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# The Proposal for a Corporate Sustainability Due Diligence Directive: Background and Latest Developments

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- **Create a level playing field within the EU by setting minimum governance standards that require companies to promote long-term, sustainable value creation and to take into account environmental and human rights impacts in their value chain, without linking this to director liability.**
- **Provide more clarity around stakeholder engagement, by facilitating effective consultations with stakeholders that are potentially impacted by certain company decisions. Companies could be required to take the outcome of stakeholder consultations into account in their decision-making, but in the end, they should always have a choice to set aside this outcome in the interest of long-term, sustainable value creation.**

**The EU proposal for a Directive on Corporate Sustainability Due Diligence lays down rules on obligations for companies regarding actual and potential human rights and environmentally adverse impacts with respect to their own operations, those of their subsidiaries, and the value chain operations carried out by their established business relationships, as well as rules on liability for violations of these obligations. In this article, the author explains the background of the CSDDD, highlights some observations regarding the initial proposal of the European Commission and the main changes as envisaged in the Political Compromise text of the Council, and touches on the interaction between the CSDDD and other EU initiatives in the field of corporate sustainability, the interaction with other Dutch corporate law developments, and the expected next steps in the legislative process.**


## 1. Introduction

The EU proposal for a Directive on Corporate Sustainability Due Diligence (hereafter, the CSDDD) lays down rules on obligations for companies regarding actual and potential human rights and environmentally adverse impacts with respect to their own operations, those of their subsidiaries, and the value chain operations carried out by their established business relationships, as well as rules on liability for violations of these obligations. The CSDDD is a result of the European Commission's initiative on sustainable corporate governance.[2]

The original proposal for a CSDDD was submitted by the European Commission to the European Parliament and the European Council on 23 February 2022 (hereafter, the Commission Proposal).[3] After a period of review and negotiations, the Council reached political agreement on a revised text for the CSDDD by agreeing on a 'general approach' on 1 December 2022.[4] Based on this general approach, the Council will begin negotiations with the European Parliament. The general approach consists of a significantly revised proposal for a CSDDD (hereafter, the Political Compromise).[5]

This article explains the background of the CSDDD, highlights some observations regarding the Commission Proposal and the main changes as envisaged in the Political Compromise, and touches on the interaction between the CSDDD and other EU initiatives in the field of corporate sustainability, the interaction with other Dutch corporate law developments, and the expected next steps in the legislative process. For more detail on the content of the provisions of the CSDDD, I refer to the other contributions in this journal.

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2 S.B. Garcia Nelen, 'Een Europees initiatief voor duurzame corporate governance', *Ondernemingsrecht* 2021/32.

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

4 https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/.

5 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 30 November 2022.

## 2. Background of the CSDDD: the European Green Deal and the EU Initiative on Sustainable Corporate Governance

In December 2019, the Commission published its plans for a European Green Deal.[6] The objective of achieving "climate neutrality" within the EU by 2050 is a part of these plans, a goal that had already been set in 2018.[7] To achieve this objective, greenhouse gas emissions are to be reduced by at least 55% compared to 1990 levels by 2030.[8] According to the Commission, the behaviour of companies across all sectors of the economy is the key to success in achieving these objectives and in delivering on the United Nations Sustainable Development Goals.[9] The European Green Deal notes that sustainability should be further embedded into the corporate governance framework. The Commission has repeatedly indicated that it would be supporting this through a new policy initiative, for instance in the COVID-19 recovery plan (*NextGenerationEU*),[10] the *Circular Economy Action Plan*,[11] the *Biodiversity Strategy*,[12] and the *Farm to Fork Strategy*.[13] In a resolution of 17 December 2020, the European Parliament called on the Commission to translate these intentions into new legislation.[14] The European Parliament adopted another resolution in March 2021 with recommendations to the Commission in the field of corporate governance, including a specific proposal for a directive on corporate due diligence and corporate accountability.[15]

Meanwhile, on 30 July 2020, the Commission published an *inception impact assessment* on this topic, which it had labelled the 'EU initiative on sustainable corporate governance'.[16] According to the inception impact assessment, the first proposal in this initiative would be to clarify that directors, as part of their duty to act in the corporate interest, should take into account the interests of all stakeholders relevant to the long-term sustainability of the company or those affected by it (including employees, environment, and other stakeholders affected by the business). The second proposal was to introduce a due diligence duty, which would require companies to take measures to address their adverse sustainability impacts, such as climate change, environmental and human rights harm in their own operations and in their value chain by identifying and preventing relevant risks and mitigating negative impacts.

The key assumption underlying the first policy proposal on directors' duties was that, according to the Commission, undue short-term market pressures make it difficult to lengthen the time horizon in corporate decision-making. As a result, corporate managers could become overly focused on short-term financial performance and disregard opportunities and risks stemming from environmental and social sustainability considerations.[17] On behalf of the Commission, EY investigated the alleged short-term pressure. The findings of that study are included in the report '*Study on directors' duties and sustainable corporate governance*'.[18] In brief, the report concludes that there is a trend, for publicly listed companies within the EU, of focusing on short-term benefits of shareholders rather than on the long-term interests of the company. According to the report, this is partly due to the fact that directors' duties and the company's interest are interpreted narrowly and tend to favour the short-term maximisation of shareholder value, combined with increasing pressure from investors and the lack of a strategic perspective on sustainability.[19] The EY report has been strongly criticised.[20] The second policy proposal, the introduction of a due diligence obligation, is partly based on the report '*Study on due diligence requirements through the supply chain*'.[21] This report showed that only a limited number of companies that participated in the research were undertaking due diligence which takes into account all human rights and environmental impacts covering the entire value chain.[22] In addition, it showed that there is broad support among the respondents for a mandatory due diligence obligation, including among

6 '*Communication from the Commission – The European Green Deal*', 11 December 2019, COM(2019) 640.
7 '*A Clean Planet for all – A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*', 28 November 2018, COM(2018) 773.
8 Articles 2(1) and 4(1) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (hereafter, the European Climate Law).
9 Explanatory memorandum to the proposal for a Directive (hereafter, the Explanatory Memorandum), page 1, and recital 2 of the Commission Proposal. See also United Nations Resolution 70/1 (2015) adopted by the General Assembly on 25 September 2015.
10 '*Europe's moment: Repair and Prepare for the Next Generation*', 27 May 2020, COM(2020) 456.
11 '*A new Circular Economy Action Plan For a cleaner and more competitive Europe*', 11 March 2020, COM/2020/98 final.
12 '*EU Biodiversity Strategy for 2030*', 20 May 2020, COM(2020) 380 final.
13 '*A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*', 20 May 2020, COM/2020/381 final.
14 European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)).
15 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).
16 '*Inception impact assessment – Sustainable corporate governance*', 30 July 2020, ec.europa.eu.
17 '*Action Plan: Financing Sustainable Growth Brussels*', 8 March 2018, COM(2018) 97 final.
18 '*Study on directors' duties and sustainable corporate governance*', July 2020, op.europa.eu.
19 '*Study on directors' duties and sustainable corporate governance*', July 2020, op.europa.eu, page 40.
20 Including by J.M. Fried & C.C.Y. Wang, 'Short-Termism, Shareholder Payouts, and Investment in the EU', *ECGI Law Working Paper*, no. 544/2020, October 2020; M.J. Roe et al., 'The European Commission's Sustainable Corporate Governance Report: A Critique', *ECGI Law Working Paper*, no. 553/2020, November 2020 and the European Law Experts Group, 'A Critique of the Study on Directors' Duties and Sustainable Corporate Governance Prepared by Ernst & Young for the European Commission', *Oxford Business Law Blog*, 9 December 2020.
21 '*Study on due diligence requirements through the supply chain*', January 2020, op.europa.eu.
22 '*Study on due diligence requirements through the supply chain*', January 2020, op.europa.eu, pages 48-50.

businesses, as such an obligation could promote a level playing field and increase legal certainty.[23]

## 3. The Commission Proposal

At the time of publication of the inception impact assessment, the Commission expected that the legislative initiative might result in a proposal for a directive as early as the second quarter of 2021.[24] However, the impact assessment report was met with a negative opinion from the Regulatory Scrutiny Board.[25] A revised assessment report was submitted to the Regulatory Scrutiny Board, which again received a negative opinion.[26] The Regulatory Scrutiny Board considered that the impact assessment report did not sufficiently: (1) address the problem description and provide convincing evidence that EU businesses, in particular SMEs, do not already sufficiently reflect sustainability aspects or do not have sufficient incentives to do so; (2) present a scope of policy options and identify or fully assess key policy choices; (3) assess the impacts in a complete, balanced and neutral way and reflect uncertainty related to the realisation of benefits; and (4) demonstrate the proportionality of the preferred option.[27] The legislative proposal was then amended to address the concerns of the Regulatory Scrutiny Board. Whether these concerns have indeed been appropriately addressed will remain unknown, as the Commission decided to continue with the initiative despite the negative opinions. The Commission considered it important to adopt a proposal for a directive because of the political importance of this initiative for the Commission's priorities, the urgency for action in the field of value chain due diligence, and because the additional clarifications and adjustments to the proposal, in the Commission's view, sufficiently addressed the shortcomings of the impact assessments.[28]

As a result of the criticism of the Regulatory Scrutiny Board, and possibly other stakeholders, the scope of the Commission Proposal was ultimately considerably limited compared to the initial proposals included in the impact assessment. In particular, the proposal no longer introduced a broad obligation requiring that, as part of their duty to act in the corporate interest, directors and supervisory directors must take into account the interests of all stakeholders relevant to the company.[29] Instead, the provisions on the directors' duties in the Commission Proposal were significantly limited and explicitly linked to the due diligence obligation.

The larger part of the Commission Proposal consists of provisions that aim to introduce a mandatory due diligence obligation. In short, this means that companies that fall within the scope of the proposed CSDDD will be obliged to identify actual or potential negative consequences for their business operations in terms of human rights and the environment and to prevent and limit them where possible. The Commission Proposal has a broad scope, as it covers companies that exceed certain thresholds and that are established or active within the EU, regardless of whether or not they are listed on the stock exchange. The outcome of the consultation activities showed that an EU legal framework for such an obligation was desirable, in particular for large companies, in order to improve legal certainty and create a level playing field.[30]

The due diligence requirements in the Commission Proposal are largely based on the concept of human rights due diligence, which was specified and further developed in the OECD Guidelines for Multinational Enterprises, extending the application of due diligence to environmental and governance topics.[31] The OECD Guidance on Responsible Business Conduct and sectoral guidance are internationally recognised frameworks setting out practical due diligence steps to identify, prevent, mitigate and account for how companies address actual and potential impacts in their operations and value chains.[32]

## 4. The Political Compromise as proposed by the Council

The Political Compromise is the result of review and negotiations within the Council that took place between 24 February 2022 and 1 December 2022. This process led to the Political Compromise, which contains various proposed changes compared to the Commission Proposal. I will highlight a few of the key changes below.

In the Political Compromise, the term 'value chain' has been replaced by 'chain of activities'. As to the scope of the chain of activities covered under the definition, the compromise text moved from the concept of a full 'value chain' towards the 'supply chain' concept by leaving out the phase of the use of the company's products or provision of services.[33] The activities of a company's downstream part of the supply chain now only extend to business partners

23 Although not among industry organisations, see '*Study on due diligence requirements through the supply chain*', January 2020, op.europa.eu, page 97.
24 '*Inception impact assessment – Sustainable corporate governance*', 30 July 2020, ec.europa.eu.
25 The Regulatory Scrutiny Board is an advisory body that supports the Commission in monitoring the quality of proposed legislation.
26 Explanatory Memorandum, page 20.
27 Explanatory Memorandum, page 20.
28 Explanatory Memorandum, pages 20-21.
29 Explanatory Memorandum, page 21 and *Commission Staff Working Document, Follow-up to the second opinion of the Regulatory Scrutiny Board*, 23 February 2022, page 8.
30 Explanatory Memorandum, page 18.
31 OECD Guidelines for Multinational Enterprises, 2011 edition, available at http://mneguidelines.oecd.org/guidelines/.
32 Recital 6 of the Commission Proposal. See in this same journal: A.J.F. Lafarre, 'Mandatory Corporate Sustainability Due Diligence in Global Value Chains: The Long-Awaited European Solution Compared to Existing International Standards', *Ondernemingsrecht* 2023/33.
33 Political Compromise, pages 6-7.

where they carry out those activities for or on behalf of the company, but not the disposal of the product by consumers.[34] When this is applied to greenhouse gas emissions, the scope of activities is more limited than what is typically referred to as 'scope 3', which includes all 'indirect' emissions resulting from the activities of a company occurring from greenhouse gas sources owned or controlled by third parties, such as business partners or consumers.[35] In the Netherlands, a court held Royal Dutch Shell responsible for the reduction of such scope 3 emissions.[36] The Dutch government recently indicated that it is in favour of including scope 3 emissions under the scope of the CSDDD and that it has resisted the currently envisaged limitation of the CSDDD to the 'downstream' part of the chain of activities.[37]

When transposing the CSDDD, member states can make their own decision on whether or not to include the provisions of financial services by regulated financial undertakings.[38] If they do, both the type of activities and the parties that are included in the chain are limited. As to the type of activities, the definition of 'chain of activities' only includes services that directly result in an allocation of capital or in the coverage of risk through insurance or reinsurance. As to the parties included in the chain, these would be limited to the recipients of the activities and their subsidiaries benefiting from the service whose activities are linked to the service in question. The chain would not include business partners or recipients that are households or natural persons not acting in a professional or business capacity, or small- and medium-sized enterprises.[39] In addition, the Political Compromise does not require financial undertakings to temporarily suspend or terminate a business relationship.[40] For other types of companies, there are other exceptions under which no temporary suspension or termination is required.[41]

The Commission Proposal required Member States to ensure that companies, when setting variable remuneration, take into account the fulfilment of the obligations to draw up a climate transition plan, including, where relevant, emission reduction objectives, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability. This provision has been deleted in the Political Compromise due to the strong concerns of Member States regarding the proposed link between the variable remuneration of directors and their contribution to the company's business strategy and long-term interest and sustainability.[42] According to the Political Compromise, the form and structure of directors' remuneration are matters primarily falling within the competence of the company and its relevant bodies or shareholders. Member states called for non-interference with different corporate governance systems within the EU, which reflects different views about the roles of companies and their bodies in determining the remuneration of directors.

In the Political Compromise, the provision on civil liability for companies under the proposed Article 22 of the CSDDD has been amended to clarify and limit potential liability for companies.[43] Companies may only become liable if and when that company intentionally or negligently failed to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and minimise their extent and as a result of such a failure damage was caused to a natural or legal person.[44] In contrast to the Commission Proposal, where a company could avoid liability in its value chain caused by indirect partners by seeking contractual assurances from its direct partners, under the Political Compromise a company cannot be held liable at all if the damage was caused only by its direct or indirect business partners in its chain of activities.[45] In addition, when identifying actual and potential adverse impacts, companies are allowed to apply a risk-based approach and the adverse impacts, once identified, may be addressed in order of priority.[46] The Dutch government has argued for the inclusion of the option of using this risk-based approach and against reliance on contractual assurances in the chain of activities in the context of the CSDDD's liability framework for companies.[47]

One of the key changes in the Political Compromise is the deletion of two articles that regulated the directors' duties for companies incorporated in a Member State. The first provided for a duty of care and associated liability and the second laid down the duty for directors to set up and oversee the due diligence actions and to adapt the corporate strategy to take into account the identified adverse impacts and adopted due diligence measures.[48] The deletion of the provision regulating the liability relating to the directors' duty of care was supported by the Dutch government.[49] The Political Compromise indicates that the 'main

34 Recital 18 of the Political Compromise.
35 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie et al. v. Royal Dutch Shell plc*), par. 2.5.4.
36 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie et al. v. Royal Dutch Shell plc*).
37 *Kamerstukken I* 2022/23, 36 146, A, page 7 and *Kamerstukken I* 2022/23, 36 146, B, page 3.
38 Article 2(8) and pages 7-8 of the Political Compromise. See in this same journal: L.J.M. Baks et al., 'Practical Implications of the CSDDD: a Threat to its Effectiveness', *Ondernemingsrecht* 2023/39.
39 Article 3(g) and recital 19 of the Political Compromise.
40 Article 7(6), Article 8(7) and recital 36b of the Political Compromise.
41 Article 7(7), Article 8(8) and recital 41a of the Political Compromise.
42 Political Compromise, page 9.
43 Political Compromise, pages 9-10.
44 Article 22(1) and recital 56 of the Political Compromise. See in this same journal: L. Lennarts, 'Civil Liability of Companies for Failure to Conduct Corporate Sustainability Due Diligence Throughout Their Value Chains – Is Art. 22 CSDDD Fit for Purpose?', *Ondernemingsrecht* 2023/36.
45 Article 22(2) of the Political Compromise.
46 Articles 6(1a) and 6a of the Political Compromise.
47 *Kamerstukken I* 2022/23, 36 146, B, page 2.
48 Articles 25 and 26 of the Commission Proposal.
49 *Kamerstukken I* 2022/23, 36 146, B, page 2.

elements' of the second provision have been moved to Article 5(3), but the latter article does not add much compared to the already existing obligations, in particular, Article 4(1), in contrast to Article 26 of the Commission Proposal. Indeed, some of the 'main elements' of Article 26 of the Commission Proposal appear to be deleted altogether.

Generally, it appears that the proposed changes in the Political Compromise aim to provide clarity and predictability, but in some instances, they also limit interference in the corporate governance rules of individual Member States. Historically, corporate governance has mainly been the domain of national traditions, with clear differences between Member States.[50] There is currently no EU-wide legislation that provides for unifying rules on corporate governance in the strict sense (i.e. the governance structure and the division of powers and responsibilities between the corporate bodies).[51] Although clarity and predictability for companies are important factors for an attractive business environment, the continuation of differences in corporate governance rules within the EU does not contribute to a true level playing field. Although multiple recitals of the Political Compromise still refer to the original intention of the EU institutions to amend corporate governance rules, the provisions of the Political Compromise no longer provide for such changes.[52]

## 5. Interaction with other EU Initiatives in the Field of Corporate Sustainability

In its efforts to make businesses operate in a more sustainable manner, the EU has so far mainly introduced reporting obligations.[53] These obligations predominantly follow from the Non-Financial Reporting Directive (the NFRD),[54] implemented in the Netherlands by the Decree on disclosure of non-financial information (*Besluit bekendmaking niet-financiële informatie*).[55] The NFRD concerned an amendment to the Accounting Directive and introduced obligations with regard to the reporting of so-called non-financial information. According to the Commission, these reporting obligations have not led to sufficient improvements.[56] On 21 April 2021, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (the CSRD),[57] which aims to significantly expand the scope of and obligations under the NFRD. The CSRD was finally adopted on 28 November 2022 and entered into force on 5 January 2023.[58] Member States will have 18 months to implement the CSRD in national legislation. The first obligations will start to apply to certain companies when reporting on the financial year 2024.

Other relevant European regulations for corporate sustainability reporting are the Sustainable Finance Disclosure Regulation (the SFDR)[59] and the Taxonomy Regulation.[60] The SFDR entered into force on 10 March 2021 and applies to financial market participants (such as certain insurance and investment firms and credit institutions) and financial advisers. Under the SFDR, when financial market participants have more than 500 employees, they are required to publish on their website a statement about their due diligence policy regarding the main negative effects of investment decisions on sustainability factors.[61] The Taxonomy Regulation entered into force on 12 July 2020 and applies, among other things, to companies that are subject to the NFRD (as amended by the CSRD). This regulation prescribes how to determine which economic activities qualify as 'environmentally sustainable'. This is intended to prevent *greenwashing* and provide investors with more clarity about which investments can be considered 'green'.[62] Environmentally sustainable activities must also comply with minimum safeguards of social rights.[63] This means that a company must have procedures in place to ensure compliance with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.[64]

50 M.A. Verbrugh, 'Naar een beter ondernemingsrecht', *Ondernemingsrecht* 2020/20, par. 3.4.

51 S.B. Garcia Nelen, *De beursvennootschap, corporate governance en strategie (Instituut voor Ondernemingsrecht nr. 120)* (diss. Rotterdam), Deventer: Wolters Kluwer 2020, par. 7.4.1.

52 Political Compromise, recitals 9, 11 and 13.

53 I only refer to the generally applicable rules and not to industry-specific legislation, such as Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and the Conflict Minerals Regulation. For a comprehensive list of relevant European legislation, see pages 3-8 of the Explanatory Memorandum.

54 Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

55 Decision of 14 March 2017 laying down rules for the implementation of Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (*Besluit van 14 maart 2017, houdende regels ter uitvoering van richtlijn 2014/95/EU van het Europees Parlement en van de Raad van 22 oktober 2014 tot wijziging van richtlijn 2013/34/EU met betrekking tot de bekendmaking van niet-financiële informatie en informatie inzake diversiteit door bepaalde grote ondernemingen en groepen*).

56 Explanatory Memorandum, page 4.

57 Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

58 *Official Journal of the EU*, L 322, 16 December 2022.

59 Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector.

60 Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

61 Article 4(3) of the SFDR. On the basis of the first paragraph of that article, financial market participants with fewer than 500 employees are only obliged to publish such a statement *where they consider principal adverse impacts of investment decisions on sustainability factors*. Where they do not consider adverse impacts of investment decisions on sustainability factors, they should publish clear reasons as to why they do not do so, including, where relevant, information as to whether and when they intend to consider such adverse impacts ('apply or explain').

62 The term *greenwashing* refers to obtaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met. See recital (11) of the Taxonomy Regulation.

63 Article 3(c) of the Taxonomy Regulation.

64 Article 18(1) of the Taxonomy Regulation.

The common denominator between the existing and intended European sustainability rules mentioned above is that they impose reporting obligations on companies. The proposal for a CSDDD is seen as complementary to these reporting rules, as it adds substantive obligations to the reporting obligations. By requiring companies to implement processes for due diligence, ultimately the reporting (which itself is the last step of the due diligence process) should become more reliable and useful.[65]

## 6. Interaction with Developments in the Netherlands relevant to Corporate Sustainability

In the Netherlands, two developments are of particular relevance. The first one is the proposed Bill on Responsible and Sustainable International Entrepreneurship (*Wet verantwoord en duurzaam internationaal ondernemen*).[66] This legislative proposal by four members of the Dutch parliament would oblige companies to, among other things, apply due diligence in the field of human rights, labour rights and the environment. In essence, this proposal is very similar to the CSDDD.[67] In a similar way, the proposal seeks to introduce mandatory due diligence requirements that align with the OECD Due Diligence Guidance for Responsible Business Conduct. The Dutch government has indicated that the CSDDD will serve as the basis for the national bill. The aim is to have the legislative processes of both proposals run in parallel as much as possible, which means that changes provided for in the draft CSDDD can be included in the national legislative process. The initiators of the national bill believe that initiating a process towards national legislation will increase the chance of an ambitious European proposal, as the more Member States develop their own initiatives, the greater the pressure will be on the entire EU to adopt legislation at the European level.[68]

The second development is the updated Dutch Corporate Governance Code that was published on 20 December 2022.[69] The updates include requirements for directors to focus on sustainable long-term value creation when determining strategy and making decisions and to take the interests of stakeholders into account.[70] In addition, companies must establish a policy for diversity and inclusion for the entire business.[71] The updated Corporate Governance Code also requires companies to take into account the impact of the company and its affiliated enterprise in the field of sustainability, including the effects on people and the environment, and to paying a fair share of tax to the countries in which the company operates.[72] To ensure that the interests of the relevant stakeholders of the company are considered when the sustainability aspects of the strategy are determined, the company should draw up a policy for effective dialogue with those stakeholders.[73] The CSDDD is mentioned in the Corporate Governance Code as it, like other legislation and international instruments, can serve as a guide to the interpretation of the concept of sustainability.[74]

## 7. Expected next Steps in the Legislative Process for the CSDDD

The next step in the CSDDD's legislative process is for the European Parliament to agree on a position in respect of the Commission Proposal. This process is not progressing as quickly as some may have hoped. Just before the publication of the Political Compromise, on 7 November 2022, the rapporteur of the European Parliament, Dutch member Lara Wolters, published her draft report on the Commission Proposal.[75] The proposals in the draft report are quite different from the changes proposed in the Political Compromise. The draft report contained significant and detailed proposals for amendments to the Committee Proposal, generally showing strong support for extensive due diligence obligations, expanding the scope of the Commission Proposal, further detailing the directors' duties and including additional requirements to link a significant portion of the variable remuneration of directors to the achievement of sustainability targets. In short, where the Political Compromise proposed to limit the scope and content of the sustainability obligations in the Commission Proposal, the draft report of the rapporteur of the European Parliament proposed to expand these.

The draft report was presented to the responsible committee, the European Parliament's Committee on Legal Affairs (JURI), on 17 November 2022. JURI committee members had until 30 November 2022 to table any amendments to the draft report. The JURI committee will now try to reach an agreement on the proposed amendments and is expected to vote on the final amendments to the Commission Proposal and adopt the mandate for negotiations by the end of March 2023. The negotiating mandate is expected to be voted on at plenary in the European Parliament in May 2023. Once the European Parliament has voted on and adopted its final report, it will engage with the Council and the European Commission in 'trilogues' to negotiate a final text of the CSDDD. The timing of the adoption of the CSDDD will depend on how soon the Parliament, the Council and the European Commission reach an agreement on the final text of the

65 Explanatory Memorandum, pages 4-5.
66 *Kamerstukken II* 2020/21, 35 761, nr. 2. See S.R.N. Fernando & S.B. Garcia Nelen, 'Het Wetsvoorstel verantwoord en duurzaam internationaal ondernemen', *Ondernemingsrecht* 2021/101.
67 Annex I to *Kamerstukken II* 2022/23, 35 761, nr. 10 contains a comparison table between the Dutch bill and the Commission Proposal.
68 *Kamerstukken II* 2022/23, 35 761, nr. 10, page 4.
69 https://www.mccg.nl/publicaties/codes/2022/12/20/dutch-corporate-governance-code-2022.
70 Principle 1.1 of the Dutch Corporate Governance Code.
71 Best Practice Provision 2.1.5 of the Dutch Corporate Governance Code.
72 Best Practice Provision 1.1.1 of the Dutch Corporate Governance Code.
73 Best Practice Provision 1.1.5 of the Dutch Corporate Governance Code.
74 Dutch Corporate Governance Code, page 10.
75 https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf.

CSDDD after May 2023. Given the significant differences between the Commission Proposal, the Political Compromise and the draft report of the JURI committee, these negotiations could take some time.

## 8. Conclusions

The ambitious EU initiative on sustainable corporate governance launched several years ago culminated in the Commission Proposal, which was more limited in scope, in particular in the field of corporate governance, but still quite ambitious in nature. With the Political Compromise, the proposals in the field of corporate governance have been deleted from the CSDDD. This seems to indicate that Member States are not willing to agree to any more far-reaching requirements at this point in time.

As a result, the CSDDD's key provisions seem to be moving away from the field of corporate law and towards the field of compliance, as they mainly oblige companies to put in place systems and processes to allow for appropriate reporting under the CSRD. The corporate governance of companies can ultimately also be impacted through reporting and compliance, but generally, these do not impact corporate governance in the strict sense, meaning the governance structure and the division of powers between the corporate bodies. Although the Political Compromise provides more clarity and legal certainty throughout the proposed CSDDD text, the continuing fragmentation of the corporate governance framework for companies operating in the EU market could hamper the efficient exploitation of the potential of the single market and, consequently, the transition to a sustainable economy.

In my view, the CSDDD could be more effective if we could create a level playing field by setting minimum governance standards on an EU-wide level. This could involve requiring companies to promote long-term, sustainable value creation and to take into account environmental and human rights impacts in their value chain, without linking this to director liability. In addition, these standards could provide more clarity around stakeholder engagement, by facilitating effective consultations with stakeholders that are potentially impacted by certain company decisions. Companies could be required to take the outcome of stakeholder consultations into account in their decision-making, but in the end, they should always have a choice to set aside this outcome in the interest of long-term, sustainable value creation. More clarity and guidance on these governance principles could create a level playing field, while still allowing flexibility for national governance standards.