

# Governance, disclosure and litigation update

## ESG Matters



In this newsletter, the NautaDutilh Sustainable Business & Climate Change team provides insights and perspectives on ESG related governance, disclosure and litigation developments. This time, we highlight the EU proposed EU directives to tackle greenwashing, which likely impact sustainable product development and may also be a booster for ESG litigation. We also provide an overview of other relevant developments we are following.

We welcome your feedback. Please don't hesitate to reach out should you have any ESG related questions or comments.



**Freerk Vermeulen** | Partner  
+31 20 71 71 885  
+31 6 11 03 10 93  
Freerk.Vermeulen@nautadutilh.com



**Frans van der Eerden** | Partner  
+31 20 71 71 697  
+31 6 51 86 97 12  
Frans.vanderEerden@nautadutilh.com

We regularly share our ESG insights and perspectives on our corporate website. If you or members of your team would be interested to also receive these updates on ESG related governance, disclosure and litigation by e-mail, you are most welcome to sign up via [this link](#).

## Highlight: EU proposals to tackle greenwashing

There is – for now – no European framework for tackling greenwashing. The European Commission is looking to change this with two proposals, the proposed Green Claims Directive and the proposed Consumer Empowerment Directive that should jointly contribute to the EU transition to a (real) green economy. If anything, the extensive reach of these proposals showcase the ever-increasing focus on greenwashing, in politics, from regulators and from the public. Companies should therefore not underestimate the impact on product development. These directives, if passed, will also boost climate litigation possibilities.

### **The absence of regulation creates room for greenwashing**

The current lack of common rules for companies making voluntary green claims leaves the way open to greenwashing. As evidenced by the results of a 2020 study by the Commission: 53.3% of environmental claims investigated in the EU were

vague, misleading or unfounded, and 40% of the claims were unsubstantiated. The absence of a clear framework is considerable to create an uneven playing field in the EU to the detriment of truly sustainable companies, and makes it more complicated for consumers to make sustainable choices as part of the EU green transition. The EU now intends to change this with two proposed directives.

---

## The proposed Consumer Empowerment Directive

The first one is the [proposal for a Directive on Consumer Empowerment](#). This Directive will update the current Unfair Commercial Practices Directive (2005/29/EC) and Consumer Rights Directive (2011/83/EU) and aims to increase the contribution of consumers to a circular economy. To this end, it introduces rules to avoid misleading environmental and social claims and includes a ban on planned obsolescence and the use of unreliable and non-transparent sustainability labels. For example, the definition of “unfair commercial practices” will be extended in such way that it includes the practice of displaying a sustainability label that is not based on a certification scheme or not established by public authorities and the practice of making an environmental claim about an entire product whilst it only concerns a certain aspect of the product. Companies will also be required to provide consumers with information on products’ durability and reparability.

---

## The proposed Green Claims Directive

The second proposal is the [Green Claims Directive](#) that aims to harmonise the rules for voluntary environmental claims in business-to-consumer practices. If adopted, companies cannot disclose ‘green claims’ to consumers without first having these independently verified and having ensured that scientific evidence supports these claims. As part of the scientific analysis, companies will have to identify the product’s environmental impact, as well as any trade-offs, in order to present a complete and accurate picture. Companies are also required to communicate these claims clearly and unambiguously. For example, claims or labels that use aggregated scores for the overall environmental impact of the product will no longer be allowed unless specified in EU rules. Comparisons of products or organisations must be based on equivalent information and data.

---

## Next steps

The new requirements and expanding litigation possibilities under the proposed Directives will likely have a significant impact on current business practices. Companies should therefore closely follow the developments, even though the EU legislative procedure to adopt these directives may take until 2024 or 2025. With respect to the Green Claims Directive, companies can also [submit comments during the public consultation](#) period (until 25 May 2023).

---

## What it means for you :

This development is relevant for the following reasons:

- any development of new products needs to take the EU Greenwashing Framework into account, to ascertain that no unfounded ESG claims are made;
- the EU Greenwashing Framework may create support for consumers to bring unfair market practice claims;
- the EU definition of Greenwashing will likely have a general impact on ESG related transparency and may intensify ESG-scrutiny from national regulators.

---

## Getting ready for change

These proposed Directives underline that meeting ESG is definitively moving from the reputational and stakeholder management area to legal. Our [Sustainable Business & Climate Change team](#) can help you to position and prepare yourself for the impact of these Directives.

# Spotlight on ESG developments

We put the spotlight on the developments in ESG related governance, disclosure and litigation we are following. Below, we summarise what's happening, what's next and what it means for you.



## Governance

### **Additional measures to further reduce CO2 emissions by 2030 announced by Dutch government**

On 26 April 2023, the Dutch government announced a new set of rules as to achieve the Dutch climate goal by 2030. The proposed measures aim to reduce CO2 emissions by an addition 22 megatons. In the upcoming months, the relevant ministries will further develop the proposed measures. Part of the measures is expected to enter into force as from 2024. See the [press release](#) of the Dutch government for more information.

### **EU Council adopts 'Fit for 55' package**

On 25 April 2023, the EU Council adopted (amendments to) several directive and regulations in order to align EU legislation with the 2030 climate targets, i.e. to reduce net greenhouse gas emissions by at least 55% by 2030 and to achieve climate neutrality in 2050. To this end, for instance, the EU introduces a Social Climate Fund to reduce the impact of the emissions trading system for vulnerable households, micro-enterprises and transport (applying as from 30 June 2024). See the [press release](#) of the EU Council for all the amendments and initiatives.

### **Frank Elderson (ECB): “2023 as a key milestone in stepping up the management of climate and environmental risks”**

The ECB expects financial institutions to submit a thorough risk analysis on their climate and environmental risks by the end of 2024. After 2024, identifying a risk as material but not adequately addressing it will no longer be tolerated. Things are moving too slowly, believes Frank Elderson (*ECB Vice-Chair of the Supervisory Board and Member of the Executive Board*). Banks are taking steps in their climate policies, but they must considerably increase the pace of progress. “We see the glass filling up slowly, but it is not yet even half full”, he said at a meeting of the Foreign Bankers’ Association on 27 March 2023. See for the way ahead for banks and supervisors the full speech [here](#).

### **Dutch Ministry of Finance – ESG Policy Agenda for the Financial Markets**

On 16 March 2023, the Dutch Ministry of Finance published its Policy Agenda for the Financial Markets for the upcoming years (for the agenda, click [here](#)). It formulates two policy goals on sustainability: (1) the financial markets are drivers towards creating a sustainable economy; and (2) reporting standards provide insight into all relevant sustainability factors and prevent greenwashing. Furthermore, the Minister announced that she would consider how the 2024 mortgage loan standards could take greater account of the energy efficiency of houses.

### **EC’s request for a one-off stress-testing exercise**

On 8 March 2023, the European Commission invited EIOPA, ESMA and EBA to conduct a one-off climate risk scenario analysis to assess, in cooperation with the ECB and the ESRB, the resilience of the financial system on the way to the EU’s targets for 2030 (see for the invitation [here](#)). The one-off exercise should give a better understanding of the vulnerabilities in the financial system and its capacity to support green investments under stress.



## Disclosure

### **The interpretation of SFDR – Answers from the EC**

On 14 April 2023, the European Commission published (click [here](#)) the answers to the questions the ESAs jointly submitted about the interpretation of the SFDR in September 2022, including amendments to previously circulated answers (click [here](#)). The EC made clear that the SFDR does not set out minimum requirements that qualify concepts such as contribution, do no significant harm, or good governance, i.e. the key parameters of a ‘sustainable investment’. Financial market participants need to carry out their own assessment for each investment and disclose their underlying assumptions.

### **Consultation to review the SFDR Delegated Regulation is open now**

On 12 April 2023, the ESAs launched jointly a consultation with the aim to review the SFDR Delegated Regulation. The most relevant topics in scope for review are (i) the proposal of some new formulas and clarifications to definitions and concepts that come with the PAI indicators, (ii) the search for an alternative to the “do not significantly harm-principle” and (iii) suggestions for a different disclosure structure in relation to pre-contractual documents, period reports and more detailed information. Furthermore, the ESAs question the use of carbon credits in the net-zero mission, as the Dutch Authority for Financial Markets did as well this April. Comments can be provided until 4 July 2023. Click [here](#) to view the proposed adjustments in more detail.

### **AFM on CSRD: “no time to lose”**

On 30 March 2023, the AFM published a report in which it explored how listed companies and audit firms are dealing with sustainability reporting. Under the CSRD, these companies will have to report on this matter in less than nine months from now. It appears that huge steps are still needed. The AFM stresses explicitly that companies have start collecting available and reliable sustainability information now. This also goes for companies that will not be covered by the CSRD until later. For more information and a chart with the timeline on the implementation of the CSRD, see [here](#).

## AFM attention points for sustainable bonds

As sustainability of the financial markets is strategic priority for the AFM, on 30 March 2023, the AFM has [published](#) ten points of attention for prospectuses relating to the issuance of sustainable bonds while awaiting the entry into force of many of the ESG legislative initiatives such as the EU Green Bond Standard and the Listing Act. Some of these points are also relevant for equity prospectuses where such prospectuses contain sustainability claims. In our experience over the last few months, the AFM's review focuses on inclusion of (i) processes around pre- and post-issuance impact reporting (points 6, 9 and 10), (ii) further information on alignment with ESG market standards and EU Taxonomy, whereby even statements such as “best efforts basis” need to be substantiated (point 7), and (iii) explanations how issuances of sustainable bonds attribute to the issuer's sustainability goals (point 8).

## EC's request for feedback on draft EU Taxonomy Environmental Delegated Act

The EC launched a feedback period for the draft [Environmental Delegated Act](#), and on the [proposed amendments to the Taxonomy Climate Delegated Act](#). The draft Environmental Delegated Act contains a new set of EU Taxonomy technical screening criteria for economic activities making a substantial contribution to (i) the sustainable use and protection of water and marine resources; (ii) the transition to a circular economy; (iii) pollution prevention and control; and (iv) the protection and restoration of biodiversity and ecosystems. The Taxonomy Climate Delegated Act will be amended to cover additional economic activities (such as the transport sector) and related technical screening criteria.



## Litigation

### Greenwashing: chewing gum made of only natural ingredients?

On 21 March 2023, the Amsterdam Court of Appeal rejected a claim brought by chewing gum manufacturer Perfetti against its competitor Benbits in summary proceedings (for the ruling in Dutch, click [here](#)). Perfetti claimed that Benbits be prohibited from claiming that its chewing gum was made using only natural ingredients, because Perfetti considered such claims to be misleading and unlawful. Although rejected, this claim shows the potential of claims for greenwashing brought by competitors against each other.

# NautaDutilh's Sustainable Business & Climate Change team



**Gaike 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



**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 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

Editors: **Kim Heesterbeek** & **Dorine Verheij**