LEGAL MEMORANDUM

ESG Guide
Overview of the ESG Regulatory Landscape

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This Legal Memorandum gives an overview of the Belgian and European ESG regulatory framework for Belgian companies and their directors who are subject to the current and upcoming ESG regulations.

It is part of the ESG Guide, together with the Euronext Guidelines to issuers for ESG Reporting and the List of ESG Key Performance Indicators. The ESG Guide is a toolkit to help companies and their directors understand the complexity of ESG issues in the context of sustainable value creation and risk management, as well as to help them determine, implement and communicate their sustainability strategy, in particular through ESG reporting.

Taking 'ESG' (Environmental, Social and Governance) or 'sustainability' factors into account when determining the company's strategy belongs to the principles of good governance set forth in the 2020 Belgian Code on Corporate Governance:

Principle 2.1: *The board should pursue sustainable value creation by the company, by setting the company's strategy, putting in place effective, responsible and ethical leadership and monitoring the company's performance.*

Principle 2.2: *In order to effectively pursue such sustainable value creation, the board should develop an inclusive approach that balances the legitimate interests and expectations of shareholders and other stakeholders."*

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I. INTRODUCTION

1. Increasing Importance of Corporate Sustainability

Regulatory reforms. In light of the objectives of the Paris Agreement and pursuant to the European Green Deal announced on 11 December 2019, the EU adopted a number of far-reaching reforms to ensure that companies play a significant part in achieving the objectives and contribute to sustainability. ESG requirements applicable to Belgian companies are continuously evolving and increasingly include sanctions for non-compliance, targeting companies and their directors.

Case law. National courts in Europe are also developing influential transnational case law, holding companies liable for harms to human rights and the environment caused by their activities. In ground-breaking cases in the Netherlands and the UK, courts have ruled that an EU-based parent company can be held accountable towards claimants residing outside of the EU for breach of a duty of care by its foreign subsidiary. Laws comparable to those on which these courts relied apply in Belgium. NGOs and activists are increasingly resorting to court litigation as a means to exercise impact and drive change, and similar cases could be brought in Belgian courts in the near future.

Investors. Corporate sustainability is not merely driven by compliance with laws. Both retail and institutional investors have also shown a growing interest in companies' ESG performance, not limited to compliance with legal rules but generally looking for "best in class" behaviors.

Banking institutions. Driven by prudential and consumer protection concerns, banks are reviewing their lending policies. In this respect, sustainability reporting has become a requirement for banking institutions to assess the climate risks of their lending, both physical and transitional, as well as to evaluate the sustainability of their business.

Rating agencies. ESG rating agencies are gradually influencing the composition of investment portfolios. These agencies are resorting to a new method: rather than conducting active research based on publicly available data, rating agencies are increasingly relying on ESG questionnaires. This is creating another incentive for companies to go beyond what is strictly legally required.

Other companies. Effective sustainable reporting will also be essential for smooth interactions between companies as, for the reasons outlined above, companies will demand transparency on the ESG performance of their partners throughout the value chain.

2. From a 'Duty to Disclose' to a 'Duty to Act'

Regulatory shift. Within the ESG context, European and national regulators are gradually shifting from a model based on transparency obligations ('**duties to disclose**') to one that creates substantive due diligence and other obligations ('**duties to act**'). Under the current rules, companies are 'merely' required to report and disclose, while EU- and Belgian-proposed legislations will require companies to act, *e.g.* conduct diligence on ESG impact throughout the company's entire value chain. Stakeholders, courts and regulators, in turn, will be able to hold companies and their directors legally accountable for adverse impact on the environment and social and human rights.

Two sides of the same coin. Duty to disclose and the duty to act are complementary. Stakeholders, investors and regulators, on the one hand, will only be able to assess the effectiveness of companies' actions to the extent comparable, reliable and relevant sustainability reporting is in place. Companies, on the other hand, will only be capable to appropriately disclose information, without engaging in greenwashing, to the extent that their actions are effectively and properly carried out.

II. DUTY TO DISCLOSE: ESG REPORTING

The key ESG reporting rules have been adopted based on the Action Plan for Financing Sustainable Growth published by the European Commission on 8 March 2018. Among the 10 actions set forth in the plan, the following are relevant:

Action 1	**Establishing an EU classification system for sustainable activities**
	EU Taxonomy Regulation
Action 7	**Clarifying institutional investors' and asset managers' duties**
	Sustainable Finance Disclosure Regulation (SFDR)
Action 9	**Strengthening sustainability disclosure and accounting rule-making**
	Non-Financial Reporting Directive (NFRD), to be replaced by the Corporate Sustainability Reporting Directive (CSRD)

In its Strategy for Financing the Transition to a Sustainable Economy, published on 8 July 2021, the European Commission reaffirmed that these Directives and Regulations will serve as 'building blocks' in this respect. An additional building block will consist of the set of investment tools in the form of benchmarks, standards and labels to facilitate developing sustainable investment solutions for companies, market participants and financial intermediaries, while preventing greenwashing.[1]

1. Non-Financial Reporting (NFRD)

a. General

The **Non-Financial Reporting Directive** (2014/95) (NFRD), which amends the Accounting Directive, was adopted in 2014. It imposes on certain large 'public interest entities' an obligation to publish a 'non-financial statement.' In Belgium, the NFRD's reporting obligations were implemented by the Law of 3 September 2017 on the disclosure of non-financial and diversity information by certain large companies and groups and are now embedded in the Belgian Code of Companies and Associations (BCCA). In its Sustainable Finance April 2021 Package the European Commission has announced that the NFRD will be replaced by the proposed **Corporate Sustainability Reporting Directive (COM(2021) 189)** (CSRD) and that 'non-financial' reporting will, accordingly, be rechristened 'sustainability reporting.' By 1 December 2022, the EU Member States will be required to transpose the sustainability reporting requirements of the CSRD into national law, which is expected to apply as from 1 January 2023. Until then, the ESG reporting regime of the NFRD will continue to apply.

b. Who must report?

Companies in-scope. The reporting requirements under the NFRD and the CSRD apply to companies governed by the law of an EU Member State. The table below outlines which companies must report ESG information under the NFRD (as implemented in Belgium) and the CSRD (according to the European Commission proposal):

[1] Most notably, the EU Climate Benchmarks Regulation (which entered into force on 30 April 2020) and the legislative proposal for a Standard on European Green Bonds (adopted by the European Commission on 6 July 2021) aim to provide greater transparency to financial market participants and facilitate alignment of their investment strategies with the EU's climate and environmental goals.

		Currently: NFRD	In the future: CSRD
Large[2]	**Listed**[3] **companies**	✓	✓
	Non-listed companies	X	✓
	Credit institutions (whether or not listed)	✓	✓
	Insurance companies (whether or not listed)	✓	✓
SMEs[4]	**Listed companies**	X	✓[5]
	Non-listed companies	X	X

Under the NFRD (as implemented in Belgium) "large" companies (or groups, on a consolidated basis) must have an average number of employees in excess of 500 over the relevant financial year, *plus* (alternatively) a balance sheet total exceeding EUR 17 million (the NFRD's strict minimum requirement is EUR 20 million) *or* a net turnover exceeding EUR 34 million (the NFRD requirement being EUR 40 million). By contrast, under the CSRD "large" companies (and groups) will be those that exceed on their balance sheet date at least two of three criteria: (i) a balance sheet total of EUR 20 million, (ii) a net turnover of EUR 40 million and (iii) 250 employees on average over the financial year. As a consequence of abolishing the strict minimum 500 employee threshold, a significantly higher number of Belgian companies would be required to report sustainability information under the upcoming CSRD.

It should be noted, however, that the personal scope of application of the CSRD might change significantly as compared to the Commission proposal. On the one hand, it remains to be seen whether the EU legislator will retain the proposed different treatment of listed and non-listed SMEs. On the other hand, the territorial scope of application might be extended significantly. In particular, at EU Counsel meetings, some Member States have advocated to extend the scope of new sustainability reporting requirements to non-EU companies that operate in the EU market and accordingly align the scope with the proposed scope for the EU Corporate Due Diligence and Corporate Accountability Directive (*see* III). As a result, all companies offering products or services in the EU would be subject to the same reporting and due diligence requirements.

[2] **Large**: for the purpose of the NFRD as implemented in Belgium, large companies are these which exceed an average number of employees of 500 over the relevant financial year, *and* (alternatively) a balance sheet total of EUR 17 million *or* a net turnover of EUR 34 million.

[3] **Listed**: under Belgian law, listed companies are companies whose shares, profit participation certificates or certificates relating to these shares are admitted to trading on a regulated market as referred to in article 3, 7° of the Law of 21 November 2017 on infrastructures for the markets in financial instruments and transposing Directive 2014/65/EU, are also defined as 'public interest entities' and have to report under the current NFRD as implemented in Belgium: companies whose bonds, other debt instruments, certificates relating to such securities or certain other securities as defined in article 2, 31° b) and c) of the BCCA are admitted to trading on a regulated market.

[4] **Listed micro-companies:** the CSRD will not apply to listed micro-companies *i.e.* companies which do <u>not</u> exceed at <u>least two of the three</u> following criteria: (a) balance sheet total: EUR 350 000; (b) net turnover: EUR 700 000; (c) average number of employees: 10.

[5] Excluding SMEs listed on a growth market or MTF.

Consolidated reporting. Parent companies of a 'large group' (*i.e.*, a group that, on a consolidated basis, exceeds the same thresholds to the definition of 'large company') must publish a consolidated non-financial statement with respect to the entire group. Subsidiaries of these companies are, in turn, exempt from ESG reporting requirements to the extent covered by their parent's consolidated statement.[6]

c. What to report?

ESG matters. A company must report the information necessary for an understanding of "*the development, performance, position and impact of its activity*" relating to at least the following **ESG matters**:

Environmental	**Social and Employee Matters**
Respect for Human Rights	**Anti-Corruption and Bribery Matters**

Currently, the non-financial statement that is required of companies that are subject to the NFRD must include a description of:

— the company's business model;

— its ESG policies and due diligence processes;

— the outcome of these policies and processes; and

— the principal risks related to ESG matters linked to its operations.

Non-financial KPIs. In addition, the company is required to report on the "*non-financial key performance indicators relevant to the particular business*." The ESG Platform has established a list of KPIs based on the existing frameworks to provide some guidance in preparing this information.

Pursue or explain. Under the current NFRD regime, where a company decides to adopt no policy in relation to one or more of the above ESG matters, the non-financial statement must provide a clear and reasoned explanation for it ('*comply or explain*' principle).

Double materiality. Companies should report information necessary to understand:

— how ESG matters affect their performance, position and development ('**financial materiality**' or the '**impact inwards**' perspective). This perspective is typically of primary interest to investors, lenders or other creditors; and

— how their activities impact ESG matters ('**environmental and social materiality**' or the '**impact outwards**' perspective). This addresses primarily the interest of other stakeholders, such as consumers, employees and civil society. It is also becoming increasingly important to investors willing to understand the ESG footprint of their investment portfolios.

Expected changes under the CSRD. The CSRD will significantly expand the mandatory content of companies' non-financial disclosures. These will include, among other things, the undertaking's plans to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limitation of global warming to 1.5 °C in line with the Paris Agreement and how these take into account the interests of the company's

[6] Under the CSRD, subsidiaries will be required to include a reference in its annual reports that the company is exempted from the sustainability reporting under the CSRD and a reference to the consolidated report of the parent company.

stakeholders.

In addition, the annual management report will have to describe:

- the targets related to sustainability matters set by the company and the progress made in achieving these targets;
- the role of the administrative, management and supervisory bodies with regard to sustainability matters; and
- the process carried out to identify the information included in the annual report, which shall take into account short, medium and long-term horizons.

As part of the above disclosures, companies shall include **forward-looking** *and* **retrospective** information, as well as **qualitative** *and* **quantitative** information.

The CSRD will apply a strict reporting requirement for all companies that fall within the Directive's scope, and therefore no longer on a '*comply or explain*' basis.

Safe harbor. Both the NFRD and the proposed CSRD create a 'safe harbor' for sustainability information relating to impending developments or matters in the course of negotiation. The board of directors can decide not to disclose such information, provided that it duly justifies that such information would cause serious harm to the company and that the non-disclosure does not prevent a fair and balanced understanding of the company's development, performance or position, nor of the impacts of its activity.

d. How to report?

Current flexibility. Under the NFRD, companies are able to choose between international, European or national frameworks to report non-financial information.[7] The large number of possible standards results in considerable difficulties in terms of comparability of the reported information.

Future mandatory EU-wide standards. For this reason, EU-wide sustainability reporting standards will become mandatory under the CSRD.[8] The European Commission will adopt:

- by 31 October 2022, a first set of standards specifying the information that companies should report in respect of the four main ESG matters (*i.e.* environmental, social and employee matters, respect for human rights and anti-corruption and bribery matters);
- by 31 October 2023, a second set of standards specifying complementary and sector-specific information, as well as specific sustainability reporting standards for listed SMEs.

Euronext Guidelines. Euronext Brussels published Guidelines to issuers for ESG Reporting, which set out best practices for issuers.[9] These guidelines can serve as a guide for directors under the current NFRD regime. Applying

[7] Recital No. 9 of the NFRD mentions, by way of example, the following frameworks: EU-based frameworks such as EMAS or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN "Protect, Respect and Remedy" Framework, the OECD Guidelines for Multinational Enterprises, the International Organization for Standardization's ISO 26000, the ILO's Tripartite Declaration of principles concerning multinational enterprises and social policy and the Global Reporting Initiative.

[8] In June 2020, the European Union has mandated the European Financial Reporting Advisory Group (EFRAG) to undertake preparatory works and provide recommendations on the elaboration of these EU-wide sustainability reporting standards; final report see EFRAG: Final Report – Proposal for a Relevant and Dynamic EU Sustainability Reporting Standard Setting (February 2021).

[9] The reporting process outlined in the Euronext Guidelines is based on the Global Reporting Initiative's standards for ESG reporting (GRI Standards).

these guidelines is voluntary; companies which do so may highlight it by including a statement in their annual report and/or their separate ESG report along these lines: "*We follow the Euronext guidance on ESG reporting of January 2020*."

EC Guidelines. At the European level, the European Commission has published two sets of guidelines pursuant to the NFRD: (i) Guidelines on non-financial reporting (2017), which set forth a methodology for preparing non-financial statements and provide some concrete examples, and (ii) Guidelines on reporting climate-related information (2019), which have a more specific scope and integrate the Recommendations of the Task Force on Climate-related Financial Disclosures (TFCD). These guidelines are non-binding.

European Single Access Point. Under the CSRD, sustainability information will have to be reported in a single electronic reporting format, will be digitally tagged and will be made available in the 'European Single Access Point.' The Single Access Point will provide access to all relevant information publicly disclosed by companies, which will enable investors and other stakeholders to access comparable sustainability information from companies across the EU. [10]

e. Auditing of sustainability information

NFRD. Under the NFRD as implemented in Belgium, there is no real audit requirement for ESG information. The statutory auditor (*commissaire/commissaris*) is only required to confirm that the non-financial statement contains the required information and is consistent with the annual accounts for the same financial year.

CSRD. One of the most notable changes under the CSRD is that, in order to prevent greenwashing, the statutory auditor will have to review the ESG information also from a substantive perspective, *i.e.* provide an opinion based on a 'limited assurance engagement.' The auditor will have to give an opinion on the compliance of the sustainability reporting with the reporting standards, the process carried out to identify the reported information and the KPIs reported (including those pursuant to the Taxonomy Regulation (*see* below 2 b)). According to the CSRD proposal, the EU Commission will adopt sustainability assurance standards. Member States should apply national assurance standards, procedures or requirements as long as the Commission has not adopted an assurance standard covering the same subject matter. The CSRD proposal also includes an option for Member States to allow any accredited[11] 'independent assurance services provider' to provide the required assurance on sustainability reporting.[12] This would open the market for independent sustainability assurance firms (other than the usual auditors of financial information). To enhance credibility, quality and consistency of the assurance services provided across the EU, all assurance service providers will be required to apply the same professional assurance standards, ethical requirements, including independence, quality framework and public oversight. In this context, independent assurance services providers, like auditors, cannot have been involved in setting up the processes and tools that are used to provide ESG information. The opinion of the statutory auditor or the independent assurance provider will have to be published together with the annual report, respecting the pertinent sustainability assurance standard. The Institute for Registered Auditors will provide further guidance to help auditors and companies to perform the engagement on ESG information, considering European and Belgian legal and regulatory requirements.

[10] The European Commission is expected to adopt a legislative proposal on the Single Access Point in Q3 2021.

[11] In accordance with Regulation (EC) No 765/2008.

[12] The NFRD already allowed the option for Member States to require that the information included in the non-financial statement or in the separate report be verified by an independent assurance services provider. The independent assurance requirement was not implemented in Belgium. Companies can, however, on a voluntary basis, engage the services of an independent expert to verify the reported non-financial information (independent 'limited assurance' report). From the 56 companies whose non-financial statements for financial year 2017 were included in the scope of the FSMA Study on the compliance by Belgian listed companies with the new requirement to publish a non-financial statement (2019), a total of nine included such an independent limited assurance report in their non-financial statement.

f. Sanctions

BCCA. Under Belgian law, breaches of non-financial reporting requirements can lead to fines for the members of the board of directors or supervisory board, from EUR 50 to EUR 10,000. In case of fraudulent intent, directors may face, in addition to such fines, one month to one year of imprisonment.

CSRD. In implementing the CSRD, Member States will have to provide for at least the following administrative measures and sanctions:

— cease or desist orders;

— administrative fines; and

— press releases identifying the company or individual responsible and the nature of the infringement. Sanctions will be applied taking into account all relevant circumstances, including financial position of the company or individual and profits gained or losses avoided.

g. Diversity information

Diversity policy. In parallel with the non-financial reporting obligations, the NFRD introduced separate reporting obligations regarding diversity of which the scope differs from the above-described requirements. Under Belgian law, all large listed companies[13] must include a diversity statement in their corporate governance statement. The statement must describe (a) the company's diversity policy in relation to the members of the board of directors, as well as to management and executive functions, and (b) its objectives, implementation and results.[14] The CSRD proposal specifies that the company should describe the diversity policy "*with regard to gender and other aspects*"[15] and allows companies to include this information as part of their sustainability reporting (instead of in the corporate governance statement).

Board composition. In addition to the above, all listed Belgian companies (whether large or not) must include in their corporate governance report an overview of the efforts made to ensure that at least one-third of the members of the board of directors / the supervisory board and the management board are of a different gender.[16]

[13] Regardless of whether the threshold of 500 employees is exceeded.
[14] Where a company does not pursue a diversity policy, the company must provide the reasons for not doing so in its corporate governance statement (*pursue or explain* principle).
[15] Such as age or educational and professional backgrounds.
[16] For this information, no *pursue or explain* principle applies, as such minimum is required pursuant to article 7:86 of the BCCA for the board of directors / the supervisory board and the management board of listed companies.

2. Classification (Taxonomy Regulation)

a. General

The EU **Taxonomy Regulation** (2020/852), adopted on 18 June 2020, creates a classification system for economic activities (and investments) that are deemed 'environmentally sustainable' (the so-called '**green list**').[17]

Environmental objectives. The Regulation defines six environmental objectives:

1.	**Climate Change Mitigation**	**4.**	**The Transition to a Circular Economy**
2.	**Climate Change Adaptation**	**5.**	**Pollution Prevention and Control**
3.	**Sustainable Use and Protection of Water and Marine Resources**	**6.**	**The Protection and Restoration of Biodiversity and Ecosystems**

Environmentally sustainable. An economic activity is deemed "environmentally sustainable" if it:

1. contributes substantially, or enables other activities to contribute substantially, to one or more of the six environmental objectives;
2. does not significantly harm any of the six environmental objectives;
3. is carried out in compliance with certain minimum safeguards;[18] and
4. complies with the Taxonomy Regulation technical screening criteria (*see* below b).

b. Interaction with the upcoming CSRD

Reporting requirements. The Taxonomy Regulation also imposes significant additional sustainability reporting requirements on companies subject to the NFRD (and in the future the CSRD). For non-financial undertakings, non-financial statements should include the proportion of turnover derived from products or services and capex and opex related to assets or processes associated with economic activities that qualify as environmentally sustainable. Similar tailored requirements will apply to credit institutions, investment firms, asset managers and insurance undertakings.

Delegated acts. On 6 July 2021 the Commission adopted the Disclosure Delegated Act specifying the content, methodology and presentation of the above information, which will commence to apply from 1 January 2022.[19] On 4 June 2021, the European Commission also adopted a delegated act concerning technical screening criteria determining the conditions under which an economic activity qualifies as contributing substantially to the two first environmental objectives (Climate Delegated Act). Another delegated act concerning the technical screening criteria for the remaining four environmental objectives (Environmental Delegated Act) will be adopted in by the end of Q2 2022. These standards will apply:

- as of 1 January 2022, with respect to environmental objectives one and two above.

[17] In Belgium, the Law of 4 July 2021 transposing European directives and implementing European regulations on financial matters amended the Financial Supervision Law of 2 August 2002, the IORP Law of 27 October 2006 and the Insurance Law of 4 April 2014, *inter alia*, to designate the FSMA as competent supervising authority to ensure compliance with the Taxonomy Regulation.

[18] The minimum safeguards shall be procedures implemented by a company carrying out an economic activity to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

[19] The Disclosure Delegated Act is currently under scrutiny by the European Parliament and the European Council.

- as of 1 January 2023, with respect to the environmental objectives three to six.

CSRD. A number of companies currently not subject to the NFRD will fall under the CSRD and therefore have to comply with these reporting obligations when the CSRD enters into force. Also, based on the CSRD proposal, information disclosed pursuant the Taxonomy Regulation will have to be audited, digitally tagged and made available in the European Single Access Point.

3. Sustainable Finance Disclosure (SFDR)

a. General

The **Sustainable Finance Disclosure Regulation** (2019/2088) (SFDR) started applying to EU asset managers and financial advisers on 10 March 2021. The SFDR sets out a number of detailed ESG website disclosures, pre-contractual disclosures and periodic reporting to investors.[20]

Sustainable investment. The SFDR defines the notion of 'sustainable investment' as an investment in a company (i) engaging in activities that contribute to an environmental or social objective, provided that the investment does not significantly harm any such objectives and (ii) following good governance practices. Disclosures on sustainable investments must be prepared with reference to the criteria set forth in the Taxonomy Regulation (*see* above 2 a).

b. Interaction with the upcoming CSRD

CSRD. The SFDR targets financial markets participants who, as a consequence, need specific sustainability information from the companies they invest in, while some of them are not subject to the NFRD. This information gap will be remedied under the CSRD.

III. DUTY TO ACT: CORPORATE DUE DILIGENCE AND ACCOUNTABILTY

1. Evolving Regulatory Framework

EU. The seeds of the upcoming EU legislation with respect to supply chain due diligence were planted in the European Commission Action Plan for Financing Sustainable Growth.

Action 10	**Fostering sustainable corporate governance and attenuating short-termism in capital markets**
	Directive on Corporate Due Diligence and Corporate Accountability

The Commission carried out consultations with stakeholders to assess the need to:

— require boards to develop and disclose a sustainability strategy, including due diligence throughout the supply chain and measurable sustainability targets; and

— clarify the rules according to which directors are expected to act in the company's long-term interest.

The European Parliament adopted two Resolutions (on 17 December 2020 and on 10 March 2021) formally requesting the Commission to propose legislation in this respect. The annex to the second Resolution includes recommendations to the European Commission and a draft text for a Directive on Corporate Due Diligence and

[20] In Belgium, the Law of 4 July 2021 transposing European directives and implementing European regulations on financial matters, amended the Financial Supervision Law of 2 August 2002, the IORP Law of 27 October 2006 and the Insurance Law of 4 April 2014, *inter alia*, to designate the FSMA as competent supervising authority to ensure compliance with the SFDR.

Corporate Accountability.

Belgium. In parallel, a proposal was introduced on 2 April 2021 in the Belgian Parliament for a Law imposing a duty of care and accountability on all enterprises, throughout their value chain.

2. An EU Corporate Due Diligence and Corporate Accountability Directive?

a. General

Draft Directive. The new directive is expected to impose a general duty of care, and significant supply chain due diligence obligations, as well as a specific corporate accountability regime for breaches. The summary below is based on the proposal set forth in the recommendations from the European Parliament, which has, however, received criticism and will likely be amended by the European Commission.

- a formal proposal for a directive by the EU Commission is expected in Q4 of 2021.

Companies in-scope. The scope of application would be remarkably wide and cover large companies, listed SMEs, and SMEs operating in high-risk sectors—whether these companies are established in the EU or elsewhere, as long as they sell goods or provide services within the EU market.

b. Duty of care and value chain due diligence obligations

Duty of care. The upcoming corporate duty of care regime will establish minimum requirements to identify, disclose, monitor, address and remediate the 'potential or actual adverse impacts' of a company's activities on:

The Environment	Human Rights	The Good Governance of States

The corresponding 'duty of care' shall be individually determined depending on the sector, size, capacity, resources and leverage of the company, and the length of its value chain.

Impact mapping of value chain. The proposed value chain due diligence obligation would first of all consist of an impact mapping exercise. Companies should make "*all efforts within their means*" to identify and assess the adverse impacts of their operations on ESG matters, throughout their entire '**value chain**', meaning all activities, operations, business relationships (including sub-contractors) and investment chains, including upstream and downstream (*i.e.*, suppliers as well as customers).

Due diligence strategy. Secondly, adverse impacts identified must be addressed through a due diligence strategy:

— disclosing information about the value chain;

— specifying the adverse impacts identified;

— establishing proportionate policies and measures to prevent, cease or mitigate adverse impacts; and

— setting forth a prioritisation strategy when adverse impacts cannot be addressed at the same time.

Stakeholder engagement. Stakeholders[21] will be entrusted an important role in shaping the due diligence strategy. Companies will be required to:

[21] **Stakeholders**: the European Parliament draft defines stakeholders very broadly, including in essence workers, local communities, children, indigenous peoples, citizens' associations, trade unions, civil society organizations and shareholders.

— carry out <u>discussions with relevant stakeholders</u> when establishing and implementing this strategy; and

— provide '<u>a grievance mechanism</u>' allowing them to voice concerns (possibly anonymously) regarding the existence of an adverse impact on ESG matters.

Disclosure obligations. Companies will be required to upload their due diligence strategy in the European Single Access Point (*see* above d) through standardized templates and to report on reasonable concerns identified through the grievance mechanism, including by reporting regularly on the progresses made.

c. <u>Corporate accountability</u>

Civil liability and jurisdiction. The draft text of the Directive provides that Member States should put in place an effective liability and remediation regime. Jurisdiction of national courts would also be considerably extended, allowing them to hold liable non-EU companies subject to the Directive for damages caused by their subsidiaries or suppliers located in third countries.

Administrative and criminal sanctions. National supervisory authorities would be empowered, based on their own investigation or concerns raised by stakeholders, to impose administrative sanctions for sustainability damages. This would include fines calculated on the basis of a company's turnover, as well as the exclusion of a company from future public procurement, State aid or public support schemes. Repeated infringement committed intentionally or with serious negligence may result in criminal prosecution.

3. Belgian Duty of Care and Corporate Accountability Law?

Belgium. On 2 April 2021, a legislative proposal for a Law imposing a duty of care and accountability on all enterprises throughout their value chain was introduced in the Belgian Parliament. The 13roposa lis inspired by the French *Loi du 27 mars 2017 relative au devoir de vigilance des sociétés.*[22] The proposal has been 'delegated' and is discussed in the competent Parliamentary Commission as of September 2021.[23]

Duty of Care. The duty of care would apply to all companies established or active in Belgium. A *plan de vigilance / zorgplan* would serve as a basis for due diligence on the entire value chain. The plan would largely correspond to the due diligence strategy as proposed by the European Parliament (*see* above 2 b), including, for example, an obligation to establish grievance mechanisms and to disclose the plan in the annual report.

Civil liability regime. The proposed law would create a specific civil liability regime for breaches of the duty of care, with a reversal of the burden of proof in favor of the victim (*i.e.,* the companies would have to prove that all necessary measures to prevent violations were adopted). Class actions would be allowed, with representation by NGOs, trade unions or civil society organizations. Belgian courts would also have jurisdiction to hold any company active in Belgium liable for a breach of its duty of care, even if such breach occurred within part of its value chain outside of Belgium.

[22] The legislative proposal also refers to similar legislation adopted or proposed in other countries, for example, the UK Modern Slavery Act 2015—Section 54 Transparency in supply chains, the Australian Modern Slavery Act of 2018, The Dutch 2019 *Wet zorgplicht kinderarbeid,* the German 2021 *Initiative Lieferkettengesetz, etc.*

[23] On 2 July 2021, the Parliament has also formally requested the Council of State for its advice on the legislative proposal.

IV. DEVELOPMENTS ON THE HORIZON

The ESG regulatory landscape is evolving rapidly and will continue to develop. This Overview will be updated from time to time to reflect these developments.

Corporate Sustainability Reporting Directive

- The CSRD is expected to be adopted by in early 2022.
- By 31 October 2022, a first set of standards, specifying the information to be reported in respect of the four main sustainability matters shall be adopted by the European Commission.
- By 1 December 2022, the EU Member States will be required to implement the CSRD.
- Sustainability reporting obligations, as implemented, will start applying for financial years starting on or after 1 January 2023.
- By 31 October 2023, a second set of standards, specifying complimentary and sector-specific information, and specific sustainability reporting standards for listed SMEs, shall be adopted by the European Commission.
- As of 1 January 2026, listed SMEs will be required to report sustainability information.

Taxonomy Regulation

- As of 1 January 2022, the Disclosure Delegated Act specifying the content, methodology and presentation of information to be disclosed under article 8 of the Taxonomy Regulation will begin to apply.
- As of 1 January 2022, the technical screening criteria laid out under the Taxonomy Regulation's environmental objectives one and two will begin to apply.
- As of 1 January 2023, the technical screening criteria laid out under the Taxonomy Regulation's objectives three to six will begin to apply.

Sustainable Finance Disclosure Regulation

- In February and March 2021, the European Supervisory Authorities (ESMA, EBA and EIOPA) published two sets of draft technical standards that would specify the content and format of the disclosures to be made by financial sector firms subject to the SFDR, proposing that (if and once approved) these become applicable starting in 2022.

Corporate Due Diligence and Corporate Accountability

- The Belgian legislative proposal for a Law imposing a duty of care and accountability on all enterprises throughout their value chain is discussed in the competent Parliamentary Commission as of September 2021.
- The European Commission is expected to publish a legislative proposal for a Corporate Due Diligence and Corporate Accountability Directive in Q4 2021.

Other

- On 21 April 2021, the European Parliament and Council reached a provisional agreement on the European Climate Law (Regulation 2018/1999). The text is currently being prepared for formal adoption.
- In Q3 of 2021, the European Commission is expected to adopt a legislative proposal on the European Single Access Point.
- The European Commission proposal for a European Green Bond Standard (Regulation 2021/0191) is expected to be adopted by the European Parliament and the European Council in 2022.
- By the end of 2023, the European Commission will report on its Strategy for Financing the Transition to a Sustainable Economy.

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