HIGH STAKES AND IMPORTANT STAKEHOLDERS: LESSONS FOR THE EU FROM THE DUTCH APPROACH TO CORPORATE GOVERNANCE

Executive remuneration today is driven by incentives that may no longer align with shareholder interests or reflect broader societal responsibilities.
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INTRODUCTION

Over the last ten years the matter of sustainability in business has emerged as one of the preeminent concerns for humanity's collective future. Questions regarding global warming, environmental impact, and the human cost of production have become key challenges for board members and legislators alike. Due to the role commercial enterprises play in both causing and solving these issues, it should be no surprise that this has led to much discussion within the field of corporate governance, which seeks to direct and control the conduct of companies. At an EU level, these challenges have led to calls for the creation of a unified approach to sustainable corporate governance. While efforts in this regard are ongoing, it is submitted that the Dutch Corporate Governance Code ('the Code'/'the Dutch Code') serves as an instructive example as to how potential legislation may best address these issues. By highlighting essential building blocks of effective corporate governance (including directorial liability, multi-stakeholderism, and other factors discussed below), the Dutch Code takes a multi-pronged approach to ensuring sustainable long-term value creation. As such, the intent of this paper is to explore the various manners in which the Dutch Code promotes these objectives, and how its provisions might guide the development of a unified approach to sustainable corporate governance at the EU level.

TABLE OF CONTENTS

EU CORPORATE GOVERNANCE

Over the last twenty years the nature of European corporate governance has slowly shifted from fragmentation towards central regulation. Efforts by the EU to adopt a unified corporate governance approach were historically stymied by issues of legislative harmonisation, with most member states preferring greater autonomy in the field of national company law (of which corporate governance forms part).[2] These attitudes continued into the 2000s, with a comparatively hands-off approach to the prescription of corporate governance requirements. An outlier in this regard was the endorsement of a green paper on Corporate Social Responsibility in 2001, though this did not dramatically shift the corporate governance landscape at the time.[3]

These attitudes changed sharply in the wake of the 2008 financial crisis. As accusations of insufficient oversight by institutional investors began to pile up, EU activity in turn sought to address the conditions that had allowed this to happen. Highlighted as challenges facing corporate governance at the time were short-termism, risk taking, and insufficient regulation.[4] Many of the EU's initiatives in this regard would manifest within the first three years after the crisis, including the Green Paper on the EU Corporate Governance Framework,[5] the appointment of the 'Reflection Group on the Future of EU Company Law', and the adoption of '[the] renewed EU strategy 2011-14 for Corporate Social Responsibility'.[6]

At present, the *zeitgeist* permeating European corporate governance follows a clear trend towards the incorporation of sustainability and multi-stakeholderism. As a testament to this, two of the largest developments of recent years have sought to promote these objectives.

The first of these is the Corporate Sustainability Reporting Directive ('CSRD'),[7] which includes new requirements for firms to report on their impact on various matters, primarily dealing with matters of inclusion, sustainability, and corporate effect. This is underlined by the so-called "double-materiality" test, which requires companies to evaluate their effect on people and environment ('impact materiality') as well as to identify any sustainability matters which financially impact the undertaking ('financial materiality').[8] Under this system multi-stakeholderism is thus promoted as an ideal at the supra-national level. The inclusion of requirements that these reports must be audited further demonstrates the cultural shift towards greater corporate accountability.[9]

Beyond the CSRD developments, the proposal to the create a "Sustainable Corporate Governance Initiative" has been a tumultuous, albeit persistent, mainstay of legislation at

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[2] *P-H Conac (2022) "Sustainable Corporate Governance in the EU: Reasonable Global Ambitions?". RED. 03. pp. 112-113.*
[3] *Green Paper Promoting a European framework for Corporate Social Responsibility, 2001.*
[4] *Conac (2022). pp. 113.*
[5] *Green Paper on the EU Corporate Governance Framework, 2011.*
[6] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility.*
[7] *Corporate Sustainability Reporting Directive, 2023.*
[8] *Paras 28 and 37.*
[9] *Paras 60-78; Art. 2 (29d)(2), Art. 3.*

the EU level.[10] Despite having been proposed on the basis of an academically-controversial report on directors' duties and sustainable corporate governance by EY, the proposal for such a directive was supported politically by the EU Parliament.[11] Though the proposal had stalled as a consequence of two (rare) negative opinions by the Regulatory Scrutiny Board of the Commission, the commitment shown towards the implementation of such legislation indicates an ongoing effort to govern the issue in a top-down manner, and the prospective text has been adopted with amendments by the European Parliament.[12] The determination of EU attitudes regarding the matter of sustainable corporate governance are consequently a matter of inference, as efforts in this regard have not yet fully crystalised. Despite these challenges, the trend towards sustainability has manifested (at least in part) in the push for a Directive on Corporate Sustainability Due Diligence ('CSDDD').[13] While the text draws heavily from Dutch,[14] French,[15] and German laws governing corporate responsibilities,[16] the duties imposed on directors do not accord directly to the legislation of any member state.[17] Despite this, the directive imposes a duty to consider sustainability matters in the short, medium and long term, including human rights, climate change and environmental consequences. [18]

In the absence of comprehensive legislation in this regard, however, the prospective CSDDD text provides the clearest window into the intention of EU lawmakers and their definition of "sustainability" within corporate governance. At its core, the CSDDD stands alongside various instruments previously adopted by the EU (such as the European Green Deal,[19] the Paris Accord,[20] and the CSRD) in order to meet the challenges of our time. Together these instruments all serve as signposts indicating the EU's commitment to combatting climate change, while further helping to define sustainability outside of the scope of corporate governance. Beyond the matter of environmental impact, the CSDDD also contemplates the achievement of human rights as one of its objectives, including the elimination of child labour and other practices deemed unethical.[21]

On this basis, therefore, it is clear that the EU conception of sustainability within the corporate governance context is intended to revolve around the objectives of environmental impact and human rights as primary concerns. As will be discussed subsequently, however, the interplay between these objectives and notions of multi-stakeholderism remain underexplored by present and prospective legislation.

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[10] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 2022.*

[11] *M. J. Roe et al. (2021), "The European Commission's Sustainable Corporate Governance Report: A Critique", Law Working Paper N° 553/2020.*

12 *Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)).*

[13] *Directive on Corporate Sustainability Due Diligence, 2022.*

[14] *Wet zorgplicht kinderarbeid, 2019.*

[15] *Loi de Vigilance, 2017.*

[16] *Lieferkettensorgfaltspflichtengesetz, 2021.*

[17] *Conac (2022). pp 115.*

[18] *Directive on Corporate Sustainability Due Diligence. art 25.*

[19] *The European Green Deal, 2020.*

[20] *The Paris Accord, 2016.*

[21] *Proposal for a Directive on Corporate Governance and Sustainability. art 25 & page 22.*

DUTCH CORPORATE GOVERNANCE

The history of Dutch corporate governance is long and storied, tracing its roots to the United East India Company (VOC) of the 17th century (and consequently the concerns of its shareholders).[22] These concerns (including effective oversight, remuneration, and shareholder influence) remained pertinent three hundred years later, when the Netherlands adopted its first Corporate Governance Code in 2003. Since its introduction, the Dutch Corporate Governance Code has undergone continuous amendment as it is adapted to the challenges of our time, frequently seeking to address the same concerns as those raised by shareholders of the VOC centuries ago.[23]

It is within this context that the present Code, as amended in 2022, must be understood. Many of its amendments are targeted towards increasing the level (and accuracy) of corporate reporting, providing greater scope for evaluating proper executive remuneration, and promoting effective share- and stakeholder involvement. Furthermore, the addition of sustainable long-term value creation as a primary objective of the Code ensures that challenges posed by climate change and environmental impact are also addressed. Whereas its predecessors did not concern themselves directly with the matter of sustainability, the current iteration makes it clear that sustainability is *the* primary consideration when determining strategies for long-term value creation.[24]

This notion of sustainability is, however, not to be considered in isolation. Sustainability in the Dutch sense is given a broad definition, encompassing not only the human and environmental effects of commercial enterprise, but also ancillary considerations such as the responsible use of technology and AI, and a commitment to ethical taxation.[25] In this regard the fight against "short- termism" is thus reinforced by provisions promoting the importance of long-term considerations as a feature of sustainability.[26] As such, the Dutch Code paves the way for stakeholder involvement pertaining to sustainability concerns, remuneration on the basis of sustainability performance for executives, and other, similar provisions.[27]

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[22] *R. A. M. Pruijin (2017) "Grondslagen van Corporate Governance". pp. 32.*
[23] *The Dutch Corporate Governance Code, 2022.*
[24] *Explanatory note to Principle 1.1.*
[25] *Principle 1.1, explanatory note to principle 1.1., & explanatory note to principle 2.1.4.*
[26] *Principle 1.1 & 1.1.1.; Conac (2022). pp. 113.*
[27] *Provision 1.1.5.; Provision 3.1.2(i).*

MULTI-STAKEHOLDERISM

From its first principle the Dutch Code makes a clear link between the environmental and human impact of enterprises and the notion of stakeholder interests.[28] In this regard the Dutch conceptualisation of sustainability is made inseparable from the notion of multi-stakeholderism from the outset – a duty is placed on corporations to consider the former by means of the latter. To this end the Code makes provision that stakeholder engagement must be facilitated by the firm, except where it is deemed that stakeholder engagement will not be in the interests of the company; in this case stakeholder interests must still, at least, be considered.[29] This dialogue also bleeds over into the reporting requirements set out by the Code, which mandate that firms include information regarding the environmental impact of their operations, as well as how stakeholder interests have been given effect to by the enterprise.[30]

In some senses, this strong codification of stakeholder interests is at odds with the conception laid out by the CSDDD. While these texts do recognise stakeholders and stakeholder interests as an important driving force in the need for legislation, its inclusion of stakeholder interests into prospective legislation is paltry by comparison.[31] Per the CSDDD, stakeholder interests are to be most readily considered when assessing actual or potential harm which might flow from the economic operations of a firm, as well as when committing to a due diligence policy.[32] Such policy therefore does not utilise the possibilities occasioned by the inclusion of stakeholders to the fullest of their potential.

This is not to say, however, that the notion of effective multi-stakeholderism is entirely absent within the European legislative context, even as relates to corporate governance. As has been touched upon previously, the CSRD serves as an effective guideline for the incorporation of multi-stakeholderism by means of its “impact materiality” test.[33] As such, elements of this may be incorporated at a supra-national level by means of a tandem approach between the CSRD and the prospective CSDDD. Any such developments, however, would doubtless be impacted by the particular context within which the CSRD exists (with its focus on reporting), which may pose an impediment to the effective adoption of multi-stakeholderism within the sphere of corporate governance.

While the lack of an effective framework for multi-stakeholderism is itself cause for concern, the consequences of this extend to the matter of effective stakeholder involvement. Greater stakeholder involvement has been linked to a host of benefits, including the amelioration of corporate short-termism, income inequality, and climate change, but this is only possible where systems adequately support this form of involvement.[34] It is further notable that the benefits of stakeholder involvement listed above are each concerns which provided impetus for the CSDDD's creation. This omission is even more concerning on the basis of

[28] *principle 1.1 and its explanatory note.*
[29] *principle 1.1.5 & 2.4.*
[30] *principle 1.1.4.*
[31] *Proposal for a Directive on Corporate Governance and Sustainability. pp. 20.*
[32] *art. 4 & 6.*
[33] *Corporate Sustainability Reporting Directive, 2023. paras. 28 & 37.*
[34] *Proposal for a Directive on Corporate Governance and Sustainability. pp. 20.*

the inclusion of multi-stakeholderism in the CSRD. It should furthermore be noted that the drafters of the CSDDD have been cognisant of a trend of increased corporate responsibility (with ties to multi-stakeholderism) being proposed nationally within several member stakes (with the Netherlands being one of these).[35] This is highlighted within the text of the CSDDD as being a potential problem, as it may lead to an "uneven playing field" for companies acting within the EEC.[36] On the basis of this, therefore, it is submitted that best practice should (at a supra-national level) support multi-stakeholderism under the umbrella of sustainable corporate governance, as well as give scope for its implementation in a wider sense than is currently contemplated under the CSDDD.

To this end, the approach taken by the Dutch Code provides insight as to how this might be achieved in a manner which is not too onerous on regulators and supervisory bodies. While the requirement that companies must take stakeholder concerns into account during the assessment of actual or potential harm which might flow from their economic operations, as well as when creating a due diligence policy (as previously mentioned) is a step in the right direction, these duties serve to promote stakeholder considerations only in a narrow sense. Modelling the CSDDD on the Dutch Code in this instance, with its broader scope for stakeholder involvement, would create scope for participation even where harm to stakeholders is not a focal consideration for the proposed economic activity. The adoption of such an approach would, however, require significant reformulation the CSDDD's provisions. Despite this it is submitted that - given the aforementioned benefits of a robust system of stakeholder involvement - this would be beneficial to the achievement of the CSDDD's goals. It should further be noted that, insofar as the Dutch Code is concerned, the provisions promoting stakeholder involvement are not absolute, and do provide scope for companies to dispense with stakeholder involvement where appropriate.[37] As such it is submitted that a similar provision, enacted at an EU level, would not amount to an unfair and unduly onerous restriction on the corporate freedom of enterprises.

[35] *Proposal for a Directive on Corporate Governance and Sustainability. pp. 10.*

[36] *pp. 11.*

[37] *The Dutch Corporate Governance Code, 2022. principle 1.1.5. and its explanatory note.*

REMUNERATION

The disconnect between the two documents further flows to the matter of remuneration. Whereas the CSDDD does recognise the importance of remuneration as a potential element in strategies for achieving sustainability objectives, it does not tie the achievement of these objectives in any way to matters of board remuneration.[38]

This lack of accountability mechanisms tied to remuneration may be seen as a missed opportunity by EU lawmakers. While the CSDDD does create scope for enforcement of its terms, such mechanisms operate by effect of Member States monitoring and sanctioning companies directly.[39] Insofar as the CSDDD seeks to govern directors, the scope of its authority is limited to mandating that directors uphold their duty of care (with a particular reference to human rights and climate change).[40] At most, therefore, the CSDDD can be seen as broadly supporting the notion of variable pay for directors, subject to the achievement of environmental (and more narrowly: climate change) objectives.[41] This imposes a rather nebulous responsibility on directors, as there is no standard by which to assess their decisions, and the CSDDD fails to indicate any suitable mechanism for holding directors liable when they fail to adequately account for sustainability considerations. In lieu of creating its own enforcement mechanisms, the CSDDD merely directs that Member States should ensure that their existing mechanisms used to sanction directors for breaches of their duty of care should apply to the CSDDD's provisions as well.[42] On this basis the CSDDD gives tremendous deference to the economic freedom of enterprises to act in whatever manner they like, without connecting (in any direct sense) the achievement of sustainability objectives to remuneration.

By contrast, the Dutch Code is significantly more express in its support for variable remuneration as a driver for sustainability. In its explanatory notes the document sets out that any best practice must indicate how remuneration policy is linked to the achievement of sustainable long-term value creation.[43] On this basis, then, the numerous components of sustainability (within the Dutch sense) should be regarded when determining variable remuneration. This imposes a far more direct relationship between directorial conduct and sustainability objectives, while also allowing the consideration of factors unrelated to climate change during remuneration discussions.

It is therefore submitted that the adoption of a best practice modelled more on the Dutch Code would (in this instance) serve to address some of the CSDDD's shortcomings. As has been noted previously, the creation of any remuneration policy according to the Dutch Code requires those formulating the policy to consider how it will advance the achievement of long-term sustainability considerations.[44] The Dutch system therefore directly incentivises decisionmakers to consider a wide range of stakeholder interests when formulating (and enacting) company policy. The use of these mechanisms would also

[38] *Proposal for a Directive on Corporate Governance and Sustainability. pp.10 & 20.*
[39] *Proposal for a Directive on Corporate Governance and Sustainability. art 10; art 17; art 18; art 20 - 22.*
[40] *art 25.*
[41] *art.15(3).*
[42] *art 25(2).*
[43] *The Dutch Corporate Governance Code, 2022. explanatory note to principle 3.4.1.*
[44] *The Dutch Corporate Governance Code, 2022. principle 3.1.2.(i.).*

alleviate (though not obviate) the reliance on Member States to police whether sustainability is being adequately considered when formulating corporate strategy.

CONCLUSION

The measures taken by the Dutch Code represent a broad approach to the various sustainability challenges of our time. By utilising diverse mechanisms, united by one overarching theme, the Code creates an effective system for achieving sustainable long-term value creation. By contrast, while the adoption of a Union-wide minimum standard for regulating sustainable corporate governance would be considered an important step for the promotion of sustainability, this does not detract from the fact that the currently projected form of the CSDDD leaves much to be desired. Concerns about narrow scope, surface-level engagement with the notion of multi-stakeholderism, and ineffective accountability mechanisms undermine what would otherwise be a promising legislative development. On this basis, therefore, it is submitted that the Dutch Code represents a more sophisticated corporate governance response to the matter of sustainability than the CSDDD, and that the development of international best practices could be well served by taking greater inspiration from the Dutch approach.