March 2024

Insights and perspectives on governance, disclosure & litigation

ESG Matters

In this month's ESG Matters, we take a special look at the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD). Our spotlight keeps you up to date with February's key developments in ESG governance, disclosure and litigation.

1 Highlight – where are we heading with the CSDDD?

In our February update, we informed you that the Corporate Sustainability Due Diligence Directive (CSDDD) was moving towards its final stages. It was expected that the final vote on the final text would take place in April 2024. What a difference a few weeks can make!

In the course of February, it appeared that the vote on the Directive would be postponed. This was primarily because Germany and Italy had announced they would abstain from voting, despite the fact that the European Council and Parliament had reached a provisional agreement on the regulation. On 28 February, the Belgian Presidency of the Council stated that no support had been found at a meeting that day to endorse the proposal for a CSDDD. According to diplomatic sources, France raised additional objections, seeking to reduce the scope of the new rules to only include companies with at least 5,000 employees (instead of 500).

This leaves market parties and other stakeholders wondering where we are going. The Belgian Presidency of the Council stated: “We now have to consider the state of play and will see if it’s possible to address the concerns put forward by member states, in consultation with the European Parliament.”

Whether this will be successful remains to be seen, as there is very little time to reach consensus before the final deadline. At the time of writing this update, the Council Presidency is reported to be seeking support for a less stringent version of the CSDDD. This compromise proposal would reportedly include a smaller scope (1,000 employees instead of 500 and EUR 300 million turnover instead of 150 million, and a slower phase-in) and the deletion of the high-risk sector approach, such as that envisaged for the textile industry.

The proposal was expected to be on the agenda for 8 March. However, it has allegedly been taken off, most likely because more time is required to win the support of the reluctant member states. There is, however, very little time. With European elections in June, the proposal has to be endorsed in principle and sent to the European Parliament before 15 March. If the CSDDD is not adopted, this may lead to further development of national initiatives to provide for due diligence regulations. We will keep you posted.

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2 Spotlight on ESG developments

Governance & transition

No support yet for endorsement of CSDDD proposal

On 28 February, the Presidency of the European Council stated that no support was found at a meeting earlier that day for endorsement of the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD). The statement follows an already postponed vote in a preparative body of the Council. The Presidency said it intends to address the concerns. With European elections in June, the proposal must be endorsed and sent to the European Parliament before the final deadline of 15 March. See also our Highlight above.

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Parliament adopts revised directive to protect the environment through criminal law (the Environmental Crime Directive)

On 27 February, the European Parliament (EP) formally adopted a revision of the Environmental Crime Directive. 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, such as imprisonment of up to at least ten years for natural persons and fines of up to at least 5% of the total worldwide turnover for legal persons. The Directive adds 'ecocide' as an aggravating circumstance for environmental crimes, without using the word explicitly. Authorisation of conduct by a public authority of a member state, for instance by means of an administrative permit, excludes criminal liability, provided that the authorisation was not issued fraudulently or through corruption, extortion, or coercion, and provided that the authorisation is not in manifest breach of relevant substantive legal requirements. After publication in the Official Journal, the directive will have to be transposed into national law within two years.

Commission approves third IPCEI to support hydrogen infrastructure

On 15 February, the European Commission approved a third Important Project of Common European Interest (IPCEI) supporting hydrogen infrastructure. Under 'IPCEI Hy2Infra', seven member states, including the Netherlands, will provide up to EUR 6.9 billion of public funding for 33 selected hydrogen projects. This is expected to generate an additional EUR 5.4 billion of private investments. The selected projects aim to develop infrastructure beyond what the market currently offers. The projects include the development of large-scale electrolysers for renewable hydrogen production, hydrogen distribution pipelines, hydrogen storage facilities and port infrastructure improvements.

Provisional agreement on EU certification framework for carbon removal

On 20 February, the EP and Council reached a provisional agreement on a Regulation establishing the first EU certification framework for permanent carbon removal, carbon farming and carbon storage in products. Based on a set of criteria, the Commission will develop tailored certification methodologies for different types of carbon removal activities. Based on these criteria, national certification bodies will be able to provide voluntary certification for carbon removal projects. It is envisaged that the proposed Green Claims Directive will require certification under this framework for corporate claims relating to carbon offsets. The provisional agreement now needs to be formally adopted by both institutions, and will apply immediately upon its entry into force.

Provisional agreement on Net-Zero Industry Act

On 16 February, the EP and the Council reached a provisional agreement on a framework of measures to strengthen Europe's manufacturing ecosystem for net-zero technology products, better known as the Net-Zero Industry Act (NZIA). The NZIA aims to facilitate investments in green technologies by simplifying authorisation procedures, such as permit procedures for strategic projects. It also proposes to facilitate market access for strategic technology products, to improve the skills of the European workforce in these sectors (notably through the establishment of net-zero industry academies) and to create a platform to coordinate EU action in this field. The provisional agreement introduces a number of improvements to the main objectives of the NZIA proposed by the Commission, such as streamlined rules for construction permit procedures, the creation of net-zero industrial valleys and more clarity on criteria for public procurement and auctions. The provisional agreement now needs to be formally adopted by both institutions. The NZIA will largely apply directly upon its entry into force.

Commission presents recommendation on 2040 emissions reduction target

On 6 February, the Commission published a detailed impact assessment report on possible pathways to achieve the agreed goal of making the EU climate neutral by 2050. Based on its impact assessment, the Commission recommends a 90% net reduction in greenhouse gas emissions by 2040 compared to 1990 levels. This recommendation is the start of a political debate and an open dialogue with all stakeholders. The political and legislative decision on the 2040 target will be made by the next EC, following this year's EU elections. The Commission states that reaching the 90% target will require a number of enabling policy conditions, including (i) full implementation of the agreed 2030 framework; (ii) ensuring the competitiveness of the European industry; (iii) a greater focus on a just transition; (iv) a level playing field with international partners; and (v) a strategic dialogue on the post-2030 framework, including with industry and the agricultural sector. See also the accompanying Q&A's on the EU Industrial Carbon Management Strategy and the Communication on Europe's 2040 climate target and path to climate neutrality by 2050.

Commission adopts communications on 2040 emission reduction targets and carbon management

On 6 February, the Commission adopted two communications. The first communication is on implementing the 2030 energy and climate framework as the stepping stone to reaching the 2040 climate target and climate neutrality in 2050, in line with the European Climate Law. The second communication is on industrial carbon management, setting out how CO_2 capture, utilisation and storage could contribute to achieving the EU's climate change objectives. The Commission announced that it will start working on the necessary regulatory framework for transportation and storage of CO_2.

Provisional agreement on right-to-repair Directive

On 2 February, the Council and Parliament reached a provisional agreement on a proposed Directive on the repair of goods, also known as the right-to-repair (R2R) Directive. The Directive will apply to products already in scope of EU repair requirements and aims to improve the reparability of these goods, including after the warranty period. The directive (i) obliges manufacturers to repair in-scope goods; (ii) introduces a European consumer information form on repair services; and (iii) establishes an EU online repair information platform. After repair, the manufacturer's liability is extended for at least 12 months. The provisional agreement maintains the consumer's right to choose between repair and replacement. The provisional agreement must now be formally adopted by both institutions and will apply 24 months after its entry into force.

Two new EU Regulations to phase down harmful F-gases and ozone-depleting substances

On 29 January, the Council announced the adoption of two Regulations to phase down fluorinated gases (F-gases) and other substances that cause global warming and deplete the ozone layer. Under the new rules, the consumption of hydrofluorocarbons (HFCs) will be completely phased out by 2050. On the other hand, the production of HFCs, in terms of production rights allocated by the Commission to produce HFCs, will be phased down to a minimum (15%) as of 2036. Both production and consumption will be phased down on the basis of a tight schedule with a degressive quota allocation (Annexes V and VII). It also sets dates for the complete phase-out of the use of F-gases in air conditioning, heat pumps and switchgears.

Disclosure

Provisional agreement on 2-year delay of ESRS reporting for certain sectors and third country companies

On 7 February, the EP and the Council reached a provisional agreement on a directive on the deadlines for the adoption of sustainability reporting standards (ESRS) for certain sectors and for certain third-country undertakings in scope of the Corporate Sustainability Reporting Directive (CSRD). The directive will postpone the adoption of these standards until 30 June 2026, giving companies more time to prepare for the sectoral European Sustainability Reporting Standards (ESRS) and specific standards for large non-EU companies. The provisional agreement must now be formally adopted by both institutions and will apply immediately upon its entry into force.

EFRAG publishes first set of technical Explanations relating to the ESRS

On 5 February, the first set of 12 responses to questions submitted via the EFRAG ESRS Q&A platform was published. EFRAG launched this platform in Q4 2023 to collect and answer technical questions to assist preparers and other stakeholders in implementing the ESRS issued as Delegated Act. Of the 258 questions received as of 31 January 2024, 127 are expected to result in either an Explanation (106) or an Implementation Guidance (21) and 17 are still under preliminary analysis. The remaining questions are considered to be either not technical (30), covered by other questions or existing guidance (45) or inconclusive/out of scope (39). Most of the Q&A Explanations are already in the process of being drafted.

Provisional agreement on Regulation on ESG rating activities

On 5 February, the Council and EP reached a provisional agreement on a proposal for a Regulation on ESG rating activities. The proposal aims to increase investor confidence in sustainable financial products. It requires ESG rating providers to be authorised and supervised by ESMA and to meet strict transparency requirements. The provisional agreement clarifies the scope and territorial application of the regulation and introduces principles on the separation of business activities to avoid conflicts of interest. ESG rating providers will be able to provide separate E, S and G ratings. Where a single rating is provided, the weighting of the factors should be made explicit. Non-EU ESG rating providers operating in the EU will also be in scope. The provisional agreement must now be formally adopted by both institutions and will apply 18 months after its entry into force.

EFRAG launches consultation on draft XBRL Taxonomy for ESRS Set 1 and Article 8 disclosures

On 8 February, the European Financial Reporting Advisory Group (EFRAG) launched its public consultation on the draft ESRS Set 1 XBRL Taxonomy. EFRAG is also consulting s on the draft XBRL Taxonomy for Article 8 disclosures. The digital taxonomies enable the marking up ('tagging') of sustainability reporting in machine-readable XBRL format. Each taxonomy is accompanied by an 'Explanatory Note and Basis for Conclusions'. It illustrates the basis for conclusions, the methodology used and the technical options considered in developing the taxonomies. It also includes illustrations of the reporting in machine-readable format to support the implementation of the Taxonomies and to obtain more informed feedback during this consultation. The consultation is open until 8 April 2024.

Financial institutions & regulation

AFM: Major listed companies are on the right track with transparency on 2030 climate targets, road to 2050 remains vague

On 7 February, the Dutch Authority for the Financial Markets (AFM) published the report Transparent net zero targets require courage, which shows that large public interest entities (PIEs) are moving in the right direction towards substantiating their climate targets up to 2030 in their annual reports. Around half of the companies analysed disclose the scope of emission data and targets, as well as how this data is generated, in a clear and transparent manner. However, the path to 2025 remains blurred and can be improved. For example, the reliability of sustainability information tends to fall short of financial information, which is partly due to limited access to data and uncertainties about the data, particularly for scope 3. In-depth interviews show that relevant internal knowledge on net-zero targets is not always included in management reports. The AFM expects transparent disclosure on uncertainties and challenges, requiring courage on the part of companies. The AFM will provide recommendations, good practices and self-assessments to support such disclosures.

AFM survey: around half of retail investors pay attention to sustainability

On 6 February, the AFM published the results of its research under 711 retail investors (*Consumentenmonitor Beleggers*). The results show that around half of private investors sometimes or (almost) always consider the sustainability of their investments. Retail investors mainly look at the name of the investment product. However, another AFM survey shows that the name of a product or fund is often not a reliable indicator of its sustainability content. The regulator also stated that it plans to investigate how market participants communicate about sustainability and whether investment firms integrate sustainability as required.

ESMA publishes first TRV Risk Monitor

On 31 January, ESMA published its first Report on Trends, Risks and Vulnerabilities 2024, outlining the key risk drivers currently facing financial markets. While overall markets have remained 'remarkably resilient' in the second half of 2023, ESMA notes that, after several years of uninterrupted growth, the uptake of ESG investing and the growth of ESG markets have leveled off in recent quarters. This is evidenced by (i) slower growth in the ESG bond market; (ii) accelerating outflows from SFDR Article 8 funds; and (iii) for the first time, net outflows from Article 9 funds. The report also highlights the improved availability of ESG data and the decline in the price of EU and UK emission allowances.

ECB expands work on climate change

On 30 January, the European Central Bank (ECB) published its climate and nature plan for 2024 and 2025, demonstrating its increased focus on climate change. Three focus areas will guide the ECB's work on climate and nature in 2024 and 2025: (i) navigating the transition to a green economy; (ii) addressing the increasing physical impacts of climate change; and (iii) advancing work on nature loss and degradation. The work planned in these focus areas will complement the ECB's current climate-related activities in its ongoing tasks, including monetary policy and banking supervision.

Litigation

German webshop to remove green claims and filters from website

On 22 February, the Commission and several national supervisory authorities, including the Dutch Authority for Consumers and Markets (ACM), announced that German webshop Zalando will remove misleading sustainability claims from its website. The announcement follows a coordinated action of European supervisors (Consumer Protection Cooperation Network) on sustainability claims in the European garment sector. Zalando has agreed to cease the generic use of the word ‘sustainability’ and other incorrect claims to indicate sustainability benefits, including green visuals in its product search filters. Zalando will also provide clear information on specific product advantages, such as the indication of a certain percentage of recycled materials, and will revise its general sustainability pages.

New Zealand Supreme Court corporate climate case proceeds to trial

On 7 February, the New Zealand Supreme Court ruled that the climate case of Māori leader Mike Smith against seven New Zealand fossil fuel companies will proceed to trial. Smith does not request damages, but rather an order on the companies to reduce their greenhouse gas emissions. The claim, based on New Zealand common law, has three grounds: public nuisance, negligence and a proposed climate duty. The Court held that the claim based on public nuisance amounts to a ‘reasonably arguable cause of action’, addressing four topics: (i) plausible identification of actionable public rights; (ii) whether otherwise legal activities can still amount to public nuisance; (iii) the special damages rule; and (iv) causation. The Court also did not strike out the other two claims. While the Court explicitly noted that its preliminary decision “says little about [the] merits” of the case, it will have an impact on other corporate climate cases under common law.

Polish energy company's management sues former directors for investing in coal plant project

On 30 January, a large majority of the shareholders of Polish energy company Enea voted in favour of a motion to claim damages from the company's former directors and supervisory board members, including their D&O liability insurers, for investing in a coal-fired power plant project. The directors allegedly ignored warnings about the project's financial climate risks and failed to conduct sufficient due diligence on the financial feasibility of the project in light of, inter alia, rising carbon prices and changing energy demand. The project was abandoned in 2020, after NGO ClientEarth successfully challenged the project in court, resulting in a financial loss of more than EUR 170 million.

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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