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Netherlands: Law & Practice
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Marloes Brans, Albert Knigge, Ronnie Bloemberg and Nadir Koudsi
Houthoff

NETHERLANDS

Law and Practice

Contributed by:
Marloes Brans, Albert Knigge, Ronnie Bloemberg and Nadir Koudsi
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Contents

Houthoff is an independent full-service Dutch law firm with offices in Amsterdam, Rotterdam, London, Brussels and New York and representatives in Asia and the United States. It is the exclusive member firm of Lex Mundi in the Netherlands and it is at the forefront of climate-related projects and cases in the Dutch market and beyond. The multidisciplinary team of 30 lawyers, including specialised partners, apply climate change expertise to core disciplines like energy, litigation, competition, investment management, environment and planning, and ESG reporting. The team's advice on permitting, regulatory aspects and subsidies is often key to the success of clients' projects. Whether it is the implementation of EU Green Deal regulations, ESG due diligence, or advising large corporates on how to meet their Paris Agreement goals, Houthoff provides an integrated approach. The firm launched an ESG Compass, organised executive events and annual Climate Weeks during the last COP. Houthoff is also co-initiator of Lex Mundi's Global Climate Change Guide, providing legal comparison over 35 jurisdictions.

Authors

Marloes Brans is a partner and the head of Houthoff's climate risk and sustainability team. She is a renowned specialist in environmental and spatial planning law. She has a combined litigation, advice and transaction practice and is involved in some of the most complex and media-sensitive cases in the Netherlands (eg, for Tata Steel, Schiphol and VDL Nedcar). Marloes has extensive experience in liaising with the authorities, and leads the public law team in due diligence and contract negotiations in M&A and transactions. She regularly publishes on these topics, speaks at national and international conferences, and teaches lawyers and at universities. Marloes is also chair of the environmental law practice group at Lex Mundi.

Albert Knigge is the head of Houthoff's litigation team and has market-leading experience in a wide range of complex, multiparty cross-border disputes. He acts as defence counsel for corporate and financial institutions with a particular focus on class action litigation, mass claim settlements and civil litigation. He is an established leader in climate change litigation, advising major clients on class action matters in the energy and automotive industries. He regularly speaks about climate litigation-related topics and judicial activism and the impact of this on companies. He is admitted to the Bar as a Supreme Court lawyer.

Ronnie Bloemberg is a lawyer in the public law, investigations and public enforcement and corporate crime practice groups at Houthoff, He has experience in advising and litigating in both civil and administrative law. He is a member of Houthoff's environmental, social and governance (ESG) litigation team and is involved in ESG litigation and pre-litigation counselling mitigating ESG-related civil liability risks. Ronnie has a PhD in the development of the criminal law of evidence.

Nadir Koudsi is a litigator and handles complex commercial, financial and insolvency law disputes, including international mass claims proceedings and proceedings in relation to directors' and officers' liability. Nadir is a member of Houthoff's environmental, social and governance (ESG) litigation team and is involved in ESG litigation and pre-litigation counselling mitigating ESG-related civil liability risks.

Houthoff

Gustav Mahlerplein 50
1082 MA Amsterdam
The Netherlands

Tel: +31 20 605 6000
Email: m.brans@houthoff.com
Web: www.houthoff.com

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1. Multilateral and Regional Regimes

1.1 Multilateral Climate Change Legal Regime

Paris Agreement

The Netherlands participates in the multilateral climate change legal regime. The Netherlands signed and ratified the United Nations Framework Convention on Climate Change (UNFCC) and participates in negotiations on key climate change agreements/acts, such as the European Climate Law (also refer to **1.2 Regional Climate Change Legal Regimes**). Together with all other EU member states, the Netherlands signed the Kyoto Protocol (on 31 May 2002) and the Paris Agreement (on 22 April 2016). The Paris Agreement was subsequently approved by the Dutch parliament on 21 July 2017, and it came into force in the Netherlands on 27 August 2017.

Climate Mitigation on EU Level

The EU has implemented a robust package of measures to mitigate climate change (see **1.2 Regional Climate Change Legal Regimes**) and, in addition, the EU adopted a new strategy on adaptation to climate change on 24 February 2021. This new strategy sets out how the EU can adapt to the unavoidable impacts of climate change and become climate resilient by 2050. The strategy has four principal objectives – to make adaptation (i) smarter, (ii) swifter and (iii) more systemic, and (iv) to step up international action on adaptation to climate change. In accordance with the last objective, the EU will increase support for international climate resilience and preparedness by providing resources, prioritising action and increasing effectiveness, through the scaling up of international finance and through stronger global engagement.

Climate Finance on EU Level

The EU has launched an ambitious Action Plan on Financing Sustainable Growth as well as a strategy for financing the transition to a sustainable economy. The EU also helps developing economies improve their conditions for mobilising low-carbon finance. In October 2019, the EU together with Argentina, Canada, Chile, China, India, Kenya and Morocco launched the International Platform on Sustainable Finance. This platform aims to scale up the mobilisation of private capital for environmentally sustainable investment. The EU is also calling for existing and potential contributors to finance climate action in developing economies in line with their respective capabilities and responsibilities.

At the 26th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in Glasgow, the EU made several commitments, including a EUR1 billion contribution to the Global Forests Finance Pledge and joining the Global Methane Pledge, committing to a goal of reducing global methane emissions by at least 30% on 2020 levels by 2030.

Technology Transfer

Technology development and transfer to support action on climate change have received increasing attention in the Netherlands. The Dutch government, together with knowledge institutions and companies, actively contributes to the further distribution of knowledge and technology in relation to the development of innovative and sustainable techniques. For example, the Dutch organisation for applied scientific research ("TNO") has its own tech transfer programme and also has an "Innovation for Development" programme, which focuses on low and middle-income countries. The Minister for Foreign Trade and Development Co-operation funds several

programmes which stimulate climate mitigation and adaptation in developing countries, eg, by means of technology transfer by companies. An example is the Energising Development programme ("EnDev") – a strategic partnership consisting of various donors and partners, including the Netherlands, Germany, Norway and Switzerland. EnDev invests in capacity building and technology transfer for market development for decentralised energy solutions such as solar energy systems.

1.2 Regional Climate Change Legal Regimes

EU Green Deal/EU Climate Law

As a member state of the EU, the Netherlands participates in the European "Green Deal". This action plan is a significant step towards the EU's objective of achieving climate neutrality by 2050 in line with the objectives of the Paris Agreement. This EU objective is anchored in legislation by means of the European Climate Law. The European Climate Law also includes a 2030 climate target of at least 55% reduction of net emissions of greenhouse gases (GHGs) as compared to 1990, a process for setting a 2040 climate target and a commitment to negative emissions after 2050. The European Climate Act came into force on 29 July 2021.

Fit for 55

Furthermore, as part of the European Green Deal, the European Commission presented the "Fit for 55 package" in July 2021. This legislative package aims to reduce emissions by at least 55% by 2030 compared to 1990 levels. The package covers wide-ranging policy areas/sectoral legislation – from renewables to energy efficiency, energy performance of buildings, as well as land use, energy taxation, effort sharing and revision of the emissions trading system (see **5.1 Carbon Markets**).

EU Nature Restoration Law

On 22 June 2022 the European Commission presented a legislative proposal for an EU Nature Restoration Law, to repair damage to European nature by 2050. The Nature Restoration Law, a key piece of the European Green Deal, sets legally binding targets to rehabilitate degraded habitats (80% of European habitats are in poor condition). The law is part of the EU Biodiversity Strategy 2030 and invests in Europe's food security, climate resilience, health and well-being. On 12 July 2023 the law was adopted by the European Parliament, which is now ready to start negotiations with the European Council on the final shape of the legislation.

2. National Policy and Legal Regime (Overview)

2.1 National Climate Change Policy

EU's Intended Nationally Determined Contribution (INDC)

The EU's INDC under the Paris Agreement is to reduce GHGs by at least 55% on 1990 levels by 2030. The Dutch government has stated that it wishes to go even further and reduce emissions by 60% in 2030. However, this ambition has not been included in legally binding regulations.

Climate Plan

The key national policy instrument for the Netherlands is the national Climate Plan (*Klimaatplan*), adopted in April 2020 in accordance with the Climate Act (see **2.2 National Climate Change Legal Regime**). The Climate Plan summarises the main aspects of national climate policy during the period 2021–2030. A new Climate Plan will be adopted at least once every five years after 2019. A progress report will be published every two years following the Climate

Plan, which may include additional policies to help meet the targets of the Climate Act.

Climate Agreement

The Climate Plan is largely based on the Climate Agreement (*Klimaatakkoord*) dated 28 June 2019. The Climate Agreement is a 237-page document which contains the result of negotiations between over 100 organisations, including the central government, local and regional authorities, private companies, civil society organisations, unions and environmental organisations. During the negotiations five so-called "sector tables" were formed, representing the sectors:

- built environment;
- industry;
- agriculture and land use;
- mobility; and
- electricity.

The instruments (eg, legislative amendments, subsidies, levies and binding agreements) by which the reduction is to be achieved are to be further detailed in the Climate Policy Programme (*Beleidsprogramma Klimaat*). The draft Climate Policy Programme was published on 2 June 2022 and also includes details of the latest Coalition Agreement "Looking out for each other, looking forward to the future 2021–2025". The final version of the Climate Policy Programme has not yet been published.

Climate and Energy Outlook and the Climate Report

Furthermore, the Dutch Environmental Assessment Agency ("PBL") annually presents a Climate and Energy Outlook (*Klimaat- en Energieverkenning*) to the Ministry of Economic Affairs and Climate, consisting of a scientific report on the consequences of the climate policies pursued over the previous year. The minister sends the Climate and Energy Outlook to parliament together with the Climate Report (*Klimaatnota*), which sets out whether and to what extent additional measures are necessary to achieve the aforementioned reduction objectives and which biennially contains a report on the execution of the Climate Plan. The most recent Climate Report was published on parliamentary climate day on 1 November 2022.

Additional Climate Package

Recently, on 26 April 2023, the minister for Climate and Energy Policy announced the Additional Climate Package (*Aanvullend Klimaatpakket*), which sets out the policy to achieve an additional 22 megatons reduction in CO_2 (in addition to the Coalition Agreement).

2.2 National Climate Change Legal Regime

Climate Act

On 1 September 2019, the Climate Act (*Klimaatwet*) came into force. The Climate Act anchors in broad outline the government's view on climate and energy. The Act sets "politically enforceable" goals for climate policy and offers a framework for developing policies aimed at irreversibly and gradually reducing GHG emissions in the Netherlands to a level that is 95% lower in 2050 compared to 1990, in order to limit global warming and climate change. To reach this target, a 49% reduction in GHG emissions by 2030 needs to be achieved. However, following the goals set out in the European Climate Law, on 14 February 2023 the Dutch House of Representatives agreed to change the goals in the Climate Act accordingly (to net zero emissions in 2050 and a 55% reduction in GHG emissions by 2030). The Dutch government has also expressed the ambition to achieve a 60% reduction in GHGs by 2030.

Climate Policy Framework

In addition to climate objectives, the Climate Act also contains a policy framework for achieving those objectives. The Climate Act regulates three policy instruments: the five-yearly Climate Plan, the biennial Progress Report and the annual Climate Report (see **2.1 National Climate Change Policy**). In order to meet the GHG emissions goals set in the Climate Act (and elaborated on in the Climate Plan and the Climate Policy Programme), a large variety of regulatory legislation has been and is expected to be enacted over the coming years (see **3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors**).

2.3 Bilateral Co-operation

The Netherlands has not concluded formal bilateral agreements pursuant to Article 6.2 of the Paris Agreement. The Dutch government does use its diplomatic channels, among other things, to increase the climate ambitions of other countries and to facilitate the transition towards net zero GHGs in specific sectors. This occurs bilaterally and multilaterally, through climate summits and international coalitions.

For more information on to what extent the Netherlands is co-operating with other Paris Agreement parties, see **1.2 Regional Climate Change Legal Regimes**.

2.4 Key Policy/Regulatory Authorities

National Level

Ministry of Economic Affairs and Climate

In the Netherlands, the Ministry of Economic Affairs and Climate is primarily responsible for climate change policy development. The ministry develops the various policy instruments, such as the Climate Plan and the Climate Policy Programme. In addition, the Netherlands has had a minister for Climate and Energy Policy since 10 January 2022. This minister is responsible for the following, among other things: climate (climate change, air emissions of industry, emission rights), the Dutch Emissions Authority ("NEa"), energy policy and the Climate Fund.

As mentioned in **2.1 National Climate Change Policy**, the PBL is responsible for Climate and Energy Outlook.

The NEa

The NEa is the independent national authority for the implementation and monitoring of market instruments that contribute to a climate-neutral society, such as the EU Emissions Trading System (and the issuance of CO_2 permits).

Ecological Authority

The Ecological Authority, which has been in existence since 19 September 2022, reviews whether the right ecological information is available to support decisions about protected nature. The Ecological Authority was established because various measures are needed to prevent damage to protected natural areas which are under pressure from, for example, drought and excess nitrogen, to restore nature and to comply with national and European nature conservation regulations.

Regional/Local Level

In general, provinces, municipalities and water boards are responsible for the regulatory enforcement of climate change policies.

- Provinces are responsible for managing and conserving nature conservation areas (such as Natura-2000 sites). As such, the provinces are responsible for complying with the Nature Protection Act (*Wet natuurbescherming*), the law regulating the protection of nature conservation areas, species and forests. In addition, the provinces are regularly the

competent authority for granting permits and enforcing environmental regulations where this concerns companies with a high environmental impact.
- Municipalities are responsible for local regulations and can, for example, lay down rules in the zoning plan regarding climate adaptation. In addition, the municipalities are the competent authority for granting permits and enforcing environmental regulations where this concerns companies with a medium or low environmental impact.
- Water boards are generally responsible for maintaining and improving water quality. In addition, the water boards are usually the competent authority for granting discharge permits.

3. National Policy and Legal Regime (Mitigation)

3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

Energy/Coal

On 20 December 2019, the Act on the Prohibition of Coal for Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie*) was adopted. The Act prohibits the use of coal in power generation from 2030 onwards. As from 1 January 2025 it will apply to production facilities with an electrical yield of less than 44%, and as from 1 January 2030, the Act will apply to all production facilities. The Act directly affects the four remaining operational coal-fired power plants in the Netherlands with a total capacity of 4,000 MW.

As a result, two of the four remaining plants are required to close or switch to alternative fuels by the end of 2024, and the two remaining units are required to do the same by the end of 2029.

Energy/Natural Gas

On 29 March 2018, the Dutch minister of Economic Affairs and Climate Policy took the watershed decision to cease the production of natural gas from the Groningen field, from which approximately 1,700 billion cubic metres (bcm) of gas had been produced since the early 1960s and which still contains an estimated 900 bcm of gas, in the shortest term possible. This decision was taken to ensure the safety in the province of Groningen, as natural gas production induced earthquakes that continue to cause significant damage to buildings. The aim is to close the Groningen field permanently by 1 October 2024.

Environment and Planning Act/NOVI

The new Environment and Planning Act (*Omgevingswet*) is set to come into force on 1 January 2024. The Environment and Planning Act bundles most regulations on the environment and introduces a long-term, integral national vision on the physical environment: the National Environmental Vision ("NOVI"). The NOVI, published in September 2020, states that, in order to reduce national GHG emissions by 95% in 2050 (compared to 1990), fossil fuels have to be replaced by renewable energy sources, such as wind and solar energy. In order to obtain these objectives, climate-proof and climate-neutral measures will have to be implemented at the national, provincial and municipal level.

National CO_2 Levy

Large companies that are subject to the EU ETS (see **5.1 Carbon Markets**), waste processing companies and specific processes that emit nitrous oxide (N_2O) have been subject to a national CO_2 levy since 2021 if their CO_2 emissions are not in line with the relevant EU emissions benchmark. The Climate Plan stipulates that the national CO_2 levy will ensure a reduction in emissions of 14.3 megaton by 2030 (com-

pared to the "base path" set out in the Climate and Energy Outlook 2019).

The CO_2 levy is expected to increase from EUR52.62 per ton of CO_2 in 2022 to EUR125–150 per ton of CO_2 in 2030 and includes the mandatory EU ETS tariff, which is currently (July 2023) around EUR90. The additional charge for companies that are subject to the CO_2 levy is therefore equal to the difference between the mandatory EU ETS tariff and the CO_2 tax. The amount of the CO_2 levy will be revised when the new EU ETS Benchmark becomes available in 2025. Proceeds from the CO_2 levy will largely be used to make industrial companies more sustainable.

In addition, on 5 April 2022, the Minimum CO_2 Price Electricity Generation Act (*Wet minimum CO_2-prijs industrie*) came into force, regarding a minimum carbon price in electricity production, which has been implemented in the Environmental Management Act and the Environmental Taxes Act. This measure is linked to the EU ETS. Whereas the price of emission allowances under the EU ETS fluctuates, the Dutch government decided to introduce a minimum carbon price of EUR12.30 in 2020, which will gradually be increased to EUR31.90 in 2030 (the minimum carbon price in 2023 is EUR16.40). Should the EU ETS price fall below this minimum price (which – at present – it is not expected to do) the difference between the minimum price and the lower EU ETS price will be levied in the form of a national CO_2 tax.

Energy-Saving Measures for All Companies

The Activities Decree (*Activiteitenbesluit*) contains environmental regulations and applies to most companies in the Netherlands which impact the environment. If the annual energy consumption of a company under the Activities Decree exceeds 50,000 kWh (electricity) or 25,000 m³ (gas), the company must take all the energy-saving measures it can within a period of five years. Companies had to provide information on their energy-saving measures by 1 July 2019 at the latest. At present, ETS-companies and companies that require an environmental permit are exempted from the energy savings obligation. However, once the Environmental and Planning Act comes into force, this obligation will also apply to these companies. Furthermore, large enterprises (as opposed to small and medium enterprises) are obliged, according to the Temporary Regulation implementation Articles 8 and 14 Energy-Efficiency Directive, to carry out an energy audit. This audit has to be repeated once every four years and will be used to gather information on energy use and on possibilities to take energy-saving measures. The first energy audit report had to be submitted to the competent authorities no later than 31 December 2020.

Permitting

Climate change mitigation is currently not directly an issue for consideration in the granting of environmental permits/authorisations, as CO_2 reduction measures are generally enforced through substantive legislation (and not by environmental permit provisions). There is, however, an intention to regulate CO_2 reduction measures for companies via general rules (the "Activities Decree"), but currently permits are not (yet) assessed against those rules. Case law demonstrates that third parties, in objecting to environmental permits, increasingly refer to climate mitigation objectives as, for instance, included in the Paris Agreement.

4. National Policy and Legal Regime (Adaptation)

4.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

Climate Adaptation Policy Framework

In the Paris Climate Agreement, in addition to reducing emissions, countries have committed themselves to further action to adapt the physical environment to climate change (climate adaptation). In the Netherlands, a National Climate Adaptation Strategy (NAS) was adopted for the first time in 2016. The NAS is the Netherlands' overarching climate adaptation strategy. The NAS lists the impacts of climate change on different sectors in the Netherlands, such as agriculture, health and infrastructure. The NAS also describes how these sectors can deal with the consequences of climate change. The NAS Implementation Programme contains the plans and actions to address the consequences of these major climate risks.

Furthermore, a Delta Plan for Spatial Adaptation (*Deltaplan Ruimtelijke Adaptatie*) has been drafted, listing all projects and measures to ensure that the Netherlands as a whole is water-robust and climate-proof by 2050. The Delta Plan includes a number of ambitions (such as visualising vulnerabilities and conducting stakeholder risk dialogues) that should enable municipalities, water boards, provinces and the national government to accelerate and intensify the process of spatial adaptation.

Climate Adaptation Regulatory Framework

There is also greater focus on climate adaptation, in particular at the local level in zoning plans. Climate adaptation-related aspects – such as measures to deal with flooding, ground water level and heat stress – are increasingly regulated and applications for environmental permits/authorisations are assessed in accordance with such provisions. Recent case law demonstrates that municipalities may refuse to issue a building permit if (among other things) the project conflicts with municipal climate adaptation policy. The Crisis and Recovery Act enables municipalities to experiment with legal provisions on climate adaptation in "zoning plans with a broader scope". It is conceivable, also under the Environment and Planning Act (which comes into force on 1 January 2024), that zoning plans or "environmental plans" (*omgevingsplannen*) may establish a rule that certain buildings may only be built climate-adaptively and that the related assessment framework will be detailed in policy rules. Environmental plans will also offer other new instruments, for instance, municipalities may adopt a heat plan in the form of an environmental programme which prescribes (area) specific measures.

Global Centre on Adaptation

Finally, it is worth mentioning that the international knowledge centre for climate adaptation, set up by the UN and Japan, is located in the Netherlands. On 17 October 2018, the Groningen office of the Global Centre on Adaptation (GCA) was opened by then-UN Secretary-General Ban Ki-Moon. The GCA is a global knowledge centre that supports countries, organisations and companies with knowledge and advice in the field of climate adaptation.

5. Responses to International Developments

5.1 Carbon Markets

EU ETS

The EU Emissions Trading System (ETS) Directive has been implemented in the Netherlands by means of the Environmental Management

Act (*Wet Milieubeheer*), the Emissions Trading Decree (*Besluit handel in emissierechten*) and the Regulation on the Monitoring of Emission Trading (*Regeling monitoring handel in emissierechten*). By 2030, the cap on emissions from sectors covered by the EU ETS is set to decrease by 62% compared to 2005 levels.

The EU ETS functions based on the "cap and trade" principle. A cap is set on the total amount of certain GHG that can be emitted by the installations covered by the ETS. The cap is reduced over time so that total emissions decrease. Within the cap, installations buy or receive emissions allowances, which they can trade with one another as required. After each year, an installation must surrender enough allowances to fully cover its emissions, otherwise fines are imposed. If an installation reduces its emissions, it can keep the spare allowances to cover its future needs, or else sell them to another installation that is short of allowances.

If a company qualifies as an EU ETS company, the company must apply for an emissions permit from the NEa. The NEa enforces compliance with the EU ETS in the Netherlands. The NEa has, for example, the authority to impose fines to cover the emissions of a company that has insufficient emissions allowances at the end of the year. A fine of EUR100 can be imposed in relation to every tonne of CO_2 emitted for which the company has not submitted allowances (this amount has been indexed since the 2013 emission year). Furthermore, a company will have to compensate for the additional emissions in the following year.

EU Non-ETS

The EU has committed to reducing non-ETS emissions by 30% in 2030 compared to 2005. The EU member states' shared efforts required to achieve this non-ETS goal are elaborated in Effort Sharing Regulation (EU) 2018/842 (the "ESR Regulation") which translates into an obligation for the Netherlands to reduce its non-ETS GHG emissions by 36% by the end of 2030. If the ESR Regulation is revised, as was agreed in late 2022, the reduction target for non-ETS emissions in 2030 for all member states will be 40% compared to 2005. The obligation for the Netherlands will be a 48% reduction of its non-ETS GHG emissions by the end of 2030.

5.2 European Union Carbon Border Adjustment Mechanism (CBAM)

Given its membership of the EU, the rules laid down in the CBAM regulation and in any future implementing regulations are directly applicable in the Netherlands. As such, the CBAM will apply in its transitional phase in the Netherlands from 1 October 2023 and, after gradual phasing in, it will apply in full from 2026.

Enforcement and Execution

The introduction of the CBAM also requires amendments to Dutch legislation in the context of enforcement and execution. A legislative proposal has been introduced to amend the Environmental Management Act (*Wet milieubeheer*), following which the NEa will be appointed as the competent authority to monitor and execute the CBAM. This amendment will also introduce the enforcement tools available to the NEa, namely imposing an order subject to a penalty (*last onder dwangsom*) or a fine, up to a maximum of EUR450,000 or 10% of the annual turnover of the company if the annual turnover is more than EUR4.5 million.

Moreover, Dutch customs will also receive implementation and enforcement duties under the CBAM. During the transitional phase, this role will be limited to informing the declarants

that they have a CBAM registration obligation with the NEa. When the CBAM becomes fully effective, the role of customs will be threefold:

- customs will only allow the release of goods into free circulation when registered with the CBAM authority;
- customs must check the accuracy of the CBAM declaration in accordance with EU-wide standards to be established by the Commission; and
- customs will periodically report to the NEa on the release of CBAM goods into free circulation.

The new duties of the customs under the CBAM do not require any legislative amendments, as these fall within customs' powers pertaining to the Environmental Management Act as laid down in the General Customs Act (*Algemene douanewet*).

Input from Dutch Industry

Lastly, although Dutch industry generally supports the introduction of the CBAM, it is also critical of the current system. The 400 companies that fall within the scope of the CBAM fear that their worldwide competitive position might be affected, as competitors outside the EU are not required to pay for their carbon emissions. Furthermore, Dutch industry mentions the complexity of the CBAM, for example, in relation to determining and verifying the amount of carbon emitted in the country of origin when producing composite products.

6. Liability for Climate Change and ESG Reporting

6.1 Task Force on Climate-Related Financial Disclosures (TCFD)

TCFD Guidelines

The Dutch government supports the TCFD guidelines as part of a larger network of international "soft law" rules and guidelines regarding both financial and non-financial climate-related disclosures. Although application of the TCFD guidelines is not mandatory, there are several institutions within the Netherlands that choose to report on financial information following these guidelines, including the Dutch central bank. Currently, however, there are no mandatory laws, policies or regulations in effect within the Netherlands specifically related to financial climate change reporting.

Non-financial Climate Change Reporting

In relation to non-financial climate change reporting, new mandatory requirements will be applicable as of mid-2024 due to the implementation of the Corporate Sustainability Reporting Directive (CSRD) in Dutch law. The CSRD will succeed the Non-Financial Reporting Directive, which has been incorporated within Dutch law since 2014. All mandatory rules in relation to non-financial climate-related disclosures are therefore derived from EU law. Furthermore, there is currently one Dutch draft law pending that concerns non-financial reporting, known as the initiative proposal on responsible and sustainable international business conduct (*Wet verantwoord en duurzaam international ondernemen*, or the "Wvdio").

Stakeholder Influence

Although legislation on this topic is still being developed, the influence of stakeholders and society on climate change liability and report-

ing has significantly increased in recent years. For example, in 2021, in the matter brought by Friends of the Earth Netherlands (*Milieudefensie*) against RDS (Royal Dutch Shell), the District Court of the Hague found for the first time that a company is under an obligation to reduce its emissions in 2030 by 45% relative to 2019. Prior to this, in 2019 in the Urgenda Case, the Supreme Court ruled that the Dutch state was under an obligation to achieve an overall reduction of 25% in its GHG emissions in the Netherlands in 2020 compared to 1990.

Companies that fail to adequately report on the impact of their business activities on climate change and environmental factors potentially expose themselves to criticism from NGOs and internal and external stakeholders. Concurrently, even in the absence of binding policies and regulations in this area, many large Dutch companies and their directors acknowledge the importance of climate change reporting and stakeholder engagement. With the growing body of case law, it is to be expected that this will be a high priority topic for many companies in the coming years.

6.2 Directors' Climate Change Liability

Relevance of ESG

ESG, including climate change, is gaining relevance within the context of companies' statutory duties. In essence, the board of a company is obliged to act in the interests of the company and its stakeholders. The relevant stakeholders form a broader group than just the company's shareholders and the board must also consider the interests of society (ie, the impact on climate and human rights) in its decision making.

Misleading Statements in Financial Reporting

Under Dutch law, there are various grounds for the civil liability of directors. First of all, directors are personally liable for misleading statements in financial reporting when:

- the reporting document provides a misleading representation of the company's condition;
- a third party incurred damage; and
- there is a causal relationship between the damage and the misleading representation (ie, the third party reasonably trusted the financial reporting and made financial decisions on the basis of that information, leading to damage).

Liability is not dependent on the directors having been aware that the statements were misleading, and an unqualified audit opinion for the financial reporting also generally does not fully protect the directors against liability for misleading statements.

Mismanagement

Secondly, directors can be liable towards the company itself for mismanagement. Liability towards the company follows from mismanagement for which the directors have "serious blame" (*ernstig verwijt*). This is judged on a case-by-case basis taking all the relevant facts and circumstances into account. However, directors' liability towards the company for mismanagement has a high threshold. Examples in which "serious blame" applies are situations in which the director acted in breach of statutory obligations or the articles of association of the company, or in which the director knowingly allowed and/or made the company commit criminal offences.

Unlawful Acts

Thirdly, directors can be liable towards third parties outside of the company for unlawful acts (*onrechtmatige daden*). Liability towards third parties is subject to the following. Directors are

in principle not personally liable for the company's actions or omissions towards third parties. Personal liability only arises under exceptional circumstances where there is "personal and serious blame". This standard resembles the previously described standard of "serious blame" that is applied for liability towards the company for mismanagement. Also, in cases of a director's liability towards third parties, all circumstances of the case must be considered, and a high threshold applies. Situations in which claims of "personal and serious blame" can be made are situations in which the director knew or should have known that it had allowed the company to enter into obligations that the company could not meet, while the director also knew or should have known that the company would not be able to compensate the damage resulting from this.

Bankruptcy

Directors can be held liable in bankruptcy for the deficit of the bankrupt estate in the event that they mismanaged the company, and this mismanagement was an important cause of the bankruptcy. In the event that the company and the board did not meet their obligation to keep proper books and records regarding the company's financial obligations, it is assumed that mismanagement took place and that this mismanagement was an important cause of the bankruptcy. The trustee in bankruptcy is also entitled to bring claims against the directors' and officers' insurance, as the trustee is entitled to exercise the company's rights.

Enquiry Proceedings

While not a direct ground for directors' liability, Dutch law allows certain parties to initiate enquiry proceedings. In enquiry proceedings, eligible parties such as shareholders who meet certain capital requirements, may request the Enterprise Chamber (*Ondernemingskamer*), a special chamber of the Amsterdam Court of Appeal, to order an investigation into the policies of a legal entity and whether there are grounds to doubt the correctness of these policies. On the basis of the results of the investigation, the Enterprise Chamber may rule that the company was mismanaged. Such decisions do not directly constitute civil liability for the board, but they could be, and often are, used as evidence in subsequent civil proceedings for damages against the board.

Developments

The following developments are expected.

- It is likely that there will be an increase in proceedings regarding sustainability reporting. This is in light of increased reporting obligations due to the CSRD, combined with more attention from civil society regarding (wrongful) sustainability claims by companies. In this context, directors' liability for misleading statements in financial reporting can become more relevant.
- Many companies will have to formulate a comprehensive climate policy due to an increase in hard law obligations to mitigate a company's climate change impact, such as in the current draft Corporate Sustainability Due Diligence Directive (CSDDD) (see **7.1 Due Diligence**). It is conceivable that boards that fail to meet these obligations will be held liable for mismanagement.

6.3 Shareholder or Parent Company Liability

Principle of Limited Liability

Under Dutch law, shareholders and parent companies are in principle not liable for the obligations or actions of a subsidiary. As a separate legal entity from its shareholders, the subsidiary bears its own legal responsibilities and liabili-

ties. Shareholders' liability is in principle limited to their investment or the shares they hold in the company. Shareholders are shielded from personal liability for the subsidiary's debts, damages or obligations. This principle of limited liability is one of the fundamental aspects of corporate law in the Netherlands.

However, there are exceptions to this general rule, generally referred to as "indirect" and "direct" piercing of the corporate veil. The application of piercing the corporate veil is determined on a case-by-case basis, and the specific circumstances and facts of each situation play a crucial role. Courts are generally cautious in applying this principle and the threshold is high.

Indirect Piercing of the Corporate Veil

In situations of indirect piercing, a creditor of the subsidiary argues that a wrongful act committed by the subsidiary (eg, not paying a claim) is caused by a separate wrongful act of the parent company (eg, through actively involving itself in the decision of the subsidiary not to pay the claim). Indirect piercing therefore leads to two separate claims for the creditor, one towards the subsidiary and one towards the parent company. A parent company is only liable in so far as its own wrongful act caused damage and in so far as the subsidiary cannot pay the claim. Indirect piercing has the following requirements:

- the group of companies is closely organised in a way that the parent company has direct power to intervene and is actively involved at the level of the subsidiary;
- a duty of care can be established for the parent company to consider the interests of creditors of the subsidiary, given the close involvement of the parent company at the level of the subsidiary;
- the parent company is aware or should be aware, given the circumstances, of its subsidiary's inability to potentially not be able to meet its creditors' claims. The duty of care is "activated" the moment the parent company has or should have had this awareness; and
- the parent company has neglected its duty of care towards the subsidiary's creditors.

Direct Piercing of the Corporate Veil

In situations of direct piercing, a creditor argues that the parent company severely abused the separate legal personality of the subsidiary for wrongful purposes and that both legal entities should be viewed as one. Direct piercing leads to a single claim that the creditor can direct at both the subsidiary as well as the parent company. The threshold for direct piercing is even higher than for indirect piercing.

Climate-Related Claims

There is no separate legal statute or case law that determines that the above would not apply to climate change-related claims, so it is possible for a shareholder or parent company to be held liable for climate change damage or breaches of climate change law if the above-mentioned requirements are met.

6.4 Environmental, Social and Governance (ESG) Reporting and Climate Change

ESG Reporting

ESG reporting has been required for a limited number of companies since the introduction of the Non-Financial Reporting Directive (NFRD), which was implemented under Dutch law in 2014. With the implementation of the CSRD under Dutch law in 2024, this requirement will also encompass a climate change component and apply to a broader scope of companies –

see **6.1 Task Force on Climate-Related Financial Disclosures (TCFD)**.

At present, there are no national laws on ESG reporting within the Netherlands, although this may change if the initiative proposal on responsible and sustainable international business conduct (the "Wvdio") is passed. The Wvdio proposes a general duty of care for companies in the areas of human rights and the environment, along with the requirement that certain companies must report annually on their policies and the due diligence measures taken in these areas. According to the explanatory memorandum to the Wvdio, the reporting requirements set out therein will be aligned with the reporting requirements of the CSRD. The reporting requirements under the CSRD are detailed in the European Sustainability Reporting Standards (ESRS). On 9 June 2023, the European Commission published the draft delegated Act containing the ESRS. The final standards are expected to be adopted in August 2023.

Dutch Stock Exchange

The Dutch stock exchange itself does not require ESG reporting in order for companies to be listed. However, Euronext Amsterdam does list products that meet ESG criteria in order to help investors identify sustainable products. Furthermore, most public companies listed on the Dutch stock exchange will in practice be obliged to include non-financial information in their annual reports, as these companies fall within the scope of the NFRD (and, as of 2024, the CSRD).

ISSB Standards

Similar to the TCFD guidelines, the ISSB standards (developed by the International Sustainability Standards Board and used to establish a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets) are valued as part of a larger network of international "soft law" rules and guidelines concerning climate-related disclosures. As these standards are still very new and will become effective as of 1 January 2024, it remains to be seen how much value will be placed on the ISSB standards in practice and how these standards relate to the mandatory disclosure requirements outlined in the CSRD.

7. Transactions

7.1 Due Diligence

Climate change due diligence has become more prevalent in recent years, although it is currently often executed under the scope of an overarching environmental due diligence. Climate change due diligence would include an assessment of compliance with regulatory requirements. These requirements can for instance relate to sustainability, circularity/waste, energy-saving measures, compliance with the EU ETS or reporting obligations (based on the CSRD).

The reporting obligations, which are yet to come into force, have expanded the scope of research in relation to typical due diligence. For example, currently in M&A transactions the seller is increasingly requested to provide the target's internal policies with regard to measuring and reducing GHGs across scope 1, 2 and (sometimes) scope 3 emissions.

Real estate transactions usually include an assessment of energy (saving) requirements. Most notable in this context are the obligation to provide the buyer with an energy label for certain type of properties, the requirement to implement energy-saving measures and the more structural

requirements following the "Nearly Zero Energy Buildings" regulations.

M&A transactions also often include a technical environmental due diligence. In the context of technical due diligence, the flood risk of a specific site, the possibility to adapt to climate change and the measures implemented to adapt to climate change are increasingly assessed.

The Draft Corporate Sustainability Due Diligence Directive (CSDDD)

Furthermore, it should be noted that on 23 February 2022 the European Committee presented a draft Corporate Sustainability Due Diligence Directive (CSDDD). In the draft CSDDD it is regulated that large companies that meet certain thresholds will have to implement a due diligence procedure to detect, prevent and mitigate the "adverse impacts" on the environment and human rights of their own business activities and those of their established business relationships.

8. Climate-Friendly Investment Support

8.1 Renewable Energy

Types of Renewables

In the Netherlands, a wide range of renewables are being deployed to meet climate targets. The Netherland's primary focus is on the development of onshore and offshore wind energy and the large-scale installation of solar panels. In addition, the focus is on geothermal energy, carbon capture and storage (CCS) and hydrogen. The deployment of this wide range of renewables should ultimately lead to a renewable energy main structure, which is detailed in the Draft Energy Main Structure Programme (*Ontwerp-Programma Energiehoofdstructuur*).

Main Subsidy Scheme: SDE++

The Dutch government has introduced several subsidy opportunities that support the uptake of renewable energy technologies. The main subsidy scheme for renewable energy in the Netherlands is the Stimulation of Sustainable Energy Production and Climate Transition (SDE++). SDE++ not only stimulates the production of renewable electricity, gas and heat (including combined heat and power), but also provides a subsidy for CO_2-reduction techniques. The subsidy scheme is, in principle, open to the operators of installations that use renewable energy sources, which are wind, solar energy, terrestrial heat, ambient heat, osmosis, wave energy, tidal energy, hydro power, biomass, landfill gas, sewage treatment plant gas and biogas. In addition to the SDE++, the National Investment Scheme for Climate Projects Industry ("NIKI") is being developed. The NIKI is meant to support the large-scale roll-out of innovative industrial technologies that are not covered by already available subsidies.

Other Subsidies

Other subsidy opportunities for sustainable energy include the ISDE (investment subsidy for renewable energy and energy saving), which is aimed at homeowners and business users, and which, for instance, can be used for insulation measures, heat pumps, solar boilers and heat network connections, and the SVM (SME sustainability grant scheme), which is aimed at small and medium-sized businesses (SMEs) and subsidises the costs of an adviser to give energy advice on sustainability measures and to provide support in the implementation of such measures. Other subsidies that focus on sustainable innovation include HER+ (for innovative projects that result in CO_2 reduction in 2030) and TSE (for entrepreneurs, scientists and research institutions), which subsidises (combinations of)

industrial research, experimental development and demonstration projects. DEI+ subsidises projects concerning innovation using hydrogen (eg, in relation to the production of hydrogen, the transport and storage or innovative use of hydrogen, and sustainably generated electrons). The VEKI (accelerated climate investments industry) subsidises the implementation of CO_2-saving measures with a payback period of more than five years.

8.2 Other Support

The Dutch government stimulates the uptake of climate-friendly innovation and investment through several measures.

The EIA (energy investment deduction) and MIA/VAMIL (environmental investment deduction/random deduction of environmental investments) are investment deduction schemes that offer tax relief to companies that invest in sustainable business assets. These schemes allow companies to reduce taxable profits by depreciating or deducting a certain percentage of the amount invested in sustainable business assets.

Examples of subsidy schemes are:

- TSE O&O (Topsector Energy Industrial Research and Development), aimed at companies developing or researching possibilities for cheaper, climate-neutral and/or circular goods or services together with other companies or researchers;
- KIA CE (Knowledge and Innovation Agenda – Circular Economy), which subsidises innovative circular products and goods; and
- MOOI (Mission-driven Research, Development and Innovation), which offers subsidies for parties wishing to work in a consortium to create solutions to reach climate goals.

The Dutch government also offers:

- benefits for companies that work on research and development or technical-scientific research (WBSO, Research and Development (Promotion) Act);
- financing possibilities such as loan guarantees for SMEs to increase financing possibilities for sustainable investments (BMKB-G, Guarantee of SMB loans); and
- financing for projects that help reach sustainable development goals (P4G).

The Temporary Climate Fund Act

The Dutch government recently published a proposal for the Temporary Climate Fund Act (with a EUR34 billion budget). This Act is intended to set resources aside and make them available for measures that contribute to achieving the reduction targets prescribed in the Climate Act. The resources will remain available for multiple years, allowing unspent money to be carried over indefinitely to the subsequent year. The resources placed in the Climate Fund will be used for (part of) the schemes mentioned above. As the Temporary Climate Fund Act is still in a preparatory stage, it is not yet known whether and, if so, when the proposal will finally be approved.

Trends and Developments

Contributed by:
Marloes Brans, Albert Knigge, Ronnie Bloemberg and Nadir Koudsi
Houthoff

Houthoff is an independent full-service Dutch law firm with offices in Amsterdam, Rotterdam, London, Brussels and New York and representatives in Asia and the United States. It is the exclusive member firm of Lex Mundi in the Netherlands and it is at the forefront of climate-related projects and cases in the Dutch market and beyond. The multidisciplinary team of 30 lawyers, including specialised partners, apply climate change expertise to core disciplines like energy, litigation, competition, investment management, environment and planning, and ESG reporting. The team's advice on permitting, regulatory aspects and subsidies is often key to the success of clients' projects. Whether it is the implementation of EU Green Deal regulations, ESG due diligence, or advising large corporates on how to meet their Paris Agreement goals, Houthoff provides an integrated approach. The firm launched an ESG Compass, organised executive events and annual Climate Weeks during the last COP. Houthoff is also co-initiator of Lex Mundi's Global Climate Change Guide, providing legal comparison over 35 jurisdictions.

Authors

Marloes Brans is a partner and the head of Houthoff's climate risk and sustainability team. She is a renowned specialist in environmental and spatial planning law. She has a combined litigation, advice and transaction practice and is involved in some of the most complex and media-sensitive cases in the Netherlands (eg, for Tata Steel, Schiphol and VDL Nedcar). Marloes has extensive experience in liaising with the authorities, and leads the public law team in due diligence and contract negotiations in M&A and transactions. She regularly publishes on these topics, speaks at national and international conferences, and teaches lawyers and at universities. Marloes is also chair of the environmental law practice group at Lex Mundi.

Albert Knigge is the head of Houthoff's litigation team and has market-leading experience in a wide range of complex, multiparty cross-border disputes. He acts as defence counsel for corporate and financial institutions with a particular focus on class action litigation, mass claim settlements and civil litigation. He is an established leader in climate change litigation, advising major clients on class action matters in the energy and automotive industries. He regularly speaks about climate litigation-related topics and judicial activism and the impact of this on companies. He is admitted to the Bar as a Supreme Court lawyer.

Ronnie Bloemberg is a lawyer in the public law, investigations and public enforcement and corporate crime practice groups at Houthoff, He has experience in advising and litigating in both civil and administrative law. He is a member of Houthoff's environmental, social and governance (ESG) litigation team and is involved in ESG litigation and pre-litigation counselling mitigating ESG-related civil liability risks. Ronnie has a PhD in the development of the criminal law of evidence.

Nadir Koudsi is a litigator and handles complex commercial, financial and insolvency law disputes, including international mass claims proceedings and proceedings in relation to directors' and officers' liability. Nadir is a member of Houthoff's environmental, social and governance (ESG) litigation team and is involved in ESG litigation and pre-litigation counselling mitigating ESG-related civil liability risks.

Houthoff

Gustav Mahlerplein 50
1082 MA Amsterdam
The Netherlands

Tel: +31 20 605 6000
Email: m.brans@houthoff.com
Web: www.houthoff.com

Ten Important Trends in Dutch Climate Law and Climate Litigation

Introduction – three "waves" of litigation

The last decade has witnessed a significant increase in both the number and type of cases relating to climate change. These cases can be subdivided and categorised in many ways, but the following threefold division can roughly be made:

Firstly, claims predominantly brought by NGO's or interest groups against government bodies to take more action to prevent climate change. The state's positive obligation to protect its citizens against human rights breaches, especially the threat to the right to life and the right to family life, caused by climate change is often pivotal in these cases, as well as obligations stipulated in treaties to which various states are signatories, such as the Paris Agreement, or norms accepted by and imposed on governments in national statutes. In some jurisdictions, the courts show judicial restraint and refer the matter to the lawmakers. However, in a number of cases, the courts have found that the state does indeed have an obligation to do more to prevent dangerous climate change and the effects thereof. In some jurisdictions, the courts have even ordered the government to take action. The Dutch Supreme Court, for example, accepted in the Urgenda Case that the state was under an obligation to take measures and ordered the Dutch government to develop and implement policies reducing Dutch GHG emissions by 25% in 2020, compared to 1990.

Secondly, claims against private companies predominantly brought by NGOs or interest groups to impose GHG emission-reduction obligations but also to compensate for loss caused by (the effects of) dangerous climate change. In a number of these cases private companies are held accountable for their commitment to sustainability and/or their observance of human rights. A trend within this category is claims brought against directors and officers holding them personally liable for failing to take action and for the effects caused by GHG emissions, in relation to the commercial activities of their companies.

Thirdly, claims brought against private companies for breach of contract or mis-selling brought by consumers, investors or companies that have, for example, relied on the disclosures and representations made by the private company with regard to the sustainability of its services or (investment) products. It is likely – also because of the important increase on both the EU and national level in (modification of) climate-focused regulatory frameworks imposing increasingly far-reaching obligations – that the number of claims brought in this category will increase in the years to come.

Although all three forms of litigation overlap and it appears that litigation brought by NGOs and interest groups against private companies, in particular, will most likely continue to increase, one may expect a trend in litigation in which the emphasis will move from public interest claims towards climate and sustainability-related commercial claims. An important driver behind this trend will probably be the increase in reporting and disclosure obligations requiring companies to provide more detailed information about their footprint and commitments and policies to reduce GHG emissions.

The Netherlands as a frontrunner on climate litigation and the introduction of a GHG reduction obligation for companies

There is a clear trend both in case law and legislation in which GHG reduction obligations are being imposed on companies. The Dutch courts

have proved to be willing to find such obligation, both against the state and private companies, in two landmark cases.

Firstly, in 2019 in the Urgenda Case the Supreme Court found against the Dutch state that it was under an obligation to achieve an overall reduction of GHG emissions in the Netherlands by 25% in 2020, compared to 1990. The Supreme Court based this reduction obligation on the premise that dangerous climate change is largely caused by anthropogenic emissions which pose a threat to the right to life and the right to family life as guaranteed by Articles 2 and 8 of the European Convention on Human Rights (ECHR). Since the state has a positive obligation to protect its citizens against a breach of these fundamental rights, it has an obligation to develop and implement policies in the Netherlands to reduce GHG emissions. The 25% reduction goal was based on the reports of the Intergovernmental Panel on Climate Change (IPCC) that has determined the reduction efforts necessary to prevent global warming.

Secondly, in the matter brought by Friends of the Earth Netherlands (*Milieudefensie*) against Royal Dutch Shell (RDS), the District Court of the Hague found for the first time that a company was under an obligation to reduce its emissions in 2030 by 45%, relative to 2019. The court based this obligation on Dutch tort law, more specifically the unwritten standard of due care (an open norm) stipulated in the civil code, which standard is determined by weighing all relevant facts and circumstances of the case. By ascertaining this standard for this matter, the court gave particular weight to "soft law" instruments – to which RDS had adhered – which impose a standard of conduct on companies to observe human rights, as a priority over national law. The District Court ruled that RDS has an obligation to achieve a reduction of 45% on its "own" scope 1 and 2 emissions, and a best-efforts obligation regarding its scope 2 and 3 emissions (ie, the emissions made by other companies or consumers in the value chain of the company). The reduction obligation has been imposed on the holding company of RDS, but with an extraterritorial effect since it pertains to the scope 1 to 3 emissions of the entire group of companies controlled by RDS worldwide. The court stipulated the emission reduction obligation in such a way that in principle this judgment is of interest to all companies based in the Netherlands and possibly also to companies outside the Netherlands.

RDS has filed an appeal and it is likely that irrespective of how the Court of Appeal in the Hague rules, either RDS or the initial claimant Friends of the Earth Netherlands will subsequently appeal to the Supreme Court. Possibly in 2025 or 2026 it will become clearer if and to what extent a court can impose such a far-reaching reduction obligation with extraterritorial effect on a company, in the absence of clear and specific statutory reduction norms.

Other potential cases

Friends of the Earth Netherlands and other NGOs have announced that they are preparing cases against other major companies in the Netherlands as well. In 2022 Friends of the Earth Netherlands sent a letter to the 29 largest emitters of GHG, referring to the emission reduction obligations stipulated in the Shell Case, and demanded that these companies present a plan on how to achieve a 45% reduction in GHG emissions by 2030. Friends of the Earth has engaged the New Climate Institute (NCI) to assist in reviewing the climate plans of the 29 companies (including their updates). It has announced that it will bring claims against whichever of these 29 companies

have the least ambitious mitigation plans and perform the worst in reducing GHG emissions.

CSDDD

Lastly, it is not unlikely that the Dutch and/or European legislator will introduce a reduction obligation for companies. On 23 February 2022 the European Committee presented the draft Corporate Sustainability Due Diligence Directive (CSDDD). According to the draft CSDDD, large companies that meet certain thresholds will have to implement a due diligence procedure to detect, prevent and mitigate the "adverse impacts", on the environment and human rights, of their own business activities and those of their established business relationships. Furthermore, large companies will have to adopt a plan on how (essentially) they intend to become climate neutral by 2050. Although intense discussions are still taking place and it is not yet entirely clear how far-reaching the CSDDD will be, it is not unlikely that a reduction obligation for companies will be introduced in some form. Finally, an important provision is included in the CSDDD that will make companies liable, to a certain extent, under civil law for infringements of the CSDDD. This may also function as an important catalyst for further litigation in the future.

Company's own statements used in litigation

The Shell Case signals that companies should be aware that it will become more likely that in litigation they will have to give account for soft law commitments they make, reduction goals they set, and covenants and other soft law instruments they adhere to. Such targets can inspire and help set the organisation in motion, but in proceedings against the company, these targets can also be used to measure the company's achievements and hold it accountable if it falls behind in achieving its goals. It is furthermore likely that over-reliance on carbon offsetting techniques to achieve net-zero goals, will be increasingly disputed.

The Netherlands as a climate litigation hub

It is likely that the Netherlands will increasingly become a hub for climate and environment-related cases, as the Netherlands has:

- a well-regulated possibility for class action procedures;
- judges who are generally willing to accept jurisdiction over activities of (Dutch) companies in other countries; and
- judges who are willing to critically scrutinise the environmental and climate impact of companies.

In the past years we have already seen an increased number of class action cases against Dutch or multinational companies (that have holding companies or subsidiaries located in the Netherlands) for their environmental impact in other countries. Examples are the cases against RDS for pollution caused by its subsidiary in Nigeria, the case against Braskem for damage caused by mining activities in Brazil, the case against Norsk Hydro for mining activities (also in Brazil), and the case involving Trafigura for pollution in the Ivory Coast.

Increased obligations and liability risks for parent companies

In conjunction with the aforementioned trend, claimants are increasingly targeting parent companies, and the courts are willing to consider the responsibility of parent companies for the acts or omissions of subsidiaries controlled by them with regard to their sustainability goals. The cases already mentioned are clear examples of this trend. Parental responsibility for the environmental impact of companies controlled by them is also the underlying rationale in the CSDDD.

Likely holding companies will hence more easily be held accountable for the conduct of their subsidiaries.

Directors' liability

NGOs are also increasingly expected to attempt to hold not only corporate entities, but also their directors, ultimately responsible for the company's policies and their execution. The announcement by Friends of the Earth Netherlands that it would bring a claim against the directors of RDS if the company does not sufficiently comply with the judgment in the Shell Case fits into this trend, as does the claim brought by UK Friends of the Earth against the board of directors of RDS, which has, however, been dismissed by the English High Court. Such attempts will most likely increase in the near future.

In addition to litigation initiated by NGOs, civil law and regulatory provisions are being implemented stipulating that companies and their directors take into account the company's environmental impact. Such provisions can be relied on if litigation is brought against the directors by other stakeholders. Examples of such obligations are the draft CSDDD, which currently contains a duty of care for directors to sufficiently take into account and report on the effects of the company's strategy and decisions on sustainability matters.

Also in the context of enforcing criminal and administrative law, the competent authorities are becoming more active in imposing sanctions against directors who can be held accountable for the company's causing pollution of or damage to the environment.

Human rights

There is also a clear trend in Dutch court cases, sparked by the Urgenda Case, in which claimants with reference to soft law instruments, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, are holding companies accountable for human rights breaches which could be related to the companies' commercial activities. In the Shell Case, the District Court of the Hague gave particular weight to these norms when ascertaining the unwritten standard of due care that RDS needs to observe to prevent its activities and the related emissions from causing such breaches of human rights. This ruling has inspired claimants to apply this approach to a broader scope of other, non-climate related matters, targeting human rights breaches allegedly caused by companies in their supply and value chain. More recently, a claim vehicle used this approach to bring a claim against a pharmaceutical company alleging that its excessive profits and pricing have caused a displacement of healthcare affecting the human rights of Dutch citizens. The increasing significance of human rights for companies is also demonstrated by the draft CSDDD and the Dutch legislative proposal regarding corporate social responsibility (*Initiatiefwet verantwoord en duurzaam internationaal ondernemen*). Both legislative proposals codify an obligation for companies to give account for the effect (including GHG emissions) of a company's own activities and in its value chain on human rights.

No doubt the three cases currently pending before the European Court of Human Rights (KlimaSeniorinnen v Switzerland, Duarte Agostinho and Others v Portugal, and Carême v France) pertaining to – potential – breaches of Articles 2 and 8 of the ECHR caused by the effects of dangerous climate change, will increase the significant role of human rights in climate change-related litigation in the EU.

Stakeholder activism

Although NGOs have been active in the context of environmental law for a long time, in recent years there has been a significant increase in stakeholder activism pertaining to climate change and other ESG-related topics. In contrast to the more traditional involvement of mostly NGOs in the Netherlands in the past (mainly as participants in permitting procedures), today's stakeholders represent much more diverse groups and are increasingly creative and active in using legal (and other) instruments to further their cause. In addition to NGOs, other internal stakeholder groups such as workers and shareholders and external stakeholder groups, such as workers' associations, clients, neighbours and politicians, have become more involved. These stakeholders seem to find a willing ear with the competent authorities and courts. Companies need to engage with their internal and external stakeholders, who sometimes represent agendas that do not align with the company's strategy and policies, as not engaging with all the company's stakeholders may increase the risk of litigation.

Stakeholder activism occurs in many different guises. The appetite for civil litigation seems to have increased and stakeholder activism could also target the supply chain or customers of the company. One important development is that banks and other financial institutions have been put under increasing pressure by NGOs to stop funding activities that cause GHG emissions, and that such financial institutions appear willing to comply. ING has for example announced that it will no longer finance new oil and gas projects.

Shareholder pressure on companies relating to ESG topics has, in general, increased, with NGOs buying shares in public-traded companies with the aim of putting these topics on the agenda of annual shareholders' meetings. This has happened to a number of companies, such as ING and Rabobank. In addition, initiatives for administrative law actions have broadened – NGOs and neighbouring companies and competitors are still active in submitting objections in permitting procedures, but are now also focusing on, for example, the withdrawal of permit and filing enforcement requests, and the contesting of subsidy decisions. These actions also seem to affect how an irrevocable permit/"licence to operate" is valued.

Reporting obligations

A highly important development in climate law has been the introduction of detailed and extensive reporting obligations for financial and non-financial companies. The reporting obligations for financial institutions are regulated in the Sustainable Finance Disclosure Regulation (SFDR) and the EU Taxonomy Regulation.

The reporting obligations for non-financial companies are regulated in the EU Corporate Sustainability Reporting Directive (CSRD), which was adopted on 5 January 2023. EU member states now have approximately 18 months to implement the reporting standards into national legislation.

Large companies that already have to comply with the Non-Financial Reporting Directive (NFRD) will have to report on the 2024 financial year in accordance with the CSRD in 2025. Large companies that meet two of the following three criteria, will have to comply with the CSRD in 2026 over the financial year 2025. The criteria are: (i) more than 250 employees; (ii) a turnover of more than EUR40 million per year; and (iii) a balance sheet of more than EUR20 million. The CSRD also applies to companies from outside the EU that meet two of these criteria within the European Union. Lastly, the CSRD will apply to

some specified smaller companies in 2027 over the financial year 2026.

The CSRD prescribes that companies have to report in detail (i) their impact on the environment and climate change; and (ii) their strategy and plans to mitigate their effects on the environment and to make their companies more sustainable. In addition, companies have to provide insight into the risks that climate change has for their business. The general reporting standards of the CSRD will be elaborated in the extensive European Sustainability Reporting Standards (ESRS), of which a draft version was circulated in November 2022. The ESRS has two general chapters and several chapters that provide detailed reporting standards for specific environmental topics, such as climate change and waste management. On the basis of the ESRS, companies will, for example, be required to report on their scope 1, 2 and 3 emissions and their mitigation plans. As a result, companies will have to report on their own emissions and the emissions of their value chain.

The introduction of the CSRD means that large companies will have to gather extensive information on their impact on climate change and that of their value chains. Furthermore, companies will be forced to report in detail on their plans to mitigate their GHG emissions, also requiring them to modify and set up the structure of their organisations to be able to sufficiently and effectively deliver this information. The reporting obligations are intended to provide investors, stakeholders and the general public (including NGOs) with accurate information regarding the impact of companies on climate change and the (transition) risks a company faces. It will therefore be highly important for companies to provide accurate and reliable information on what their mitigation plans are and what risks the company faces. As has been indicated above, companies have to be aware that the information they provide can be used in future litigation and discussions with stakeholders (eg, to keep companies accountable for meeting their reduction targets). The reporting obligations will likely function as an important catalyst for litigation in the future.

Greenwashing and misleading information

An increasing number of claims have been brought against companies for greenwashing and presenting misleading information. The NGO's Client Earth and Fossielvrij NL have, for example, brought a claim against airline company KLM, accusing it of making misrepresentations – breaching EU consumer law in its advertising campaign about "Flying Responsibly" and misrepresenting that the GHG emissions of flights can be set off by purchasing carbon credits. Another example is a group of law students who successfully launched a greenwashing claim against RDS, alleging that it made misrepresentations that customers could drive in a GHG-neutral way by offsetting their carbon emissions against carbon credits bought via RDS. It is likely that more cases regarding greenwashing will be brought in the future, in particular, in relation to "green" products that are overly reliant on carbon offsetting.

In addition to civil procedures, the Netherlands Authority for Consumers & Markets (*Autoriteit Consument & Markt*) has recently started investigations and has reached settlements with companies such as Decathlon and H&M for presenting misleading information. Furthermore, a screening exercise by the European Committee and national enforcement authorities in 2021 learned that 42% of the reviewed websites contained environmental claims that were false, deceptive or exaggerated and that could qualify

as unfair commercial practice under EU regulations.

Finally, it is likely that the extensive new reporting obligations under the CSRD – on the basis of which companies have to present accurate information regarding their climate impact and mitigation plans – will also lead to more litigation between companies and investors or consumers for greenwashing and misrepresentations. For example, H&M has recently been threatened with a class action, challenging statements regarding its "Conscious Choice" range, and claimants argue that they have been misled into paying a premium for products based on untrue claimed environmental credentials. In addition, investors in "green bonds" who have been willing to accept a lower yield, may sue for compensation if the company has made misrepresentations regarding the green nature of the bonds.

Regulatory pressure

As a member state of the EU, the Netherlands participates in the European "Green Deal". This action plan is a significant step towards the EU's objective of achieving climate neutrality by 2050 in line with the objectives of the Paris Agreement. This EU objective is anchored in legislation by means of the European Climate Law. The European Climate Law also includes a 2030 climate target of at least a 55% reduction in net emissions of GHG as compared to 1990, as well as a process for setting a 2040 climate target and a commitment to negative emissions after 2050.

As part of the European Green Deal, the European Commission presented a "Fit for 55 package" in July 2021. This legislative package aims to reduce emissions by at least 55% by 2030, compared to 1990 levels. The package covers wide-ranging policy areas and sectoral legislation – from renewables to energy efficiency, energy performance of buildings, as well as land use, energy taxation, effort sharing and revision of the emissions trading system (ETS). For instance, in April 2023, the EU adopted several new laws as part of the Fit for 55 package, which set a higher emission reduction target for the current ETS for industry and, in addition, established an ETS for several new sectors, such as shipping and road transport. At the same time, the EU decided that a carbon border adjustment mechanism (CBAM) and a Social Climate Fund should be introduced. Litigation and stakeholder pressure will therefore increasingly be supported by, and at some point in time likely overtaken by, regulatory pressure.

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