



December 2023

Insights and perspectives on governance, disclosure & litigation

# ESG Matters



This monthly update helps you keep up with the latest developments in ESG governance, disclosure and litigation. In this edition, we take a special look at the 'S' in ESG, exploring how employers can achieve a safer working culture.

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## Giving substance to the 'S' in ESG: ensuring a safe working environment

The importance of the 'S' in 'ESG' is growing for many employers, as organisations increasingly recognise that social matters are an important element of sustainable business conduct. In this ESG Matters, we highlight two legal developments in the area of social business operations which are relevant for many Dutch companies.

Companies are looking for guidance on how to achieve a safer working culture. The legislative proposal for the mandatory appointment of a confidential advisor regarding transgressive behaviour, currently debated in the Dutch Senate, provides such guidance. As does the Whistleblower Protection Act, which entered into force on 18 February 2023. The importance of these topics is reflected in the Corporate Sustainability Reporting Directive (CSRD), which will require in-scope organisations to report on their policies against violence and harassment in the workplace and their protection of whistleblowers.

## Mandatory appointment of a trusted advisor

The Dutch legislator considers the appointment of a trusted advisor an effective measure against violence and harassment in the workplace. Therefore, the [proposed legislation](#) on the trusted advisor legally requires such an appointment. The role of the trusted advisor includes: (i) supporting employees; (ii) identifying bottlenecks in existing policies; and (iii) providing information and advice in the event of (alleged) transgressive behaviour.

The trusted advisor can either be an internal or external person. The default option seems to be an internal advisor. However, we see several advantages to appointing an external trusted advisor. Firstly, this ensures a certain distance from the organisation. This may lower the threshold for employees to come forward, as they may perceive the advisor as more independent. In addition, an external trusted advisor will often have more knowledge and cross-organisational experience. An often-heard argument in favour of an internal trusted advisor is that such a person is familiar with the company's culture. However, this can also carry the risk that the trusted advisor may not be entirely objective and may take some reports less seriously, for example if the reported behaviour is part of the company culture. In practice, we often see companies having both an internal and an external trusted advisor, which we recommend.

If an internal trusted advisor has been or will be appointed, they cannot be disadvantaged in relation to their position in the organisation. In particular, the proposal contains a prohibition on retaliation, such as dismissal or demotion. Compared to the Whistleblower Protection Act, the protection under the proposal on the mandatory appointment of trusted advisors is limited to the trusted advisor, and does not include the person making a report.

## Whistleblower Protection Act

The Dutch [Whistleblower Protection Act](#) requires more types of employers to establish an internal reporting procedure for suspected wrongdoings. This obligation applies to each employer who generally has at least 50 employees. In addition, *all* employers covered by the [Dutch Prevention of Money Laundering and Terrorist Financing Act](#) (Wwft) and *all* organisations active in the fields of (i) financial services, products and markets; (ii) civil aviation; (iii) maritime labour and port state control; and (iv) offshore oil and gas activities, regardless of the number of employees, are required to establish a whistleblower policy. In addition, each individual group company with at least 50 employees is required to establish its own internal reporting channel. The Act also provides greater protection for whistleblowers. It does not require a trusted advisor.

The Act also aims to create a safer working environment. The Act allows individuals to report suspected wrongdoing as soon as there is a suspicion of wrongdoing. As such, a reporting channel can be used as an early warning system. However, it is important to note that the Act requires that the misconduct be of public interest.

For this reason, reports due to transgressive behaviour are often deemed not to qualify as a ‘wrongdoing’ under the Act. With this approach, a company risks treating a report on transgressive behaviour as an individual matter when it may actually be indicative of a larger problem, such as an unsafe working environment. Furthermore, whistleblowers who report such behaviour are not protected against retaliation under the Act.

## Improving the workplace safety culture

In light of social injustices in the workplace, the legislator is providing guidance for creating a safer working environment. The hard and fast rules of the proposed legislation and the Act should increase the safety of the working environment, which in turn should increase the willingness to report. The CSRD’s reporting requirements on these topics can also raise internal and external awareness. Moreover, organisations are increasingly recognising that creating a safer working environment can have a positive impact on the business, including employee productivity.

For further reading, some critical remarks and practical recommendations, we refer to the recent article by Maartje Govaert and Inger van Dijkman in [Tijdschrift Ondernemingsrecht](#) (in Dutch).

## What it means for you:

- The applicability of clear policies on social safety and undesirable behaviour is essential. Therefore, ensure that policies on the position of the trusted advisor, whistleblower protection and on reporting to the trusted advisor and under the whistleblower policy are in place and comply with statutory requirements.
- Communicate the content of these policies appropriately and regularly to the workforce and other stakeholders, e.g. by setting up training courses or discussion groups in order to create (more) awareness regarding a safe working environment.
- Consider anticipating on the legislative proposal, e.g. by determining whether the appointment of an internal or external trusted advisor is appropriate.

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# Spotlight on ESG developments



## Governance & transition

### ECB examines net-zero commitments of global banks

On 28 November, the European Central Bank (ECB) published a [paper](#) examining the net-zero commitments of 30 Global Systemically Important Banks (G-SIBs). The paper discusses potentially problematic entity-level disclosures relating to net-zero commitments, and specifically addresses greenwashing risks. The ECB concludes that comparability and reliability of net-zero commitments should be improved by defining a common minimum framework, as is already partially the case in the European Union. The ECB reiterates that incomplete or poor net-zero commitments and insufficient transition risk management may give rise to litigation and reputational risks, as well as supervisory action by prudential supervisors.

### Final consultation on draft UN Guide on human rights due diligence with an environmental focus

On 28 November, the UN Working Group on Business and Human Rights and the UN Development Programme published a [draft guide](#) for businesses on human rights due diligence and the environment. In addition, a public [consultation](#) was launched to allow respondents to provide final feedback on the draft guide by 15 January 2024. The guide aims to provide practical tools for conducting human rights due diligence with a particular focus on the environment, and sets out four 'essential components' for conducting such due diligence. The guide also specifies the correlations between the aforementioned due diligence and other due diligence-related guidelines, frameworks and assessments.

### Provisional agreement on gas and hydrogen Directive

On 27 November, the European Council and the European Parliament reached a [provisional agreement](#) on the Directive on gas and hydrogen markets, as originally [proposed](#) in December 2021. As part of the broader EU hydrogen and decarbonized gas markets package, the Directive provides investment rules for hydrogen networks and consumer protection rules. The proposed Regulation will be agreed upon at a later stage. The provisional agreement on this Directive can be seen as a first step towards the much-needed legal certainty in the emerging European hydrogen market.



## Council adopts position on right-to-repair Directive


On 22 November, the European Council adopted its [negotiation mandate](#) (position) on a proposed [Directive on the repair of goods](#), also known as the right-to-repair (R2R) directive. The Directive aims to remove obstacles that discourage consumers from having broken products repaired, such as inconvenience, lack of transparency or lack of access to repair services. The Council supports the general objectives of the proposed Directive, while introducing some improvements regarding the obligation to repair, the information form and the online platform. The Council aims to maintain the choice between repair and replacement. Negotiations with the EP will start in the coming weeks.

## EP adopts position on EU Regulation on the certification of carbon removals

On 21 November, the EP adopted its [position](#) on a Regulation establishing a framework for the certification of carbon removals. The proposed framework covers both technological and natural carbon removals, providing quality criteria as well as verification and certification rules. The framework aims to quantify, monitor and verify carbon removals with the goals of increasing their use, building trust with stakeholders and countering greenwashing. EP will now start its negotiations with EU Member States.

## UN Emissions Gap Report 2023

On 20 November, the [UN Emissions Gap Report 2023](#) was released. This annual report tracks the gap between (i) greenhouse gas emission levels consistent with the Paris Agreement and (ii) current and projected emission levels under the Nationally Determined Contributions (NDCs) to the Paris Agreement. The report notes that global emissions have increased by 1.2% between 2021 to 2022. Full implementation of current NDCs would result in a 2.5-2.9°C temperature rise by 2100, slightly higher compared to the 2022 Report (2.4-2.8°C). The 2023 Report aims to inform the next round of NDCs under the Paris Agreement, which countries are requested to submit in 2025.



## Provisional agreement on revised Directive to protect the environment through criminal law

On 16 November, the EP and the Council reached a provisional agreement on the revision of the Environmental Crime Directive, as originally [proposed](#) by the EC in December 2021. Following debate on this matter, the provisional agreement provides that permits issued under administrative law in principle do exempt from criminal liability, except if they were issued fraudulently or by corruption, extortion or coercion. The revision clarifies several definitions of environmental crimes, including on illegal timber trade, deforestation-linked products and water abstraction. The Directive also sets a minimum on several maximum sanctions for natural and legal persons, and adds ‘ecocide’ as an aggravating circumstance in environmental crimes (without using that word explicitly in the legal text). The EP is expected to formally adopt the proposal in February 2024.

## DNB: “Insurers have made progress in embedding sustainability, but most are not halfway there yet”

On 15 November, DNB published an [article](#) and a [presentation](#) on a self-assessment by over 20 insurers of the sustainability maturity level of their organisations. The majority of the insurers indicated that at least one of their directors bears responsibility for sustainability. Many insurers are also committed to sharing knowledge and expertise, and actively involve key functions in sustainability-related decisions. Although many insurers have climate plans and commitments in place, respondents encounter difficulties when translating intentions into concrete investment- and insurance-related actions. DNB will conduct a more comprehensive self-assessment in 2024, with the goal of determining DNB’s sectoral sustainability-related enforcement priorities for the coming years, if any.

## ECB’s Frank Elderson - Formal action against banks on climate risk management

In a [keynote speech](#) on 14 November, ECB Board Member Frank Elderson spoke about formal action by the ECB regarding Climate-related and Environmental (C&E) risk management. Some banks have missed the March 2023 interim deadline set in the ECB’s [Guide on C&E Risk Management](#), as they have not yet performed an adequate materiality assessment of the impact of C&E risks across their portfolios. The ECB has therefore started to adopt enforcement measures, such as the potential imposition of penalty payments. Elderson also expressed the ECB’s view that banks should be in scope of the Corporate Sustainability Due Diligence Directive (CSDDD).



## AFM 2024 outlook: More action needed to assess climate risks in the Dutch housing market

On 7 November, the AFM published its [2024 Trend Monitor \(Trendzicht\)](#) on recent developments and associated risks, bottlenecks and control measures. With regard to sustainability, the AFM warns that the Dutch housing market is lagging behind in assessing climate risks. Homebuyers and homeowners would be insufficiently informed about climate risks that are not part of the financing process. Foundation damage and flooding are the most prominent risks, as they can have potentially large financial consequences, but are mostly uninsurable. The AFM publication '[Factoring climate risks into housing prices](#)' provides an in-depth discussion of this issue.



## Updated NGFS climate scenarios for central banks and supervisors

On 7 November, the Network of central banks and supervisors for Greening the Financial System (NGFS) published an update of its [NGFS Climate Scenarios](#). These scenarios aim to capture the impact of possible energy transition pathways and physical risks on banks and the economy. The scenarios are now underpinned by new and more granular data to better reflect a more disorderly future, taking into account recent developments. Two new scenarios have been introduced: one that explores the consequences of delayed, divergent and therefore overall ineffective climate action, and a Paris-aligned scenario that is driven by significant behavioural change and avoids the worst physical risk impacts. Finally, droughts and heatwaves have been added to the modelling of acute physical risks.



## Disclosure



### European Green Bond Regulation published

On 30 November 2023, the [European Green Bonds Regulation](#) has been published in the EU Official Journal. The Regulation lays down uniform requirements for labelling an environmentally sustainable as a 'European green bond' (EuGB) in line with the technical screening criteria of the Taxonomy Regulation. The EuGB Regulation will apply as of 21 December 2024.



## ESAs provide clarity and tips to consumers on sustainable finance

On 30 November, the three European Supervisory Authorities (ESAs: EBA, EIOPA and ESMA) published an [interactive factsheet](#) for consumers on investments, loans, insurance and pensions with a sustainable focus. The factsheet provides answers to frequently asked questions and steps consumers can take to understand how their financial choices can contribute to a more sustainable future. The factsheet also provides tips for consumers to consider before choosing financial products with sustainability features, and includes helpful pop-up boxes that explain specific terms such as ‘ESG’ and ‘EU taxonomy’, which can sometimes be intimidating and prevent consumers from understanding key financial concepts.

## Basel Committee consultation on Pillar 3 climate risk disclosures

On 29 November, the Basel Committee on Banking Supervision issued a [consultation paper](#) on a Pillar 3 disclosure framework for climate-related financial risks. This work is part of the Committee’s holistic approach to addressing climate-related financial risks to the global banking system. The Committee is analysing how a Pillar 3 disclosure framework for climate-related financial risks would further its mandate to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability, and the possible design of such a framework.

## ESMA clarifies definitions and criteria for ‘sustainable investments’ and ‘do no significant harm’

On 22 November, ESMA published three explanatory notes covering key topics of the Sustainable Finance Disclosure Regulation (SFDR), the Taxonomy Regulation (TR) and the Benchmark Regulation (BMR). The notes cover (i) the [definition of sustainable investments and activities](#); (ii) the [application of the ‘do no significant harm’ \(DNSH\) requirements](#); and (iii) the [use of estimates](#). These notes do not add to, interpret or replace the relevant texts and have no legal effect, but can be useful to help stakeholders navigate the European sustainable finance framework.





## **EBA publishes final standards for regulatory authorities assessing new market risk internal models**


On 21 November, the EBA published its final draft of the [Regulatory Technical Standards](#) (RTS) on the assessment methodology to be used by competent authorities to verify institutions' compliance with the requirements applicable to their internal models under the Fundamental Review of the Trading Book. Risks arising from climate change and wider environmental issues are changing the risk profile of the financial sector and will become even more important in the future. The RTS therefore explicitly require competent authorities to verify that institutions incorporate climate and related risks into their stress testing programmes for internal models. Given the novelty of this requirement, competent authorities will not assess this aspect before 1 January 2025.

## **Publication of and internet consultation on the Dutch implementation of the CSRD**

On 20 November, the Dutch Ministry of Justice and Security launched an [internet consultation](#) on the Dutch [implementation decision](#) (Implementatiebesluit) on the Corporate Sustainability Reporting Directive (CSRD). The consultation addresses the Dutch implementation of the reporting requirements for corporates under the CSRD. Respondents can, for example, provide input on the exemption of various legal entities and financial institutions from the scope of the implementation decision, the consolidation options in relation to EU and non-EU ultimate parents, and Member State options. A previous consultation already covered the implementation of audit and transparency topics. The consultation closes on 18 December 2023.

## **EBA publishes final templates for collection of climate-related data from EU banks**

On 17 November, the European Banking Authority (EBA) published the [final templates](#) that will be used to collect climate-related data from EU banks as part of the one-off Fit-for-55 climate risk scenario analysis. The templates will be used to collect data from 110 EU banks, covering climate-related and financial information on credit risk, market and real estate risks. The templates are accompanied by template guidance, which includes definitions and rules for compiling the templates. The data collection started on 1 December 2023 and will end on 12 March 2024.



## AFM and ESMA: points of attention for listed companies in their 2023 reporting


On 10 November, the AFM and ESMA jointly [called](#) on listed companies to address certain key areas of focus in their 2023 reporting. Focus areas are: (i) transparency on net zero targets, including plans, uncertainties, emissions reporting and any use of carbon credits; (ii) compliance with the double materiality principles under the CSRD from 1 January 2024, requiring companies to report on both external impacts and internal environmental and social impacts; and (iii) improving qualitative disclosures related to the Taxonomy Regulation. In addition, the AFM and ESMA recommend consulting [ESMA's examples and recommendations](#) on climate-related disclosures, using [ESMA's guidance on alternative performance measures](#) (APMs) when communicating with investors and analysts, and taking into account [ESMA's European Common Enforcement Priorities](#).

## EFRAG publishes draft of voluntary ESRS for non-listed Small- and Medium-Sized Enterprises

On 8 November, EFRAG published a [draft](#) of ESRS for non-listed Small- and Medium-Sized Enterprises. These ESRS are voluntary and apply to undertakings that are out of scope of the CSRD. They are encouraged to use this standard to prepare and communicate sustainability information. These draft ESRS cover the same sustainability topics as the ESRS for large undertakings, but are based on the key concept of proportionality and therefore take into account the fundamental characteristics of SME's.

## Dutch SER and DASB publish Q&A on CSRD and ESRS

On 8 November, the Dutch Social and Economic Council (Sociaal-Economische Raad: SER) and Accounting Standards Board (Raad voor de Jaarverslaggeving: DASB) published Questions and Answers on the CSRD and ESRS (in [Dutch](#) and [English](#)). The purpose of the document is to provide clarity on the CSRD and the related ESRS and to support undertakings in preparing their annual sustainability report. The Q&A have no legal effect, but can be useful to help stakeholders navigate the CSRD and ESRS.



## EP approves European Single Access Point regarding access to financial services, capital markets and sustainability information

On 9 November, the EP approved three proposals for the establishment of a European Single Access Point (ESAP). These include: (i) the [proposal](#) for a regulation establishing an ESAP providing centralised access to publicly available information relevant to financial services, capital markets and sustainability; (ii) the [proposal](#) amending certain directives as regards the establishment and functioning of the ESAP; and (iii) the [proposal](#) amending certain regulations as regards the establishment and functioning of the ESAP. The adopted proposals are part of [the package of regulatory proposals](#) published earlier by the EC to improve the ability of companies to raise capital across the EU and to ensure that Europeans can get the best return on their savings and investments.

## AFM submits position paper to SFDR consultation: towards more meaningful and consumer-friendly sustainability disclosures

On 2 November, the AFM submitted a [position paper](#) to the EC's consultation of the SFDR framework. The AFM's proposals aim to make the SFDR framework more meaningful for investors and to facilitate the reorientation of capital towards sustainable investments. Key proposals are: (i) removal of the current Article 8 and Article 9 qualifications; (ii) minimum adverse impact disclosures for all financial products, (iii) three easy-to-understand sustainable product labels, with both quality and disclosure requirements attached to each of these labels, (iv) reduced disclosure for products that do not meet any of the sustainability labels. In addition, the AFM suggests alignment of client advice rules under MiFID and IDD to match legislative changes to the SFDR. This should enable intermediaries and investors to effectively use SFDR disclosures to meet their clients' sustainability preferences.



## Litigation




### **Brussels Court of Appeal imposes 55% reduction obligation on Belgian governments for 2030**

On 30 November, the Brussels Court of Appeal [ruled](#) that the climate policies of the Federal State, the Flemish Region and the Brussels Region violate articles 2 and 8 of the European Convention on Human Rights and their duty of care under Belgian tort law by failing to do their part in the reduction of global greenhouse gas emissions. Diverting from the ruling in first instance, the Court of Appeal imposed a specific order on the governments as a relief for the unconstitutionality of the policies. The court ordered the governments to reduce, in consultation with the region Wallonia, the yearly greenhouse gas emissions at the Belgian territory by at least 55% by 2030 as compared to 1990. The claim against the Walloon Region was dismissed because it had already legally implemented the aforementioned target. Since the [Urgenda case](#), this is the second time worldwide that a court has ordered a government to reduce its greenhouse gas emissions by a specific percentage by a certain date.



### **German government [ordered](#) to adopt climate action programmes on buildings and transport sectors**

On 30 November, the German higher administrative court of Berlin-Brandenburg ordered the German federal government to adopt a resolution on an 'immediate action programme' for emission reduction in the buildings and transport sectors for the years 2024-2030. The court ruled that Section 8 of the German Climate Protection Act (CPA) required the adoption of such a resolution, as the Federal Environment Agency had determined that the permissible sectoral emission levels as specified in the CPA were exceeded in 2021 and 2022. The government's Climate Protection Programme 2023 does not meet the requirements of the CPA for an immediate action programme, as it does not contain effective short-term measures that ensure compliance with the CPA's sectoral maximum emission levels. The court allowed an appeal to the Federal Administrative Court.



## Dutch NGO Milieudefensie to launch climate case against financial institution

On 27 November, Dutch NGO Milieudefensie (Friends of the Earth Netherlands) publicly [announced](#) that it will launch its next climate case against a Dutch financial institution. The announcement was accompanied by a [study](#) of research group SEO Amsterdam Economics, which assesses the integrity and transparency of the climate plans of seven Dutch financial institutions. The study is a targeted follow-up to Milieudefensie's broader 2022 study on the climate plans of 29 large Dutch companies. On 19 January 2024, Milieudefensie will publicly announce which financial institution will be targeted.

## UK Court of Appeal definitively dismisses claim against Shell board members

On 16 November, the UK Court of Appeal definitively dismissed ClientEarth's derivative claim against the board members of Shell plc, by rejecting ClientEarth's application for appeal against the UK High Court's decision on this matter in May of this year. In this case, ClientEarth argued that the board members of Shell breached their fiduciary duties under UK company law relating to the management of climate risk, most notably by failing to adopt a Paris-aligned transition strategy and violating the Dutch court order in *Milieudefensie v. Shell*. As the UK Court of Appeal is the highest competent judge on this matter, the case is now definitively closed.

## Request for disclosure of Australian bank's biodiversity risk framework

On 9 November, a shareholder of Australian bank ANZ filed a [discovery request](#) against ANZ at the Federal Court of Australia, requesting disclosure of the bank's internal risk management framework relating to the 'twin risks' of climate change and biodiversity loss. The shareholder seeks to assess whether the bank is adequately managing the material risks associated with climate change and biodiversity loss, in view of Australian prudential and misleading conduct laws. The shareholder states that she initiated this claim because ANZ's annual report does not sufficiently address the management of these risks. This is the first discovery request that specifically addresses the interrelationship between biodiversity risks and climate change risks.



## Criminal complaints against French banks relating to illegal deforestation

On 8 November, French NGOs filed a [criminal complaint](#) with the French Financial Prosecutor's Office, alleging that four French banks and insurance companies violated anti-money-laundering laws by providing deforestation-linked finance to Brazilian companies. This is the first criminal complaint against French banks for money laundering and receiving stolen goods, based on their alleged financial support of and profit from activities responsible for deforestation. The complaint follows a pending civil lawsuit on the same matter.

## Consumer groups launch greenwashing complaint on plastic bottles

On 7 November, the European Consumers Organisation (BEUC), including the Dutch Consumentenbond and 12 other member organisations, filed a [greenwashing complaint](#) with the EC. BEUC is requesting a coordinated supervisory investigation by the EC and the network of supervisory authorities (CPC) into the '100% recycled/recyclable' claims and green visuals on plastic bottles of Coca-Cola, Nestlé and Danone. BEUC's complaint alleges that these claims and visuals are in breach of European consumer law because they would not reflect the practical and technical realities of plastic recycling. BEUC's complaint follows a similar legal complaint against the European aviation sector (see [July edition](#) of ESG Matters).

## PepsiCo sued for plastic pollution

On 15 November, the New York State Attorney General filed a civil [claim](#) against PepsiCo for polluting the environment and endangering public health with its single-use plastic bottles, caps and wrappers. The State accuses PepsiCo of contributing to a public nuisance by generating a significant share of plastic waste found in and near the Buffalo River. More than 17% of the identifiable plastic items in the river was produced by PepsiCo. In addition, the State argues that the company failed to warn consumers about the potential health and environmental risks of plastics, and misled the public about its progress in fighting plastic pollution. This is the first ESG lawsuit filed by a U.S. state against a major plastic producer.

Do you have any questions or comments on a specific ESG topic? Please do not hesitate to contact our Sustainable Business & Climate Change team. If you or members of your team would also like to receive updates, please [sign up](#).

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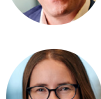
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