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FOSTERING SUSTAINABILITY IN THE NETHERLANDS: COMPANIES, OWNERSHIP, ENGAGEMENT, FINANCE AND PRODUCTS

WP 2022-21

Christoph Van der Elst

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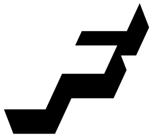

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Abstract

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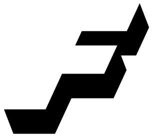

Fostering Sustainability in the Netherlands: Companies, Ownership, Engagement, Finance and Products

Christoph Van der Elst

I. Introduction

Sustainable growth and development have been since long time on the agenda of various fora of the Dutch society. When the OECD started to develop its thirty green growth indicators, the Netherlands was the first country to apply this set of indicators and showed its development of twenty of these indicators. Corresponding with the OECD development of its thirty green growth indicators, the Netherland was the first country to apply these OECD indicators, with a demonstrated development of twenty indicators.[1] The Netherlands provided its progress in indicators such as water use intensity, energy efficiency, etc. since the late 1980s or 1990s.[2]

More recently, awareness to the importance of sustainable growth is soaring everywhere in the Dutch society. For example, the new proposal by the legislature for a law on undertaking internationally responsible and sustainable was launched in March 2021 requiring companies' awareness that their activities can have adverse effect on the environment or human rights and ordering reasonable measures preventing and or limiting these effects and even stop the activities if these effects could not reasonably be restricted.[3] In a broader perspective, the Dutch legislator enacted in 2019 the Law on Climate that provides in article 2 in "a framework for the developments of policy aimed at irreversibly and step-by-step reduction greenhouse gas emissions in the Netherlands, to a level that will be 95% lower in 2050 than in 1990, in order to prevent global warming and limiting the change of the climate. To achieve this target for 2050, our Ministers responsible for climate change and emissions aim to achieve a 49% reduction in greenhouse gas emissions by 2030 and a fully CO_2-neutral electricity production by 2050." Thereto a climate plan was developed providing the policy which would result in this reduction goals.[4] The plan requires the government to develop measures across all levels of Dutch society. Further, the Dutch judiciary is using its powers to emphasize the role of the government as well as companies to take appropriate action in the fight against climate change. Next to the famous Shell case[5], in the Urgenda case the Dutch Supreme Court confirmed in 2019 the court of appeal's decision that the State is bound to reduce the greenhouse gas emissions by the end of 2020 by at least 25% compared to the emissions in 1990, based on the fact that the emissions provide a real and immediate risk to people's live or

[1] *OECD*, Towards Green Growth: Monitoring Process, Paris, OECD Publishing, 2011, 17.
[2] *Statistics Netherlands*, Green Growth in the Netherlands, The Hague, CBS, 2011, 52 p.
[3] Wet verantwoord en duurzaam internationaal ondernemen, Kamerstukken II 2020/21, 35761, https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2021Z04465&dossier=35761#wetgevingsproces.
[4] Ministry of Economic Affairs and Climate, *Klimaatplan 2021-2030*, April 2020, 60 p., https://open.overheid.nl/repository/ronl-c66c8a00-ac14-4797-a8ea-973a98c5bee0/1/pdf/Klimaatplan%202021-2030.pdf (last accessed 20 October 2022).
[5] See Section II.2.

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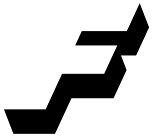

welfare and the Dutch state is aware of this risk, therefore being in breach with the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[6]

The focus of this contribution is on several European regulatory developments in sustainable finance and its transposition and implementation in the Netherlands. The second section discusses the embedding of sustainability in the Dutch corporate governance framework. The stakeholder approach has long been adopted into Dutch company law, however, recently, pressure from various stakeholders that sustainability be included in the execution of the duties of the board of directors is increasing. The third section addresses the sustainability requirements of the financial entities. Section four engages the state of the art of the (disclosures of the) financial products sustainability specifications. The AFM-studies show that significant progress has been made to adequately inform the financial end-investor, while also that the quality of information (and the sustainable financial investment process) can be further increased. However, it had been found that not all end-investors can fully and sufficiently qualify the disclosed information. Section five provides in a brief conclusion.

II. Sustainability in the Dutch Corporate Governance Scene

1. The Dutch Corporate Governance Model

Book 2 of the Dutch Civil Code (DCC) provides the statutory legal framework for companies, their boards and their shareholders. The DCC distinguishes two types of companies divided by shares: public limited liability companies (naamloze vennootschappen or NV) and private limited liability companies (besloten vennootschappen met beperkte aansprakelijkheid or BV). Since beginning of the 70s the private limited liability company became very successful. While there are many differences between the two forms (open versus closed, capital requirement differences, etc.), as both are familiar with the notion of capital, shares and shareholders, the choice between the one and the two-tier board structure and the division of powers between board and shareholders are very similar.

Larger Dutch companies typically have a two-tier board structure with a management board (in Dutch: *Raad van Bestuur*) and a supervisory board (in Dutch: *Raad van Commissarissen*). Following the 1949 Dutch Supreme Court's decision in *Doetinchemse IJzergieterij*[7], and the following enactment of Articles 2:129 and 2:239 DCC the management board controls and oversees the management of the company and the company's strategy. Pursuant to articles 2:140 and 2:250 DCC, the supervisory board is responsible for exercising supervision over the management and policy of the management board and over the general course of business of the company and its enterprise.[8] In the two-tier board system, the supervisory board is appointed by the general meeting of shareholders (AGM) pursuant to articles 2:142 jo 2:144

[6] Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007, an English version of the Court's decision can be found here: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

[7] Supreme Court 1 April 1949, Nederlands Juristenblad, 1949, 465

[8] *de Brauw*, Strategiebepaling bij beursvennootschappen, activistische aandeelhouders en bescherming in het Nederlandse stakeholdermodel, Ondernemingsrecht. 2022, 141-155.

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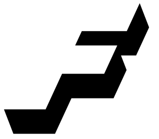

DCC[9], and has the legal duty to appoint and to remove members of the management board under the *structuurregime* according to article 2:162 DCC.[10] The AGM has the right to remove the directors that are appointed by the AGM at any time and without reason following article 2:134(1) DCC.[11]

Nevertheless, in the famous *Forumbank* case (Supreme Court 21 January 1955, *NJ* 1959, 43), the Supreme Court decided that the AGM is not empowered to give instruction to the board of directors,[12] nor is the general meeting allowed to exceed the limitation of its powers.[13] The Supreme Court specified the division of powers in the ABN-AMRO case (and similarly in the ASMI[14] and Boskalis/Fugro[15] case) as follows:

(i) Determining the strategy of the company and its related enterprise is in principle, a matter for the board of directors, (ii) the supervisory board monitors this board matter and (iii) the general meeting of shareholders can provide its opinion related to the determination of the strategy through the use of law and articles of association provided mechanisms. In general, the latter means that the board of a company is accountable for its policy to the general meeting of shareholders however it is not obliged to involve the general meeting of shareholders in advance in its decision-taking process for those acts for which the board of directors is authorized, unless the law or the articles of associations provide otherwise.[16] With the addition of 'in principle' in the *ABN AMRO*-ruling, the Supreme Court left some room for uncertainty.[17] Resolving this uncertainty, the Dutch Parliament considered the power to determine the policy and the strategy pivotal for the board of directors and incorporated this rule in article 129 (1) DCC in 2021, but only for stock exchange listed companies. It remains debated why the Dutch Parliament codified this power for the listed companies only.[18]

The (management and supervisory) board of both company types must take the interest of the company and its affiliated enterprise into account, including the interests of all stakeholders and shareholders (art. 2:129 (5)/2:239 (5) DCC). Directors of companies are responsible for the

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[9] In addition, the employees' council has the binding right to nominate one-third of the members of the supervisory board (article 2:158(6) DCC).

[10] And, since the Board and Governance Act, ex article 2:164a DCC for the one-tier board system.

[11] However, one may note that all resolutions must be in accordance with a standard of reasonableness and fairness following article 2:15(1) DCC.

[12] The articles of association can provide in a right of instruction of a body of the corporation regarding the general policy, which is to be pursued in matters defined in the articles of association (article 129 (4)/239 (4) DCC). For the public limited liability companies, only general instructions can be issued.

[13] Until 2013, the two-tier board structure was mandatory for NVs that classify as a 'large' company under the so-called Dutch *structuurregime* (*see* article 2:153(2) DCC). With the introduction of the Dutch Board and Governance Act (*Staatsblad* 2011, 265) which went into effect on January 1, 2013, Dutch companies may determine in their articles of association whether they follow a one-tier or a two-tier board structure. Nonetheless, many large Dutch listed companies still use the two-tier board structure.

[14] Supreme Court 9 July 2010, Nederlands Juristenblad, 2010/544.

[15] Supreme Court 20 April 2018, Rechtspraak van de Week, 2018/532.

[16] Supreme Court 13 July 2007, Jurisprudentie Ondernemingsrecht, 2007/178, note *Nieuwe Weme*.

[17] *Assink*, Kanttekeningen bij Boskalis/Fugro, Maandblad voor Ondernemingsrecht, 2018, 183-197.

[18] *Van Olffen*, Wetsvoorstel wettelijke bedenktijd beursvennootschappen, Ondernemingsrecht, 2020, 50-58.

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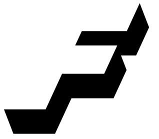

proper performance of their tasks, including the general conduct of the affairs of the company and the general financial policy (art. 2:9 DCC). In addition, the company and all corporate incumbents involved in its organization must behave towards each other in accordance with what is required by standards of reasonableness and fairness (art. 2:8 DCC). In the *Cancun* case the Supreme Courts addressed it as follows: "In the performance of their duties, the directors must, partially based on the provisions of art. 2:8 Civil Code, exercise due care regarding the interests of all those involved in the company and its business. This duty of care may entail that when serving those interests, the interests of all those involved in the company and its business are not unnecessarily or disproportionally harmed."[19]

In addition to statutory corporate law, Dutch listed companies must also consider the 2016 Dutch Corporate Governance Code (DCGC 2016). While the Code does not impose binding obligations but, in accordance with European rules, postulates a mandatory comply-or-explain regime. The DCGC 2016 embodies 'long-term value creation' as its very first key principle. 'Long-term value creation' requires management board members and supervisory board members:[20]

"to act in a sustainable manner by focusing on long-term value creation in the performance of their work. Long-term sustainability is the key consideration when determining strategy and making decisions, and stakeholder interests are taken into careful consideration […]."

In addition, Principle 1.1.1, section vi, mentions when developing the company's strategy that attention should also be paid to: "any other aspects relevant to the company and its affiliated enterprise, such as the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery"[21]. The code is being revised and the 2022 draft code refers explicitly to an ESG strategy in its proposed principle 1.1.1: "The management board should develop a view on long-term value creation by the company and its affiliated enterprise and should formulate a strategy in line with this. This should include an ESG strategy (the Environmental, Social & Governance aspects of running a business), for which the management board should formulate specific objectives." The final 2022 Code is expected to be published soon.

2. Sustainability and the Board of Directors

The Dutch model ring-fences the board of directors for setting the strategy and protecting the company against *so called* short-term shareholder activism, but it also requests firm commitment to many stakeholder interests. For example, the employees play a significant indirect role in the election of members of the supervisory board of large companies submitted to the "structuurregime". The employees' council is informed of the candidates for a supervisory board membership and the council recommends 1/3 of the members of this board.[22]

[19] Supreme Court 4 April 2014, Nederlands Juristenblad, 2014/286, note *van Schilfgaarde*.
[20] The Code can be found here: https://www.mccg.nl/english.
[21] Part of which is also developed in anti-money laundry (AML) regulations.
[22] Article 2:158 DCC.

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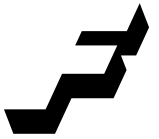

Vis-à-vis the requirements of corporate sustainability which the board should also take care of, the recent Shell court case is very influential. The District Court of The Hague asserted that according to Dutch tort law, companies must comply with the Paris climate goals vis-à-vis Dutch citizens.[23] In its dictum it stated: "orders Royal Dutch Shell, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels."

The court clarifies the different emission scopes as well as the distribution of scope emissions of Royal Dutch Shell (RDS):

"2.5.4. RDS reports on greenhouse gas emissions on the basis of the World Resources Institute Greenhouse Gas Protocol (GHG Protocol). The GHG Protocol categorizes greenhouse gas emissions in Scope 1, 2 and 3:

- Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organization;
- Scope 2: indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam, or heating for its operations;
- Scope 3: all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas.

2.5.5.RDS' reporting method and Shell's information on greenhouse gas emissions are available, inter alia, in their annual reports, Sustainability Reports, the Carbon Disclosure Project (CDP) – an international not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions – and on the website of the Shell group. In 2018, RDS reported that 85% of the Shell group emissions were Scope 3 emissions."

The case is pending in the court of appeal, and it is currently unclear how the court of appeal will decide. Notwithstanding the appeal, the case is intensively being discussed, criticized as well as praised in the Netherlands.[24] It requires the board of directors (in this case of the parent company) to consider in the development of the strategy of the company's general sustainability issues.[25] Recent research shows that current sustainability goals of companies significantly differ, and planetary boundaries are not yet part of most corporate policies.[26]

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[23] Court The Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (English translation).

[24] See for an overview *X*, De klimaatzaak tegen Shell, Deventer, Kluwer, 2022, 75 p.; *Spier*, SDGs: tussen droom en daad: een processie van Echternach, Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur, 2021, nr. 6, 176-187.

[25] *van Calker* and *Steenkamp*, Het Shell-vonnis en bange bestuurders, Ondernemingsrecht, 2022/31; *Kastelein*, Klimaatzaak tegen Royal Dutch Shell dwingt ook kapitaalverstrekkers tot een actieve(re) rol bij verduurzamingstransitie, Tijdschrift voor Financieel Recht, 2021, nr. 7, 225-228; *Hoekstra*, RDS-Milieudefensie; de op-maat naar stakeholder litigation op het gebied van duurzaamheid, Tijdschrift voor Financieel Recht, 2021, nr. 8/9, 294-303.

[26] *van Aartsen*, *Olaerts* and *Bauer*, De verankering van duurzaamheid in Nederlandse beursgenoteerde ondernemingen, Ondernemingsrecht, 2022, 555-567.

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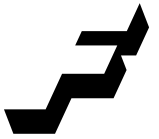

Further, a large group of corporate law scholars proposes to introduce into Dutch law an explicit provision of responsibility of the board of directors to act as a responsible company.[27] The logic behind the proposal is that the company is a responsible corporate citizen and the board of directors should incorporate this responsibility. Thereto the group suggest amending the current legal behavioral guideline of the board of directors in article 2:129 (5) Dutch Civil Code, which state that: "the Directors shall, in the performance of their duties, direct their attention to the interests of the corporation and of its enterprise". The experts suggest adding to the guideline that "the directors must make sure that the company is participating in our society as a responsible company". The supervisory board must monitor that the board of directors performs this duty adequately. This responsibility covers a healthy environment and climate but covers also topics such as remuneration ratios, diversity, tax responsibilities, etc. The corporate lawyers clarify that the responsible company takes "responsibility towards its employees and is responsible for the consequences of its actions in the communities in which it operates and for the consequences of its actions for the environment and the climate. The goal of long-term profitable continuity must be embedded in this broad responsibility." The experts believe that a stronger commitment of the board of directors of companies is preferable to an alternative distribution of powers in companies, especially to increasing the powers of the shareholders.[28]

3. Sustainable ownership and governance

The shareholders' position, role and involvement in the Dutch corporate governance scene looks resembles a pendulum. With the introduction of the structure regime in the 1970s in the Netherlands, an important part of the powers of the general meeting of shareholders shifted to the supervisory board who elected the board of directors and elected its own members as well: "it elevated the supervisory and management boards to a legal position that made them immune to shareholder criticism".[29] Since the 1990s, there has been a shift towards a broader and intensified involvement of shareholders in the governance of Dutch companies. The general meeting of shareholders must approve the decisions of the board of directors, which significantly changes the identity and characteristics of the company, for example in actions such as the acquisition and disposal of interests in other companies, which constitutes at least one third of the amount of assets.[30] The general meeting must also approve the remuneration policy of the board of directors[31]. Further, the Dutch legislator increased reporting requirements and corporate governance standards that the (supervisory) boards must comply with. Next, each shareholder holding 1% or more of the capital could add an item to the agenda of the meeting.[32] In the first decade of the new millennium, active shareholders, especially several hedge funds, pursued significant reforms of listed Dutch companies, which should, according to these shareholders, increase shareholder value despite claims from the board of

[27] *Winter* e.a., Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer, Ondernemingsrecht, 2020, 471-474.
[28] *Winter* e.a., Naar een algemene zorgplicht voor bestuurders en commissarissen, Ondernemingsrecht, 2021, 31-39.
[29] *Calkoen*, The One-Tier Board in the Changing and Converging World of Corporate Governance, Deventer, Kluwer, 2012, 322.
[30] Art. 2:107a Dutch Civil Code.
[31] Art. 2:135 Dutch Civil Code.
[32] Old art 2:114a Dutch Civil Code.

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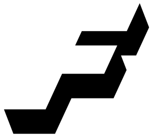

directors that such reform would be contrary to the interest of the company.[33] It raised concerns that the balance of power shifted too much towards the shareholder community. Consequently, in more recent years several shareholder oriented legal changes were scaled back, for example the right to put items on the agenda of the general meeting for which the threshold for shareholding increased to 3% from the former 1%.[34] Besides, the courts were holding back some of the requests of the shareholders, like in the famous *Akzo Nobel* case.[35]

This recent development of more and less shareholder rights must also be positioned in the evolution of shareholder ownership of Dutch companies, shareholder voting, and shareholder engagement. It should be noted that Dutch listed companies have, on average, a more dispersed ownership structure than other Western European countries such as France, Germany, and Belgium. According to a study of Lafarre the free float of Dutch large and midcap companies is more than 80% and only a few have less than 50% of the shares widely dispersed.[36] In less than 20% of the Dutch companies the largest shareholders hold more than 50% of the equity. In the three other mentioned Western European countries the number of companies with a controlling shareholder is around 40%.[37]

Many institutional investors are keen to vote at general meetings of the investees, executing their fiduciary duties vis-à-vis their beneficiaries. The increase in the institutional investors' shareholder base of many Dutch companies resulted in an increase of the average attendance of shareholders in the general meetings of Dutch companies to more than 75%, which represents an increase of more than double the percentage in 2005.[38]

There is currently a discussion in the Netherlands regarding the voting item "say on climate". Some scholars make a plea to have this topic tabled as a recurring voting item, similar to the vote for the financial report. With the sustainability report, the company is accountable for its sustainable behavior. The director of Eumedion, representing **the interests of over fifty large institutional investors, in the field of corporate governance and sustainability, made a plea for a binding vote on the sustainability report.[39] According to Eumedion, upholding arguments by many companies stating that one single vote on the sustainability strategy would not be appropriate. Therefore, it expects that the sustainability report in accordance with the soon to be expected Corporate Sustainability Reporting Directive shall be submitted to a vote.[40] De Jongh argues for an advisory vote: it is the board of directors that**

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[33] *Van der Elst, De Jong* and *Raaijmakers*, Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen, SER Onderzoeksrapport, 2007, 129 p.

[34] Art. 2:114a Dutch Civil Code.

[35] See for a short overview of this case, *Lafarre*, Shareholder Voting and Engagement in the Netherlands: The Dutch Institutional Approach, in *Kaur*, *Xi*, *Van der Elst* and *Lafarre* (eds.), Shareholder Engagement and Voting, Cambridge, Cambridge University Press, 2022, 405-406.

[36] *Lafarre*, Shareholder Voting and Engagement in the Netherlands: The Dutch Institutional Approach, in *Kaur*, *Xi*, *Van der Elst* and *Lafarre* (eds.), Shareholder Engagement and Voting, Cambridge, Cambridge University Press, 2022, 411.

[37] *OECD*, Corporate Governance Factbook 2021, Paris, OECD, 25.

[38] Eumedion noticed that in companies with a shareholder base that consists of many retail investors, attendance is much lower (*Eumedion*, Evaluation of the 2022 AGM Season, 4, https://www.eumedion.nl/clientdata/215/media/clientimages/Evaluation-AGM-season-2022-def.pdf?v=221025104107).

[39] *Abma*, De duurzaamheid van de algemene vergadering, working paper, juli 2022, 13 p.

[40] *Abma*, Evaluation of the 2022 AGM season, working paper, 2022, 12, https://www.eumedion.nl/publicaties.html.

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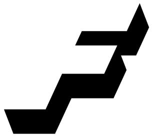

is responsible for setting the strategy, including the sustainability strategy.[41] **Others reject the any (additional) power for the shareholders in this respect, largely arguing that (setting) the sustainability (goals) of the company belongs to (the strategy of) the board of directors. At best, shareholders can request any of the ESG-criteria as an item for discussion at the general meeting.**[42] **A few companies effectively tabled sustainability as a discussion item for the general meeting, either initiated by the board**[43] **or the shareholders.**[44] **Royal Dutch Shell, although having its headquarter in London, organizes** a yearly vote on a sustainability related item (The Shell Energy Transition Strategy). In addition, since 2016 a group of shareholders adds to the agenda the voting item of setting and publishing targets consistent with the goals of the Paris Climate Agreement and publish targets that are consistent with the goal of the Paris Climate Agreement. The voting item gradually received more yes votes over the years, with up to 30% of the votes in 2021, while the management voting item on the Transition Strategy received a large majority of the votes. Further, it also becomes common practice that the auditors of Dutch companies review the climate-related disclosures and risks, although most are silent in their opinion.[45]

Notwithstanding this discussion, the current practice is that in the general meeting of Dutch companies sustainability is only indirectly being discussed. Companies must provide in their annual report information on sustainability and these reports of the (supervisory) board are an item of discussion. The current reporting practices of climate-related risks are heterogeneous and only a small minority is compliant with the Task Force on Climate-Related Financial Disclosures (TFCD).[46] **Further, it has become more and more common that ESG-criteria are being used for setting the (variable) pay of the top executives. Both the remuneration policy and the remuneration report are (recurring) voting items.**

In November 2022 the Dutch Authority for the Financial Markets (AFM) issued recommendations for the future reporting practices of large stock exchange listed companies.[47] The AFM expects that companies' non-financial statements will be coherent and complete related to environment, people, and corruption. The supervisor will assess how companies present their net-zero objectives and scope-3 disclosures. Companies must explain explicitly and specifically how they intend to achieve their net-zero or CO2-neutral objectives and the contributions of measures taken, including uncertainties in effectiveness and feasibility. The AFM also explicitly supports ESMA's priorities in non-financial reporting, including transition

[41] *de Jongh*, Say on Climate: Over negatieve externe effecten en verdeling van bevoegdheden, Ondernemingsrecht 2021, 696-703.
[42] *van Olffen* and *Breukink*, Say on what's next, Ondernemingsrecht, 2022, 110-115.
[43] Like at ING.
[44] **Like at LyondellBasell in 2021. In this case the shareholders asked to table the climate change commitment of the company and an annual advisory vote on its climate strategy. The board rejected any kind of vote.**
[45] *Abma*, Evaluation of the 2022 AGM season, working paper, 2022, 12-15, https://www.eumedion.nl/publicaties.html.
[46] *Abma*, Evaluation of the 2020 AGM season, working paper, 2020, 18-19, https://www.eumedion.nl/publicaties.html.
[47] *AFM*, Waar moeten beurgenoteerde ondernemingen op letten bij hun verslaggeving over 2022, 7 November 2022, https://www.afm.nl/nl-nl/professionals/nieuws/2022/november/aandachtspunten-verslaggeving-2022.

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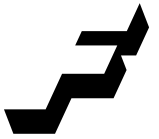

plans and disclosures on taxonomy eligibility.[48] The AFM already refers to the implementation of the proposed **Corporate Sustainability Reporting Directive (CSRD), which will require all large companies to publish regular reports on their environmental and social impact activities.**[49]

Another important difference of the Dutch ownership structure of listed companies when compared with other Western European countries is the international diversification of shareholder base. According to one study approximately 87% of all shares of the largest companies are owned by foreign institutional investors and 6% by Dutch institutional investors.[50]

The Netherlands has, like most other Member States countries, transposed the Shareholder Rights Directive II almost literally. Observing of article 5:87c of the Dutch Financial Supervision Act, it sounds that the institutional investor and asset manager must have an engagement policy that describes how they monitor their investees on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, *social and environmental impact* and corporate governance, how they conduct dialogues with investee companies, how they exercise the voting rights and other rights attached to shares, how they cooperate with other shareholders and how they communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement. The investor or manager discloses must disclose on a per annum basis how they have executed their policy which should at least include how they voted at the general meeting of shareholders, their voting behavior, an explanation of the most important votes and how they made use of the services of proxy advisors.

These developments, the increase in the institutional investors' ownership and the requirement for institutional investors of developing engagement policies and disclosing engagement reports that should include the monitoring of the ESG-criteria should positively affect the sustainability requests of investors. Research shows that investors are increasingly aware of embedding sustainability in their investees[51], but engagement efforts are directed towards a (small) sample of Dutch companies and not all engagement efforts of (institutional) investors are related to ESG issues. Two studies illustrate these findings.

As a beneficiary of one of the largest asset owners of the Netherlands - and according to the Thinking Ahead Institute ranking of the largest pension funds in the world, the fifth largest

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[48] *ESMA*, European enforcers focus on Russia's invasion of Ukraine, economic outlook and climate related disclosures, 28 October 2022, https://www.esma.europa.eu/press-news/esma-news/european-enforcers-focus-russia%E2%80%99s-invasion-ukraine-economic-outlook-and-climate (*ESMA*, European common enforcement priorities for 2022 annual financial reports, 28 October 2022, 12 p.).

[49] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, https://www.consilium.europa.eu/media/57644/st10835-xx22.pdf.

[50] The remainder of the shares being held by other types of investors. *Abma*, *van Kleef*, *Lemers* and *Olaerts*, De algemene vergadering van Nederlandse beursvennootschappen, Deventer, Wolters Kluwer, 2017, 8.

[51] A recent study shows that at general meetings of Dutch companies more shareholder questions are sustainability-related (*Lafarre* and *Van der Elst*, Corporate Sustainability and Shareholder Activism in the Netherlands, in Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability, *Sjäfjell* and *Bruner* (eds.), CUP, 2019, 260-275).

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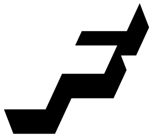

pension fund[52] - APB, I am most familiar with the engagement of this fund. APB discloses in its corporate governance framework[53] that its investment policy considers four basic corporate governance principles that the investees must adhere to: long term value creation, board responsibility, sustainability and transparency. The corporate governance framework of ABP includes the voting policy of the fund, which also entails its approach to climate related topics which are being voted at the general meeting of shareholders of the investees. Management proposals of climate transition plans are supported only if all of the following conditions are met: the plan contains a net-zero ambition (scope 1,2 and 3); it contains medium- and long-term climate goals; it is in line with the 1.5° Celsius limit or the sector-specific criteria from the International Energy Agency Net Zero Emissions Scenario; it includes all major business units and is measurable and realistic and it does not include investments in new fossil capacity. Climate related shareholder proposals are supported unless: the company has a climate approach which it has disclosed and meets the same criteria which APB uses for assessing the climate transition plans; the proposal contains illegal micro-management behavior; it sets expectations that may be harmful for the company and/or its shareholders or it is counterproductive in addressing climate change of the company.

In its stewardship policy ABP further develops how it votes, monitors, engages and cooperates. Like those of other major Dutch asset owners[54], the transparency of the fund is very high, but it illustrates the difficulties in combining and balancing all the goals as prescribed in the European SRD II: risks, returns, costs and sustainability. This approach of combining all these goals resulted in the statement:

"ABP developed highly sophisticated inclusion policies, where the investment universe is based on a proprietary methodology and by categories of frontrunners and laggards. When investing in laggards, action must be taken to improve the sustainability performance. The engagement is one of the core elements of the inclusion policy. We strive to invest only in companies that either sufficiently perform on the identified sustainability indicators, or in companies where we expect them to make progress in these areas. ABP expects the portfolio companies to gradually change over time in line with our policy of inclusion. The inclusion policy requires investment teams actively consider the relevant ecological, social and governance factors, in addition to considerations in terms of return, risk and costs.[…] Since it is the responsibility of the portfolio manager to invest in line with these requirements, (s)he has a full understanding of the entities in which to invest and be responsible for the engagement process. In this way, responsible and sustainable investing is fully embedded in the way we invest and, in our culture, as well as in this of our asset managers."[55]

According to its report of mid-2022, APB invested in more than 3000 listed companies[56] in over fifty countries. 30% are US companies and over 10% are Japanese and Chinese companies.[57] In

[52] Thinking Ahead Institute, Global Top 300 Pension Funds, 2021, 42, https://www.thinkingaheadinstitute.org/content/uploads/2021/09/PI-300-2021.pdf. ABP manages around €500 billion.

[53] https://www.abp.nl/images/corporate-governance-raamwerk220422-2.pdf.

[54] See for example PGGM, the asset manager of PFZW the second largest Dutch pension fund at https://www.pggm.nl/onze-diensten/actief-aandeelhouderschap/

[55] *ABP*, Stewardship Beleid, 2022, 5.

[56] Listed shares and convertible bonds (but only if the investment exceeds the threshold of EUR 500,000) which represents 99,9% of all stakes.

[57] *ABP*, Beursgenoteerde beleggingen van ABP, 2022, 28 p.

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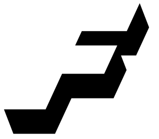

2021 ABP engaged with 16.3% of the companies. Table 1 illustrates the frequency of the engagement topics. While all but the last one can be qualified as ESG-topics, no sustainability topic was discussed in more than 10% of the companies.

Table 1: Frequencies of engagement of the pension fund ABP with its investees

Topic discussed	**number of companies**
environment	7,5%
labour conditions	2,3%
human rights	2,2%
ethics	3,5%
corporate governance	6,4%
sustainable finance	2,2%
other	4,6%

Note: an engagement can include more than one topic

Source: own calculations based on ABP *Engagement met bedrijven* and *beursgenoteerde beleggingen* (ABP.nl)

In a study on earnings calls and general meetings of 40 companies and interviews with 16 asset managers, analysts, pension fund managers and investor relation managers of large Dutch companies The Dutch Authority for the Financial Markets (AFM) noticed that non-financial information is only of limited use, discussed primarily in one-on-one meetings and not very decisive for taking investment decisions. Sustainability related topics have been addressed by analysts in 10% of the companies and was an issue in the presentations of less than 60% of the companies.[58]

III. Sustainable Financial institutions in the Netherlands

In the last decades not only the legislative and regulatory corporate governance, risk management requirements and sustainability obligations of stock exchange listed companies experienced a dramatic change, but many other types of entities, not the least financial institutions, must now incorporate strengthened governance and risk management standards. For banks, insurance companies and pension funds the most important government requirements can be found in article 88 et seq. of the CRD IV[59], article 41 et seq. of Solvency

[58] *AFM*, Verkenning naar het gebruik van niet-financiële informatie door institutionele beleggers en analisten, 16 February 2021, 25 p.

[59] Sub-section 3 Governance of directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit

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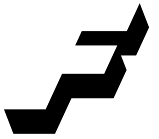

II[60] and art. 20 et seq. of IORP II[61]. These institutions also have specific risk management and investment policy requirements which are transposed in Dutch law of financial supervision and monitored by De Nederlandse Bank.[62] The European Commission works on the modernization of these legal frameworks, originally and largely developed in the aftermath of the financial crisis and aiming at a reduction of the risk of financial collapse, towards contributing to long-term sustainable finance of the economy and managing climate risk with a long-term climate risk scenario analysis.[63]

For undertakings for collective investments (UCIT) and alternative investment funds governance-related requirements are more broadly defined. For example, the UCITS-Directive states: "the persons who effectively conduct the business of a management company are of sufficiently good repute and are sufficiently experienced".[64] Commission Directive 2010/43 provides further guidance, such as the requirement to employ personnel with skills, knowledge, and expertise necessary for the responsibilities of the management company. The Directive also adds organizational requirements, risk management requirements, etc. for the management company of an UCIT.[65] According to article 9, the management company must ensure that the investment policy of the UCIT is adequately implemented and that the risk management policies and arrangements are adequately approved and reviewed among other requirements. Note, that next to the sustainability requirements to be found in the SFDR, the Commission delegated Directive (EU) 2021/1270 added several sustainability requirements to this list of governance requirements, including the retention of "the necessary resources and expertise for the effective integration of sustainability risks", the integration of "sustainability risks in the management of UCITS, taking into account the nature, scale and complexity of the business of the investment companies" and as an additional responsibility for its senior

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institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L nr. 176, 27 June 2013.

[60] Section 2 System of governance of directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L nr. 335, 17 December 2009.

[61] Chapter 1 System of Governance of Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs), OJ L nr. 354, 23 December 2016.

[62] *Nuijten*, *Vermeulen* and *van der Eerden*, Alleen samen krijgen we de klimaatverandering onder controle? Over handhaving van duurzaamheidsverplichtingen voor financiële ondernemingen, Tijdschrift voor Financieel Recht, 2021, nr. 8/9, 314-323; *Beekhoven van den Boezem* and *Vleeschhouwer*, De rol van De Nederlandse Bank als centrale bank en prudentieel toezichthouder bij de green recovery, Tijdschrift voor Financieel Recht, 2020, nr. 10, 487-492.

[63] See for example European Commission, on the review of the EU prudential framework for insurers and reinsurers in the context of the EU's post pandemic recovery, 22 September 2021, COM (2021) 580 final. See also *Schoute*, Via duurzame financiering naar een circulaire economie: de rol die banken kunnen spelen, Onderneming en Financiering, 2022, nr. 2, 62-81.

[64] Article 7 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L. nr. 302 17 November 2009.

[65] Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company, OJ L nr. 176, 10 July 2010.

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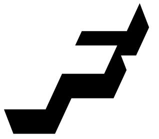

management: "the responsibility for the integration of sustainability risks"[66]. The directive has been transposed in almost identical words in the Decree on the Supervision of the Conduct of Financial Undertakings Wft which reads that: "investment companies integrate sustainability risks in the management of UCITS, taking into account the nature, scale and complexity of the business of the investment companies" [67].

At the same time, the UCITS-Directive prescribes in detail in which financial instruments it can invest as well as in what quantities.[68] These investment policy guidelines have been recently further elaborated in a new European regulation (EU) 2019/2033.[69] According to Article 52 of the Regulation investment firms must disclose detailed information regarding the use of their voting rights:

"(a) the proportion of voting rights attached to the shares held directly or indirectly by the investment firm, broken down by Member State and sector; (b) a complete description of voting behaviour in the general meetings of companies the shares of which are held […], an explanation of the votes, and the ratio of proposals put forward by the administrative or management body of the company which the investment firm has approved; and (c) an explanation of the use of proxy advisor firms; (d) the voting guidelines regarding the companies the shares of which are held […]".

This information will among others give insights in how the investment firm executes its engagement policy, and also given the state of sustainable affairs of the investees, clarify how the investment firm responds to the sustainability efforts of these investees. The European Commission has developed a disclosure framework that will allow beneficiaries and third parties to compare the (sustainability of) the voting and engagement behavior in the Commission Delegated Regulation (EU) 2022/1159 of 11 March 2022 supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards for public disclosure of the investment policy by investment firms.[70] Article 53 European regulation (EU) 2019/2033 further strengthens the transparency of the investment firms and lowers the risks of greenwashing by requiring the disclosure of "information on environmental, social and governance risks, including physical risks and

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[66] Article 1 of Commission Delegative Directive (EU) 2021/1270 of 21 April 2021 amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS), OJ L nr. 277, 2 August 2021.
[67] Article 30a Besluit Gedragstoezicht financiële ondernemingen Wft. This decree transposed in a similar way the other requirements of the Commission delegated Directive (EU) 2021/1270, like the requirement to take into account sustainability risks in the decision-making procedures, reporting lines, internal control mechanisms, internal reporting and communication. These and the other requirements raise many implementing issues of the UCITS: what is to be considered as an adequate level of "taking into account"? what is a nature, scale and complexity of a UCIT admitting for which level of integration of which type of sustainability risks? etc.
[68] See article 49 et seq. of Directive 2009/65/EC.
[69] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, OJ L nr. 314, 5 December 2019.

[70] OJ L. nr. 179, 6 July 2022.

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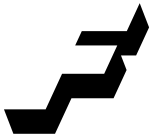

transition risks". The instrument of both European Regulations makes requirements directly applicable in the Netherlands and all other European member states.

Sustainability is not to be seen as a "sidekick" of governance or risk management practices, rather it is viewed as a main goal toward which the financial industry must take major steps:

"Sustainable finance refers to the process of taking **environmental, social and governance (ESG) considerations** into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects. […] To this end, the Commission has since 2018 been developing a comprehensive policy agenda on sustainable finance".[71]

In this way the European Commission presented its sustainable finance ambitions. The current result of the Commission's commitment is a complex and detailed system requiring massive changes in the investment policies, reporting schemes, remuneration practices, and product portfolios of (large) companies and even more so for all financial institutions. Since the publication of the European Commission's Sustainable Finance Action Plan in 2018, numerous directives and (delegated) regulations have been issued, requiring significant human capital in financial institutions for the purpose of developing compliant sustainable frameworks. The abundance of European legislation also resulted in very modest additional national steps of governments and regulators of member states, limiting their interventions to the transposition of the European Directives accompanied by letters containing supervisory bodies' expectations of financial market participants.[72]

In particular 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 (SFDR) which came into force on 21 March 2021, is affecting investment policies of financial market participants. Dutch financial institutions must ensure that they have developed a policy on the integration of sustainability risks in their investment decision-making process, investment advice or insurance advice.[73] Dutch financial institutions must consider principal adverse impacts of investment decisions on sustainability factors[74], show how their remuneration policies are consistent with the integration of sustainability risks[75] and disclose the manner in

[71] European Commission, Overview of sustainable finance, https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en.

[72] See for example the letters of the *AFM* of 3 July 2020 "Informatie over nieuwe wet- en regelgeving op het gebied van duurzaamheid" and of 16 December 2020 "Nieuwe regels over de publicatie van duurzaamheidinformatie" (https://www.afm.nl/nl-nl/professionals/nieuws/2020/juli/duurzaamheidsbrief-aan-sector en https://www.afm.nl/nl-nl/professionals/nieuws/2020/december/pensienuitvoerders-voorbereiden-sfdr-verordening).

[73] Art. 3 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, OJ L. nr. 317, 9 December 2019.

[74] And if they do "a statement on due diligence policies with respect to those impacts" and if they do not "clear reasons for why they do not do so" (Art. 4 (1) Regulation (EU) 2019/2088).

[75] Art. 5(1) Regulation (EU) 2019/2088.

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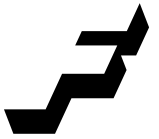

which sustainability risks are integrated into their investment decisions[76]. Sustainability risks are broadly defined as "environmental, social or governance event or condition, that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment".[77] All these demands must be disclosed in precontractual information, information on their website and information in periodic reports. The Dutch Authority for the Financial Markets confirmed that all the financial market participants will comply with these sustainability related disclosure requirements.

The AFM explicitly refers to an ESMA supervisory briefing which serves as a guidance document for the financial market participants.[78] In the first phase AFM expected the financial market participants to comply "in general" with SFDR. However, in the meantime the AFM further elaborated on several uncertainties, such as the clarification of *when* the parent company must publish a principal adverse impact statement, and that the statement must address the adverse effects on sustainability factors of the parent only. In addition, the ESMA supervisory briefing clarifies that in case of individual portfolio management the investment firm must comply with the transparency requirements of the portfolio (in accordance with article 10 of the SFDR) which can be done by referring to model portfolios (if those are being used) to meet the obligations of confidentiality. When managers are submitted to the registration system (and hence to not provide in a prospectus), they can elect the document providing the required precontractual information. The AFM further refers the financial institutions to the clarifications by the European Commission as well as to the clarifications of the European Banking Authority, both involved in the development of these and other questions.

Accordingly, the European Commission elaborated specific disclosure regimes (technical standards) in April 2022 for disclosing sustainability-related information under the Sustainable Finance Disclosures Regulation (SFDR).[79] The Commission announced that the Delegated Regulation:

"specifies the exact content, methodology and presentation of the information to be disclosed, thereby improving its quality and comparability. Under these rules, financial market participants will provide detailed information about how they tackle and reduce any possible negative impacts that their investments may have on the environment and society in general."

The Delegated Regulation predominantly provides product related disclosure guidelines[80] but also contains sustainability related governance reporting guidelines. These are: the description of the principal adverse impacts of investment decisions on sustainability factors, the

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[76] Art. 6(1) Regulation (EU) 2019/2088.
[77] Art. 2 (22) Regulation (EU) 2019/2088.
[78] See https://www.afm.nl/nl-nl/professionals/onderwerpen/duurzaamheid-sfdr-verwachtingen (last accessed 28 October 2022).
[79] Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre- contractual documents, on websites and in periodic reports, OJ L nr. 196 of 25 July 2022.
[80] See section IV.

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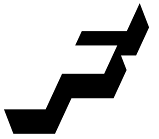

description of policies to identify and prioritise principal adverse impacts of investment decisions on sustainability factors and a summary of the engagement policy. The reporting guidelines further specify the different (sub)indicators and the adverse impact of investment decisions on sustainability factors. The indicators are related to climate and other aspects of the environment, such as the carbon footprint and water emissions, and those related to social and employee, human rights, anti-corruption and anti-bribery matters like gender pay gap and share of investments in companies that violated the UN Global Compact principles or OECD guidelines for multinational enterprises or investments in weapon manufacturers. It also defines the indicators, for example as the unadjusted gender pay gap which is defined as the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees. It remains to be seen if a financial market participant holds stakes of different sizes in many investees, how the (un)weighted(?) (binary) average pay gap appropriately signals sustainability.

IV. Sustainability and Financial Products

Recent European legislation not only affects the sustainability behavior of financial institutions but also, and even more (the development and disclosure of information of) the financial products (which are being marketed). According to article 6 (1) of Regulation (EU) 2019/2088 Dutch financial institutions, like all European institutions, must include in their pre-contractual disclosures "the manner in which sustainability risks are integrated in their investment decisions" as well as "the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available". A financial product is broadly defined as: "a portfolio, alternative investment fund, an insurance-based investment product, a pension product, a pension scheme, an undertaking for collective investments in transferable securities or a pan-European personal pension product"[81]. For some of these products, this requirement is not new. Pursuant to the IORP II Directive (EU) 2016/2341 pension funds already had to consider environmental, social and governance risks relating to their investment portfolio in their risk-management system for some years now.[82]

More precisely, the SFDR, in combination with the Taxonomy Regulation[83] and their many delegated regulations and directives[84] enhance transparency and comparability of the

[81] Art. 2 (12) Regulation (EU) 2019/2088.

[82] See art. 18 (3) g Besluit financieel toetsingskader pensioenfondsen (implementatie IORP II).

[83] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.06.2020.

[84] See for an overview of the regulatory framework: https://finance.ec.europa.eu/regulation-and-supervision/implementing-and-delegated-acts/taxonomy-regulation and for an overview *Blom* and *Dickhoff*, EU geeft kleur aan duurzaamheid en de rol van de financiële sector, Tijdschrift voor financieel Recht, 2021, nr. 8/9, 257-263.

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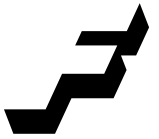

sustainability levels of the products financial institutions offer.[85] The **product level disclosures should give the financial consumers better insight into the sustainability and principal adverse impacts of financial products and funds. Next to the aforementioned mandatory information that always must be provided in accordance with article 6, there are two other types of funds and products offering "enhanced" sustainability, article 8 ("light green") and article 9 ("dark green") funds and products. An article 8 product promotes inter alia (a combination of) environmental and social characteristics conditional the good governance practices of the investees, while article 9 products must have sustainable investment as an objective. Both article 8 and 9 products require additional disclosures accordingly.[86] Further, the financial market participant must report on the Taxonomy alignment of the products' content. The disclosure must be made in pre-contractual documentation, periodic reporting, and the website of the financial market participation. In the meantime, an abundant number of regulatory guidelines and requirement (mostly regulatory technical standards) have been issued, benchmarking the financial products, due diligence policies, monitoring requirements, the use of data sources, etc. Especially for "light green" and "dark green" products these plentiful prerequisites should prevent *greenwashing* - deceptively using information and marketing that a product is more environmentally (and/or socially or more broadly sustainably) friendly.**

For most issues related to financial products, the Dutch AFM refers to the developments and guidelines developed and issued by the European regulators. Similarly to ESMA, the AFM considers it important that financial market participants would control the name of the product when it refers (or not) to sustainability.[87] How the name must be controlled can be found in ESMA's supervisory briefing of 31 May 2022.[88]

In its report of September 2021, addressing the reporting practices of financial market participants, and in particular of investment funds, the AFM acknowledged that all managers of these funds with sustainable characteristics or objectives had included information about these issues in their prospectuses in March 2021. Nevertheless, the AFM also noted that there is room for improving the quality of the information and questioned the sustainability classifications of many investment funds. The way in which the sustainability risks were integrated in the investment policy is of a too general nature and often not fund specific. Further, the estimation of the likely effects of the sustainability risks on returns is missing. *Light green* as well as *deep green* funds provide too little specific information and give too limited insights and explanations of the objectives and how these are pursued through the

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[85] Many commentators have discussed this European legal framework. See for example: *de Galan* and *Pijls*, Het civiel effect van de Taxonomie- en Transparantieverordening, Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur, 2022, 3-14; *Kuijpers* and *de Klerk*, Hoe duurzaam belegd is de impact van "SFDR", Ondernemingsrecht, 2021, 809-820; *Blom* and *Dickhoff*, EU geeft kleur aan duurzaamheid en de rol van de financiële sector, Tijdschrift voor Financieel Recht, 2021, nr. 8/9, p. 257-263; *Siemers*, Informatieverschaffing over duurzaamheid door beleggingsinstellingen, Tijdschrift voor Financieel Recht, 2021, nr. 1/2, p. 16-28; *Buijink*, *Hazelzet* and *Mreijen*, Duurzaam financieren in het licht van vrijwillige initiatieven en Europese regelgeving, Tijdschrift voor Financieel Recht, 2020, nr. 10, 473-378.

[86] For a detailed analysis see *Boogaard*, Classificatie van financiële producten op grond van artikel 8 en 9 SFDR, Tijdschrift voor Financieel Recht, 2022, nr. 1, 13-21.

[87] See https://www.afm.nl/nl-nl/professionals/onderwerpen/duurzaamheid-sfdr-verwachtingen (last accessed 28 October 2022).

[88] *ESMA*, Supervisory Briefing - Sustainability risks and disclosures in the area of investment management, 31 May 2022, 16 p.

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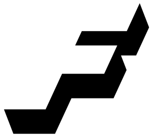

investment policy. Based on the information, the supervisory authority raised questions about the sustainability classifications of the funds, especially those aiming for sustainable investments. It found that the funds appear to be broader oriented, and that the investment portfolio often does not focus exclusively on sustainable investments.[89]

In November 2022 the AFM repeated the study as well as investigated the compliance of the pension fund industry as well as of banks, insurance companies and investment companies with the SFDR requirements.[90] The AFM observed that the sustainability disclosures of investment funds made significant progress and that several funds with sustainable objective were redesigned in funds that promote sustainable characteristics. In addition, almost all funds with an environmental objective and the funds that promote environmental characteristics publish the mandatory pre-contractual information under the Taxonomy, but there is room for further improvement. The same goes for the other financial market participants. The current policies of investment funds provide a global understanding, but concrete information about the process is missing and only partially explain how the sustainability risks are integrated. Further, information on how the integration of sustainability risks in the remuneration policy is being accomplished is also too general.

The statement of pension providers is incomplete vis-à-vis the accountability of the most important adverse effects of their investment decisions on sustainability factors. A significant majority of the pension beneficiaries (93%) have a scheme that promotes sustainability. However, pension providers have an obligation to explain these sustainability characteristics and how they meet these characteristics. This description is too often missing.

The information on the websites of banks, insurance companies and investment companies is often difficult to understand, vague and repetitive. It is unclear how the companies include sustainability risks in the investment process and which steps are taken for managing sustainability risks. The remuneration policy does not show how the sustainability risks are included and how it encourages to mitigate sustainability risks. Precontractual information for products must show how sustainability risks are integrated in the investment decisions and what the likely effects of sustainability risks are on the return of the financial products, but this information was often lacking. There is also little information of the Taxonomy, and the information of the environmental objectives underlying the investments is scarce.

At the same time, varying consumer sustainability preferences must also be considered. Investment firms must control the sustainability preferences of the retail clients. The minimum sustainability threshold of the clients must be considered for identifying the needs of the financial consumer.[91] Related to the sustainable investment products, the Dutch supervisor also performed a consumer testing of the financial product disclosures of environmentally

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[89] *AFM*, Implementatie SFDR – Onderzoek naar implementatie van SFDR vereisten door beheerders van Nederlandse beleggingsinstellingen, September 2021, 14 p.

[90] *AFM*, SFDR in de praktijk: blijvende aandacht nodig – Onderzoek naar de naleving van de SFDR en Taxonomieverordening door beheerders van Nederlandse beleggingsinstellingen en icbe's, November 2022, 15 p.; *AFM*, SFDR in de praktijk: blijvende aandacht nodig – Eerste onderzoek naar naleving van SFDR-en Taxonomievereisten door pensioenfondsen en PPI's, November 2022, 20 p.; *AFM*, SFDR in de praktijk: blijvende aandacht nodig – Eerste onderzoek naar SFDR- en Taxonomievereisten onder banken, beleggingsondernemingen en verzekeraars, November 2022, 21 p.

[91] *Lafarre* and *Verhoef*, European Regulation of Sustainable Finance and Investor Sustainability Duties: Measuring is Knowing?, Banking and Finance Law Review, in press.

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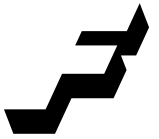

sustainable investments in pre-contractual and periodic disclosures in April 2021.[92] The questionnaire was based on "standardized information of investors that simply promote environmental characteristics or products that have a specific objective of investing in environmental activities". The document provided entailed information from a fictitious investment fund. Only 34% of the respondents correctly indicated that the product has a sustainable investment objective and 37% ticked the box of "I do not understand the schematic". Overall, 43% disagreed with the statement that they understand the information in the disclosure, 60% did not find the pre-contractual information useful to make a financial decision, deeming it either too detailed, vague or confusing, with difficult language and terms. Half of the respondents acknowledged that they did not understand the distinction between sustainable investments that are Taxonomy-aligned and sustainable investment that are not. These results are disappointing particularly given the particular qualifications of the respondents elected: highly educated, older, financially literate, and more likely to invest. Hence when the respondents fail to understand, a representative sample of the Dutch population would (more than likely) neither understand. According to the AFM retail investors should be aware that there are significant differences in the underlying interpretation of sustainability within the range of sustainable investment funds.[93]

V. Conclusion

The European green deal of 2018 did not start an evolution towards a sustainable society, but rather can be considered a revolution in many areas of society. The European Commission plans to meet the zero emission target by 2050 and decouple the economic growth from resource use are progressive. Thereto not only emitters are envisaged but also the financial industry must be actively involved to steer the whole economy towards a sustainable world. Over the last five years, the European financial landscape changed dramatically since the deal's launch and looks completely different compared to a decade ago. Companies must pro-actively develop new technologies and production methods bringing us closer to a sustainable world. More and more the investors are paying attention to the sustainability policies of companies and shareholder activism is (partly) redirected to sustainability topics. Currently, investors are under pressure to transform and move towards more sustainable investments and financial consumers, although having plenty of options in the financial product market, are being nudged towards greener products. It does not come as a surprise that all parties, investors, investees, and financial institutions, are still struggling to meet the standards of the new regulatory environment. There is still a long, steep way to go but a promising start has already been made.

[92] *AFM*, Consumer testing on financial product disclosures for environmentally sustainable investments in pre-contractual and periodic disclosures under the Taxonomy Regulation, April 2021, 39 p.
[93] *AFM*, De retailmarkt voor duurzaam fondsbeleggen, April 2022, 13 p.

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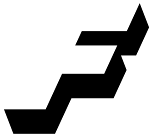

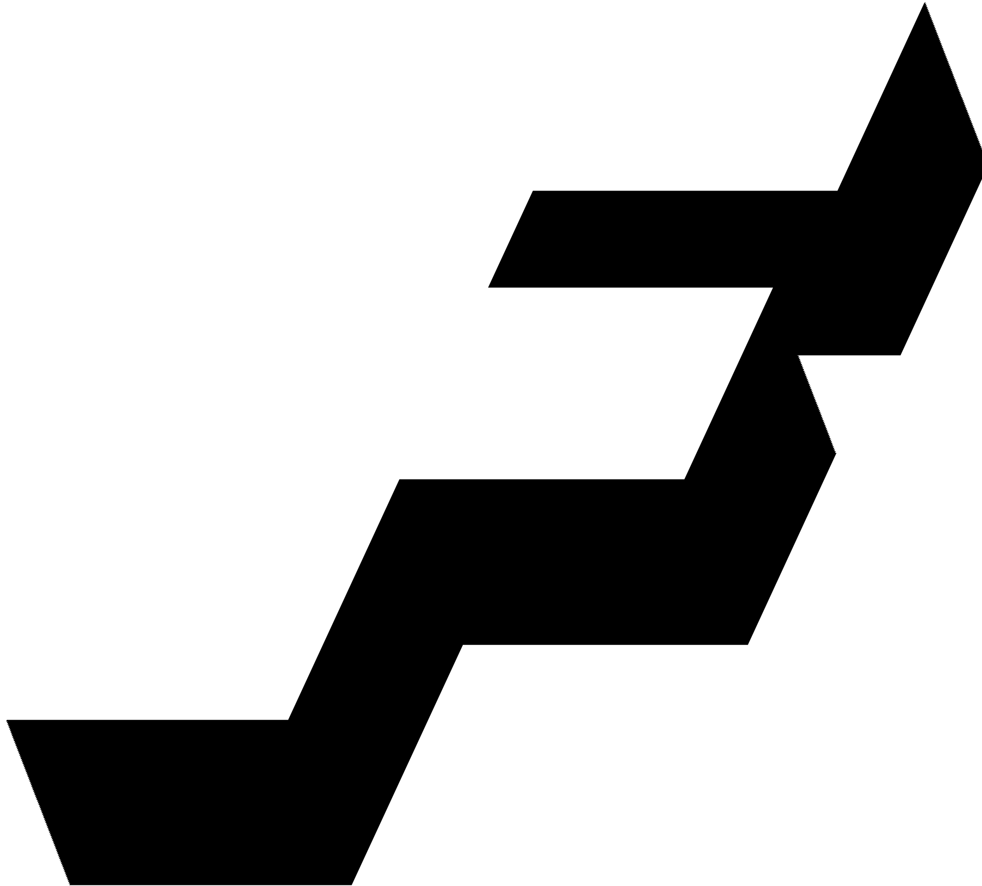

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