [Guidelines on sustainability claims](#) up for consultation for financial institutions and pension providers. The purpose of these guidelines is to provide market participants with the tools to make correct, clear, and non-misleading sustainability claims. The consultation will run until 24 July. The ACM has issued - and recently revised - [similar guidance](#).



Amsterdam District Court: Fossilvrij admissible in claims against KLM

On 7 June, the Amsterdam District Court held that [Fossilvrij is admissible in its claims](#) on green advertising against KLM. Fossilvrij was permitted to file a submission by 5 July 2023 on the question of whether the specific advertisements on which the claims are based are still relevant.



Greenwashing in the financial sector: ESAs publish progress reports

On 1 June, the European Supervisory Agencies (ESAs) published their progress report on greenwashing risks in the financial sector. In these reports, [EBA](#), [ESMA](#) and [EIOPA](#) arrived at common high-level understanding of 'greenwashing' with each ESA highlighting its current thinking of greenwashing and related risks in its respective sector.

We regularly share our ESG insights and perspectives on our corporate website. If you or members of your team would also be interested to receive updates, you are most welcome [to sign up](#).

NautaDutilh's Sustainable Business & Climate Change team



Gaïke Dalenoord | Partner Corporate M&A. Focus on chemicals and hydrogen



Frans van der Eerden | Partner Financial Law. Focus on financial regulatory & sustainability



Marieke Faber | Partner Dispute Resolution. Focus on climate litigation and sustainability strategy



Maartje Govaert | Partner Employment & Pensions. Social pillar of ESG (employment law matters)



Harm Kerstholt | Partner Corporate M&A. Focus on Energy, ESG Due Diligence, and human rights



Iris Kieft | Partner Public & Regulatory. Focus on public regulatory, energy, climate change and the circular economy



Suzanne Kröner-Rosmalen | Counsel Corporate Governance. Focus on sustainable corporate governance, ESG disclosures and strategy



Geert Raaijmakers | Partner Corporate Governance. Focus on sustainable corporate governance



Arjan Scheltema | Partner Finance. Focus on Green Bonds, Green Covered Bonds, Green Securitisations and Energy Efficient Mortgages (HUB)



Freerk Vermeulen | Partner Dispute Resolution and head of the Supreme Court Litigation Team. Focus on climate litigation and sustainability strategy



Petra Zijp | Partner Capital Markets. Focus on green bonds and ESG linked issuances

Meet the [whole team](#)

Editors: [Kim Heesterbeek](#) & [Dorine Verheij](#)