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Sustainability Belgium
Navigating a greener world

Sustainability reporting obligations, directors' duties and an action plan for (listed) companies in Belgium

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1. Introduction

"Sustainability is our business", is a phrase that many companies insert into their sustainability reports, reflecting the increasing trend for companies to showcase their sustainability credentials. In fact, 80% of companies worldwide now produce sustainability reports[1], and this trend is increasing. Companies may either wish to adopt sustainable policies and to publicise this as an ethical choice, or are strategically required to do so as their stakeholders become more demanding in view of increasing public scrutiny. However, for some companies, this is now also a legal requirement.

The European Union (the **EU**) has both driven this trend, and has now started to regulate the disclosure and reporting of environmental, social and governance (**ESG**) matters, known as "Sustainability Reporting".

EU sustainability regulations have existed for decades, but the commitments to reduce greenhouse gas emissions under the 2015 Paris Climate Agreement[2] and to meet the UN's 2030 sustainable development goals[3] (the **SDG**s) have galvanised political will in many quarters to re-examine their policies. The EU's 2018 Sustainable Finance Action Plan and the European Green Deal have resulted in a plethora of new proposals and requirements, all of which champion sustainability.

In the wake of Covid-19, the sustainability agenda has not only become increasingly prominent, but it is also subject to increased critical analysis, especially as regards environmental and social matters. The debate over whether or not to embed sustainability policies within a company has been decided in the affirmative, and now the main question is how to properly comply with the new EU rules and to facilitate a smooth transition towards meeting the new environment, social and governance standards (the **ESG Standards**).

Corporate sustainability in the EU is spearheaded by three main sets of duties and obligations: (i) reporting obligations, (ii) directors' duties and (iii) due diligence. In this contribution, we will focus on reporting obligations and directors' duties. For more information on the due diligence duties and obligations, see our previous contribution on a first step towards EU-wide legislation on mandatory human rights due diligence.

One of the leading instruments on mandatory reporting in the EU is the Directive 2014/95/EU[4], also known as the Non-Financial Reporting Directive (the **NFRD**). This seminal directive on corporate sustainability kick-started the movement towards the mandatory disclosure of a company's sustainable policies. However, there is now a call for a more ambitious instrument – in line with the Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (the **SFDR**)[5]. Following its public consultation, the European Commission (the **EC**) has recently published a proposal for a Corporate Sustainability Reporting Directive (the **CSRD**)[6], with a view to revise the NFRD requirements.

With regard to directors' duties, the EC proposes an EU policy that includes stakeholders' views and interests as part of a company's overall strategy. Directors would be accountable for developing and implementing the sustainable policies internally.

These different aspects of corporate sustainability cannot be considered in isolation, as the appropriate level of regulation is one of the greatest fundamental challenges to the effectiveness of corporate sustainability. The more duties there are, the more time companies will have to spend on complying with and reporting on their compliance with those duties. Companies will soon have to report and justify the content of their policies – an element that was freely determined in the past and merely supported by guidelines and voluntary standards. The regulation paradigm is shifting from disclosure to action, and the new CSRD is clearly heading in that direction.

We have taken a reconciliatory approach below to showcase the interplay of the numerous legislative initiatives, and help companies to navigate a greener world.

2. From the NFRD to a proposal for a CSRD

The NFRD has been a significant factor in promoting corporate sustainability in the EU. Nevertheless, the NFRD suffers from some serious shortcomings, which are evident from the reporting practice of companies.

The EC intends to remediate such shortcomings in the short term. To that end, on 21 April 2021, the EC adopted a proposal for a CSRD, which would amend the NFRD by amending the Accounting Directive[7], the Audit Directive[8], the Transparency Directive[9] and the Audit Regulation[10].

2.1 Scope of the NFRD, who should report?

The obligations contained in the NFRD are currently addressed at:

(i) **certain large companies** – limited to "public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year ", and;

(ii) **public interest entities** – which are "parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year".[11]

Therefore, the NFRD does not apply to smaller companies, such as SMEs, or entities that are not of public-interest, in order to avoid increasing their regulatory burden.

Recital 14 of the preamble to the NFRD specifies that the limitation of the scope of application of the NFRD to certain large companies should not prevent Member States from requiring that non-financial companies and targeted groups publish non-financial information, thus extending the scope of application to other undertakings.

2.2 NFRD obligations – what and how to report?

The companies covered by the NFRD must include a **non-financial statement** as part of their annual public reporting obligations. This non-financial statement must at least relate to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters (the **NFRD Matters**).

Furthermore, additional obligations, provided for in Article 1(2) of the NFRD, are imposed on listed companies, requiring them to disclose the diversity policy applied to their administrative, management and supervisory bodies, and surveillance. The listed companies must establish their diversity policy in light of criteria such as, for instance, "age, gender or educational and professional backgrounds". Listed companies must describe the objectives of their diversity policy, how it has been implemented and the results in the reporting period.

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(a) Content of the non-financial statement

While the NFRD set requirements for the content of the report, this did not extend to the content of the information itself, which means that the EU did not impose mandatory requirements in respect of the goals to achieve and reporting on the achievement of those goals.

The EC published its non-binding Guidelines on non-financial reporting in 2017[12] (the **NFRD Guidelines**) and the Guidelines on reporting climate-related information in 2019[13], which have provided greater insights into what should be included in the report.

The non-financial statement must include a brief description of a company's business model and of the policies pursued in relation to the NFRD Matters – including any due diligence processes implemented – as well as the outcome of those policies.

The non-financial statement should also contain the principal risks to the NFRD Matters linked to the company's operations – including, where relevant and proportionate, its business relationships, products or services which are likely to adversely impact the NFRD Matters – and how the company manages those risks.

The company should also include the non-financial key performance indicators relevant to the particular business.

Where a company does not pursue policies in relation to some of the NFRD Matters, it must provide a clear and reasoned explanation for not doing so in the non-financial statement[14]. The "**comply or explain**" system is therefore applicable, and prevents companies from avoiding addressing any required non-financial information.

In addition, the NFRD reinforces the possibility of companies relying on exceptions, by allowing the Member States to introduce a "**safe harbour**" **clause**, which the Belgian legislator has done. This allows companies, subject to specific conditions, to omit information relating to impending developments or matters in the course of negotiation in exceptional cases where the disclosure of such information would be seriously prejudicial to the commercial position of the company.

(b) Reporting methodology – what standard should a company use?

The NFRD gives companies significant flexibility to disclose relevant information in the way that they consider most useful. Companies may use international, European or national guidelines to produce their statements. To the extent that companies make use of this option, they must indicate the frameworks on which they rely. For instance, they can rely on the UN Global Compact, the OECD guidelines for multinational enterprises, TCFD or ISO 26000.

It is emphasised that companies are assisted by the NFRD Guidelines to ensure that disclosure is "*high quality, relevant, useful, consistent and [provides] more comparable non-financial information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders."*[15]

The key here is to disclose material information. Companies, auditors and users of financial information often use the concept of materiality, forcing a company to understand the main components of its value chain in order to identify key issues and assess what makes the information material. We see that most of the BEL 20 companies start their report by establishing their materiality matrix to reflect their stakeholders' views, and the main challenges encountered in their sustainability agenda. The EC's Guidelines give many examples of what companies must consider in establishing how their activities may impact ESG matters and disclosing how they will tackle the issues and set time-framed goals.

The NFRD Guidelines also call for the disclosure of fair, balanced and understandable information. This means that companies should be careful when communicating with stakeholders, and make sure that they have access to reliable information. The information should be comprehensive but concise. The companies are also expected to be strategic and forward-looking. It is crucial for companies to set an agenda with short-term and long-term goals in order to address the ESG issues. The sustainability report should also be consistent with other elements of the management report and more generally, with all information disclosed by the relevant company.

There has been a call for the adoption of an EU non-financial reporting standard and template. The EU intends to create its own standard by using the "best and most widely accepted elements" of existing international non-financial/ESG Standards (such as the GRI, SASB, TCFD[16], etc.) as its starting point. Some argue that a mandatory template could provide companies with less flexibility, as they would have to complete a specific template and "tick" the required boxes. However, this seems a sensible demand that would increase the ESG reported data's reliability and comparability.

2.3 Review of the Non-financial Reporting directive[17]

In December 2019, the EC committed to reviewing the NFRD, as part of the European Green Deal. The objectives of this review are two-fold. First, the EC aims to improve the disclosure of climate and environmental data by companies to better inform investors of the sustainability of their investments. Second, the EC wishes to give effect to changes required by the SFDR and the Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the **Taxonomy Regulation**)[18].

However, the non-financial information disclosed by companies under the NFRD does not currently meet the needs of investors and others. In particular, the EC considers that the disclosed information does not adequately detail how non-financial issues impact companies and how companies themselves impact society and the environment.

Some of the identified reasons for this are that the reported information is not sufficiently comparable or reliable, companies do not report all non-financial information that users think is necessary, and some companies do not even report this information at all.

Furthermore, it is hard for investors, among others, to find non-financial information, even when it is reported; and companies face uncertainty and complexity when deciding what non-financial information to report, and how and where to report it.

(a) THE SFRD AND THE TAXONOMY REGULATION: THE FUTURE REPORTING PACKAGE FOR ALL COMPANIES?

Concerns have been raised about the **interaction between the different pieces of sustainability reporting legislation**, and the need to streamline the different pieces of legislation on sustainable finance.

As stated in the proposal for a CSRD, the NFRD, together with the SFDR and the Taxonomy Regulation, form a powerful sustainability reporting framework at the heart of the EU's sustainable finance strategy. The purpose of such a legally diverse instrument is to create a consistent and reliable flow of sustainability information throughout the financial value chain. As a result of both the SFDR and the Taxonomy Regulation, asset managers and financial advisers need more sustainability information from investee companies. A revision of the NFRD is therefore necessary to allow for the creation of a sustainable reporting circle among reporting entities.

The proposal for a CSRD creates awareness of the entanglement of the different reporting instruments and builds on and develops the consistency of the sustainability reporting requirements – currently set out in the NFRD – with the broader sustainable finance legal framework.

(i) The SFDR

The SFDR sets the sustainability reporting requirements for a specific category of economic actors, ie financial market participants, including asset managers and financial advisers. However, other companies should not ignore the SFDR, as the proposed revisions of the NFRD will lead to the harmonisation of reporting standards. Therefore, similar rules will increasingly be applicable to companies outside the scope of the SFDR.

Furthermore, financial market participants need adequate information from investee companies to be able to comply with the requirements of SFDR, and ultimately to meet the needs of end investors, including individuals and households. The proposal for a CSRD aims to create a bridge between the NFRD and the SFDR by ensuring that investee companies report the information needed by the financial market participants in order to fulfil their own SFDR reporting requirements[19].

Disclosure under the SFDR includes reporting on (i) policies on the identification of principal adverse impacts; (ii) actions taken and planned to mitigate the principal adverse impacts; (iii) adherence to international standards and (iv) an historical comparison covering at least five previous reference periods. A summary of the sustainability items should also be included.

The SFRD disclosure requirements can be divided into two main categories: entity-level and product-level requirements.

The entity-level requirements relate to how the company should deal with sustainability issues from an organisational perspective (eg how it deals with sustainability risks and how its due diligence policies take into account sustainability impacts).

The product-level requirements call for the company to disclose the sustainability risks and factors when offering financial products or offering advisory services. The SFDR requires additional pre-contractual disclosure, website disclosure and disclosure in periodic reporting, in combination with the obligations included in the EU Taxonomy Regulation.

It is worth noting that if a financial product promotes environmental and/or social characteristics or has a clear sustainable investment objective, this will trigger more detailed obligations. This is in line with the policy goal to avoid and reduce the risk of "greenwashing".

The SFDR[20] empowers the European Supervisory Authorities (the **ESAs**) to establish the technical standards, content, methodologies and presentation of sustainability-related disclosures. Consequently, through the Joint Committee, the ESAs have developed draft Regulatory Technical Standards[21] (the **Draft RTS**).

The ESAs' powers have two main components: (i) adverse impact reporting at entity level: disclosures of principal adverse impacts of investment decisions on sustainability factors; and (ii) pre-contractual, website and periodic product disclosures: applicable to products with either environmental or social characteristics ("light green") or with sustainable investment objectives ("dark green"), including provisions on "do not significantly harm".

The Draft RTS include a mandatory reporting template, to be used for the statement on considering principal adverse impacts of investment decisions on sustainability factors. A set of indicators are specified for adverse impacts in the field of climate and environment, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters. These indicators are divided into a core set of universal mandatory indicators, and additional opt-in indicators.

Article 2 of the Draft RTS states that financial market participants must provide the relevant ESG information in a manner that is "easily accessible, non-discriminatory, free of charge, prominent, simple, concise, comprehensible, fair, clear and not misleading". This means that reporting entities must be careful to disclose and report information in a "user-friendly" way, using for example, legal design technics to make sure that the stakeholders cannot only access the information, but also process and make use of it. The SFDR template already guarantees that information will generally be provided in a clear way. Entities reporting information under the NFRD also use reporting frameworks, which assist accessibility.

We can expect that the revision of the NFRD will also involve the adoption of technical standards and a mandatory reporting template, progressively replacing the different reporting frameworks.

In this regard, the proposal for a CSRD supports endowing the EC with the power to adopt EU sustainability reporting standards. The reason for this is, as stated in the Explanatory Memorandum of the proposal for a CSRD, that no existing standard or framework in itself satisfies the Union's needs for detailed and consistent sustainability reporting requirements. The existence of several private standards and frameworks creates a lot of uncertainties and inconsistencies among companies, which impedes the creation of an "EU reporting way", which would allow investors and organisations, and more generally, stakeholders, to access relevant and comparable sustainability information. Companies will gain in precision and clarity what they lose in flexibility, since they will bear more constraints on how and what they report. The need for coherence will imply the need to align the different regimes.

(ii) The Taxonomy Regulation

The Taxonomy Regulation establishes a classification system for environmentally sustainable economic activities by setting out conditions that economic activities must meet in order to qualify as environmentally sustainable. The aim of the Taxonomy Regulation is to foster sustainable investments and to tackle the greenwashing of 'sustainable' financial products. This instrument creates a common language that investors can use when investing in environmentally sustainable projects and activities. The Taxonomy Regulation establishes six environmental objectives: (i) climate change mitigation; (ii) climate change adaptation; (iii) the sustainable use and protection of water and marine resources; (iv) the transition to a circular economy, (v) pollution prevention and control, and (vi) the protection and restoration of biodiversity and ecosystems.

The EC will complement the Taxonomy Regulation by adopting implementing and delegated acts. These acts will establish the list of environmentally sustainable activities by defining technical screening criteria for each environmental objective.

On the same date as the adoption of the proposal for a CSRD, the College of Commissioners approved the first delegated act supplementing Regulation (EU) 2020/852 by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (the **EU Taxonomy Climate Delegated Act**)[22], which will be officially adopted in the coming weeks. The EU Taxonomy Climate Delegated Act contains the first technical screening criteria for activities which contribute to climate change mitigation or adaption objectives. A second delegated act to be adopted by the end of 2021 will cover the remaining objectives.

As with the SFDR, the proposal for a CSRD creates a bridge between the NFRD and the Taxonomy Regulation. Article 8(1) of the Taxonomy Regulation requires entities falling within the scope of the NFRD to include information in their non-financial statements on how, and to what extent, their activities are "associated with" environmentally sustainable activities. In other words, relevant companies should disclose certain indicators on the extent to which their activities are environmentally sustainable according to the taxonomy. The EC will specify these disclosure obligations in another delegated act specifying the information that companies subject to the NFRD will have to disclose on how, and to what extent, their activities align with those considered environmentally sustainable in the EU taxonomy, building on the technical advice submitted by the ESAs on 1 March 2021. These indicators are complementary to the information required under the NFRD itself, and companies will have to report them alongside other sustainability information.

The proposal for a CSRD aims to ensure that the sustainability reporting requirements are consistent with the taxonomy. This will mainly be achieved through the abovementioned adoption by the EC of mandatory sustainability reporting standards. Such future standards will consider the indicators that companies must disclose on the extent to which their activities are environmentally sustainable according to the taxonomy, as well as the screening criteria and 'do-no-significant-harm' thresholds of the taxonomy.

(b) THE PROPOSAL FOR A CSRD, THE ENTHRONEMENT OF "SUSTAINABILITY REPORTING"

Following the public consultation, the EC summarised the stakeholders' views and identified the key findings in a report[23]. The results of the consultation lead to the identification of several problems for users of **non-financial information**. The proposal for a CSRD addresses most of the issues raised, although the scope of each change is likely to remain widely debated.

The key changes to the NFRD are the extension of the **scope** of the reporting requirements to additional companies, new **terminology**, the **assurance** of sustainability information through mandatory accounting, the parallel and upcoming adoption of mandatory EU sustainability reporting **standards**. We will consider each of these points, among others, below.

(i) The extended scope of the CSRD

The scope of the NFRD has often been criticised as too narrow. Approximatively 11,700 companies are required to comply with the NFRD requirements as transposed by the Member States, who have often extended the scope of the NFRD voluntarily. Without such national extensions, only 2,000 companies would be subject to the NFRD. The proposal for a CSRD meets the demand for an extended scope.

The proposal for a CSRD would apply to additional companies including all **large companies**; including small and medium-sized companies if they are **listed companies under the Accounting Directive**[24] (except listed micro-companies).

In the light of this planned extension, companies not yet subject to the NFRD requirements should prepare by taking the following steps towards sustainability reporting.

(ii) CSRD – new terminology

The proposal for a CSRD makes a crucial point on terminology. The notion of "non-financial information" implies that it has no impact on financial matters, and that it covers separate or even opposite interests. The Explanatory Memorandum of the proposal for a CSRD reflects the strong view that sustainability issues may put financial performance at risk, and that sustainability reporting is crucial to financial sustainability. The new terminology of the proposal for a CSRD would embed the terms of "sustainability information" and "sustainability reporting". This new vocabulary is more in line with the language used by stakeholders aware of the increasing importance of sustainability.

The proposal for a CSRD clarifies the importance of the principle of double materiality. This requirement, for companies to report both on how sustainability issues affect their performance, position and development (the 'outside-in' perspective) and on their impact on people and the environment (the 'inside-out' perspective), had already been introduced by the NFRD, albeit vaguely.

"Concerns have been raised about the interaction between the different pieces of sustainability reporting legislation, and the need to streamline the different pieces of legislation on sustainable finance."

(iii) The sustainability report as mandatory part of the management report

Another important and very specific proposed change is the removal of the option for companies to report on sustainability in a separate report. Companies will have to ensure that all information is published as part of their management reports, and disclosed in a digital, machine-readable format.

(iv) Assurance of the information

The EC proposes to introduce a general EU-wide audit (assurance) requirement for sustainability information, to ensure the accuracy and reliability of the reported information. This new tool would provide more certainty to stakeholders, especially to investors.

In line with the new terminology acknowledging the financial impact of sustainability information, the aim of the CSRD would be to progressively reach a similar level of assurance for financial and sustainability reporting. This would start with a "limited" assurance requirement. The EC is aware that a more demanding level of assurance (such as "reasonable assurance") is difficult at this stage in the absence of sustainability assurance standards. However, the EC would be empowered to adopt such assurance standards, and we would expect that the assurance requirements would increase in parallel.

Member States would also be allowed to open up the market for sustainability assurance services to so-called "independent assurance services providers". Thus, Member States could choose to allow firms, other than the usual auditors of financial information, to assure sustainability information.

(v) The CSRD, less costs for the companies?

In its Explanatory Memorandum, the EC insists that the aim of the CSRD would also be to reduce unnecessary business costs generated by the reporting requirements and the growing demand from stakeholders for sustainability information. Mandatory EU standards would provide a clearer and hopefully more affordable path and methodology for companies. Companies would be able to refer directly to these standards when dealing with reporting issues, such as the difficulties encountered by companies in obtaining information from their own business partners (suppliers and investee companies).

(c) BEL 20 COMPANIES, HOW COMPANIES ACTUALLY REPORT?

In order to understand what corporate sustainability means for companies, and how they actually report non-financial information, we have looked at the sustainability reports of the BEL 20 companies.

We observe that companies often state the following in their sustainability reports: the legal requirements obliging them to disclose non-financial information, the reporting frameworks they use to do so, and the materiality matrix explaining how and why they prioritize specific sustainability interests.

Overall, most of the companies have submitted sustainability reports as part of or separately from their annual report, and often by reference to the NFRD or to the Belgian law provisions (articles 3:6 and 3:32 of the Belgian Code for Companies and Associations). Most companies use the Sustainable Development Goals (SDGs) of the United Nations and the Global Reporting Initiative.

In their sustainability report, BEL 20 companies generally identify their respective stakeholders, and also define the materiality matrix of the report. The materiality matrix reflects the stakeholders' interests and the policies set in line with corporate and business realities. This materiality matrix is a way to tackle the paradox perspective[25] on corporate sustainability, creating a path for sustainable development, since ESG concerns are regarded as an end in themselves, and not just as means to profit maximization. In the light of the tensions between different ESG criteria, companies explain how they prioritize sustainable matters, especially by means of consultation with their stakeholders. Companies have to find a balance between their own interests, their shareholders' interests and their stakeholders' interests.

(d) CASE LAW ON REPORTING OBLIGATIONS, SOME EXAMPLES

In O'Donnell v Commonwealth of Australia, Kathleen O'Donnell, a retail purchaser of government bonds, sued the Commonwealth of Australia, the Secretary to the Department of Treasury and the CEO of the Australian Office of Financial Management. The claimant alleges that the disclosure memorandum associated with the bond was misleading or deceptive in that it omitted climate-related risks to the country's economy and assets. The claimant also alleges a breach by two officers of the Commonwealth, the Secretary of the Treasury and the CEO of the Australian Office of Financial Management, of their duty of due diligence for failing to ensure that the disclosure documents presented a true and fair view of the financial risks associated with the bonds. The proceedings commenced in July 2020 and are now at an interlocutory stage[26].

In Abrahams v Commonwealth Bank of Australia (**CBA**), two of the bank's shareholders brought a lawsuit in 2017 alleging that the CBA had failed to disclose the physical and transitional risks to its business from climate change, so that its annual report did not give a "true and fair view of financial condition and performance"[27]. The case was withdrawn after the bank provided more comprehensive disclosures. Since 2017, it has become a leader in climate-related financial disclosures recommended by the TCFD. Its disclosures include how physical risks could affect its residential loan portfolio, its agribusiness loan portfolio, and its scenario analysis disclosures showing that there will be reduced financial risks to its business with adaptation measures.

Currently in France, 5 NGOS and 14 local authorities are suing Total, based on the duty of vigilance law and because of the inadequacy of Total's climate commitments with the objectives of Paris Agreement. In February 2021, the pre-trial judge ruled in favour of the NGOS and local authorities by confirming the jurisdiction of Paris commercial court for the litigation[28]. The case is ongoing.

(e) A ROAD TO CORPORATE SUSTAINABILITY: FROM "PASSIVE" DISCLOSURE TO "ACTIVE" DUTIES

Given the growing trend towards more corporate sustainability obligations, it is reasonable to expect that in the not-so-distant future, companies will not only be asked to report on their policies, which are freely determined, but also to fulfil certain established criteria.

Moreover, the revision of the NFRD will most likely be followed by the creation of a comparative tool of the non-financial information reported by companies – market by market, Member State by Member State, or based on other criteria. The emergence of such a tool will allow stakeholders to compare the sustainability performance of each company.

Despite the absence of legal requirements regarding the content of the non-financial information itself, transparency and comparability of the information by the public is a strong incentive for companies to adopt sustainable policies.

By way of illustration, in 2015, Volkswagen found itself facing a sharp fall in stock price, multiple investigations, and heavy fines for the installation of software designed to cheat nitrogen oxide emission tests in its diesel cars and, for incorrectly reporting its carbon dioxide (CO_2) emissions[29]. It is striking here that due to misleading reporting or unreliable sustainability policies, the stakeholders and market's reactions may directly sanction a company, outside of official investigations and sanctions. As soon as the company is labelled as "unethical" or "dishonest", it can be very difficult to regain stakeholders and market trust.

The sustainability strategy of a company has also become a powerful way to impose itself on the market and a competitive plus. However, the launch of the proposal for a CSRD has been delayed due to several calls to include the Internal Market Commissioner in the process. We can expect significant delays in the adoption of this instrument, and some now fear some backtracking by the EC. Despite the tensions among stakeholders and the conflicted interests, we are of the view that it is unlikely that the EC will step back from its objectives, and the above points should still be relevant.

3. Directors' duties

Directors have the legal and statutory duty to act in the interest of their company. The meaning of this duty has evolved over time and across jurisdictions, in the light of the notion 'in the interest of a company'. Many have assimilated this duty with the financial interests of the shareholders. But the definition of the interests of shareholders has expanded, from an exclusive financial and short-term perspective to a long-term consideration. Consequently, regulators now try to avoid short-termism from shareholders and to foster a company's long-term performance and sustainability. The main challenge is to create a sustainable context with long-term value creation and to implement this view consistently. This position also leads to taking into account all stakeholders' interests, not just shareholders.

The EC published a study last year on directors' fiduciary duties and sustainable corporate governance[30]. According to this study, the narrow interpretation of directors' duties and a company's interests tends to favour short-termism in many companies, in particular those listed on a regulated market. The study also showed that the limited enforcement of the directors' duties to act in the long-term interest of the company was driving a narrow understanding of their duty of care. The EC has proposed EU policy intervention to lengthen the consideration time in corporate decision-making and as such promote corporate governance that is more conducive to sustainability.

In view of such EU policy intervention, the EC launched a consultation on sustainable corporate governance on 26 October 2020[31], in which it is, among others, seeking feedback on whether directors' duties should be more clearly defined in legislation. The consultation closed on 8 February 2021. The EC will most likely publish a formal proposal later this year (planned for second quarter of 2021).

The future legislation could embed a duty for directors to consider all stakeholders' interests rather than giving primacy to shareholders. This would involve an obligation to identify the relevant stakeholders and to implement procedures to ensure that adverse environmental, human rights and social impacts on stakeholders are addressed.

In addition, the EC is examining whether it needs to strengthen enforcement mechanisms outside of internal board structures and the general meetings of shareholders. This might include an enforcement role for civil society stakeholder groups, such as those representing employee or environmental concerns.

Time will tell to what extent directors' duties will become part of the sustainability strategy. There is a call for stricter tools to facilitate transparency and accountability. The Shareholder Rights Directive II[32](the SRDII) has already responded to this call in part. The SRDII creates disclosure requirements for directors and executives' remuneration in listed companies by strengthening the content of the remuneration report. It also strengthens the shareholders' right to influence their remuneration ("say-on-pay"). A next step in the context of the directors' duties could be disclosure requirements concerning salary gaps.

The future legislation on directors' duties will most likely meet the global imperative for the achievement of the SDGs proposed by the UN's 2030 Agenda. In this context, an audit tool adjusted to the SDGs appears to be a necessity to help companies comply with sustainability reporting requirements

and the directors 'duties. To this end, the proposed changes to the NFRD, including the assurance of the information to regulate, should foster consistency among companies, and we can expect the emergence of the same standards for directors' duties.

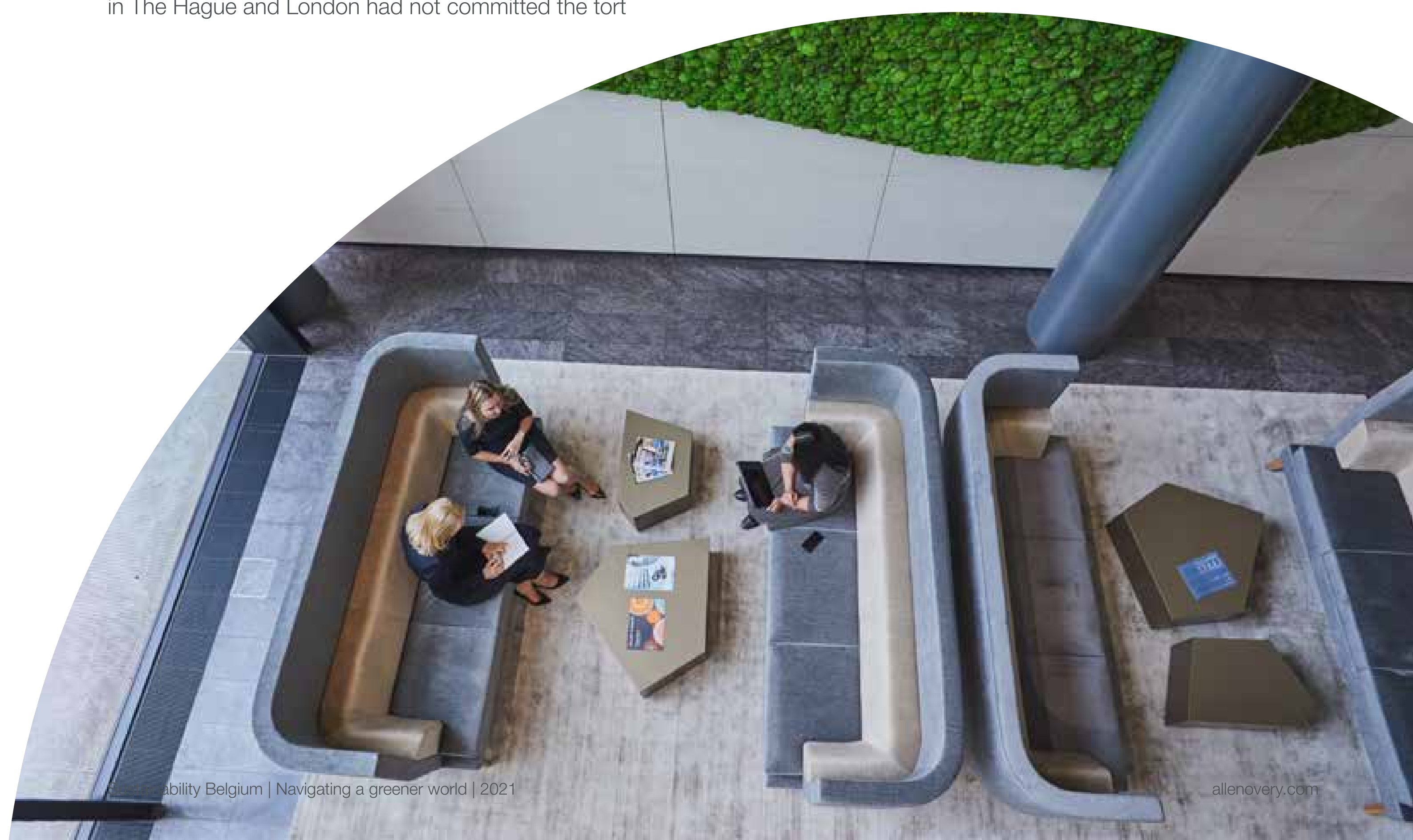
Case law and pending cases illustrate the increasing worldwide focus on directors' duties and sustainable reporting. The examples below will probably inspire many stakeholders in many countries to use such an opportunity to achieve corporate sustainability.

In the Chandler v Cape case[33], the central question was whether a parent company could have a "duty of care" to the employees of a subsidiary under a health and safety policy. The case concerned damage caused by exposure to asbestos dust. On appeal, it was ruled that this could be the case if the parent company has assumed this duty of care. This would be the case if: (i) the undertakings of the parent company and of the subsidiary are essentially the same; (ii) the parent company has or should have a greater knowledge of a relevant aspect of health and safety in the industry than the subsidiary; (iii) the parent company knew or ought to have known that the working conditions at its subsidiary were unhealthy; (iv) the parent company knew or should have known that the subsidiary or its employees would rely on the parent company to use its superior knowledge for the protection of those employees; and (v) the parent company had already intervened in the business activities of the subsidiary on a number of occasions.

Claims against the parent company are not always granted. In the case of Four Nigerian Farmers and Milieudefensie v. Shell on the alleged but disputed tortious liability of Shell companies for damage caused by an oil spill in 2005 near the village of Oruma in Nigeria, the District Court of The Hague ruled that the parent companies of the Shell group in The Hague and London had not committed the tort of negligence under Nigerian law to the Nigerian farmers affected and the NGO Milieudefensie and, therefore rejected all claims filed against these parent companies[34]. However, parent companies are not in the clear. This decision of the District Court was appealed and the Hague Court of Appeals ruled in a much commented decision of 29 January 2021[35], that Shell parent company is under a duty of care and must ensure that its Nigerian subsidiary installs leak detection systems within one year.

Previously, in France, the Supreme Court pierced the corporate veil of group companies in the Total case, with its decision of 25 September 2012, by ordering the group's parent company of Total to pay compensation for the civil damage resulting from the sinking of the tanker Erika in December 1999 causing marine pollution. The judgment was based on Total's voluntary commitment to monitor the condition of ships operated by its charterers, even though no national or international obligations were imposed upon it to do so[36].

> "The future legislation on directors' duties will most likely meet the global imperative for the achievement of the SDGs proposed by the UN's 2030 Agenda."



4. Action Plan

The EC has responded to the call for consistency by factoring this into future legislation. The core challenge for companies is now to think ahead to ensure a smooth transition towards corporate sustainability. Based on the previous reports of some companies and on the evolution of EU legislation, it is advisable for companies to improve their reporting practices. The following action points could be seen as an initial step.

4.1 ESG distinction – Company or an investor?

Some of the companies refer to and report their ESG strategies and policies in two different capacities, as a sustainable company and as a sustainable investor.

The scope of their sustainability activities, their policies and their reporting differ depending on the capacity of the company in question. An explicit reference to the company's capacity at the beginning of the report would be helpful.

4.2 Reporting framework

There is a fine line between providing information, reporting and valuation. This is the reason why it is desirable for companies subject to non-financial reporting obligations to use a reporting framework.

In this respect, the EC refers in particular to the non-exhaustive list established in Recital 9 to the NFRD to provide examples of widely recognised reporting frameworks.

The use of reporting frameworks enables companies to prepare their sustainability reporting in a more structured way. The most used reporting framework is the Global Reporting Initiative. Considering that it the most widely used framework, we expect that it will inspire the EC as to which mandatory sustainability reporting standards to adopt. Most of the companies also refer to the Sustainable Development Goals of the United Nations to set their agenda. Using these two sources seem to be a fair option while awaiting for the EU standards.

4.3 Refer to the application of and compliance with the NFRD

Most of the companies refer to the NFRD (or the national transposition law) in their sustainability report. This explicit reference is highly advisable for the companies within the scope of the NFRD, but it might also be helpful for companies outside the scope of the NFRD to state that they are voluntarily complying with the EU reporting requirements.

This might be even more advisable if the EU decides to adopt mandatory reports, since these might become a privileged "label" that the investors will request to obtain some guarantees on the disclosed sustainability information – providing that the companies actually comply with these standards.

4.4 Scope

Reporting companies should be clear on the extent to which subsidiaries and linked entities are covered by the report. If some entities, shareholders or subsidiaries are not covered, companies should include a link to the sustainability report of the excluded entity in their sustainability report.

4.5 Materiality assessment – Matrix of sustainability factors relating to specific activities of the company

The materiality assessment should drive companies to urge management to engage with their stakeholders to understand what sustainability issues concern them most. Companies must understand the sustainability priorities of key stakeholders — particularly investors, customers, employees, regulators, and business partners – and how they view the organisation's performance. This information can be gathered and monitored through periodic surveys of specific stakeholder groups or across all stakeholder segments. It is best to have a formal process of ongoing stakeholder engagement at management level, and in some cases to involve the board.

Afterwards, companies can report their sustainability matrix by describing the priorities for their stakeholders. This will allow companies to prioritise some goals depending on their activities, their workers, their business locations and their subsequent commitments.

4.6 Timeframe – Set the agenda over time

It is advisable to set some goals in order to show that any inadequate policies are being addressed. Furthermore, by setting mid-terms goals, companies can consider their accomplishments while acknowledging that they are still pursuing greater sustainability. Some companies also publish a specific timetable for future publications in order to be transparent about ongoing studies and future disclosures.

4.7 Transparency and accessibility

Accessibility should be two-fold, accessibility of the report and accessibility of the information.

With regard to the accessibility of the sustainability report, it is important to ensure that the users of the report (shareholders and stakeholders) can easily access it. The proposal for a CSRD states that the sustainability report must be part of the management reports. We suggest already complying with this requirement since it provides more visibility and legitimacy to the sustainability reports.

With regard to the accessibility of information, once a company has ensured that stakeholders can easily find the information required in the sustainability report, the company must also ensure that the information is understood.

The EC promotes the use of digital technologies to report sustainability reports. We observe that reporting companies already make extensive use of legal design technics in order to illustrate key figures in an appropriate way. Some companies also wisely include a lexicon in order to specify the exact meaning of the terms used in the sustainability report.

4.8 Covid-19 Response overview

The Covid-19 pandemic has deeply affected the sustainability agenda, and it is advisable to report on how COVID-19 has delayed or impeded the company in achieving some of its sustainability goals. As emphasised by the EC in the proposal for a CSRD, this pandemic is likely to further accelerate the growth in demand for sustainability information from companies, for example regarding the vulnerability of workers and the resilience of supply chains. Companies should therefore address this issue directly by reporting on the negative impact of COVID-19 on their sustainability agenda and how they plan to recover and catch up over time.

5. Conclusion

Recent legislation and future legislative proposals clearly show that the NFRD was a pioneer in sustainability reporting and has paved the way for greater transparency. As a final thought, it may be wise to think ahead. Do not use the law as the only reference for compliance. Companies should align themselves with the facets of corporate sustainability that are most important to their organisation and adopt a method of reporting on related activities, risks, and opportunities. Companies should articulate clear and measurable goals on sustainability issues so that progress can be assessed over time. Gathering sustainability information and developing a sustainability reporting infrastructure now will place companies in an optimal position for a future in which the demand for sustainability will most likely increase.

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