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The Corporate Climate Transition Plan: How to Ensure Companies are Paris-Proof

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- **The interaction between CSDDD and CSRD needs to be clarified. If companies are required to adopt a climate plan under CSRD, Article 15 CSDDD has little to no added value.**
- **Denying a review by the supervisory authority under CSDDD leaves private enforcement as the only mechanism available to test whether a company's climate plan is Paris-proof.**
- **Scrutiny of climate plans by national courts based on national legal systems will lead to a lack of harmonisation and an unlevel playing field fostering unequal effects.**

In this contribution, the authors discuss the relevance and effects of Article 15 of the Corporate Sustainability Due Diligence Directive which obliges Member States to ensure that large companies shall adopt a climate transition plan to ensure that the business model and strategy of these companies are compatible with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050. How does Article 15 relate to the obligations regarding climate plans of the already adopted CSRD? Is climate change an adverse impact under the CSDDD? Should variable executive remuneration be linked to the objectives of a company's climate plan? Will shareholders have a say-on-climate? What role is envisaged for public enforcement by the supervisory authority to ensure the transition to a sustainable economy? And how does the CSDDD affect private enforcement, like cases such as the *Milieudefensie/Shell* case? This contribution is based on the proposal of the European Commission published on 23 February 2022 and the compromise text of the EU Council published on 30 November 2022.

1. Introduction

The Corporate Sustainability and Due Diligence Directive ("CSDDD") aims to promote responsible business conduct. Its twin sister, the Corporate Sustainability Reporting Directive ("CSRD")[2] aims to ensure corporate high-quality reporting on sustainability matters.[3] This includes a requirement for certain companies to report their climate transition plan in the management report. The requirement for having a climate transition plan ("Climate Plan") is laid out in Article 15 CSDDD. In this contribution, we focus on the question of whether the Climate Plan measures to be adopted and implemented by companies under Article 15 CSDDD are of any added value now that the CSRD is adopted, and if so, whether these measures are clear, proportionate, and enforceable.

This contribution is based on the proposal of the European Commission published on 23 February 2022 ("Commission Proposal") and the compromise text of the CSDDD of the European Council published on 30 November 2022 ("Political Compromise").[4] The text of Article 15 of the Commission Proposal and the Political Compromise are:

Text Article 15 (Commission Proposal)

Combating climate change

1. Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations.
2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan.
3. Member States shall ensure that companies duly take into account the fulfilment of the obligations re-

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2 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] *OJ* L322/15.
Final text adopted can be found in Directive of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, 2021/0104(COD) PE-CONS 35/22, 16 November 2022.

3 Recital 12 of the preamble to the CSRD.

4 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 2022/0051(COD), 15024/22, REV 1, 30 November 2022.

ferred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability.

Text Article 15 (Political Compromise)

Combating climate change

1. Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan, including implementing actions and related financial and investments plans, to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119, and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations.
2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes greenhouse gas emission reduction objectives in its plan.
3. […]

Under the CSDDD regime, companies have to adopt a Climate Plan to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C as agreed in the Paris Agreement[5] and – added by the Political Compromise – the objective of achieving climate neutrality by 2050, and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities (hereafter: "Paris-proof").[6]

Because CSRD and CSDDD are related, it is important that an alignment of the scope of applications and the provisions is ensured. Paragraph 2 discusses the conditions and scope of application of Article 15 CSDDD and the interaction with CSRD. Paragraph 3 deals with the question of whether climate change qualifies as an actual and potential adverse impact on the environment under the CSDDD and is as such subject to a due diligence obligation and intensive supervision by the designated supervisory authority.

In the Commission Proposal, companies were obliged to duly take into account the fulfilment to be Paris-proof when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability.[7] Even though this provision has been deleted in the Political Compromise as a result of strong opposition by Member States,[8] it is optional and maybe recommendable for companies to adopt this link in their remuneration policy. We deal with this question in paragraph 4.

The question is by which means and which parties can enforce companies to comply with this duty and whether the adopted Climate Plan itself is a binding and enforceable obligation. The objective of an adopted Climate Plan should be to ensure that the company's business model and strategy is Paris-proof. Therefore, it is important to address the question of what remedies are available in case an interested party (shareholders, stakeholders, non-governmental general interest institutions) deems a company's Climate Plan incompatible to achieve the goal of the Paris Agreement. For short, which parties have a say-on-climate? The availability of such a mechanism to ensure Paris compatibility is especially important because the CSDDD fails to establish clear emission reduction goals.[9]

The question of whether shareholders (should) have a say-on-climate will be addressed in paragraph 5. Paragraph 6 discusses the public enforcement mechanisms of Article 15 CSDDD. The public enforcement mechanism seems to be limited to situations where companies do not adopt a Climate Plan at all. It is left to Member States to assign this task to a new or existing supervisory authority or authorities. Any scrutiny of Paris-proofness by this supervisory authority seems to be excluded or is at most very limited. Even though CSDDD leaves room for private enforcement by general interest institutions in (collective) proceedings, it does not establish a private enforcement mechanism that is guaranteeing a level playing field for companies regarding their Climate Plan.[10]

5 Paris Agreement [2016] *OJ* L282/4.

6 Art. 15 CSDDD. See Regulation (EU) 2021/1119 for the objective of achieving climate neutrality by 2050 and see Art. 19a(2), point (a)(iii), and Art. 29a(2), point (a)(iii) of Directive 2013/34/EU for the exposure of the undertaking to coal-, oil- and gas-related activities.

7 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) 71 final (CSDDD Proposal).

8 Letter by the presidency of the European Council attached to Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 2022/0051(COD), 15024/22, 28 November 2022, par. 26.

9 Cf. critical notes by De Kluiver and De Waard. See H.J. de Kluiver, 'Kroniek van het Ondernemingsrecht, Ondernemingsrecht, mensenrechten en klimaat. Doen we de goede dingen en doen we ze goed? Over moeizame regulering en gebrek aan focus', *NJB* 2022/952, p. 1180-1181 and D. de Waard, 'Concepten en standaarden: Een analyse van de aansluiting van de European Sustainability Reporting Standards op de praktijk van duurzaamheidsverslaggeving', in: M. Luckerath-Rovers et al. (eds.), *Jaarboek Corporate Governance 2022-2023*, Deventer: Wolters Kluwer 2022, p. 139.

10 De Kluiver 2022, p. 1180-1181.

Ever since the *Milieudefensie/Shell* case[11] companies need to be aware that adopted climate plans can be subject to scrutiny by private individuals and organisations via liability claims. The question arises whether these claims fall under the scope of the liability regime of Article 22 CSDDD or whether national rules on civil liability may cover claims in case any interested party deems the Climate Plan insufficient to achieve its goal, *i.e.* ensuring that the company's business model and strategy are Paris-proof. It is noteworthy that the CSDDD does not provide the reliefs available to interested parties in case liability for insufficient Climate Plans can be established. Can interested parties non-governmental general interest institutions like Milieudefensie, Urgenda, and Client Earth[12] still obtain a court order (or declaratory relief) that a company is bound to reduce its emissions further than planned like in the *Milieudefensie/Shell* case? These questions concerning the private enforcement mechanism will be discussed in paragraph 7. In paragraph 8 concluding remarks are given.

2. Climate Plans under the CSDDD and in Relation to the CSRD

One of the CSDDD's ambitions is to ensure by law the transition of companies to a sustainable and Paris-proof business model and strategy. Article 15 CSDDD, however, has been largely stripped out in the Commission Proposal, and even more in the Political Compromise. Despite some companies' expectations, CSDDD does not set any concrete emission reduction goals.[13] It leaves companies ample room to set their emission reduction objectives on their own and even includes the option for some companies to omit greenhouse gas ("GHG") emission reduction objectives in their Climate Plans.[14] Member States are only obliged to ensure that certain large companies adopt a Climate Plan ensuring that its business model and strategy is Paris-proof.[15] This plan needs to contain implementing actions and related financial and investments plans so as to achieve this Paris-proof business model and strategy.[16]

The aforementioned ambition is still reflected in the way the article is written down which assumes a results-oriented approach (the Climate Plan must be Paris-proof) rather than a best-efforts approach.[17] The scope of Article 15 CSDDD (both in the Commission Proposal as in the Political Compromise) is, however, limited to EU companies (formed in accordance with the legislation of a Member State) with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been or should have been adopted and non-EU companies generating a net turnover of more than EUR 150 million in the EU in the financial year preceding the last financial year ("Large Companies").[18]

Article 15 CSDDD has multiple connections to the CSRD, which is already adopted and introduces the obligation for companies to report in their management report on their Climate Plans including implementing actions and related financial and investment plans.[19] As requested by many Member States, the text of Article 15 CSDDD on combating climate change has been aligned in the Political Compromise as much as possible with the obligation of the CSRD to report a company's Climate Plan, in order to avoid problems with its legal interpretation while avoiding broadening the obligations of companies under Article 15 CSDDD.[20]

At first glance, the CSDDD appears to contain the basic obligation to adopt a Climate Plan and the CSRD appears to contain the obligations to report on it. It is highly questionable, however, whether the CSRD itself already imposes an obligation on companies to adopt a climate plan.[21] While it is true that a slightly more cautious approach may be found in the recitals, the text of the directive itself does not seem to leave any room for companies covered

11 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*).

12 Client Earth holds the Board of Directors of Shell liable under the UK Companies Act, s. 172 and 174, for not implementing a climate strategy that is in keeping with the Paris Agreement goal. ClientEarth Press Release 15 March 2022, https://www.clientearth.org/latest/press-office/press/clientearth-starts-legal-action-against-shell-s-board-over-mismanagement-of-climate-risk/.

13 Please note some companies expected the (EU) legislator to adopt a policy framework with clear and binding legislative targets so as to facilitate the transition. Cf. The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 2.5.17.

14 Cf. J.E.S. Hamster, 'Het voorstel van de Europese Commissie voor een richtlijn inzake passende zorgvuldigheid op het gebied van duurzaamheid: een kritische verkenning', *MvO* 2022, 5&6, p. 155. It is, however, highly debatable if the possibility to omit GHG emission reduction objectives in Climate Plans, as stems from Art. 15(2) CSDDD, is of much use, as we will explain in this paragraph.

15 Art. 15 includes a reference to the objective of achieving climate neutrality by 2050 as established in the European Climate Law as well. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] *OJ* L243/1.

16 This clarification concerning Art. 15 was published by the Presidency of the Council on 25 July 2022 in advance of the meeting on 5 and 6 September of the Working Party on Company Law.

17 See also The European Company Law Expert Group (ECLE), the ECGI-blog, 2 August 2022, see https://ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd.

18 'Large companies' are defined in Art. 2(1)(a) and Art. 2(2)(a) CSDDD.

19 Art. 19a(2), point (a)(iii), and Art. 29a(2), point (a)(iii) Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] *OJ* L330/1) as replaced by Art. 1(4) and (7) CSRD.

20 Letter by the presidency of the European Council attached to Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 2022/0051(COD), 15024/22, REV 1, 30 November 2022, par. 25. See Art. 19a(2), point (a)(iii), and Art. 29a(2), point (a)(iii) Directive 2013/34/EU as replaced by Art. 1(4) and (7) CSRD.

21 See the article of L.K. van Dijk & J.B.S. Hijink (in Dutch) who argue that such an obligation already stems from the CSRD. L.K. van Dijk & J.B.S. Hijink, 'Finalisering van de Europese CSRD: een mijlpaal voor duurzaamheidsverslaggeving met grote impact op het ondernemingsrecht vanaf 2025', *Ondernemingsrecht* 2022/87, par. 2.2.4.

by the directive not to adopt a Climate Plan.[22] Should the CSRD indeed itself contain an implicit obligation for companies to adopt a Climate Plan, Article 15(1) CSDDD seems largely redundant.

The same applies to Article 15(2) CSDDD which provides that the company has to identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or has an impact on, the company's operations.[23] In case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes GHG emission reduction objectives in its plan.[24]

The draft European Sustainability Reporting Standard (ESRS) E1 – Climate Change ("ESRS E1") – yet to be adopted by the European Commission – elaborates on the obligation of CSRD for companies to report their Climate Plans by setting standards for these Climate Plans.[25] A "transition plan to mitigate climate change" is defined in ESRS E1 as "an aspect of the undertaking's overall strategy that lays out the entity's targets and actions for its transition towards a lower-carbon economy, including actions such as reducing its GHG emissions and with the objective of limiting climate change to 1.5 °C and climate neutrality."[26] The (draft) ESRS E1 seems to leave no room for companies that fall within the scope of CSRD whether to include GHG emission reduction objectives in their report. The Application Requirements,[27] for example, state: "Sectoral pathways have not yet been defined by the public policies for all sectors. Hence, the disclosure under paragraph 15(a) on the compatibility of the transition plan with the objective of limiting global warming to 1.5 °C should be understood as the disclosure of the undertaking's GHG emissions reduction target. The disclosure under paragraph 15(a) shall be benchmarked in relation to a pathway to 1.5 °C. This benchmark should be based on either the sectoral decarbonisation methodology if available for the undertaking's sector or the absolute contraction methodology bearing in mind its limitations (i.e., it is a simple translation of emission reduction objectives from the State to Corporate level)." Since this part of ESRS E1 qualifies as material, making this standard is always applicable when a company is required to adopt a Climate Plan, emission reduction objectives must be included in a company's Climate Plan. Should the ESRS E1 be adopted in its current form, Article 15(2) also seems largely redundant.

It should be noted that there is a difference in the scope of application of Article 15 CSDDD and the CSRD.[28] If CSRD itself contains an obligation to adopt a Climate Plan, then this obligation will apply to a significantly larger number of companies.[29] Furthermore, while the vast majority of companies covered by the CSDDD will also be covered by the CSRD, a few may not. Only in those cases where a company is covered by the CSDDD but not by CSRD and ESRS E1 would Article 15(1) and (2) CSDDD still have some utility.

In addition, the inclusion of Article 15 in the CSDDD ensures that certain rights granted to the supervisory authority under the CSDDD also cover Climate Plan of Large Companies. However, as we will argue later, these rights of the supervisory authority with respect to Article 15 in the Political Compromise have been curtailed to the point where these rights have become negligible. Furthermore, it is logical that the designated supervisory authority that must supervise compliance with Article 15 CSDDD is the same as the supervisory authority that supervises compliance with companies' reporting obligations. Assuming an implicit obligation that follows from CSRD to adopt a Climate Plan, the supervisory authority that must supervise compliance with the obligations that follow from CSRD will have much more far-reaching powers. It can therefore be concluded that, if it is indeed to be assumed that the CSRD already imposes an obligation on such companies to adopt a Climate Plan, and should ESRS E1 be adopted in its current form by the European Commission, Article 15 CSDDD has little or no added value. We would therefore argue that the interaction between CSDDD and CSRD needs to be clarified before Article 15 CSDDD is adopted.

3. Is Climate Change an Actual and Potential Adverse Impact on the Environment?

Under Article 6 CSDDD, companies are required to take appropriate measures to identify actual and potential adverse impacts on human rights and the environment arising "from their own operations or those of their subsidiar-

22 See recital 30 of the preamble to the CSRD in which the words "any plans they may have" are included, translated in Dutch as "eventuele plannen", in German as "etwaige Pläne" and in French as "les éventuels plans qu'elles peuvent avoir". Recital 30: "[…] They should also be required to disclose any plans they may have to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the objectives of limiting global warming to 1,5 °C in line with the Paris Agreement and achieving climate neutrality by 2050, as established in Regulation (EU) 2021/1119, with no or limited overshoot."

23 See also recital 50 of the preamble to the CSDDD.

24 Art. 15(2) CSDDD.

25 The ESRS E1 refer more specifically to a transition plan to mitigate climate change, which seems to be the same as the plan referred to in Art. 15 CSDDD. In the following, we will continue to refer to a *climate plan* when we refer to the plan referred to in Art. 15 CSDDD. To be retrieved from https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2FED_ESRS_E1.pdf.

26 See draft ESRS E1, Appendix A.

27 See draft ESRS E1, Appendix B.

28 Large undertakings, and small and medium-sized undertakings, except micro undertakings, which are public-interest entities as defined in point (a) of point (1) of Art. 2 of Directive 2013/34/EU and third-country undertakings which generate a net turnover of more than EUR 150 million in the Union for each of the last two consecutive financial years and which have a subsidiary undertaking or a branch on the territory of the Union that meets certain thresholds. See Art. 1(3) and Art. 40a Directive 2013/34/EU as replaced by Art. 1(1) and Art. 1(14) CSRD.

29 CSRD will apply to around 50,000 companies while the CSDDD will apply to around 13,000 EU companies and 4,000 non-EU companies.

ies and, where related to their value[30] chains of activities, those of their business partners".[31] Surprisingly, climate change as such does not fall under the definition of adverse impact on the environment as adopted in the CSDDD. The Paris Agreement or any other legislation with clear emission reduction goals are not listed in Annex I, part II of the CSDDD. This list enacts the legal prohibitions and obligations that may serve as a basis to conclude an adverse environmental impact.[32]

It is interesting to note that the Administrative tribunal of Paris in its judgments of 3 February 2021[33] and of 14 October 2021[34] categorises climate change as such environmental damage. The recently[35] adopted Article 1246-1247 of the French Civil Code explicitly mentions environmental damage[36] as a compensable loss under French civil law. It is therefore remarkable that such an explicit qualification is not found in the CSDDD.

Due to CSDDD's overarching purpose, it seems even more strange that climate change does not qualify as an adverse impact. The reason it is not explicitly inserted in Annex I, Part II could be that, if climate change were defined as an adverse impact, far-reaching due diligence obligations would apply to a broader set of companies, including mapping the impact of business partners on climate change as well. Not defining climate change as an adverse impact, however, does not mean that due diligence obligations due to climate change will not have to be performed in certain cases. For example, Annex I, Part II states the obligation to avoid or minimise adverse impacts on wetlands.[37] The Wadden region in the Netherlands, which played an important role in the *Shell* case, is one of the wetlands that is recognised as such under the Ramsar Convention.[38] Couldn't the argument be made that a contribution to climate change leads to an adverse impact on wetlands, such as the Wadden region, and thus that climate change indirectly still qualifies as an adverse impact? In that context, it also cannot be ruled out that climate change can be indirectly classified as having an adverse impact on human rights. If so, there is a possible risk of overlap between the Climate Plan on the one hand and the prevention action plan or corrective action plan on the other that the company should develop and implement.[39] More so, it gives the designated supervisory authority in that case far more powers to intervene than this supervisory authority appears to be entitled to with respect to supervising the Climate Plan (see paragraph 6). We note that Article 15 has no added value in this regard since in this case combating climate change is addressed through Article 6 et seq. CSDDD.

4. Remuneration

Article 15(3) of the Commission Proposal states that Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability. Due to the strong concerns of Member States regarding the provision proposed by the Commission linking the variable remuneration of directors to their contribution to the company's business strategy and long-term interest and sustainability, Article 15(3) has been deleted from the Political Compromise. The argument for deletion is that the form and structure of directors' remuneration are matters primarily falling within the competence of the company and its relevant bodies or shareholders. Delegations called for not interfering with different corporate governance systems within the Union, which reflect different Member States' views about the roles of companies and their bodies in determining the remuneration of directors.[40]

This argument is remarkable in the sense that, with regards to the revised Shareholders Rights Directive ("SRD

30 In adjusting the change from value chains to chains of activities, the word value still seems to be here incorrectly.

31 Art. 1(1)(a) CSDDD indicates that adverse impacts are related to human rights and the environment.

32 Art. 3(b) CSDDD: 'adverse environmental impact' means an impact on the environment resulting from violation of one of the prohibitions and obligations listed in the Annex I, Part II. Cf. D. Horeman, 'Aansprakelijkheid en duurzaamheid in de financiële sector', in: M.J. van Lopik & I.P. Palm-Steyerberg (eds), *The Twin Transition: Digital & Sustainable Finance (Bundel ter gelegenheid van het dertigjarig bestaan van de Vereniging voor Financieel Recht) (Serie Van der Heijden Instituut nr. 179)*, Deventer: Wolters Kluwer 2022, p. 403.

33 Tribunal administratif Paris (TA Paris), 3 févr. 2021, "Association OXFAM France et autres", req. n° 190467, 190468, 190472, 190476/4-1), r.o. 16 http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/1904967190496819049721904976.pdf.

34 Tribunal administratif Paris (TA Paris), "Association OXFAM France et autres", req. n° 190467, 190468, 190472, 190476/4-1), par. 11: 'Le préjudice écologique né d'un surplus d'émissions de gaz à effet de serre présente un caractère continu et cumulatif dès lors que le non-respect constaté du premier budget carbone a engendré des émissions supplémentaires de gaz à effet de serre, qui s'ajouteront aux précédentes et produiront des effets pendant toute la durée de vie de ces gaz dans l'atmosphère, soit environ 100 ans. Par conséquent, les mesures ordonnées par le juge dans le cadre de ses pouvoirs d'injonction doivent intervenir dans un délai suffisamment bref pour permettre, lorsque cela est possible, la réparation du préjudice ainsi que pour prévenir ou faire cesser le dommage constaté.' (underlining TA and ML) http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf.

35 Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages, *JORF* n° 0184 du 9 août 2016.

36 '*Préjudice écologique*'.

37 "[A]s defined in Article 1 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971 (Ramsar Convention), interpreted in line with Article 4(1) of the Ramsar Convention and applicable law in the relevant jurisdiction."

38 See for a map of the wetlands in the Netherlands that qualifies as such under the Ramsar Convention: https://www.nationaalgeoregister.nl/geonetwork/srv/api/records/07d73b60-dfd6-4c54-9c82-9fac70c6c48e.

39 See Art. 7(2)(a) and Art. 8(3)(b) CSDDD for the obligation to develop and implement, without undue delay, a prevention action plan resp. a corrective action plan.

40 See Political Compromise, p. 9.

II"),[41] interfering to some extent with different corporate governance systems within the Union was not perceived as insurmountable. A seemingly contradictory argument against Article 15(3), therefore, was the potential overlap with the obligations that apply based on SRD II.[42] SRD II already states that the remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives. Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance ("ESG") factors.[43] SRD II, therefore, demands that the remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability and shall explain how it does so.[44]

It should be noted that the scope of SRD II and CSDDD differs, namely applying to listed companies respectively to Large Companies. Accordingly, the obligation contained in Article 15(3) CSDDD was limited to companies that had linked variable remuneration to the contribution of a director to the company's business strategy and long-term interests and sustainability. This largely eliminated the difference in scope, covering only those companies that fall within the scope of SRD II and those companies that voluntarily linked variable remuneration to the contribution of a director to the company's business strategy and long-term interests and sustainability.

It should be noted, that the obligation that follows from SRD II is broader and covers all components that can be subsumed under ESG. Article 15(3) only addresses the link between variable remuneration and climate change mitigation and GHG emission reduction, and therefore only made explicit one aspect of ESG-related remuneration to be included under SRD II. Thus, the removal of this provision does not cause great grief, as this obligation already seems to follow from SRD II. Whether all companies in scope are entirely aware of this SRD II duty is another matter. Despite the deletion of this explicit requirement in CSDDD, it therefore seems preferable for companies to explicitly explain how the remuneration policy and individual variable remuneration are linked and contribute to achieving the goals of the company's Climate Plan, as integrated into the company's business model and strategy. The same applies to companies that are not covered by SRD II but have adopted Climate Plans. It seems inconceivable that, although a company adopts a Climate Plan and implements this Climate Plan by integrating it into the company's business model and strategy, the variable remuneration is in no way linked to the climate goals the company seeks to achieve.

5. Corporate Governance – Say on Climate

The CSDDD Commission Proposal lacked a specification of the role of shareholders or the general meeting in the corporate sustainability and due diligence obligations. The draft report of the European Parliament's Committee on Legal Affairs provided for shareholder involvement in a company's Climate Plan.[45] 'That plan shall be developed in consultation with stakeholders, and the plan and its implementation shall be approved by the company's shareholders, where applicable.'[46] The latter provision seems to refer to national (company) law to determine whether the Climate Plan and its implementation is subject to shareholders' (general meeting) approval. Furthermore, it leaves it to national legislation to determine whether shareholders have the power to pass a binding resolution in a general meeting concerning the company's corporate sustainability and due diligence obligations and its Climate Plan.[47] The CSRD does not require Member States to provide such powers either. So it is left for Member States to determine whether shareholders in a general meeting need to give their approval or may introduce a draft resolution concerning the Climate Plan.

A mandatory approval by the general meeting of the Climate Plan is deemed to be contrary to Dutch company law's tenet of board autonomy.[48] However, De Jongh recommends that the general meeting may review the actual execution of the Climate Plan in their annual meeting. This could result in a resolution expressing a non-binding opinion on the Climate Plan reporting in the management report.[49] Van Olffen & Breukink conclude that on the basis of Dutch case law, the management board is not obliged to consult the general meeting on its Climate Plan or to allow a non-binding vote on the execution of the Climate Plan.[50] However, shareholders may discuss based on their general right to ask questions, the (execution of the) Climate Plan.[51] If shareholders are not given the opportunity to vote on the Climate Plan, there is a chance that shareholders will use other votes to express any dissatisfaction with the Climate

41 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] *OJ* L132/1.

42 The European Company Law Expert Group (ECLE), the ECGI-blog, 2 August 2022, see https://ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd.

43 See recital 29 of the preamble to SRD II.

44 See Art. 9a(6) SRD II.

45 Draft report 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)) Committee on Legal Affairs, 7 November 2022.

46 Amendment 166 to Art. 15(1) CSDDD.

47 For an overview of shareholder activism on sustainability, we refer to M.H.C. Bakker, 'Aandeelhoudersvoorstellen en duurzaamheid: een verkenning', *Ondernemingsrecht* 2022/38.

48 J.M. de Jongh, 'Say on climate', *Ondernemingsrecht* 2021/110, par. 6.

49 De Jongh 2021, par. 6. De Jongh expresses that ideally this matter would be regulated in the Shareholder Rights Directive.

50 M. van Olffen & E.J. Breukink, 'Say on what's next?', *Ondernemingsrecht* 2022/17, par. 4.

51 Van Olffen & Breukink 2022, par. 6.

Plan, for example their binding vote on adopting the remuneration policy and their non-binding vote on the remuneration report.[52] Increasingly, executive remuneration is expected to be linked in part to non-financial objectives of the company. This also increases the likelihood that a negative vote can be expected in the event that the variable remuneration of directors is insufficiently linked to achieving the goals of the Climate Plan and in the event that the company's ambitions as evidenced by the Climate Plan are deemed insufficient.[53] Another potential protest vote can be expected when reappointing the person who holds sustainability in his or her portfolio. The absence of a direct say-on-climate may therefore lead to indirect forms of say-on-climate.

6. Public Enforcement

Each Member State has to designate one or more supervisory authorities to supervise compliance with the obligations enshrined in Articles 6 to 11 and Article 15 CSDDD.[54] The connecting factor is like in most EU company and financial law legislation, the registered office of the company.[55] The designated authority of the Member State where the company's registered office is situated is the competent supervisory authority.

In principle, Member States are free in their choice which supervisory authority they designate. Member States may designate the authorities for the supervision of regulated financial undertakings also as supervisory authorities for the purposes of the CSDDD.[56] In case the public supervisory task is divided over multiple authorities, the Member State has to ensure that the respective competencies of those authorities are clearly defined and that they cooperate closely and effectively with each other.[57]

In the Bill brought before the Dutch Parliament on 2 November 2022 with a similar scope as the CSDDD, the initiating MPs have designated the Netherlands Authority for Consumers and Markets (ACM).[58] The ratio is found in the general task of the ACM to ensure a well-functioning market of citizens and companies. In this market, companies compete fairly and consumers are protected from unfair practices. Therefore ACM is the guardian of these rules ensuring fair play.[59]

However, we deem the Netherlands Authority for the Financial Markets (AFM) better suited for this supervisory task concerning companies' Climate Plans. The AFM is already the designated authority for companies' non-financial reporting duties.[60] As the Climate Plan will become part of the sustainability reporting requirements in the management report with the entering into force of the CSRD, it is envisaged that AFM will be the designated supervisor as well.[61] A substantial argument in this regard is the fact that these duties are essentially about adopting a Climate Plan including emission reduction objectives that are communicated by the company to the world outside in their non-financial reporting.[62]

The CSDDD provides that Member States have to ensure that the supervisory authorities have adequate powers and resources to carry out the tasks assigned to them under this Directive, including the power to request information and carry out investigations related to compliance with the obligations set out in Articles 6 to 11 and Article 15.[63] A major limitation in relation to Article 15 of the Political Compromise, however, is that Article 18 of the Political Compromise provides that Member States shall only require supervisory authorities to supervise that companies have adopted a Climate Plan.[64] The reason this limitation is added may be found in the criticism of the far-reaching power that the supervisory authority otherwise seemed to have over the content of Climate Plans. The fear is that Article 15 CSDDD allows and even requires direct governmental intervention in a company's Climate Plan. "By setting the emission reductions in lieu of the company, the supervisory authority effectively dictates the business model and strategy of that company. This legislative strategy seems to overestimate governmental wisdom while underestimating the judgement of those

52 Cf. on 21 February 2023 AllianzGI announced it will hold directors accountable if the company does not have net zero targets in place and a credible strategy for how to achieve them. As of 2024, depending on the set-up of the board AllianzGI will vote against the Chairperson of the Sustainability Committee, the Strategy Committee or the Chairperson of the Board of certain high-emitting companies if the net zero ambitions or the Climate-related Financial Disclosures are deemed dissatisfactory. https://www.allianzgi.com/en/press-centre/media/press-releases/20230221-proxy-voting-release.

53 Cf. on 21 February 2023 AllianzGI announced as of 2023 it strengthens its voting guidelines with respect to sustainability aspects; it expect European large-cap companies to include environmental, social and governance key performance indicators into their remuneration and would vote against pay policies if this is not implemented. https://www.allianzgi.com/en/press-centre/media/press-releases/20230221-proxy-voting-release.

54 Art. 17(1) CSDDD.

55 Art. 17(2) CSDDD.

56 Art. 17(5) CSDDD.

57 Art. 17(4) CSDDD.

58 Art. 1:1 sub q Voorstel Wet verantwoord en duurzaam internationaal ondernemen, *Kamerstukken II* 2022/23, 35761, No. 9.

59 *Kamerstukken II* 2022/23, 35761, No. 10, p. 25.

60 Art. 2 up and including Art. 4 Financial Reporting Supervisory Act (Wtfv).

61 See the Dutch legislative proposal, "Wijziging van Boek 2 van het Burgerlijk wetboek tot implementatie van Richtlijn (EU) 2021/2101", *Kamerstukken II* 2021/22, 36157, No. 2.

62 The AFM is already the supervisor concerning non-financial reporting and it is envisaged that its task will be extended by CSRD implementing sustainability reporting requirements. See the Dutch legislative proposal, "Wijziging van Boek 2 van het Burgerlijk wetboek tot implementatie van Richtlijn (EU) 2021/2101" *Kamerstukken II* 2021/22, 36157, No. 2. Cf. https://www.afm.nl/nl-nl/sector/themas/duurzaamheid/csrd.

63 Art. 18(1) CSDDD.

64 Art. 18(1) last sentence CSDDD.

who were elected to run the company."[65] This criticism is a bit heavy-handed. The fact that a supervisory authority may review whether a presented Climate Plan is sufficiently compatible with the objectives as stated in Article 15 CSDDD does not automatically mean that the supervisory authority, if it finds the plan insufficiently compatible, then also dictates the specific content of the Climate Plan that is Paris-proof, including setting specific targets for every individual element of the Climate Plan, and thus dictates the company's business model and strategy. The supervisory authority will need to approach a Climate Plan holistically. It seems more reasonable to expect that the supervisory authority will merely delineates the outer boundaries of such a plan. Nevertheless, the fact that a supervisory authority can reject a Climate Plan, and take possible action, does of course mean that the supervisory authority has some indirect influence on the outer limits of the strategy and business model of companies that fall within the scope. But isn't that the very reason for this directive, to set those outer limits to create a level playing field? And what is the alternative? That it is up to national courts to decide on Climate Plans and GHG emission reduction on a case-by-case basis?

The chosen compromise seems to drastically limit the powers of the supervisory authority to the extent that the supervisory authority may only examine whether a Climate Plan has been adopted. The question is how Article 15 CSDDD's result-oriented approach relates to the supervisory authority's obligation to determine that a company has indeed adopted a Climate Plan. An in-depth analysis of whether the presented Climate Plan is indeed Paris-proof does not seem to be within the powers of the supervising authority based on the Political Compromise. But does this mean that the supervisory authority may not review the content of that plan at all? Shouldn't the supervisory authority at least marginally test whether the adopted plan qualifies as a Climate Plan within the meaning of Article 15 CSDDD? We would say, for example, that the supervisory authority should at least review whether the plan contains the various components that should be reflected in a Climate Plan, including a rationale for why, according to the company, the Climate Plan is Paris-proof. In addition, the question arises as to how these limited powers of the supervisory authority under CSDDD relate to the powers vested in the supervisory authority under CSRD.

The aforementioned limitation in the Political Compromise to the review of the content of a Climate Plan also colours the other powers of the supervisory authority under CSDDD. A supervisory authority shall have the power to request information and carry out investigations related to compliance with the obligations set out in Article 15 CSDDD. Furthermore, a supervisory authority may initiate an investigation on its own motion or as a result of substantiated concerns communicated to it in accordance with Article 19 CSDDD, where it considers that it has sufficient information indicating a possible breach by a company of its CSDDD obligations.[66] Article 19 CSDDD entitles any natural and legal persons to submit substantiated concerns to the competent[67] supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive.[68]

From a practical standpoint, it seems logical for a supervisory authority not to vet every Climate Plan, but only to test them marginally as described before. But how does the result-oriented obligation to have a Paris-proof Climate Plan relate to the powers of the supervisory authority if there are substantiated concerns? Does the provision in the Political Compromise that supervisory authorities are only required to supervise that companies have adopted a Climate Plan mean that these substantiated concerns may only relate to the absence of a plan that can be qualified as a Climate Plan on the bases of Article 15 CSDDD? It looks like that, but comes across as contrived. The same seems to apply to the powers the designated supervisory authority at least needs to have, according to Article 18(5) CSDDD, being: (a) to issue an order, (b) to impose penalties as provided in Article 20 CSDDD, and (c) to impose interim measures in case of urgency due to the risk of severe and irreparable harm.[69] The orders that may be imposed are: (i) the cessation of infringements (thus, ordering a company to adopt a climate plan?); (ii) the abstention from any repetition of the relevant conduct (thus, ordering the company to continue having such a plan?); and (iii) where appropriate, to provide remediation proportionate to the infringement and necessary to bring it to an end.[70]

It is questionable whether it is so beneficial for companies to deny the supervisory authority a more substantive review of Climate Plans. The Network of Supervisory Authorities can lead to a harmonised approach by supervisory authorities within the EU, and an approved Climate Plan by the supervisory authority could give companies some comfort when tested in court. Leaving aside the rights enjoyed by the supervisory authority under CSRD,

65 The European Company Law Expert Group (ECLE), the ECGI-blog, 2 August 2022, see https://ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd.

66 Art. 18(2) CSDDD.

67 The wording of Art. 19(1) CSDDD states 'any supervisory authority', but a logic interpretation is that these interested parties must submit their substantiated concerns to the competent supervisory authority (i.e. the supervisory authority of the Member State where the company's statutory seat is situated). Otherwise, supervisory authorities which are not competent, should refer these substantiated concerns to the competent supervisory authority. This would put too much of an administrative burden on these supervisory authorities.

68 Art. 19(1) CSDDD.

69 Art. 18(5) CSDDD.

70 Art. 18(5) CSDDD.

denying a more substantive review by the supervisory authority under CSDDD leaves the option of private enforcement as the only mechanism available to test whether the Climate Plan of a company is indeed Paris-proof. We would like to stress the point that courts addressed by actors with a valid claim have to deliver justice in the sense that the court has to set the minimum requirements for companies if their actual Climate Plans are ruled to infringe upon the rights of (represented) claimants. In this way, the courts may set intermediate emission reduction goals like in the *Shell* case if there is a proven doubt that the Climate Plans are Paris-proof indeed. Unlike the competent supervisory authority, the courts do not have any discretionary authority on whether to take action; courts are bound to deliver justice within the boundaries set by the applicable law to claimants in case their rights are infringed. Scrutiny of Climate Plans by national courts based on national legal systems, therefore, bears an enormous risk of a lack of harmonisation regarding the liability for Paris-incompatible Climate Plans, forcing courts to set GHG emission reduction objectives and effectively dictating the business model and strategy of certain companies. It will most probably lead to an unlevel playing field and is bound to have unequal effects, hitting the company that gets sued while sparing others in comparable situations.[71] Furthermore, the legal remedies available to different actors, including collective redress options for claimants or (representative) organisations differ widely within the EU.[72] This phenomenon increases the unequal effects.

7. Private Enforcement

How can interested parties bring about the required compatibility of these implementing actions and related financial and investment plans with the transition to a sustainable economy? Under Dutch law, private parties may be sued by another private party in a general interest collective redress action under Article 3:305a of the Dutch Civil Code. The *Milieudefensie/Shell* case is a prime example of this.[73]

The Hague District Court has ordered Royal Dutch Shell (RDS) to reduce the CO_2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy.[74] However, the Court emphasises that it does not formulate a legally binding standard for – in this case – a reduction pathway to be chosen.[75] It is important to reiterate that a climate plan is not static, but a dynamic constantly updated living document. The Court does not prescribe a particular climate plan; it merely delineates the outer boundaries of such a plan. RDS's obligation is derived from the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code as interpreted by the District Court on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.[76] The assessment culminates in the conclusion that RDS is obliged to reduce the CO_2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (scopes 1 through 3). It is up to RDS to design the reduction obligation, taking into account its current obligations and other relevant circumstances. The reduction obligation is an obligation of result for the activities of the Shell group (scope 1), with respect to which RDS may be expected to ensure that the CO_2 emissions of the Shell group are reduced to this level. Furthermore, the reduction obligation is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users (scopes 2 and 3), in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible. This obligation is also designated hereinafter as 'RDS' reduction obligation'.[77]

The Court has not yet concluded a violation of RDS's obligation. However, the court has established that RDS may violate its reduction obligation, and the claimed order to comply with that obligation must be allowed. The claimed order may only be rejected if Milieudefensie et al. had no interest, to be respected at law, in it. This could occur when the order cannot contribute to preventing the alleged imminent infringement of interests. RDS' argument that the order will not be effective and possibly be counter-produc-

71 This last argument was also used against a substantive review by the supervisory authority. See The European Company Law Expert Group (ECLE), the ECGI-blog, 2 August 2022, see https://ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd: "In view of the limited governmental resources and the enforcement specificities of each Member State, governmental interventions are bound to have unequal effects, hitting one company while sparing others in comparable situations – and this does not even take into account that not all the companies are covered by the Directive, even if they are major polluters."

72 Cf. findings of Common Core research on mass harm, edited by Rianka Rijnhout & Tomas Arons, to be published in first 6 months of 2023 with Intersentia.

73 Cf. R.J.B. Schutgens & J.J.J. Sillen, 'Algemeenbelangacties bij de burgerlijke rechter' in: Vereniging voor de vergelijkende studie in Nederland en België, Preadviezen 2020-2021, *De algemeenbelangactie en de civiele rechter*, Den Haag: Boom Juridisch, p. 178.

74 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*).

75 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 4.4.29.

76 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 4.1.3.

77 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 4.1.4.

tive fails on the basis of the considerations[78] regarding the effectiveness of the reduction obligation. Since it has been established that in every scenario climate change as a result of CO_2 emissions-induced global warming has negative consequences for the Netherlands and the Wadden region, with serious human rights risks for Dutch residents and the inhabitants of the Wadden region, Milieudefensie has an interest in allowing its claimed order.[79]

It is important to note that in this *Shell* case, in essence the court ordered Shell to adjust its climate transition plan and bring its activities and policies in line with the court-ordered emission reduction goals. In Article 15 CSDDD the so-called *Shell*-norm is (partially) codified.[80] Therefore, the result of adopting Article 15 CSDDD is that it can no longer be disputed that large companies have a legal duty to adopt a Climate Plan that is Paris-proof.[81] Although any review or critical assessment of the Paris-compatibility of a company's Climate Plan via public enforcement seems to be excluded, this does not exclude per se litigating the Paris-compatibility of a company's Climate Plan via private enforcement.

Article 22 CSDDD contains a specific civil liability regime. It has been amended significantly in the Political Compromise in order to achieve legal clarity and certainty for companies and to avoid unreasonable interference with the Member States' tort law systems.[82] The four conditions that have to be met in order for a company to be held liable – a damage caused to a natural or legal person, a breach of the duty, the causal link between the damage and the breach of the duty and a fault (intention or negligence) – were clarified in the text and the element of fault was included.[83]

Please note that the CSDDD does not provide for civil liability in case a company does not comply with its Article 15 obligation to set up and implement a Climate Plan and adopt emission reduction objectives. Article 22 CSDDD only provides for a civil liability regime in case of a violation of its duty to adopt appropriate measures to prevent potential (Article 7) and bring to an end actual (Article 8) adverse impact on human rights and the environment. As we noted before, although climate change as such has not been explicitly recognised as a potential or actual adverse impact on the environment, climate change could still indirectly fall under the definition of adverse impact on the environment and could therefore, via Article 7 and 8, fall within the scope of Article 22 CSDDD.

It is important to note that the civil liability rules under the CSDDD are not without prejudice to EU or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than the CSDDD.[84] So this provision leaves room for legal systems like the Dutch in the *Shell* case, to bring emission reduction duties under its liability regime in the *Shell* case via potential violations of human rights.

However, this lack of harmonisation regarding the liability for Paris-incompatible climate plans means companies are confronted with an unlevel playing field. The EU legislator risks companies to transfer their seats and activities so as to escape cumbersome liability regimes (forum shopping).

8. Concluding Remarks

The main question that needs answering is whether the CSRD does contain its own requirement for companies to adopt a Climate Plan. If that is indeed the case, then Article 15(1) CSDDD has little to no added value. This is all the more true for Article 15(2) CSDD as the restriction contained therein seems to be negated by the – yet to be adopted by the European Commission – ESRS E1. As a result, only in those exceptional cases where a company is covered by the CSDDD but not by CSRD and ESRS E1, Article 15(1) and (2) CSDDD will still have some utility. If CSRD does not contain its own requirement to adopt a Climate Plan, then the introduction of Article 15(1) is necessary to create a legal obligation to do so. Furthermore, the inclusion of Article 15 in the CSDDD could have some utility due to the supervision rights of the supervisory authority under the CSDDD. However, now that these rights have been curtailed in the Political Compromise to the point where these rights have become negligible, the supervision of Climate Plans under CSDDD also seems to have no real added value anymore. If supervision regarding Climate Plans will play a role, it will be because the supervisory authority under CSRD is exercising its powers. We would therefore argue that the interaction between CSDDD and CSRD needs to be clarified before CSDDD is adopted.

78 The Court refers here to See the 2013 memorandum of the PBL Netherlands Environmental Assessment Agency and the KNMI memorandum '*De achtergrond van het klimaatprobleem*' ('The background of the climate problem'). Footnote 11 of the Court ruling.

79 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 4.5.5.

80 Cf. S.B. Garcia Nelen, 'De beursvennootschap van de toekomst', *O&F* 2022/2, p. 13.

81 Cf. The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*), par. 4.1.2: '*RDS endorses the need to tackle climate change by achieving the goals of the Paris Agreement and reducing global CO_2 emissions. According to RDS, the energy transition required for achieving these goals demands a concerted effort of society as whole. RDS opposes the allowance of the claims: RDS asserts that there is no legal basis for doing so. RDS also argues that the solution should not be provided by a court, but by the legislator and politics.*'

82 Letter by the presidency of the European Council attached to Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 2022/0051(COD), 15024/22, 28 November 2022, par. 26.

83 Letter by the presidency of the European Council attached to Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 2022/0051(COD), 15024/22, REV 1, 30 November 2022, par. 27.

84 Art. 22(4) CSDDD.

It is further noteworthy that climate change as such is not defined as an adverse impact under CSDDD. However, this does not alter the fact that climate change may indeed play an indirect role with respect to the due diligence obligations based on Article 6 through 11.

In the Political Compromise, the provision to link variable remuneration to the objectives of a company's Climate Plan has been deleted. The removal of Article 15(3) will not cause great grief, as this obligation already seems to follow from SRD II. Despite the deletion of this explicit requirement in CSDDD, it therefore seems preferable for listed companies to explicitly explain how the remuneration policy and individual variable remuneration are linked and contribute to achieving the goals of the company's Climate Plan, as integrated into the company's business model and strategy. The same applies to companies that are not covered by SRD II but have adopted Climate Plans.

A major limitation under the Political Compromise is that supervisory authorities under CSDDD may only supervise that companies have adopted a Climate Plan. This limitation drastically colours the powers of the supervisory authority under CSDDD. It is questionable whether it is so beneficial for companies to deny the supervisory authority a more substantive review of Climate Plans. Leaving aside the rights enjoyed by the supervisory authority under CSRD, denying a more substantive review by the supervisory authority under CSDDD leaves the option of private enforcement as the only mechanism available to test whether the Climate Plan of a company is indeed Paris-proof. Please note in this respect, that the CSDDD does not provide for civil liability in case a company does not comply with its Article 15 obligation to set up and implement a Climate Plan and adopt emission reduction objectives. The civil liability rules under the CSDDD are, however, not without prejudice to EU or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than the CSDDD. Therefore, CSDDD leaves room for legal systems, like the Dutch in de *Shell* case, to bring emission reduction duties under its liability regime via potential violations of environmental and human rights. Article 15 CSDDD (partially) codifies the so-called *Shell*-norm, making it no longer possible to dispute that a company has a duty to implement a Climate Plan that is Paris-proof. This makes it a little easier to have Climate Plans tested by a court. Scrutiny of Climate Plans by national courts based on national legal systems, however, bears an enormous risk of a lack of harmonisation regarding the liability for Paris-incompatible climate plans, and will most probably lead to an unlevel playing field fostering unequal effects. This accomplishes exactly what companies and Member States would like to avoid by introducing legislation that applies within the EU.