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Highlight: Letters to the big polluters as ultimate encouragement

Enforcing corporate responsibility through impact litigation

On 13 January 2022, the Dutch branch of Friends of the Earth (Milieudedefensie) sent an open letter to the CEOs of 29 companies, requesting compliance with the climate duty of care as formulated by the Hague District Court in the Milieudedefensie v. Shell case. A second letter followed on 20 March 2023, asserting that none of the addressee companies' climate plans would be Paris-aligned. Milieudedefensie aims to publish its update on the corporate climate policies of the 29 addressee corporates in July 2023, and has already announced a new climate case against a Dutch corporation. Furthermore, Milieudedefensie activists attended general shareholder meetings of the addressee companies, repeatedly asking whether the board will commit to reducing the company's CO₂-emissions by 45% per 2030.

Milieudedefensie's strategy – pincer movement

The apparent objective of Milieudedefensie is to elicit ambitious corporate climate commitments based on the aforementioned judgment, under threat of litigation against 'laggards' (policy litigation). An understandable approach, since the broad duty of care as accepted by the District Court may well be overturned in the ongoing appeal proceedings. At the same time, climate policies to which a company commits are subject to scrutiny and questioning whether the company can deliver on them. Milieudedefensie therefore seems to aim at creating a 'pincer' of two litigation risks in the run-up to 2030. Whilst the strategy of Milieudedefensie obviously triggers media-attention, its effectiveness is questionable. As committing to reduction targets without having a realistic operational trajectory to meet them may fuel greenwashing litigation, corporations generally seem to avoid making unwarranted commitments in response to the open letters.

The role of the legislative power – implementing the Urgenda judgment

In our view, proper legislation should be established instead of policy litigation. Taking due account of European legislative proposals, the Dutch government should speed up its decision-making processes and prioritise ambitious but feasible trajectories, especially in the energy, industrial, chemical, agricultural, transport and financial sectors. This would give corporations guidance and legal certainty to build their policies on. Courts should not even have to question whether they have any legitimisation in dealing with the fundamental distributive questions of climate litigation as envisaged by Milieudefensie. They may well give guidance on proper climate governance and develop new standards for management and supervisory boards, properly accommodating the board's duty to weigh conflicting interests in the multifaceted transition. However, policy issues should principally be decided by the legislative power.

The role of companies

Boards should continue to set ambitious yet balanced climate risk mitigation pathways. Corporations would do well to be increasingly vocal about what an ambitious 'do your part' means, taking into account the myriad of possibilities as well as operational, technological and societal constraints. CEO's who fail to engage in meaningful discussions with stakeholders about what their organisations can and cannot do, are likely to face serious scrutiny by NGO's, supervisory authorities and other stakeholders. Although we have serious questions regarding Milieudefensie's strategy, corporations must be prepared for further steps. Milieudefensie is due to publish its update on the corporate climate policies of the addressee corporates and is expected to launch its second climate case against a Dutch corporation shortly.

What it means for you:

1. Review the corporate climate policy and goals and regularly assess feasibility, considering alignment with the company's strategy in order to be fully transparent and accountable.
2. Develop and implement policy on meaningful stakeholder engagement.
3. Follow a diligent decision-making process when setting, re-assessing and developing corporate climate or stakeholder engagement policies. With this, weigh all relevant aspects considering stakeholder's views on the company's climate vision.
4. Be vocal about decisions made and to reflect on what arguments were put forward, which stakeholders were engaged in what way and what alternatives were considered.

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Spotlight on ESG developments



Governance

EP adopts position on proposed Corporate Sustainability Due Diligence Directive

On 31 May, the European Parliament discussed the proposed [Corporate Sustainability Due Diligence Directive](#). Its aim is to oblige large corporates to address negative effects on human rights and the environment in their value chain. And therefore: to make these effects the subject of continuous investigation. The proposal is being presented as a ‘gigantic legal revolution’ and still heavily debated. Critics claimed that the rules impose red tape on corporates and harm competitiveness in view of increased competition from the US and China. The European Parliament [adopted its position](#) in respect of the proposal on 1 June. As a next step in the legislative process, the European Parliament and the Member States will enter into negotiations to establish the final wording of the directive.

Draft Decree on embedding the updated Corporate Governance Code published

On 30 May, the [Draft Decree on embedding the updated Corporate Governance Code](#) was published as part of the four week preliminary scrutiny procedure at the Lower House of Parliament. After approval, the Decree will enter into force on 1 January 2024, establishing the updated reporting obligation for management reports covering financial years commencing on or after 1 January 2023. This means that compliance with the updated code in 2023 will be reported for the first time in 2024. For more information on the updated Code, see our 20 December 2022 [newsletter](#).

Dutch legislative proposal for mandatory appointment of confidential advisor

On 23 May, the House of Representatives of the Dutch Parliament adopted the [legislative proposal](#) for the mandatory appointment of a confidential advisor. Its objective is to ensure that every employee has a legal right of access to a confidential advisor and to ensure the position of the confidential advisor as such within an organisation. The legislative proposal contributes to reducing inappropriate behaviour in the workplace and creating a safe working environment for employees in general.



Dutch guideline on reports of sexual transgressive behaviour in the workplace

On 17 May, government commissioner for combating inappropriate behaviour and sexual violence Mariette Hamer published a [handbook](#) on reports of sexually transgressive behaviour in the workplace. This guide is intended to help in relation to the entire process of dealing with a report and the (required) steps that follow, including the various interventions and, if appropriate and desired, conducting an investigation.



Regulation on deforestation and forest degradation adopted by EU Council

On 16 May, the EU Council adopted the [proposed regulation](#) on deforestation and forest degradation caused by EU consumption and production. The regulation lays down rules on the import and export of cattle, cocoa, coffee, oil palm, soya and wood which are expected to apply as of mid-2024 or mid-2025.



EU Council adopts approach to proposed Ecodesign Regulation

On 15 May, the EU Council [adopted its approach](#) towards the proposed revision of the Ecodesign Regulation. [The proposal](#) aims to establish a framework for setting ecodesign requirements for sustainable products. As a next step in the legislative process, the EU Parliament will adopt its approach to the proposal.



Disclosure



ESAs proposal for ESG disclosures for STS Securitisations

On 25 May, the European Supervisory Authorities (EBA, EIOPA and ESMA) jointly submitted [draft Regulatory Technical Standards \(RTS\)](#) on ESG impact disclosure for Simple, Transparent and Standardised (STS) securitisations under the Securitisation Regulation. The key proposals included in the RTS specify ESG disclosures which would apply to STS Securitisations where the underlying exposures are residential loans, auto loans and leases. The EC is expected to endorse the RTS within three months after their publication. More [information on this topic](#) is available on ESMA's website.



European Single Access Point: a provision agreement has been reached

On 23 May, the negotiators from the Council and the European Parliament reached a [provisional agreement](#) on three proposals creating the European Single Access Point (ESAP). The ESAP will offer a single point of access to public financial and sustainability-related information about EU companies and EU investment products. The ESAP platform is expected to be available from summer 2027.

EU Pay Transparency Directive finalised

On 17 May, the EU Pay Transparency Directive (EU) 2023/970 was [published](#) in the Official Journal of the EU. Pursuant to this Directive, employers with 250 or more workers must annually report their gender pay gaps, and employers with 150-249 workers must do so every three years. The first reports will be published in 2027 and will relate to the 2026 calendar year. The threshold will then be lowered to 100 workers, beginning with reports published in 2031 relating to the 2030 calendar year. Note that member states could go further. They can set the headcount at a lower level, require more regular reporting, or include a wider category of workers. The directive must be implemented in national legislation by 7 June 2026.

Consolidated Q&A on the SFDR

On 17 May, the [consolidated Q&A](#) on the EU Sustainable Finance Disclosure Regulation (SFDR) was published. This document combines responses given by the European Commission to questions requiring interpretation of Union Law and responses generated by the European Supervisory Authorities (ESAs) relating to the practical application or implementation of the SFDR.

Sustainable Finance Roadmap: ESMA's three key priorities

In a [speech](#) at the AFME 2nd Annual Sustainable Finance Conference on 4 May, Executive Director Natasha Cazenave outlined the supervisory priorities of ESMA's Sustainable Finance Roadmap. These are: (1) promoting transparency and tackling greenwashing; (2) capacity building, i.e., increasing the knowledge and expertise of ESMA staff and National Competent Authorities; and (3) monitoring and assessing ESG markets and risks.

NBA published whitepaper on application CSRD

On 12 April, the Netherlands Institute of Chartered Accountants (NBA) published a [whitepaper](#) on the application and impact of the Corporate Sustainability Reporting Directive (CSRD). This publication aims to help large enterprises and other organisations such as SMEs and public entities report on sustainability.



Responses on the EC's call for feedback on the draft Taxonomy Delegated Acts

On 5 April, the EC issued a call for feedback on a proposed delegated regulation containing a new [set of EU Taxonomy criteria](#) for economic activities making a substantial contribution to the environmental objectives water, circular economy, pollution and biodiversity. The consultation ended on 3 May. Notable contributions include those from the [EU Platform on Sustainable Finance](#), the [Principles for Responsible Investment](#), [Milieudefensie](#) and the Dutch [Ministry of Infrastructure and Water Management](#).



Litigation



Dismissal of claim against Shell directors in London court

On 12 May, the English High Court dismissed environmental organisation [ClientEarth's claim](#) against Shell Plc and its directors. ClientEarth argued amongst others that the Shell directors owed and breached specific climate-related duties, including the duty to align Shell's risk strategy with the Paris Agreement. The High Court concluded that the Shell directors do not owe such specific duties under English law and dismissed the claim on the basis that ClientEarth has not made out a *prima facie* case for the relief sought. ClientEarth has asked and been granted an oral hearing to ask the court to reconsider the decision.



EP approved proposal Consumer Empowerment Directive

On 11 May, the European Parliament approved the [proposal for a Consumer Empowerment Directive](#). The proposal will update the Unfair Commercial Practices Directive (2005/29/EC) and Consumer Rights Directive (2011/83/EU). According to the [press release](#) of the European Parliament, the primary objective is to assist consumers in making environmentally friendly choices and encourage companies to provide more durable and sustainable products. The Council of the European Union and the European Parliament will now start negotiations on the content and final wording of the directive.



Inhabitants Bonaire and Greenpeace sent letter of summons to Dutch State

On 11 May, Greenpeace sent a [letter of summons](#) to the Dutch State, together with eight inhabitants of Bonaire. They demand that the Dutch State takes measures and develops policies to protect Bonaire against climate change. The inhabitants and Greenpeace threaten to start legal proceedings if the Dutch State does not reply to the letter before 23 June 2023 or if parties have not reached an agreement before 30 September 2023.

Civil action of NGOs vs. ENI and large shareholders

On 9 May, Italian NGOs Greenpeace and ReCommon and twelve Italian citizens initiated a civil lawsuit against energy company ENI. The plaintiffs state in a [media briefing](#) that they are requesting an order on ENI to reduce its group CO₂-emissions by 45% in 2030 as compared to 2020 levels, and are asserting their right to claim a monetary penalty in case of non-compliance. The NGOs also sue the Italian Ministry of Economy and Finance as well as state-controlled investment bank *Cassa Depositi e Prestiti* in their capacity of ENI shareholders.

Milieudedefensie v. Shell proceedings: joinder 'Milieu en Mens' foundation allowed

On 25 April, the Court of Appeal of The Hague [allowed the joinder](#) (*voeging*) of the Milieu en Mens (M&M) foundation in the *Milieudedefensie v. Shell* proceedings. On the same date, the [request for joinder](#) of Climate Intelligence Foundation (Clintel) was dismissed. M&M believes that Milieudedefensie misuses the District Court's judgment to pressure other Dutch organisations to comply with its climate demands. This leads to harm to citizens and businesses in the form of higher energy costs and prices. The case has been referred to the roll of 6 June to allow M&M to submit a statement.

In this newsletter, we provide insights and perspectives on ESG-related governance, disclosure and litigation developments. Besides our overview of the latest information, this edition highlights NGO Milieudedefensie's open letters to 29 Dutch companies regarding their climate policies and its plan to publish an update on the requested policies in July 2023. Do you have any questions or comments on a particular topic? Please do not hesitate to reach out to our Sustainable Business & Climate Change team.

If you or members of your team would also be interested to receive updates, you are most welcome to sign up via [this link](#).

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