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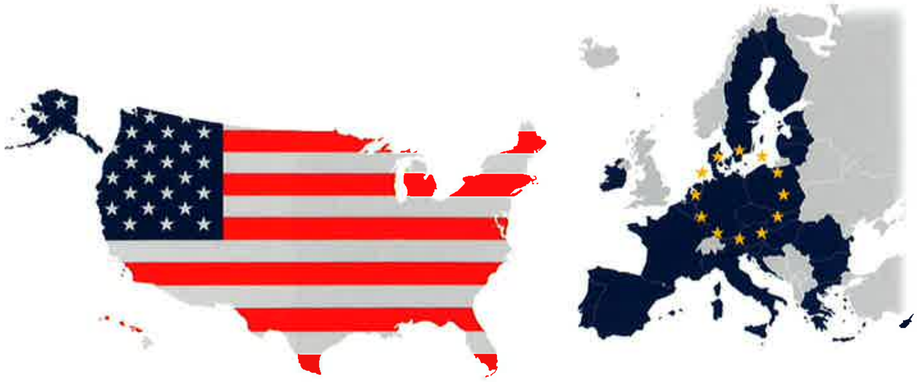

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In cooperation with DAJV
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person would be mere puffery and not a legal issue.[28] While the depiction of the size of the products would relate to an objective fact and therefore not be mere puffery, a reasonable consumer would not have been misled.[29] In fact, the plaintiff did not allege that the defendants used more meat in their ads than in their served meals – he claimed that they use an identical amount of uncooked meat in their ads (which would shrink during cooking). The Court said that when a label or ad has an ambiguous representation, a clarification can defeat a claim for misleading advertising.[30] That was the case here, where the plaintiff challenged pictures on defendants' webpages, which had prominent, objective information about the weight and caloric content of the meals on the same webpage.

While no German court decisions have been published on ads for burgers, beef has still been subject of unfair competition proceedings. The Higher Regional Court of Cologne examined the packaging of potato chips that displayed a grilled steak and the words "grilled steak" in the eye-catchy center of the front side[31]:

The list of ingredients did not mention any meat. It only stated that 5 % of the chips was a flavoring mixture, which the defendant claimed contained 0.5-1 % of beef extract and chicken extract powder. This was accurate, but the Court ruled that consumers would expect a higher proportion of real beef in a product labelled "grilled steak".[32] The tiny amount present here would not be enough. The court's verdict seems rather astonishing, considering how often pictograms are employed to indicate flavor and how rare it is to find real steak in the advertised products. Potato chips are a good example.

III. Conclusion

U. S. and German law share a similar legal basis for regulating misleading product presentations. However, the similarities mask significant differences in how the law is applied in practice. German courts tend to find legal claims for deceptive practices more likely than U. S. courts, which set a higher bar for proving consumer harm. Product designers and advertisers should be aware of these nuances and adjust their marketing strategies accordingly. Perhaps a surprise for those not regularly dealing with the subject matter: what works in the U. S. may expose to liability in Germany (and possibly the EU). ■

28 *Id.* at 4.
29 *Id.*
30 *Id.* at 6.
31 Oberlandesgericht Köln (OLG Köln) [Higher Regional Court of Cologne] 29 November 2017 – 6 U 50/17, GRUR-RR 2018 292 (Ger.).
32 *Id.* at 294.

Romy de Galan, Yentl Coenradie and Jacques Kröner, The Netherlands*

The European Corporate Sustainability Reporting Directive & European Sustainability Reporting Standards

A First Guide to European Sustainability Reporting Requirements

I. Introduction

"In short, ING's climate plan scored a big F. By supporting big polluters, ING is contributing to dangerous climate change worldwide. This has to stop! That is why we are now taking the matter to court, again", read the announcement of Friends of the Earth Netherlands (*Milieudefensie*, "FEN"), on 19 January 2024, about the climate plan of The Netherlands' biggest bank.[1] This is another large climate case that FEN initiated after its victory in The Hague District Court (*Rechtbank Den Haag*) against Shell, on 26 May 2021. In the Shell matter, the court held the ultimate parent company of the Shell group responsible for global warming and associated climate change, considering that the implementation of its group policy would result in higher CO_2 emissions.[2] The court decided that Shell has an obligation to reduce CO_2 emissions with net 45 % by the end of 2030, relative to 2019 levels.[3] The court decision is currently under appeal.[4] FEN, however, is not awaiting the outcome of the appeal proceedings, but has found a new target in one of the most important

* Romy (associate), Yentl (associate) and Jacques (partner) are lawyers (*advocaat*) at Houthoff, a Netherlands-based international law firm.
1 FEN is the Dutch branch of Friends of the Earth International, which is an international network of environmental organizations, active within 73 countries. With approximately 110,000 members, FEN currently operates as one of the largest Dutch environmental organizations; *FEN's Editorial office,* Wij brengen ING voor de rechter in een baanbrekende nieuwe Klimaatzaak, Friends of the Earth Netherlands (*Milieudefensie*) (19 January 2024), https://milieudefensie.nl/actueel/wij-brengen-ing-voor-de-rechter-in-een-baanbrekende-nieuwe-klimaatzaak. The quote is an unofficial translation of the Dutch text: "*Kortom, het klimaatplan van ING scoorde een dikke onvoldoende. Door grote vervuilers te ondersteunen draagt ING bij aan gevaarlijke klimaatverandering wereldwijd. Dit moet stoppen! Daarom stappen wij nu opnieuw naar de rechter*".
2 Rechtbank Den Haag [The Hague District Court], Judgment of 26 May 2021, *Shell*, C/09/571932, ECLI:NL:RBDHA:2021:5339 (official English translation) ("Shell case").
3 Shell case, par. 5.3.
4 Shell initiated the appeal proceedings. The judgment in these appeal proceedings is expected to be published in the fall of 2024 but could be postponed to the beginning of 2025. It is expected that the judgement in the appeal proceedings will be subject to appeal to the Dutch Supreme Court.

financial institutions in The Netherlands, seeking to hold it accountable for continuing to finance activities of clients that cause too much emissions or breach human rights.[5] FEN's actions illustrate the importance of corporate sustainability and environmental awareness for businesses – governments, non-profit organizations and consumers care and so should businesses, within the European Union and beyond.

The developments with regard to 'Environmental, Social and Governance' (**"ESG"**) initiatives in Europe are numerous. Requirements for the reporting of ESG related information are at the center of many of these ESG initiatives. By having to publish information about impact on people and planet, companies are forced to review their businesses thoroughly in ways they have never done before. In this process, companies will gain valuable insights into their ESG status. Gaining such insight is a first step towards enhancing a company's business performance with respect to ESG, as the fundamental understanding of a company's current ESG status is imperative to its improvement. With the ESG status and improvement plans becoming public, companies will also experience pressure from external stakeholders and society who will value the ESG status of a company and, as such, is the expectation, will force companies to do the right thing from an ESG perspective. The ING-case illustrates the above perfectly.

This article aims to summarize the European sustainability reporting requirements, with the Corporate Sustainability Reporting Directive[6] (**"CSRD"**) being the most recent legislative instrument that entered into force in this area. Paragraph 2 provides an overview of the circumstances which have led to the entry into force of the CSRD, after which the applicability and requirements of the CSRD are described in paragraph 3. In paragraph 4, a description of the European Sustainability Reporting Standards (**"ESRS"**) is provided. Paragraph 5 goes further into depth on the relevance of the CSRD and the ESRS for U. S.-based companies.

II. Developments within the European Union

1. Period 2011-2013

In recent years, corporate sustainability has become increasingly relevant for business operations. The continuing awareness of climate change consequences[7] caused rapid development of ESG aspects within corporate law.[8] By publicly endorsing non-binding guidelines, with the United Nations' Guiding Principles on Business and Human Rights[9] (**"UN Guiding Principles"**) and the Organization for Economic Cooperation and Development's Guidelines for multinational enterprises[10] (**"OECD Guidelines"**) being two important examples, companies have been able to show their commitments in terms of ESG. These rapid developments resulted in a patchwork of frameworks and guidelines, mostly initiated by non-state actors such as non-governmental organizations, groups of stakeholders and companies themselves. However, due to the non-binding nature of these voluntary frameworks or guidelines, companies had the freedom to defer as they saw fit. This 'soft law' dominated ESG regulatory landscape was increasingly questioned, as the wish for rules imposing binding obligations on companies grew.[11] According to Justine Nolan, professor of Law at UNSW Sydney: "*[t]he reason that soft law type codes and initiatives have developed in such numbers in the past few decades is that there remains very few direct legal obligations dealing with human rights that bind corporations operating trans-nationally. This lack of clear legal liability has been central to the creation of a permissive international 'human rights free' environment in which some corporations seem to now operate and the parallel increase in the development of soft law mechanisms to regulate corporate behavior. (…) [S]ome corporations, in particular, transnational corporations (TNCs) have been able to operate largely in a legal vacuum, devoid of obligations at the international level.*"[12]

In its 'Renewed EU strategy 2011-14 for Corporate Social Responsibility',[13] the European Commission[14] stated that some member states have introduced non-financial disclosure requirements that go beyond (at that time) existing EU legislation. It follows from this policy document that "*a growing number of companies disclose social and environmental information*" and that small and medium-sized companies "*often communicate such information informally and on a voluntary basis*". The European Commission also acknowledges the existence of many international frameworks for the disclosure of social and environmental information. To ensure a level playing field, the European Commission wished to present a legislative proposal on the transparency of social and environmental information by companies.[15]

2. Period 2014-2018

One of the first steps towards such harmonized EU-legislation for transparency regarding social and environmental information by companies was taken in 2014, when the Non-Financial Reporting Directive[16] (**"NFRD"**) entered into force. In the preamble of the NFRD, it is highlighted that coordination of national provisions regarding the disclosure of non-financial information is important and necessary, because most of the undertakings that fall within the scope of the NFRD operate in more than one EU member state. In order to enhance the consistency and comparability of non-financial information,

5 *Friends of the Earth Netherlands (Milieudefensie)*, Official Letter to ING of 19 January 2024, par. 7, https://en.milieudefensie.nl/news/this-is-our-official-letter-to-ing.
6 Directive (EU) 2022/2464, *OJEU* 2022, L 322.
7 Such as the rise of the global temperature and sea level changes, *e.g.* see *Rajendra K. Pachauri / Leo A. Meyer (eds.)*, Climate Change 2014: Synthesis report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, pp. 40 and further (2015).
8 For an overview of these developments, see *Claire Methven O'Brian*, Business and human rights in Europe 2011-2021: A decade in review, in: *Philip Czech* et al. (*eds.*), European Yearbook on Human Rights 2021 (2021).
9 United Nations, Guiding Principles 2011, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
10 Organization for Economic Cooperation and Development, Guidelines for multinational enterprises 2011, https://www.oecd.org/daf/inv/mne/48004323.pdf. The OECD Guidelines were revised in June 2023, this current version can be accessed via: https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1700129444&id=id&accname=guest&checksum=DFCB47FBB11A4E76DB448363A2E33731.
11 *Justine Nolan*, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?, in: *Surya Deva / David Bilchitz (eds.)*, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (2013), par. 2 (end) and par. 3; *Cees van Dam*, Enhancing Human Rights protection: a Company Lawyer's Business, pp. 10-14 (2015); *Methven O'Brian*, *loc. cit.*, par. 5.4. This soft law dominated landscape is currently still being questioned in the U. S., since the U. S.' sustainability reporting related hard law is not (yet) as advanced as in the EU, *e.g.* see *Daniel C. Etsy / Nathan de Arriba-Sellier*, Zeroing in on Net-Zero: From Soft Law to Hard Law in Corporate Climate Pledges, University of Colorado Law Review, Volume 94 No. 3 2023, 636 (in particular, pp. 669-670).
12 *Nolan*, *loc. cit.*, par. 2.
13 *European Commission*, Communication from the Commission of 25 October 2011, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final (**"Renewed EU strategy 2011-14"**).
14 The European Commission is the EU's main executive body. It puts forward proposals for new laws, which are reviewed and adopted by the European Parliament and the Council of the European Union. The European Commission manages the EU policies, including the EU's budget and ensures compliance with EU law by the EU member states. For more information, see: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en.
15 Renewed EU strategy 2011-14, pp. 11-12.
16 Directive 2014/95/EU, *OJEU* 2014, L 330.

the European Commission established certain minimum legal requirements through the NFRD.[17] The NFRD required certain companies with more than 500 employees and a balance sheet total or net turnover of more than 20 or 40 million euros,[18] respectively, to include a non-financial statement in their management report. This non-financial statement needed to contain information necessary for an understanding of the company's development, performance, position and impact of its activity, relating to, at a minimum, environmental, social and employee matters, respect for human rights, as well as anti-corruption and bribery matters.[19] Under the NFRD, the companies within its scope had to report for the first time in 2018 (over the financial year 2017).[20]

The NFRD was deemed to be an important step towards greater business transparency and accountability on social and environmental issues: "*Indeed, disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection. In this context, disclosure of non-financial information helps the measuring, monitoring and managing of undertakings' performance and their impact on society.*"[21]

In early 2018, the Action Plan: Financing Sustainable Growth[22] ("**Action Plan 2018**") was published by the European Commission. This Action Plan 2018 includes several initiatives within in the European Union's long term vision to achieve sustainable and inclusive growth, manage financial risks stemming from climate change and foster transparency.[23] Several legislative measures followed from the Action Plan 2018, including the Taxonomy Regulation,[24] the Sustainable Finance Disclosure Regulation[25] and the Benchmark Regulation.[26] The European Parliament emphasized the importance of the non-financial reporting rules for these ESG related legislative instruments, by acknowledging that: "*[the SFDR, Taxonomy Regulation and Benchmark Regulation] can only fully meet their objectives if more and better non-financial information is available from investee companies.*"[27]

3. Period 2019-2024

In June 2019, the second year that reporting under the NFRD was required, the European Commission published the 'Guidelines on non-financial reporting: Supplement on reporting climate-related'[28] ("**EC Guidelines 2019**"). In the EC Guidelines 2019, the European Commission states that: "*[c]orporate disclosure of climate-related information has improved in recent years. However, there are still significant gaps, and further improvements in the quantity, quality and comparability of disclosures are urgently required to meet the needs of investors and other stakeholders.*"[29]

The Council of the European Union[30] also stressed the importance of reliable, comparable and relevant information on sustainability risks and opportunities in December of 2019.[31] This led to the Council of the European Union suggesting "*the development of a European non-financial reporting standard taking into account international initiatives, with specific attention for climate-related disclosures (in order to promote Paris alignment of investment flows).*"[32]

About one week thereafter, the European Commission published its policy plan as a '*roadmap towards a sustainable economy*'. This policy plan, also known as the 'European Green Deal', aims to achieve a circular society by 2050 and provides a roadmap of key policies and measures needed to achieve this goal.[33] In its communication on the European Green Deal, the European Commission announced its intention to review the NFRD.[34]

Several public consultations were opened by the European Commission in 2019 and 2020 to request input on the revision of the NFRD. It followed from a summary of these consultations and from a report including a fitness check on the NFRD,[35] both published by the European Commission, that the NFRD left a great amount of flexibility in its implementation possibilities. Because the NFRD did not require the use of a non-financial reporting standard or framework, various (soft law) frameworks were still used to produce non-financial statements.[36] This resulted in a lack of comparability, reliability and relevance of the published information. Positive impacts were often (over) highlighted, while actual and potential negative impacts were under-reported. Moreover, the concept of 'double materiality' was not well defined and deemed difficult to implement. Lastly, the respondents supported the suggestion to expand the scope of the NFRD

17 NFRD, recital 4-6.
18 See paragraph III.2 of this article for a more elaborate review of the scope of the NFRD.
19 Article 1 paragraph 1 of the NFRD (amending article 19a of the Accounting Directive (Directive 2013/34/EU, OJEU 2013, L 182)).
20 Article 4 NFRD.
21 NFRD, recital 3; More recently, see: *European Parliament*, Briefing Implementation Appraisal, Non-financial Reporting Directive of January 2021, PE 654.213, p. 2.
22 *European Commission*, Communication from the Commission of 8 March 2018, Action Plan: Financing Sustainable Growth, COM(2018) 97 final.
23 Action Plan 2018, p. 2.
24 Regulation (EU) 2020/852, *OJEU* 2020, L 198. The Taxonomy Regulation establishes a taxonomy to determine whether an economic activity is environmentally sustainable, with the aim of leading capital towards sustainable investments and preventing greenwashing.
25 Regulation (EU) 2019/2088, *OJEU* 2019, L 317. The Sustainable Finance Disclosure Regulation governs the disclosures of sustainability information about various financial products by financial market participants and financial advisers to their investors. For an analysis of the effect of the Taxonomy Regulation and Sustainable Finance Disclosure Regulation on Dutch civil law (in Dutch), see *Romy M. de Galan / Arnoud C. W. Pijls*, Het civiel effect van de Taxonomie- en Transparantieverordening, Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur, Volume 1 2022, p. 3.
26 Regulation (EU) 2019/2089, *OJEU* 2019, L 317. The Benchmark Regulation introduces disclosure requirements for the administrators of ESG-related benchmarks.
27 *European Parliament*, Briefing Implementation Appraisal, Non-financial Reporting Directive of January 2021, PE 654.213, p. 2.
28 *European Commission*, Communication from the Commission of 20 June 2019, Guidelines on non-financial reporting: Supplement on reporting climate-related information, *OJEU* C209/1.
29 EC Guidelines 2019, p. 2.
30 The Council of the European Union represents the governments of the EU member states. Ministers from each government meet to adopt laws and coordinate policies here. For more information, see: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en.
31 *Council of the European Union*, Council Conclusions on Deepening of the Capital Markets Union of 5 December 2019, 14815/19, p. 6 ("**Council Conclusions of 5 December 2019**").
32 Council Conclusions of 5 December 2019, p. 11.
33 *European Commission*, Communication from the Commission of 11 December 2019, The European Green Deal, COM (2019) 640 final, p. 2.
34 The European Green Deal, p. 17.
35 *European Commission*, Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive of 2 July 2020, consultation period: 20 February 2020 – 11 June 2020, Ref. Ares(2020)3997889 (unofficial document) ("**EC Summary Report Consultation NFRD 2020**"); and *European Commission*, Commission Staff Working Document, Fitness Check on the EU framework for public reporting by companies of 21 April 2021, SWD(2021) 81 final ("**EC Fitness Check NFRD 2021**").
36 Such as the Global Reporting Initiative (GRI) Standards 2016, https://www.globalreporting.org/standards/; the Sustainability Accounting Standards Board (SASB) Standards 2018 (updated in 2023), (https://sasb.org/standards/download/); the International Integrated Reporting Framework (IIRC) 2013 (revised in 2021), https://integratedreporting.ifrs.org/resource/international-ir-framework/; the UN Guiding Principles and the OECD Guidelines. Also see: *European Parliament*, Briefing Implementation Appraisal, Non-financial Reporting Directive of January 2021, PE 654.213, p. 3.

to certain additional categories of companies.[37] The NFRD was not as effective as expected.

A little under two years later, the CSRD entered into force. The CSRD aims to do exactly that which the Council of the European Union stressed: it introduced a **non-financial reporting standard**, which should result in addressing the information gap between stakeholders' and users' information needs and the available corporate sustainability information. Moreover, the CSRD is set to end the non-binding nature of ESG rules for many companies, since its scope is far greater than the scope of the NFRD. These changes will be discussed in paragraph III below.

4. Future Developments

As mentioned in the introduction, reporting requirements such as the ones included in the CSRD will lead to a company gaining valuable insights into its ESG status. The CSRD serves as a steppingstone for legal sustainability requirements regarding a company's actual business conduct with respect to ESG. Having a clear understanding of its position allows a company to establish realistic goals for improvement. The European Commission is currently working on further ESG legislation which will have further impact on businesses. In February 2022, it published its proposal for the Corporate Sustainability Due Diligence Directive[38] ("**CSDDD**"). According to the European Commission, the CSDDD will complement the CSRD by adding a substantive corporate duty for some of the companies within the scope of the CSRD. Such companies will need to perform due diligence to identify, prevent and mitigate external harm arising out of adverse human rights and environmental impacts in the company's own operations, its subsidiary undertakings and in its value chain.[39] The European Commission states that the CSRD and CSDDD are closely interrelated and will lead to many synergies: the requirement to set up certain processes to collect proper information for reporting purposes under the CSRD, is closely related to identifying adverse impacts as meant in the CSDDD. The CSRD will also cover the last step of the due diligence process under the CSDDD, which is the reporting stage. Lastly, the CSDDD mandates that companies develop a business model and strategy that aligns with the transition to a sustainable economy and the limiting of global warming to 1.5 degrees Celsius, as outlined in the Paris Agreement,[40] on which companies under the CSRD are also required to report. The European Commission writes: "*Thus, this Directive will lead to companies' reporting being more complete and effective. Therefore, complementarity will increase effectiveness of both measures and drive corporate behavioural change for those companies.*"[41]

On 14 December 2023, the European Parliament and the Council of the European Union have reached a political agreement on the CSDDD.[42] This political agreement has yet to be formally adopted by the European Parliament and the Council of the European Union and is currently facing headwinds due to reservations of certain member states. At the date this text was written, formal voting by the European Parliament was set to take place on 15 March 2024. Developments with respect to the CSDDD may have occurred in the meantime.

III. Corporate Sustainability Reporting Directive

1. Introduction

The European Commission published the proposal for the CSRD on 21 April 2021, which entered into force on 5 January 2023 as the official successor to the NFRD. Although the CSRD has already entered into force, European law prescribes that the content of a directive must be transposed in national law of the EU member states. This implementation has to happen by 6 July 2024.

2. Formal Scope and Time of Application

The moment a company needs to comply with the CSRD is determined by its size. The sizing criteria are included in the Accounting Directive,[43] which directive is amended through the CSRD. Recently, the sizing criteria have separately been amended through a delegated directive that was published on 21 December 2023,[44] to correct for inflation since the entry into force of the Accounting Directive. EU member states have until 24 December 2024 to implement these changes into their national laws. Once implemented, companies have to apply these new criteria with respect to financial years starting from 1 January 2024. The delegated directive also gives member states the option to allow companies to apply the new criteria for the financial year beginning on or after 1 January 2023. In the below overview, the **new** sizing criteria are already included.

The timing of the application of the CSRD essentially proceeds in three stages:

(i) Reporting in 2025 (over financial year 2024): all companies or parent companies that were already subject to the NFRD.

These are: (i) large companies which are public-interest entities having on their balance sheet dates on average 500 or more employees during the financial year, or (ii) public-interest entities which are parent undertakings of a large group having, on a consolidated basis, on their balance sheet dates on average 500 or more employees during the financial year. Several definitions from the Accounting Directive are used to determine this scope:[45]

a. '**large companies**' are companies that exceed two of the three following criteria on a stand-alone basis: (i) a net turnover of EUR 50,000,000, (ii) a balance sheet total of EUR 25,000,000 and (iii) an average number of employees of 250.

b. '**public-interest entities**' are: (i) EU companies that are listed on a regulated market in the EU, (ii) certain credit institutions, (iii) certain insurance companies and (iv) compa-

37 In respect of this whole paragraph, see: EC Summary Report Consultation NFRD 2020, pp.3-4; and EC Fitness Check NFRD 2021, pp. 57-61.

38 *European Commission*, Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 23 February 2022, COM (2022) 71 final.

39 For an overview of the corporate sustainability reporting and corporate sustainability due diligence developments within The Netherlands and the EU, and the correlation between the CSRD and CSDDD (in Dutch), see *Yentl Coenradie*, Duurzaamheidsrapportage en gepaste zorgvuldigheid; practice what you preach (deel 1), Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur, Volume 3 2023, p. 57.

40 *United Nations*, United Nations Framework Convention on Climate Change's Paris Agreement 2015, https://unfccc.int/process-and-meetings/the-paris-agreement. The Paris Agreement is an important legally binding international treaty on climate change, which was adopted by 196 nations at the United Nations Climate Change Conference (COP21) in Paris, France, on 12 December 2015.

41 For this full Alinea, see CSDDD proposal, pp. 4-5.

42 *European Commission*, Commission welcomes political agreement on rules enforcing human rights and environmental sustainability in global supply chains (14 December 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6599.

43 Directive 2013/34/EU, *OJEU* 2013, L 182.

44 Commission delegated directive (EU) 2023/2775 of 17 October 2023, *OJEU* L 21 December 2023.

45 Article 3 paragraph 4, article 2 paragraph 1 and article 3 paragraph 7 of the Accounting Directive.

nies designated as public-interest entities by an EU member state.

c. '**large groups**' are groups consisting of parent companies and subsidiary company/companies that are to be included in a consolidation and which, on a consolidated basis, meet the criteria for a 'large company'.

(ii) Reporting in 2026 (over financial year 2025): all large companies and large groups as defined in the Accounting Directive (see above);

(iii) Reporting in 2027 (over financial year 2026): all (i) small and medium-sized companies (not micro companies) as defined in the Accounting Directive, which are listed on a regulated market in the EU,[46] (ii) small and non-complex institutions as meant in point 145 of article 4 paragraph 1 of the Capital Requirements Regulation,[47] provided that they are (a) large companies or large groups, or (b) small and medium-sized companies which are listed on a regulated market, and (iii) captive insurance undertakings as meant in point 2 of article 13 and captive reinsurance undertaking as meant in point 5 of article 13, both of the Solvency II Directive,[48] provided that they are (a) large companies or large groups, or (b) small and medium-sized companies which are listed on a regulated market.

a. '**medium-sized companies**' are companies that do not exceed two of the three criteria for large companies and are not small companies.
b. '**small companies**' are companies that do not exceed two of the three following criteria: (i) a net turnover of EUR 5,000,000, (ii) a balance sheet total of EUR 10,000,000 and (iii) an average number of employees of 50 and are not micro companies.
c. '**micro companies**' are companies that do not exceed two of the three following criteria: (i) a net turnover of EUR 900,000, (ii) a balance sheet total of EUR 450,000 and (iii) an average number of employees of 10.

3. Material Scope of the Sustainability Report

The scope of the information that must be included in the report under the CSRD has been significantly expanded in comparison to the NFRD. We wish to mention two significant changes.

The first relevant change to be mentioned is found in new Article 19 a (for individual companies) and Article 29 a (for large groups) of the Accounting Directive.[49] This section requires reporting to be based on a materiality assessment. In the materiality assessment, the company or group has to identify all matters with material impacts, risks and opportunities across ESG topics within their own operations and their value chain. Non-material matters may be justifiably excluded.[50] Companies need to focus on sustainability matters relevant for **their operations and stakeholders**. This materiality assessment is conducted from two perspectives. On the one hand, the reporting company should determine the impact of sustainability risks and opportunities on the company or group, otherwise known as the 'outside-in' perspective. This perspective often relates to financial impact on the company or group and is therefore also referred to as 'financial materiality'. On the other hand, the management report should include information necessary to understand the company's or group's impact on sustainability issues. This second aspect is also referred to as the 'inside-out' perspective or 'impact materiality'.[51] Keeping these two perspectives in mind, a company or group should include the most material ESG topics in its sustainability reporting.

The second relevant change amends the concept of 'non-financial' information as used under the NFRD and replaces it with the concept of 'sustainability' information. An extensive definition of the term 'information' which must be reported is introduced pursuant to paragraph 2 of Article 19 a and of Article 29 a of the Accounting Directive, resulting in a detailed European sustainability reporting standard of what information should be included in the sustainability report. The information requirements are defined based on open standards regarding the company's or group's sustainability policy, including, amongst other:

(i) a brief description of the company's business model and strategy, including (a) the resilience to sustainability matters, (b) opportunities related to sustainability matters and (c) the plans of the company to ensure limiting global warming to 1.5 degrees Celsius in line with, amongst other, the Paris Agreement;
(ii) a description of the role of the management board and supervisory board with respect to sustainability issues;
(iii) a description of the company's/group's sustainability policy;
(iv) a description of the due diligence process implemented by the company or group with regard to sustainability matters and of the principal actual or potential adverse impacts connected with the company's or group's own operations and its value chain, including the actions taken to prevent, mitigate or bring to an end such adverse impacts; and
(v) a description of the principal risks related to sustainability matters and the dependencies on those matters.

In accordance with paragraph IV of Article 19 a and paragraph 5 of Article 29 a of the Accounting Directive, the topics to be reported on have been further specified in the ESRS, which are discussed in paragraph 4 below.

Similar to the annual (consolidated) accounts of a company or group, the sustainability report should be published accompanied by an assurance opinion from an auditor. The CSRD prescribes a progressive approach to enhancing the level of the assurance required for sustainability information from limited assurance engagements at the beginning growing towards reasonable assurance engagements. This to allow for the progressive development of the assurance market for sustainability information, and of undertakings' reporting practices.[52]

4. There Is More, the 40a-Report

From 2029 onwards (reporting over financial year 2028), in accordance with new Article 40 a of the Accounting Directive, subsidiaries or branches in the EU that meet certain thresholds (see below) whose ultimate parent company is a company governed by non-EU law ("**non-EU parent**"), have to publish a sustainability report on the group level of such non-EU parent ("**40a-report**"). In the 40a-report, the impacts of sustainability matters should be included for all EU and non-EU subsidiaries and/or branches of the non-EU parent. This 40a-report is **separate from and in addition to** the sus-

46 Article 3 paragraph 1, 2 and 3 of the Accounting Directive.
47 Regulation (EU) 575/2013, *OJEU* 2013, L 176 (CRR I) and Regulation (EU) 2019/876, *OJEU* 2019, L 150 (CRR II).
48 Directive 2009/138/EC, *OJEU* 2009, L 335.
49 Article 1 paragraph 4 of the CSRD (amending article 19 a of the Accounting Directive).
50 For more on the relevance of a materiality assessment, see: Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023, *OJEU* L 21 December 2023, pp. 5 and 8-9 (Annex I, ESRS 1).
51 CSRD, recital 29.
52 CSRD, recital 60.

tainability report described in paragraph III.3 above. The following thresholds are in place for EU subsidiaries and EU branches which need to publish the 40a-report:[53]

a. Regarding **subsidiaries**: a 40a-report is only required when the EU subsidiary of that non-EU parent is either: (i) a large company or large group; or (ii) a small or medium-sized company (except micro companies) that is listed on a regulated market within the EU.
b. Regarding **branches**: a 40a-report is only required where: (i) the non-EU parent does not have a subsidiary as mentioned in the previous sentence and (ii) the EU branch generated a net turnover of more than EUR 40,000,000 in the preceding financial year.
c. Regarding both **subsidiaries and branches**: a 40a-report is only required if the non-EU parent, at its group level or, if not applicable, the individual level, generated in the EU a net turnover of more than EUR 150,000,000 for each of the last two consecutive financial years.

The 40a-report should be drawn up at the group level of the non-EU parent and published by the EU subsidiary or EU branch. The content of the 40a-report follows a slightly lighter regime than the sustainability report described in paragraph III.3 above. The 40a-report does not have to cover the items under (i)(a), (i)(b) and (v) of paragraph III.3 above and does not have a double materiality perspective. It only focuses on the 'inside-out' perspective. The 40a-report should be published accompanied by an assurance opinion expressed by an auditor of the sustainability reporting.[54]

The EU subsidiary or EU branch is dependent on its non-EU parent for the content of the 40a-report and the assurance opinion. In the event the EU subsidiary or EU branch has, applying best efforts, requested all required information for the 40a-report and the assurance opinion from its non-EU parent company, but not all this information was provided, it should draw up and publish the 40a-report itself containing the information that is in its possession (if any) and issue a statement indicating that the non-EU parent did not make all the necessary information or assurance opinion available.[55]

It is noted that an EU subsidiary of a non-EU parent that falls within the scope of the CSRD should publish two reports: one at its own (group) level (the sustainability report described in paragraph III.3 above), and one at its non-EU parent's group level (the 40a-report).[56] There is a possibility to avoid this if the non-EU parent reports on sustainability matters in line with the standards of the CSRD and ESRS or equivalent standards.[57] In that case, the EU subsidiary (and its subsidiaries, if applicable) is exempted[58] from reporting on sustainability matters itself.

IV. European Sustainability Reporting Standards

The ESRS have been developed by the European Financial Reporting Advisory Group ("**EFRAG**"), which is an organization that advises the European Commission and aims to develop and promote European views in the field of corporate reporting. In general, the ESRS can be divided into four categories, stated below. The ESRS consist of twelve sub-sets of reporting standards and each of these sub-sets cover a specific topic:

(i) ESRS 1 and 2: The general requirements (ESRS-1) and general disclosures (ESRS-2);
(ii) ESRS E (for 'Environment'): The topical requirements relating to climate change (ESRS-E1), pollution (ESRS-E2), water and marine resources (ESRS-E3), biodiversity and ecosystems (ESRS-E4) and resources and circular economy (ESRS-E5);
(iii) ESRS S (for 'Social'): The social requirements relating to the own workforce (ESRS-S1), workers in the value chain (ESRS-S2), affected communities (ESRS-S3) and customers and end-users (ESRS-S4);
(iv) ESRS G (for 'Governance'): The governance requirements relating to business conduct (ESRS-G1).

On 31 July 2023, the first set of ESRS have been adopted by the European Commission by means of a delegated regulation,[59] as a result of which these standards will be mandatory for companies reporting under the CSRD from 1 January 2024 onwards. The general rule is that all disclosures would be subject to the materiality assessment described under paragraph III.3. This does not apply to the disclosure requirements and data points in the ESRS-2 (General disclosures), which are all mandatory. The ESRS furthermore specify that:

- If a company concludes that ESRS-E1 is not a material topic and that therefore it does not report in accordance with that standard, it shall disclose a detailed explanation of the conclusions of its materiality assessment with regard to ESRS-E1. This provision is included in recognition of the widespread and systemic effects of climate change on the economy as a whole;
- If a company concludes that a datapoint deriving from the Sustainable Finance Disclosure Regulation, the Benchmark Regulation or (certain disclosures of) the Capital Requirements Regulation is not material, it shall explicitly state that the datapoint in question is "not material". These provisions aim to facilitate the compliance of financial market participants, benchmark administrators and financial institutions with their own disclosure obligations under the respective regulations mentioned in the previous sentence.[60]

In addition to the sustainability matters covered in the ESRS, a company will need to identify company-specific sustainability matters that are not covered in the ESRS, because it is noted that the ESRS may not be all-encompassing. The company should include those sustainability matters in its materiality assessment as well. Moreover, the European Commission is currently developing sector-specific ESRS standards, which should also be taken into account in the future.

Furthermore, the EFRAG and the European Commission have provided for several phase-ins, which aim to help (in particular small) companies that will have to prepare their sustainability report for the first time, to apply to the standards effectively, among others:

- All companies may omit metrics on their value chains for a period of three years. In addition, there would be phase-

53 Article 1 paragraph 14 CSRD (introducing article 40 a Accounting Directive).
54 Article 1 paragraph 14 CSRD (introducing article 40 a Accounting Directive, see paragraph 3).
55 Article 40 a paragraph 2 of the Accounting Directive (article 1 paragraph 14 of the CSRD).
56 EU branches do not have an individual obligation to report on sustainability matters for their own activities.
57 The European Commission should deem standards as 'equivalent' to the ESRS following a certain procedure. We are not aware of any implementing acts issued by the European Commission stating the equivalence of any (U. S. law) sustainability reporting standards to the ESRS.
58 Article 19 a paragraph 9 and 29 a paragraph 8 Accounting Directive (article 1 paragraph 4 and 7 CSRD). This exemption, however, is subject to certain criteria about what must be included into the sustainability report to make use of the exemption. Please refer to the paragraphs of the Accounting Directive mentioned in the previous sentence.
59 Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023, *OJEU* L 21 December 2023.
60 Explanatory Memorandum to the Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023, C(2023) 5303 final, p. 6.

ins of between one and three years for certain information on the following issues: the financial effects on the undertaking arising from climate, breakdown of employees by gender, collective bargaining coverage, adequate wages, social protection, and training and skills development;
- Companies or groups with less than 750 employees[61] may omit scope 3 greenhouse gas emissions data as set out in ESRS-E1 and the disclosure requirements set out in ESRS-S1 in the first year that they apply the standards;
- Companies or groups with less than 750 employees may omit disclosure requirements set out in ESRS-E4 and ESRS-S, except ESRS-S1, in the first two years that they apply the standards;
- All companies may omit the disclosure requirements set out in ESRS-E, except ESRS-E1 in the first year that they apply the standards;
- All companies may omit data points set out in ESRS-S1 in relation to social protection, persons with disabilities, work-related ill-health and work-life balance in the first year that they apply the standards.[62]

V. Implications of the CSRD for U. S.-Based Companies

The CSRD is aimed at driving (sustainable) change in the business behavior of companies and groups that operate within the EU, regardless of where these companies or groups are based. That's why, even though the CSRD and ESRS are EU law instruments, the impact for U. S.-based companies can be significant.

First, when a U. S. company is a subsidiary of an EU company that falls within the scope of the CSRD, it is to be expected that the U. S. subsidiary's EU parent will request information to comply with its obligations under the CSRD. This might mean that certain data should be collected by the U. S. subsidiary that the U. S. subsidiary did not collect before, meaning U. S. subsidiaries will also have to review their own business models and (operational) activities in relation to sustainability matters. Moreover, if the EU parent is unhappy with the sustainability level of the U. S. subsidiary and it feels that it does not align with the sustainability goals the EU company wishes to present to its stakeholders, this might result in the EU parent requiring its U. S. subsidiary to make impactful changes to its business and operations.

Second, when a U. S. company has an EU company or group of companies in its international group that falls within the scope of the CSRD, such EU subsidiary or group will have to prepare an extensive sustainability report on ESG topics and will have to implement policies and strategies with sustainability goals. It should be taken into account that if from a financial reporting perspective, the EU company or group is exempt from publishing its financial report because its financial information is included in the consolidated financial report of the U. S. parent, it does not mean that the EU company or group is also exempt from the sustainability report. Only if the U. S. parent reports on sustainability matters in line with the standards of the CSRD and ESRS or equivalent standards, an exemption can apply.

Third, there is the 40a-report (see paragraph III.4). The 40a-report is to be prepared on the group level of the U. S. parent company. Especially for international groups spread across the globe, it could be a challenge to gain the required insights on sustainability matters of the whole group, especially because the 40a-report needs to be audited.

Lastly, even when a U. S. company does not have an in-scope EU subsidiary or EU branch in its group and it is also not a subsidiary of an in-scope EU company or group, it may still encounter the consequences of the CSRD. In-scope EU companies have to include sustainability information about their value chain in their sustainability report. If a U. S. company does material business with an in-scope EU company, likely the U. S. company will be considered part of the value chain of the EU company. In this situation, this could mean that the U. S. company has to collect information and acquire insights in its own activities relating to sustainability matters as requested by the EU company and prepare such information to be shared with its EU business partner.

VI. Conclusion

Even though sustainability reporting requirements are not new in the EU, the CSRD will impose many new obligations and will affect a great number of companies, both EU and non-EU based. These new sustainability reporting rules are complex and extensive. Therefore, we recommend U. S. companies to timely review their organizational chart and operations to determine if they could become subject to sustainability reporting requirements of the CSRD. If so, U. S. companies will need to understand what reporting requirements will apply to which of its group entities and should be prepared to receive information requests regarding their own operations from their EU based parent companies and business relationships. ■

61 This exception applies to companies or groups that had an average number of not more than 750 employees during the financial year on a consolidated basis where applicable.

62 Explanatory Memorandum to the Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023, C(2023) 5303 final, p. 4.

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The German Redress Action

The New Kid on the Block in Collective Redress?

I. Collective Action Exposure: Focus on Europe

Extensive pre-trial discovery, civil jury trials and spectacularly high damages awards: Anecdotal evidence of the U. S. as a plaintiff-friendly jurisdiction is so abundant that it has become conventional wisdom that U. S. courts draw in an ever-increasing number of foreign forum-shoppers. Recent empirical research, however, suggests that litigants on both sides of the Atlantic could suffer from a potentially risky misconception about their litigation exposure.

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