REPORTING UNDER THE 'E' OF THE CSRD

Reporting under the 'E' of the CSRD. An Overview of Legal Requirements and a Comparison With Existing Obligations under Environmental Law, Focussing on the Netherlands

Marloes Brans, Ronnie Bloemberg** & Felix Felder****

The Corporate Sustainability Reporting Directive (CSRD) introduces sweeping requirements for certain groups of companies to report on their environmental, social and governance performances. In this article, we provide an overview of the disclosure requirements under the 'E' in the CSRD, focusing on the requirements to report on greenhouse gasses and pollution, which – unlike climate change – have gone largely undiscussed to date. We compare those requirements with the existing obligations under European and Dutch environmental law, and share our observations along the way. We show that existing rules generally carry obligations to report raw data and emission details, whereas the CSRD will require companies to provide more context for that information and a more extensive explanation of the risks. The CSRD will also require companies to explain what policies and targets they have defined to reduce their emissions and/or their use of pollutants in the future. We do this by listing the disclosure requirements under the CSRD, using the European Sustainability Reporting Standards (ESRS) adopted by the European Commission on 31 July 2023. Given the uniform manner in which the standards are structured, the comments about pollution may also serve as an example for how other standards, in particular environmental standards, should be applied.

Keywords: CSRD, ESRS, sustainablity reporting, greenhouse gases, pollution, Substances of Very High Concern

I. Introduction

The deadline for implementing the Corporate Sustainability Reporting Directive (CSRD)[1] was 6 July 2024. The CSRD introduces impactful requirements for certain groups of companies (in particular large enterprises) to report on their Environmental, Social and Governance performances. It derives from the EU's Green Deal and the accompanying sustainable finance action plan. In the Netherlands, it is estimated that thousands of companies will fall under the CSRD. Most of the changes that the CSRD requires are in the area of financial laws and regulations. However, the Directive impacts environmental law as well: the CSRD and its accompanying 'sustainability standards' include a number of disclosure requirements concerning matters for which European and Dutch environmental law already impose obligations. A distinction can be made between reporting on data (and metrics) and targets on the one hand, and reporting on policies and actions on the other.[2]

This article provides an overview of the disclosure requirements under 'E' in the CSRD, focusing on the requirements to report on *pollution*, which – unlike *climate change* – have gone largely undiscussed to date. Given the uniform manner in which the standards are structured, the comments about *pollution* may also serve as an example for how other standards (in particular the environmental standards) should be applied. We present this by listing the disclosure requirements under the CSRD, comparing those requirements with the existing obligations under European and Dutch environmental law, and sharing our observations as part of these analyses. First, we explain how to deduce information from existing (reporting) obligations to fulfil the disclosure requirements under the CSRD, and highlight gaps compared with existing information. Second, we show that existing rules generally carry obligations to report raw data and emission details, whereas the CSRD will require companies to provide more context for that information and a greater explanation of the risks. The CSRD will also require companies to explain what policies and targets they have defined to reduce their emissions and/or their use of pollutants in the future.

This article starts with a brief introduction, in section II, of the scope and applicability of the CSRD. Section III then discusses the disclosure requirements for climate change, and greenhouse gases in particular, to explain the actual requirements, including their relationship to reporting on climate transition plans. This has already been covered at

* Partner and lawyer environmental law at Houthoff (the Netherlands). Email: m.brans@houthoff.com. An earlier version of this article was published in the Dutch Journal of Construction Law (Tijdschrift voor Bouwrecht) (TBR 2024/84).

** Lawyer (supreme court) litigation and environmental law at Houthoff (the Netherlands). Email: r.bloemberg@houthoff.com.

*** Lawyer environmental law at Houthoff (the Netherlands). Email: f.kelder@houthoff.com.

[1] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 Dec. 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 (*OJ EU* 2022, L322/15).

[2] The present article discusses those targets as a matter of policy, since the approaches are similar and in practice any company that has defined targets will often incorporate them into its policies.

length in scholarly literature, and lessons can be drawn from this for the requirements to report on pollution. Next, section IV describes the obligations that concern data relating to pollution, and specifically air emissions. Section V deals with the requirements for substances of concern and of very high concern as a more specific sub-group of air emissions. Section VI then discusses the disclosure requirements for pollution-related policies, targets and actions. Lastly, section VII takes a brief look at the other environmental standards (for water and marine resources, biodiversity and ecosystems, and resource use and circular economy). This article ends with a conclusion in section VIII.

II. CSRD: Scope and Applicability

The CSRD replaces the existing Non-Financial Reporting Directive ('NFRD').[3] It also amends other Directives and a Regulation.[4] First and foremost, the CSRD significantly expands the scope of application of the NFRD: it will extend to approximately 49,000 companies in Europe, compared with some 11,000 companies under the current legislation.[5] The CSRD will apply to (1) large undertakings, (2) publicly traded small and medium-sized undertakings[6] and (3) a number of specific non-EU undertakings.[7]

The CSRD will enter into force in phases between 2024 and 2029. Publicly traded companies and financial institutions with more than 500 employees that already fall within the scope of the NFRD will be required to report for the first time in 2025, on the 2024 financial year. All other large enterprises that do not fall within the scope of the NFRD will have to report for the first time in 2026, on the 2025 financial year. Publicly traded small and medium-sized companies will be required to report for the first time in 2027, on the 2026 financial year. Non-EU companies without a listing on an EU exchange will begin reporting in 2029 (in abbreviated form) on 2028.[8]

2.1 ESRS sustainability standards

Besides the scope of application, the CSRD brings sweeping changes to the sustainability disclosure requirements compared with the NFRD. Management reports will need to include far more information about environmental, social and governance factors.[9] Precisely what information companies need to present is detailed in the European Sustainability Reporting Standards (ESRS), adopted by the European Commission on 31 July 2023.[10] Those Standards have binding effect. The ESRS contain two cross-cutting standards that reflect general basic principles for the manner of reporting, plus ten topical standards that detail the principal general disclosure requirements for specific issues. The diagram in Figure 1 below shows the various cross-cutting and topical ESRS standards. ESRS E1 to E5 set out the topical environmental standards.

ESRS 1 sets out a series of general requirements and basic principles with relevance for all companies under the CSRD. ESRS 2 contains the general disclosure requirements that apply to all companies and all issues under the ESRS, many of which are not concerned with materiality. The disclosure requirements are labelled, with numbers and with abbreviations that align with the overarching requirements. For example, disclosure requirement 'GOV 1' is concerned with the role of administrative, management and supervisory bodies, as part of the requirements relating to governance.[11] The topical ESRS provide details for various aspects of the general disclosure requirements of ESRS 2. Disclosure requirement 'IRO-1', for '**I**mpact, **R**isk and **O**pportunity', plays a key role here.[12] Companies need to explain what process they have used to map out their impacts (or consequences), risks and opportunities and to assess their materiality. The process should help companies to decide what information to include in their sustainability statement as required by the CSRD.[13]

2.2 Double materiality assessment

An important basic reporting principle is that companies have to perform a 'double materiality assessment' to establish what environmental and sustainability issues carry the most weight for the company and its stakeholders.[14] Double materiality refers to the combination of (1) impact materiality and (2) financial materiality. An issue falls under the double materiality principle if it is material *under either or*

[3] Directive 2014/95/EU (Non-Financial Reporting Directive).
[4] Regulation (EU) 537/2017 (Audit Regulation), Directive 2006/43/EC (Audit Directive), Directive 2004/109/EC (Transparency Directive) and Directive 2013/34/EU (Annual Financial Statements Directive).
[5] Commission Staff Working Document, Executive summary of the impact assessment accompanying the document 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, 21 Apr. 2021, at 82.
[6] This refers to companies whose securities are traded on a European exchange and that satisfy at least two of the three following criteria: (1) a balance sheet total of at least EUR 350,000.00, (2) a net turnover of at least EUR 700,000,00 and/or (3) an average of at least ten employees.
[7] Companies outside the EU fall within the scope of the CSRD if they have (1) a net turnover of more than EUR 150 million in the EU and (2) at least one subsidiary that is a large undertaking or that is publicly traded within the EU or a branch established in the EU that had a turnover of at least EUR forty million in the preceding financial year.
[8] Article 5(2) of the CSRD and Art. 20 of the draft Implementing Decree on the Sustainability Reporting Directive, www.internetconsultatie.nl/duurzaamheidsrapportage/b1 (accessed 21 Jul. 2024).
[9] Article 1(4) of the CSRD replacing Art. 19a of the NFRD.
[10] Commission Delegated Regulation (EU) 2023/2772 of 31 Jul. 2023 supplementing Directive 2013/34/EU.
[11] Article 1(8) of the CSRD inserting Art. 29b of the NFRD in conjunction with ESRS 1 paras 18 ff.
[12] ESRS 2 paras 1–2 and 51–53.
[13] Article 1 sub 4 CSRD replacing Art. 19bis NFRD and Art. 1 sub 7 CSRD replacing Art. 29bis NFRD in conjunction with ESRS 2 paras 46–53.
[14] Article 19a(1) and Art. 29a(1) of the NFRD in conjunction with Recital 29 of the Preamble to the CSRD.

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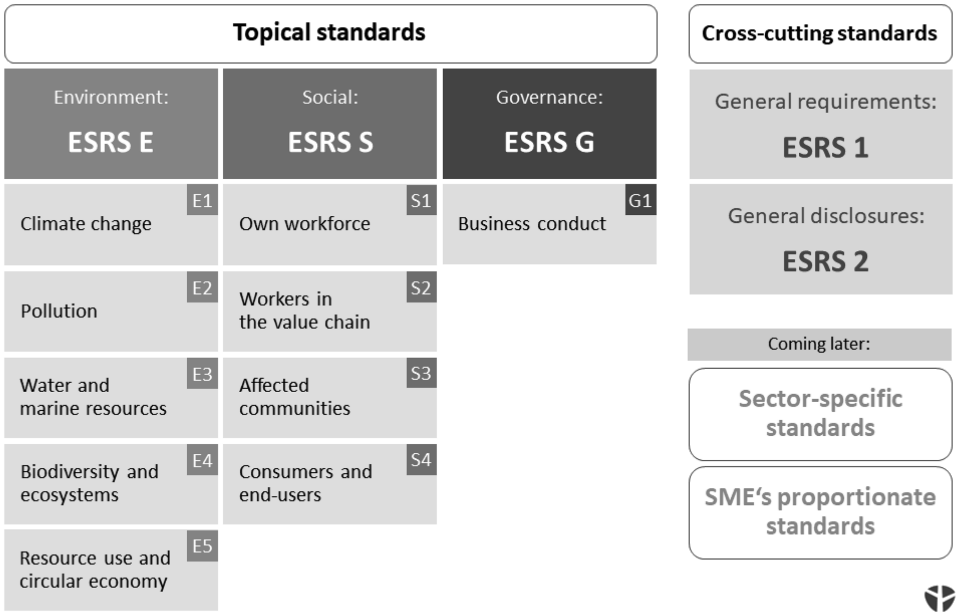
Figure 1 Overview of Cross-Cutting and Topical ESRS Standards



Source: https://denkstatt.at/en/esrs-standards-explained/.

both of these principles.[15] An issue has 'impact materiality' if the company's own operations, or the operations in its value chain, have a relevant impact on people or the environment (the '*inside-out*' perspective), whether positive or negative. An issue has financial materiality if it is likely to impact the company's financial position in the short or the long term (the '*outside-in*' perspective), which again may involve both financial risks and opportunities.

Companies only have to report under a topical standard if the issue is found to be material.[16] As a rule, it is the company's own responsibility to determine whether or not an issue is material. A meticulous materiality assessment is a vital first step for the company to decide on what topics it should report under the CSRD. Although the ESRS topical standards are minimum standards and provide the necessary details on how to report, at the same time it is still unclear to what level of detail companies are required to report on environmental issues under the ESRS (and when they should report at the level of specific installations, for example, and when to report in more general terms for the company as a whole).[17] This makes it challenging to decide what level of detail to disclose in order to be compliant with the CSRD. In addition, certain issues or data points within a topical standard only need to be disclosed if the topic or sub-topic is material (for example, *see* the information about ESRS E3 in Table 1).[18] Even where an issue under a topical standard is found to be material (such as climate change), a further assessment will be required to determine what sub-topics within that standard are material. 'Sector-specific' standards, lastly, will largely determine the material issues for certain sectors regardless of the company's own materiality assessment.[19]

Table 1 Summary of the Materiality of Topics and Sub-topics for ESRS E3 (see Overview in ESRS E1 AR 16).

	Topic	*Sub-topic*	*Sub-sub-topic*
ESRS E3	Water and marine resources	– Water – Marine resources	– Water consumption – Water withdrawals – Water discharges – Water discharges in the oceans – Extraction and use of marine resources

2.3 Core disclosure requirements and audit 'assurance'

ESRS 2 sets out minimum disclosure requirements for matters including (1) the company's 'policies' with regard

[15] ESRS 1 paras 2 and 37–42.
[16] ESRS 1 paras 21 and 30.
[17] ESRS 1 paras 54–57 dictate in general terms that information might need to be broken down by country, site location or subsidiary if this is necessary for a proper understanding of the company's material risks and opportunities.
[18] ESRS 1 AR 16 lists the topics and sub-topics for sustainability matters.
[19] To date, this applies only to the draft sector-specific standard 'Oil and Gas – Midstream to Downstream', published on 24 Jan. 2023, WP Oil and Gas [draft] ESRS (Upstream and services + Midstream to downstream) Cover Note, efrag.org.

to sustainability matters,[20] (2) the measures, or 'actions', that the company takes to manage each material sustainability matter,[21] and (3) the company's 'targets' for the sustainability matters.[22] This all revolves around preventing, mitigating and remediating material 'impacts', acting on 'risks' and/or pursuing 'opportunities' (*see also* section 2). The minimum disclosure requirements under ESRS 2 should be considered in conjunction with the topical ESRS, which provide further detail for those minimum requirements. Importantly, however, the ESRS do not appear to impose any obligation to have or draft actual policies, actions or targets: a company may also disclose that it does not have any policies, actions or targets in place.[23] However, if a company has policies, actions or targets in place for a particular sustainability matter, the disclosures on that matter must be compliant with the minimum requirements. ESRS 2 and the topical standards also set out minimum disclosure requirements for the 'metrics' that a company uses to measure its performances and effectiveness for a material impact, material risk or material opportunity.[24] Companies may omit the disclosure of their metrics if they assess the information to be not material.[25]

A further relevant consideration is that an external auditor needs to provide 'assurance' on the 'sustainability report'.[26] Although the auditor's opinion will initially need to offer 'limited assurance', looking further ahead it might have to provide 'reasonable assurance'.[27] This means that, before a company publishes its annual report, the auditor will need to review the reliability of the information and determine, for example, whether the company has applied the double materiality assessment correctly. If the auditor is unable to provide this assurance, it will need to issue a limited assurance opinion, or even refrain from issuing an opinion if too much information is missing. As such, companies will need to make careful arrangements with their auditors to ensure that they obtain the required limited assurance opinion.[28]

III. Disclosure Obligation for Greenhouse Gases (ESRS E1 Climate Change)

3.1 Disclosure requirements (data and policies) under the CSRD

The CSRD will radically change the manner in which greenhouse gas emissions are reported.[29] Companies must align their reports with the disclosure requirements of ESRS E1 (*Climate change*) if they consider 'climate change' to be a material topic. A company that decides not to report on climate change must provide a detailed explanation of why the topic is not material. It must also include an explanation as to whether the topic might become material in the future, and if so when.[30] It is expected that only a small number of companies will be able to successfully argue that climate change is not a material topic: almost every single company – either directly or through its value chain – emits greenhouse gases and/or has to deal with the impact of climate change on its operations.

3.1.1 *Scopes 1, 2 and 3 Emissions*

An important requirement under ESRS E1 is that companies must map their gross Scopes 1, 2 and 3 emissions and report them in tonnes of carbon emissions.[31] Companies that emit other greenhouse gases in addition to CO_2 must report those emissions in CO_2 equivalents. ESRS E1 defines 'emission scopes' in the same way as the GHG Protocol.[32] The GHG Protocol comprises a series of widely supported (but non-binding) reporting standards, drafted by the World Resources Institute and the World Business Council for Sustainable Development. For example, the 'GHG Protocol Corporate Value Chain (Scope 3)' uses fifteen categories to explain how Scope 3 emissions should be defined.[33] These standards are phrased in general terms, and often give companies discretion to make their own assessments when defining their own emissions in (in this example) Scope 3. Another important

[20] ESRS 2 paras 63–65.
[21] ESRS 2 paras 66–69.
[22] ESRS 2 paras 78–81.
[23] ESRS 2 paras 62 and 72. This means that these disclosure requirements will, at a minimum, reveal *whether* the company has policies, targets or actions in place for a particular sustainability matter.
[24] ESRS 2 paras 73–77.
[25] ESRS 1 paras 34.
[26] Article 3 sub 15 CSRD inserting Art. 26bis in Directive 2006/43/EU of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.
[27] Article 8 of the draft Implementing Decree on the Sustainability Reporting Directive and G. M. van Santen et al., *Handboek Jaarrekening 2024*, Deventer: Wolters Kluwer, at 1454.
[28] It is likely that auditors will be forced to express limited assurance opinions more often than in the past, particularly during the years ahead. Although a company cannot be fined for a limited assurance opinion, such an opinion will draw attention from readers of corporate reports such as lenders, supervisory authorities and NGOs, e.g., The Dutch Authority for the Financial Markets (AFM), for instance, has announced that such an opinion might trigger further investigation into a company. *See* M. Bresson, *Accountants zullen niet zomaar handtekening zetten onder onvolledig duurzaamheidsverslag (Auditors Will not Easily Sign Off on Incomplete Sustainability Report)*, Het Financieele Dagblad 28 Nov. 2023, and M. Pols & E. van der Schoot, *AFM maant bedrijven over duurzame verslaggeving en wil kunnen straffen (AFM Urges Companies on Sustainable Reporting and Wants to Be Able to Sanction)*, Het Financieele Dagblad 30 Mar. 2023.
[29] Greenhouse gases are those gases that are listed in Part 2 of Annex V to Regulation (EU) 2018/1999 (Governance Regulation): carbon dioxide (CO^2), methane (CH_4), nitrous oxide (N_2O), sulphur hexafluoride (SF_6), nitrogen trifluoride (NF_3), hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs).
[30] ESRS 1 paras 32. This stricter obligation to explain applies only for ESRS E1 (*Climate change*), and not, for example, to ESRS E2 (*Pollution*).
[31] ESRS E1 paras 44–52.
[32] *See* ESRS E1 AR 39(a), AR 45(a) and AR 46(a).
[33] 'Corporate Value Chain (Scope 3) Standard', www.ghgprotocol.org. (accessed 21 Jul. 2024).

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factor here is that Scope 3 emissions cover the entire value chain, and that to obtain sufficient data companies will depend heavily on other companies in their value chain.

3.1.2 *Climate Transition Plans*

ESRS E1 also regulates how companies must report on their 'climate transition plans'. It does not appear, in principle, that drafting a climate transition plan is an obligation under the CSRD (*see also* section 2.3).[34] However, large companies that fall within the scope of the Corporate Sustainability Due Diligence Directive ('CSDDD') will be obliged to draw up, and report on, a climate transition plan.[35] Those companies will also have a best efforts obligation to put their climate transition plans into practice.[36]

Besides the concept of a climate transition plan, the revised Industrial Emissions Directive (IED) introduces an obligation for operators of IPPC installations to have an 'indicative transformation plan' as part of their environmental management system that will also become mandatory.[37] For particular operations, the indicative transformation plan must present information about how the installation (or installations) will be transformed during the 2030–2050 period, to contribute to the emergence of 'a sustainable, clean, circular, resource-efficient and climate-neutral economy by 2050'.[38] Unlike a climate transition plan, which covers the operations of an entire company, an indicative transformation plan is mandatory for installations that fall within the scope of the IED. Affected companies need to have their climate transition plans and indicative transformation plans in place by 1 January 2027[39] and 30 June 2030, respectively.

The climate transition plan should explain how the company's strategy and business model are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C. To achieve this, the climate transition plan must include at a minimum: (1) the company's emission reduction targets, (2) the planned reduction actions to achieve those targets, (3) an explanation and quantification of how the company will finance the reduction actions, (4) if applicable, a disclosure of significant CAPEX amounts invested in coal-, oil- and gas-related operations, (5) an explanation of how the transition plan is embedded in the company's overall strategy and business model, and (6) whether the transition plan is approved by the administrative and supervisory bodies.[40]

The precise manner of reporting on these sub-topics in the climate transition plan is described in ESRS E1 on climate change. For the emission reduction targets, for example, ESRS E1-4 states that if the company includes emission reduction targets those targets should be presented in tonnes of CO_2 equivalents or as a percentage of the emissions of the base year, and that the targets must cover its Scopes 1, 2 and 3 emissions. If the company has defined emission reduction targets, those targets must '*at least include target values for the year 2030 and, if available, for the year 2050'.* From 2030, the target values will have to be set after every 5-year period.[41] The company must also explain whether its emission reduction targets are '*science based*' and are compatible with the goal of limiting global warming to 1.5°C.[42]

Essentially, unlike previously in the NFRD, under the CSRD companies will in principle have to report on the volume of their Scopes 1, 2 and 3 emissions, and on their transition plans, emission reduction targets and the financing for their emission reduction plans, in so far as they have them. Companies also have to explain what risks climate change exposes them to. They will have to be meticulous in their communications about their emission reduction targets and planned actions, given that third parties – for example lenders and consumers – will base their opinions of the company on that information. If it subsequently emerges that the information presents an overly optimistic portrayal, or if the company fails to carry out its planned reduction actions, it might be held liable. A final factor that is relevant here is that the management report must be a '*living document*', updated every year, with an explanation of what progress the company has achieved.

3.2 Existing disclosure obligations (data and policy): EU ETS and others

At this time, many of the 49,000 companies that will come under the scope of the CSRD are not required to map and publicly disclose their greenhouse gas emissions. This situation is different, at least in part, for companies that fall under the EU Emissions Trading System ('EU ETS'). Those companies are already required – in short – to map the emissions

[34] A company that does *not* have a climate transition plan in place must explain whether it will adopt one in the future, and if so when. *See* ESRS E1 para. 17.

[35] Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. The CSDDD, which was adopted in its final form on 24 May 2024, will apply to all EU undertakings with more than 1000 employees on average and a worldwide net turnover of more than EUR 450 million.

[36] For more about the obligation under the CSRD to draw up a climate transition plan, *see* R. Bloemberg, *Wordt de Shell-uitspraak ingehaald met de komst van de CSDDD? Een vergelijking tussen de reductieplicht uit het Shell-vonnis en de CSDDD*, (8) Tijdschrift voor Ondernemingsrecht 253–263 (2024).

[37] The revised IED was adopted in its final form on 12 Apr. 2024. *See* 'Industrial emissions: Council signs off on updated rules to better protect the environment', www.consilium.europa.eu. (accessed 21 Jul. 2024).

[38] Directive of the European Parliament and of the Council amending Directive 2010/75/EU industrial emissions (integrated pollution prevention and control) and Directive 1999/31/EC (the landfill of waste).

[39] The introduction date of 1 Jan. 2027 applies to the largest undertakings with at least 5000 employees and EUR 1500 million in turnover. Undertakings with at least 3000 employees and EUUR 900 million in turnover need to be compliant with the CSDDD starting in 2028, and undertakings with at least 1000 employees and EUR 450 million in turnover have to be compliant starting in 2029. *See* Art. 37 of the CSDDD.

[40] ESRS E1 paras 15–16.

[41] ESRS E1 para. 34(d).

[42] ESRS E1 para. 34(e).

that are caused by their installations. They also have to submit annual emissions reports on the volume of their emissions.[43] In the Netherlands, the Dutch Emissions Authority also publishes those data on its website, showing the emissions of each of a company's installations.[44] A factor that is relevant here is that the reporting obligations under the EU ETS only apply to the Scopes 1 and 2 emissions of the companies in question from the relevant installations that are covered by the EU ETS. Those companies do not have to report on their Scope 3 emissions, nor on matters such as their emissions reduction targets or planned reduction actions, although the requirement to surrender rights already means that the EU ETS by itself functions as an emissions reduction mechanism.

In addition to the EU ETS, the Netherlands has a few other CO_2 reporting (and reduction) obligations (partly) to implement the obligations following from the National Emission Ceilings Directive,[45] which stipulates the 2020 and 2030 emission reduction commitments per Member State for five[46] main air pollutants. For example, a large group of 'environmentally harmful activities' and properties there is an obligation to make their energy consumption more sustainable.[47] Under that requirement, the party that controls an environmentally harmful activity or property is obliged to take any and all measures to make its energy consumption more sustainable with a payback in five years or less. This includes both energy-saving measures and maximizing renewable energy production on site. The purpose of this requirement – similar to e.g., the requirements for buildings that follow from the European Performance of Buildings Directive – is to realize significant carbon reductions around the whole country in due course. In addition, the Energy Efficiency Directive[48] requires large enterprises to perform energy efficiency audits every four years. The report based on this audit (EED report) must include, among others, a general overview of existing energy flows, a description of important factors that influence the energy use and a calculated overview of the energy saving potential. Although the Dutch energy savings obligation and EED report primarily concern companies' Scopes 1 and 2 emissions, it is also possible that the information might play a role in the value chain (for example for financial parties).

IV. Disclosure Obligation for Data About Air Emissions (ESRS E2 *Pollution*)

4.1 General

The central disclosure obligations relating to the environment are included in ESRS E2 concerning *Pollution.* ESRS E2 provides details specifically for the topic of pollution on how to give shape to the disclosure requirements for impacts (or consequences), risks and opportunities (IRO-1, E2-1 to E2-6; *see also* section 2.3). The purpose is to provide more information about the company's positive and negative material impacts on *air, water* and *soil* pollution. Another purpose is to provide information about what mitigating or compensatory measures are in place, if any, in order to act on the risks and opportunities that are identified. Companies are also required to explain what plans they have in place to make their strategy and business model compatible with the transition to a sustainable and clean economy.[49] The topic of pollution is closely connected to other environmental topics (concerning water and marine resources, biodiversity and ecosystems, and resource use and circular economy). Therefore, where necessary, these environmental topics should be considered together (*see also* section VII).[50] If a policy or action concerns multiple different sustainability matters, the topical disclosures may use cross-references.[51]

4.2 Disclosure requirements (data) under the CSRD

ESRS E2 sets out the requirements for disclosure under the CSRD for (1) air, water and soil pollution, and (2) for substances of concern and of very high concern.[52] As mentioned above, the focus of this article is on air pollution and on substances of concern and of very high concern, which also occur in air emissions and are discussed in section V. The CSRD uses 'air pollution' to refer to companies' emissions into air ('both indoor and outdoor'), and prevention, control and reduction of those emissions.[53] Disclosure requirement ESRS E2-4 (*Pollution of air, water and soil*) is intended, among other purposes, to provide an understanding (particularly in quantitative terms) of the emissions that the company generates to air in its operations.[54] Therefore, ESRS E2-4 primarily concerns *emission data.* To provide this

[43] Article 68 of Commission Implementing Regulation (EU) 2018/2066 of 19 Dec. 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC. Industrial undertakings that fill out an electronic annual environmental report (PRTR Report, *see* s. 4.2) must also disclose their emissions of certain greenhouse gases to the competent authority.

[44] www.emissieautoriteit.nl/onderwerpen/rapportages-en-cijfers-eu-ets (accessed 21 Jul. 2024).

[45] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 Dec. 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC.

[46] Sulphur dioxide (SO2), nitrogen oxides (NOx), non-methane volatile organic compounds (NMVOC), ammonia (NH3) and fine particulate matter (PM2,5).

[47] Article 5.15 of the Dutch Environmental Activities Decree (*Besluit activiteiten leefomgeving*) and Art. 3.84 of the Dutch Environment Structures Decree (*Besluit bouwwerken leefomgeving*).

[48] Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 Sep. 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast).

[49] ESRS E2 paras 1–6.

[50] ESRS E2 para. 7.

[51] ESRS 2 para. 61.

[52] Article 19a(2) of the Annual Financial Statements Directive and ESRS E2 para. 2.

[53] ESRS E2 para. 3. *See also* para. 3 for the requirements concerning prevention, control and reduction.

[54] ESRS E2 para. 27.

information, the company is required to disclose[55] the volume of emissions into air of pollutants listed in Annex II to Regulation (EC) 166/2006 (PRTR Regulation) – which it is not already required to disclose under ESRS E1 (such as greenhouse gases)[56] (*see* sections 3.1ff.) – in the appropriate mass units.[57]

The company is *obliged* to disclose the 'consolidated amount'[58] of air emissions for each pollutant (cf. the company's obligation to disclose its Scopes 1–3 greenhouse gas emissions under ESRS E1 paragraph 44), meaning the total air emissions of the pollutant emitted by the facilities over which the company has financial or operational control.[59] As a result, reporting under the CSRD may take place at a different 'corporate level' than the level at which the PRTR report (discussed below) is submitted. This requires understanding and coordination between the reporting company and the company holding the facilities (the 'operator'). The company may in principle also *choose* to disclose additional breakdowns, for example at site level or a breakdown of its emissions by type of source, by sector or by geographical area.[60] In some situations – when this is needed for a proper understanding of the material impacts, risks and opportunities – the company is required to disaggregate information and report on one or more significant site(s).[61] It is important to keep in mind that disclosing information under the PRTR Regulation does not discharge companies from their obligation to make their own independent materiality assessments and, if necessary, disclose additional air emission data.[62]

In principle, therefore, the information or data about air emissions that companies are required to disclose under ESRS E2-4 may refer to information that the company is already required to report on under existing legislation.[63] However, an important difference (compared with the existing obligations) is that this disclosure is about more than the raw data: a company that discloses its emission information (concerning air) is obliged to provide the context and meaning of those emission details.[64] This includes describing the following elements: (1) the changes (in the volumes emitted) 'over time', (2) the measurement methodologies, and (3) the process or processes to collect data for 'pollution-related accounting and reporting'.[65] The requirement that the data should be put into context potentially makes the CSRD disclosure information more useful to other parties, as it may enable them to better understand what position emission data take in the company's policies and organization, and the risks (financial and otherwise) attached to the use of pollutants.

4.3 Existing reporting requirements (data) under the PRTR Regulation and the Environmental Activities Decree

4.3.1 PRTR Report

Under Article 5 of the PRTR Regulation, companies that undertake one or more of the activities specified in Annex I to the PRTR Regulation, and that exceed the capacity thresholds specified for a particular activity in that Annex, are required to submit a report (PRTR Report) on the annual loads of air emissions of all pollutants (91) that: (1) are specified in Annex II to the PRTR Regulation (including nitrogen, sulphur, methane, ammonia, phosphorous and mercury) *and* (2) exceed the threshold value (column 1) in Annex II to the PRTR Regulation.

In the Netherlands, based on the Environmental Activities Decree (*Besluit activiteiten leefomgeving*, '**Bal**'), on some environmentally harmful activities (*milieubelastende activiteitenmilieubelastende activiteiten*)[66] PRTR reporting is also in place for the substances that[67]: (1) are specified in Annex V to the Bal (including ethene, formaldehyde and styrene) *and* (2) exceed the threshold values of Annex V of the Bal. This may include activities that fall within the scope of the PRTR and for which the Bal specifies additional reporting requirements. It is also possible that certain activities that do not fall within the scope of the PRTR are declared subject to the PRTR reporting requirements (or elements of those requirements) at the national level by the Bal.

In addition, Dutch law obliges companies that are required to disclose its emissions under Article 5 of the PRTR to have a specific system of measurement and registration in place.[68] This means that reporting under the PRTR Regulation should also use the measuring and registration system designed in accordance with the Bal.

Furthermore, we note that companies whose financial years do not coincide with the calendar year could

[55] ESRS E2.28 The company must also disclose the volume of microplastics that the company uses or generates.

[56] Ozone-depleting substances, nitrogen oxides and sulphur oxides must be disclosed under ESRS E2, even though they are connected to climate change (ESRS E1 para. 8).

[57] ESRS E2 AR 21.

[58] The consolidated amount only needs to include the emissions of pollutants from facilities that exceed the threshold values for emissions under Annex II of the PRTR Regulation, ESRS E2 para. 29.

[59] ESRS E2 para. 29.

[60] ESRS E2 AR 22.

[61] ESRS 1 paras 54–57; *see also* footnote 17. ('= ESRS 1 paras 54–57 dictate in general terms that information might need to be broken down by country, site location or subsidiary if this is necessary for a proper understanding of the company's material risks and opportunities').

[62] ESRS 1 para. 11.

[63] This is a general rule, and applies not only to information under the PRTR Regulation but also to the IED, e.g.; *see* ESRS E2 AR 24.

[64] ESRS E2 para. 30.

[65] Including the type of data that this requires and the information sources.

[66] Dutch environmental regulations regulate environmentally harmful activities and address the operators of such activities.

[67] Article 5.10 of the Environmental Activities Decree.

[68] With which: (1) complete, consistent and credible data are obtained, (2) information can be gathered with an appropriate frequency to determine what emissions and what transfers of pollutants fall under the reporting obligation, (3) information can be obtained about the totality of emissions and transfers of pollutants from all deliberate, accidental, routine or non-routine activities, and (4) the best available information can be obtained (Art. 5.12 of the Bal).

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encounter difficulties here. For example, in the Netherlands, the PRTR report needs to be submitted to the competent authority by 31 March of the calendar year following the calendar year for which the PRTR report has to be prepared, using an online application.[69] CSRD reports in the Netherlands have to be filed together with the company's management report, which in turn has to be filed together with the annual financial statements (Article 2:394 of the Dutch Civil Code, which stipulates that the financial statements must be published no later than twelve months after the end of the financial year). This means that, if a company's financial year is the same as the calendar year, the company will generally have sufficient time to process the data from the PRTR report, i.e., before 31 March of the following year. However, less time might be available if the company's financial year ends at a different moment.

The data from the PRTR reports is made publicly available on a European level via the European Pollutant Release and Transfer Database.[70] In the Netherlands, the Minister of Infrastructure and Water Management ('**Minister**') also makes the data from the PRTR reports available through the national Emissions Register,[71] by 31 March of the second calendar year after the reporting year.[72] The emission data are shared in such a manner that it is essentially impossible to trace them back to individual companies. Also, any company with an obligation to report may ask the competent authority not to share specific parts of the information provided in the PRTR report to the Minister for inclusion in the national Emissions Register.[73] The competent authority will then have to decide, on the basis of the Dutch Open Government Act (*Wet open overheid*), that to a great extent implements the Treay of Aarhus e.g., dealing with the access to environmental information, whether or not to grant that request.[74] Given that most of the data submitted in PRTR reports are emission data which principally need to be disclosed, they will likely have to be shared with the Minister.[75] Conversely, information in a PRTR report that qualifies as company or manufacturing data will not have to be shared with the Minister, as long as the interest in keeping the information confidential outweighs the interest in disclosure.[76]

4.3.2 Dutch Reporting Obligations

The IED only obliges Member States to ensure that permits for installations include monitoring obligations and that the national competent authorities receive the results of this monitoring at least once a year.[77] Furthermore, for most installations the IED does not set specific emission limit values. Consequently, emissions into air are often primarily subject to national (general) rules or to emission limit values that follow from BAT reference documents. In the Netherlands, emissions into air from any point source are subject to the general rules for each substance or substance class formed by the emission limit values of Table 5.30 of the Bal,[78] except where specific emission limit values apply on the basis of the applicable Best Available Technique (BAT) conclusions or on the basis of specific rules from Chapter 4 of the Bal.[79] The emission limit values of Table 5.30 should be monitored in accordance with the monitoring regime also prescribed by Table 5.32 of the Bal.[80] The results obtained from the measurements performed on the basis of the monitoring system have to be recorded in a report that is shared with the competent authority.[81] 'Based on Chapter 4 Bal, some specific environmentally harmful activities are subject to different emission limit values and monitoring regimes. This applies i.e., to combustion plants, which are subject to emission limit values under the IED'. Under Article 8.33 of the Dutch Environmental Quality Decree (*Besluit kwaliteit leefomgeving*, '**Bkl**'), lastly, the competent authority must attach requirements to an environmental permit for environmentally harmful activities, to specify monitoring or another method for establishing compliance with the emission limit values[82] set out in the permit.[83] The data obtained from the prescribed monitoring must be shared with the competent authority on a regular basis, and at least once per year (except where they are already included in a PRTR report).[84]

[69] Article 7 PRTR Regulation in conjunction with Art. 5.9 of the Bal (effective 1 Jan. 2025; previously the same date applied under Art. 12.20 of the Environmental Management Act).
[70] Article 10 PRTR Directive.
[71] *See* www.emissieregistratie.nl (accessed 21 Jul. 2024). The data that need to be included in the PRTR report, under the PRTR Regulation, are also shared with the European Environment Agency and published on, www.industry.eea.europa.eu (accessed 21 Jul. 2024). That same website houses the Industrial Emissions Portal, previously the European Pollutant Release and Transfer Register (E-PRTR).
[72] Article 10.46 of the Environment and Planning.
[73] Article 5.11 of the Bal.
[74] *See Bulletin of Acts, Orders and Decrees of the Netherlands* 2018, 293, at 1381–1382.
[75] Article 10(1), opening lines and at (c), read in conjunction with Art. 10(4) of the Open Government Act.
[76] *See Bulletin of Acts, Orders and Decrees of the Netherlands* 2018, 293, at 1382.
[77] Article 14 IED.
[78] Article 5.30 of the Bal. Table 5.30 stipulates for each substance or substance class what the applicable emission limit value is.
[79] Article 5.27 of the Bal.
[80] The monitoring regime varies, depending on the fault factor (*storingsfactor*), from a one-off measurement of emission-relevant parameters to continuous measurement of emissions.
[81] Article 5.38 of the Bal.
[82] The emission limit values may concern emissions into air, water *and* soil; *see* Art. 8.26 of the Environmental Quality Decree.
[83] Permit requirements too will only include emission limit values if the environmentally harmful activity or activities regulated by the permit are not governed by any rules under the Bal concerning emission limit values (including the associated measuring/reporting requirements), or if emission limit values apply under an applicable BAT conclusion that deviate from that Decree. This means that these permits have the effect of supplementing the Decree and the BAT conclusions.
[84] Article 8.33 of the Environmental Quality Decree.

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4.3.3 CSRD Reporting

The basic principle is that companies may report on data about air emissions under the CSRD using the available PRTR information. However, implementation of (reporting on) PRTR information may differ per Member State. In addition, we note that the ESRS are minimum standards, meaning that it cannot be excluded that emissions that are material to the company and do not have to be reported in the PRTR report may have to be reported under the CSRD, for example, because of regulation at the national level. In these situations, it is important that the reporting requirements under national law such as the Bal or the Bkl in the Netherlands may bring significantly more monitoring requirements to establish compliance with emission limit values (as opposed to the PRTR Regulation, which requires reporting annual loads). Also the number of substances with regulation (or additional regulation) at the national level that requires monitoring (such as under the Bal, *see* paragraph 5.4.4 Bal), will potentially be much greater than under the PRTR Regulation. This means that for 'substances with regulation (or additional regulation) at the national level' the CSRD, which requires disclosure of consolidated amounts, might require companies to share more information, and in a different form, about emission data if they are considered material to the company.

4.4 Disclosure requirements for water and soil

The matters set out in the paragraphs above apply largely to emissions into water and soil as well, given that emissions into air, water and soil have to be reported under both the CSRD and the PRTR Regulation. Unlike for air emissions, however, Dutch national law does not contain any general reporting requirements for emissions into water or soil in the same way as for emissions into air (cf. paragraph 5.4.4 of the Bal). However, an environmental permit for an environmentally harmful activity might stipulate emission limit values for emissions into water or soil. If so, the permit must also contain monitoring requirements for those emission limit values.[85] In addition, as with some air emissions, for some environmentally harmful activities Chapter 4 of the Bal (or specific provisions from that chapter) stipulates emission limit values for discharges into sewers/surface water or for waste water. The measuring system and the manner and frequency of sharing the emission data with the competent authorities are then again also determined by the relevant provisions from Chapter 4 of the Bal. It will be interesting to see whether under the CSRD companies will have to report any additional emission data for water and soil, either compared with the PRTR report or otherwise, and if so what those additional data are.

V. Substances of Concern and Substances of Very High Concern (ESRS E2 *Pollution*)

5.1 Disclosure requirements (data) under the CSRD

Under disclosure requirement ESRS E2-5 (*Substances of concern and substances of very high concern*), a company's CSRD report must disclose information on the production, use, distribution, commercialization and import/export of 'substances of concern' and 'substances of very high concern', on their own, in mixtures or in articles.[86] The CSRD qualifies the following as a substance of concern ('**SC**')[87]: a substance that (1) meets the criteria laid down in Article 57 and *is* identified in accordance with Article 59(1) of Regulation (EC) 1907/2006 (REACH), (2) is classified in Part 3 of Annex VI to Regulation (EC) No 1272/2008 (CLP) in one of the hazard classes or hazard categories indicated in the CSRD or (3) negatively affects the re-use and recycling of materials in the product in which it is present, as defined in relevant Union product-specific ecodesign requirements.[88] The CSRD qualifies any substance that meet the criteria laid down in Article 57 of REACH that *were* identified in accordance with Article 59(1) of the REACH as a substance of very high concern ('**SVHC**').[89]

The objective of the disclosure requirement for SCs and SVHCs is to enable an understanding of the company's impact on public health and the environment through the use/emission of SCs and SVHCs. The disclosure requirement also enhances the understanding of the material risks of using and emitting SCs and SVHCs, for example if and when the rules change, and what the opportunities for companies using them are.[90]

To comply with this disclosure requirement, companies have to use mass units[91] for reporting[92] on the total amounts of SCs and SVHCs: (1) that are generated or used during the production or that are procured, (2) that leave their facilities as emissions, as products, or as part of products or services, and (3) that leave their facilities as emissions, as products, or as part of products or services *split into main hazard classes*. The data about SCs and SVHCs that companies are required to disclose under ESRS E2 may refer to data on which the company is already required to report under existing legislation (at the European level or otherwise).[93] Under disclosure requirement E2-1 (*Policies related to pollution*), companies must also report on any policies that they have in place for substituting and minimizing the use of SCs and phasing out SVHCs (*see also* section 6.1).[94] Besides the

[85] Paragraph 1.2.9 of the Bal.
[86] ESRS E2 para. 32. The original Dutch text of the present article used the abbreviations from the English-language version of ESRS E2. As will become apparent below, the definition of a substance of very high concern in the Dutch-language version of ESRS E2 covers other substances than the definition of a substance of very high concern in the Bal.
[87] Commission Delegated Regulation (EU) 2023/2772 of 31 Jul. 2023 supplementing the CSRD, Table 2.
[88] ESRS E2 does not include any references to regulations. It is possible that the Ecodesign Directive (2009/125/EC) is meant.
[89] *Ibid.*
[90] ESRS E2 para. 33.
[91] ESRS E2 AR 29.
[92] ESRS E2 para. 34 and ESRS E2 AR 28.
[93] ESRS E2 AR 30.
[94] ESRS E2 para. 15(c).

requirements discussed in this section, SCs and SVHCs (and emissions of those substances into air) are also subject to the requirements regarding air emissions described in section IV.

5.2 Existing reporting requirements (data) under the Environmental Activities Decree (including avoidance and reduction programmes)

In national environmental legislation, the qualification of substances of (very) high concern may differ from the definition in the CSRD. For example, under Dutch law, a '**Dutch SVHC**'[95] is a substance that: (1) satisfies one or more of the criteria or conditions set out in Article 57 of REACH, or (2) (a) is listed in Annex VI to the CLP Regulation and is classified as a CMR substance (carcinogenic, mutagenic or toxic to reproduction) in category 1a or 1b, (b) is included in the candidate list within the meaning of Article 59 of REACH or in Annex XVII to REACH, (c) is listed in Annex I–III to Regulation (EU) 2019/1021 (POP Regulation), (d) is included in the list of priorities for action established under Article 6 of the OSPAR Convention, or (e) is identified as a priority substance in Annex X to the Water Framework Direction,[96] or (3) satisfies the established scientific criteria for determining endocrine disrupting properties. On the other hand, the Bal does not regulate SC, or at least not directly; in some situations, a duty of care could be relevant in this respect.

Whereas at the Dutch national level (i.e., under the Bal) companies are only required to report on Dutch SVHCs, under the CSRD they must disclose not only SVHCs but also SCs. At the same time, fewer substances qualify as SVHCs than under the more or less equivalent Dutch SVHCs, although SCs and Dutch SVHCs show some overlap, principally with substances included on the candidate list within the meaning of Article 59 of REACH. These are identified as SCs by the EU and as Dutch SVHCs under the Bal. Nevertheless, under the CSRD companies are likely to fall within the 'increased disclosure regime' of disclosure requirement E2-5 for more substances, perhaps even many more, than the Dutch SVHCs.

In the Netherlands, operators of environmentally harmful activities that emit Dutch SVHC must also inform the competent authority every five years the extent to which they emit Dutch SVHCs into air or water.[97] In addition, they must inform the competent authority of the available options for limiting emissions of Dutch SVHCs into air or water.[98] These operators are also required to draft avoidance and reduction programme ('**ARP**') for their Dutch SVHCs. That ARP should describe, among other details, the options for avoiding the use of Dutch SVHCs and, if avoidance is impossible, what possibilities and technologies are available to prevent and minimize emissions of Dutch SVHCs into air or water.[99]

We deem it likely that using an ARP for reporting requirements under the CSRD will, unlike using a PRTR report, cause difficulties in practice for a number of reasons. Firstly, Dutch SVHCs are not defined in the same manner as the substances that need to be disclosed under the CSRD (SCs and SVHCs). Secondly, the CSRD reporting requirements for SCs and SVHCs have a broad scope of application – much broader in fact than an ARP: the CSRD reporting requirements for SCs and SVHCs cover not only emissions into air and water, but every SC or SVHC that enters or leaves the company, regardless of its form.[100] An ARP, conversely, describes only elements of that information. Lastly, the reporting frequencies are different (every year under the CSRD and after every five years at the Dutch national level).

In general, as a result of the discrepancy with and partially lack of EU regulation of SC and SVHC, it seems probable that it will be more difficult to use a nationally prescribed reporting method of SC and SVHC – if any – for reporting requirements under the CSRD. In the Dutch context, to provide more integrated information despite the differences in reporting on substances of concern or of very high concern under the CSRD and at the Dutch national level, companies could consider making a connection to SCs and SVHCs in their five-year ARPs. When applicable, Dutch companies should distinguish (if possible) between Dutch SVHC emission data at the national level and emission data, plus other information where necessary, connected to the CSRD reporting requirements for SCs and SVHCs (plus any PRTR requirements). This will make it possible for the auditor to verify (and review) the information, while also showing what information is not relevant/not intended for CSRD reporting.

VI. Disclosure Requirement for Policies, Targets and Financial Impact Related to Pollution

6.1 Policies related to pollution

Disclosure requirement ESRS E2-1 (*Policies related to pollution*) provides further details to disclosure requirement IRO-1 (*see* section 4.1). To this end, ESRS E2-1 states that the company must disclose its policies adopted to manage its material impacts (or consequences), risks and opportunities related to pollution

[95] Article 5.22a of the Bal.
[96] Directive 2000/60/EC of the European Parliament and of the Council of 23 Oct. 2000 establishing a framework for Community action in the field of water policy.
[97] Article 5.22 of the Bal.
[98] Article 5.23 of the Bal. The obligation to also limit or minimise emissions into water, and to report accordingly after every five years, was introduced in the Environment and Planning Act.
[99] Article 5.24 of the Bal and Part 4.4a of the Dutch Environment and Planning Regulation (*Omgevingsregeling*).
[100] Namely as emissions, without limiting the definition of the type of emission. They may take the form of emissions to air, water or soil or of a product or part of a product.

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and its prevention and control (in more general terms, *see* 'Core disclosure requirements and audit "assurance"' in section II). The company must explain *to what extent* such policies[101] have been adopted,[102] and indicate what pollutants[103] or substances[104] the policies address.[105] Similarly to the climate transition plan under ESRS E1.17, it does not appear that companies are obliged to have policies in place for pollution.[106] However, it is likely, that environmental management systems and transition plans from the IED, which will become mandatory, will qualify (in whole or in part) as policies (and actions) related to pollution that companies must disclose under the CSRD.

At least for its own activities and its upstream and downstream value chain, the company should explain the extent to which its policy focuses on the following efforts[107]: (1) mitigating the impact related to pollution of air, water and soil, (2) substituting and minimizing the use of SCs and phasing out SVHCs (*see also* section 5.1) and (3) avoiding incidents and limiting their impact on people and the environment. The company must also disclose what pollution-related actions[108] it takes and what resources (financial and otherwise) it has allocated to implementing those actions,[109] to enable an understanding of what actions the company has taken and planned to achieve the pollution-related targets set out in its policies.[110]

Unlike the system of ARPs for Dutch SVHCs, we note that Dutch environmental law does not appear to contain any obligation to draw up specific environmental policy plans.[111] Even so, many companies determine policies and actions for internal purposes, for example for raw materials management to limit waste flows or to install Best Available Techniques, which depending on the issue might also be recorded as permit requirements. Some companies also have environmental management systems in place, for example as part of their ISO certification. However, these are often descriptions of the actual situation, with an explanation of actions to improve that situation. Policies that must be reported under the CSRD, if they are in place, appear to have more of a driving role aimed at preventing pollution or limiting its impacts. The CSRD also sets out the substantial obligation to report pollution from operations in the value chain, for which many companies will not possess information. This appears to go much further than the 'policy documents' that most (Dutch) companies use at present.

6.1.1 *Targets Related to Pollution*

Under disclosure requirement ESRS E2-3 (*Targets related to pollution*), companies must disclose what pollution-related targets they have, and to what extent those targets relate to preventing or controlling amounts of emissions into air, water and soil and SCs and SVHCs (in more general terms, *see* section 2.3).[112] To provide context, the company must specify whether those targets are prescribed by an authority or were adopted voluntary.[113] This means that, for the purpose of defining targets, regulatory obligations may not be presented as the company's own *extralegal* targets, presumably at least partially to reduce the risk of 'environmental washing'. Where this is relevant for describing its policies, the company may include information about site-specific targets (*see also* section 4.2).[114]

6.1.2 *Financial Effects*

Under disclosure requirement ESRS E2-6 (*Anticipated financial effects from pollution-related impacts, risks and opportunities*), companies must provide information about the anticipated financial effects on the company of[115]: (1) the impact of polluting operations and dependencies on the company's business, and (2) the opportunities presented by preventing and controlling pollution through its operations. Wherever possible, the company should express these financial risks in terms of concrete monetary values. Opportunities only need to be expressed as a concrete monetary

[101] Addressing the identification, assessment, management and remediation of the negative impacts of pollution.
[102] ESRS E2 paras 12/13.
[103] '*A substance, vibration, heat, noise, light or other contaminant present in air, water or soil which may be harmful to human health and/or the environment, which may result in damage to material property, or which may impair or interfere with amenities and other legitimate uses of the environment*', Annex II to Delegated Regulation (EU) 2023/2772.
[104] '*Any chemical element and its compounds, with the exception of the following substances: i) radioactive substances, ii) genetically modified micro-organisms*', Annex II to Delegated Regulation (EU) 2023/2772.
[105] ESRS E2 AR 11.
[106] *See* in particular ESRS E2 para. 15, opening lines.
[107] ESRS E2 para. 15.
[108] Under ESRS E2 MDR-A – *Actions and resources n relation to material sustainability matters*, the company must essentially explain what material actions it takes/plans to take to address the company's risks and opportunities and to prevent, mitigate or remediate the potential impact on people and the environment. If a particular material policy leads to actions, the company must indicate the key actions, including planning, projected outcome, scope and the timeline by which the action is expected to be completed. Significant financial effects of these actions must also be explained. Under ESRS E2 para. 19, in the context of pollution, the company must specifically disclose whether the action concerns *avoiding* pollution, *reducing* pollution, or *restoring* ecosystems where pollution has occurred.
[109] ESRS E2 paras 36 ff.
[110] ESRS E2 paras 6–17.
[111] The CSRD effectively requires companies to publish their avoidance and reduction programmes for Dutch SVHCs.
[112] ESRS E2 paras 20–21 and 23. The description of the targets should include the information prescribed under ESRS 2 MDR-T Targets MDR-T – *Tracking effectiveness of policies and actions through targets.* Most of the requirements under MDR-T concern form, e.g., to indicate how policies and targets are related, what period the targets cover and how they align with national, international and European policies.
[113] ESRS E2 para. 25.
[114] ESRS E2 AR 18.
[115] ESRS E2 paras 36 and 38.

value if sufficient information is available.[116] At a minimum, the company must disclose the following information[117]: (1) the percentage of its net revenue made with products and services involving or containing SCs or SVHCs, (2) OPEX incurred in conjunction with major 'incidents'[118] and 'deposits',[119] (3) CAPEX incurred in conjunction with major incidents and deposits,[120] and (4) the provisions for environmental protection and remediation costs (including soil remediation and other environmental remediation at production sites). The company must disclose any relevant contextual information, for example a description of 'material'[121] incidents and deposits that had negative impacts on the environment and/or on the company's financial position. It must also address the effects for its financial performances with short-, medium- and long-term horizons.[122]

These appear to be impactful 'finance-specific environmental disclosure requirements', specifically with regard to soil remediation and other environmental remediation at production sites. In our experience, in the Netherlands, this type of information is often only addressed for the first time as part of or in preparation for transactions. It is not available in every 'autonomous business situation'. In some situations, remediation and/or restoration can be costly, even extremely costly. The costs require extensive prior soil testing, and frequently involve discussions with the competent authorities in order for any estimate to be made, which even then is often only a rough indication. It will therefore need to be seen, in multiple respects, how 'far' companies need to take this finance-specific environmental disclosure requirement, including with their prior testing (to determine extent and actions). At the very least, the CSRD appears to move further in the direction of establishing a 'finance-specific environmental valuation' for companies.

VII. Water and Marine Resources, Biodiversity and Ecosystems, and Resource Use and Circular Economy (ESRS E3-E5)

Besides ESRS E1 and ESRS E2, discussed above, the CSRD contains three further environment ESRS: ESRS E3 – *Water and marine resources*, ESRS E4 – *Biodiversity and ecosystems*, and ESRS E5 – *Resource use and circular economy.* These three ESRS are linked to, and overlap with, ESRS E2.[123] Moreover, e.g., policies for biodiversity or the circular economy, are frequently linked to policies about pollution and how to control it, and hence need to be addressed as such in CSRD reports.[124] In general terms, reporting on policies for these three environmental matters is subject to the same rules as climate change and pollution. The terms of these three ESRS are therefore considered briefly, highlighting several points that are important in connection with reporting under ESRS E2.

7.1 ESRS E3

Under ESRS E3 (*Water and marine resources*), companies must first describe how their operations affect water (including both surface water and groundwater), whether positively or negatively.[125] This covers the effects of both withdrawing and discharging water. Companies must also explain how their operations impact 'marine resources' and associated economic activities.[126] Under ESRS E3, the company must also indicate: (1) what action it takes to prevent or reduce the negative effects of its business on water and marine resources (for example by reducing its water consumption), (2) what the company contributes to the EU's ambitions for water, (3) to what extent the company's policies are aimed at adapting its business model in line with sustainable water use, and (4) in what way the company is dependent on specific sources of water or marine resources, and what risks and opportunities they present for the company.[127]

ESRS E2 and ESRS E3 are connected primarily in so far as a company discharges particular harmful emissions into surface water, groundwater and/or seas/oceans. Those emissions will then in principle need to be addressed under ESRS E2, although they are also relevant in connection with ESRS E3.[128] For example, the CSRD treats emissions into the sea as impact drivers that potentially

[116] ESRS E2 para. 39.
[117] ESRS E2 para. 40.
[118] 'A legal action or complaint registered with the undertaking or competent authorities through a formal process, or an instance of non-compliance identified by the undertaking through established procedures. Established procedures to identify instances of non-compliance can include management system audits, formal monitoring programs, or grievance mechanisms'. *See* Annex II to Delegated Regulation (EU) 2023/2772. This may include for instance interruptions of production that resulted in pollution; *see* ESRS E2 AR 32.
[119] 'An amount of a substance that has accumulated in the environment, either in water or in soil, and either as a consequence of regular activities or from incidents or from disposals of undertakings, independent of whether that accumulation occurs at the production site of an undertaking or outside'. *See* Annex II to Delegated Regulation (EU) 2023/2772. The ESRS does not specify how '*major* incidents or deposits' should be construed, nor do any other immediate points of reference appear to exist. The Seveso Directive, e.g., refers to 'major accidents'.
[120] Given that the CSRD report is a retrospective review and, where material, should indicate how much OPEX/CAPEX was incurred for major incidents and deposits, companies are indirectly encouraged to define appropriate policies.
[121] It is unclear is why the adjective 'major' is not used here as well.
[122] ESRS E2 para. 41.
[123] ESRS E2 para. 7, ESRS E3 para. 4, ESRS E4 para. 5 and ESRS E5 para. 7.
[124] *See* ESRS E3 AR 16, ESRS E4 AR 11 and ESRS E5 AR 8.
[125] ESRS E3 para. 1(a).
[126] ESRS E3 para. 3.
[127] ESRS E3 para. 1.
[128] ESRS E3 para. 4.

have a negative effect on the availability of marine resources.[129] For addressing emissions into water under ESRS E3, it is also relevant whether those emissions into water take place from sites located near 'areas at water risk' such as waters whose chemical composition falls short of the prevailing standards. Therefore, if a company has sites that discharge into such areas, the materiality assessment is relatively likely to indicate that the company must disclose those discharges under ESRS E3, including in qualitative terms. This then raises the question, for example, of whether companies should disclose in their CSRD reports if a discharge enters a body of water that does not satisfy the requirements under the Water Framework Directive (and should conduct tests first). In the Netherlands that would pose a real difficulty, as many surface waters do not meet those requirements.

7.2 ESRS E4

ESRS E4 (*Biodiversity and ecosystems*) has a broad scope, covering the relationships between companies and ecosystems and populations of terrestrial, freshwater and marine flora and fauna. Accordingly, under ESRS E4 companies must describe – in so far as this information is material and comparable to ESRS E3 – what positive and negative effects their operations have on those ecosystems and to what extent their operations contribute (or potentially contribute) to the important causes behind diversity loss and deteriorating ecosystems. Under ESRS E4, the company must also indicate: (1) what actions it takes to prevent or mitigate negative impacts of its business on biodiversity and ecosystems, (2) to what extent the company plans to align its strategy and business model to respect planetary boundaries and meet the targets from (for example) the Habitats Directive and the Birds Directive, and (3) the company's dependencies on specific ecosystems.[130]

ESRS E4 is related to both ESRS E1 and ESRS E2 because climate change and pollution are considered to be important causes for changing ecosystems and biodiversity.[131] Companies must consider what they contribute to those two causes when determining whether they are required to report under ESRS E4.[132] Companies for which both ESRS E1 and ESRS E2 are manifestly material will then be more likely to have to report under ESRS E4 as well. Another important factor is that under ESRS E4 companies are required to indicate and describe sites with operations that have a potentially negative effect on areas where ecosystems or biodiversity are under pressure.[133] This might be specifically relevant for companies with sites primarily located in the Netherlands, as most Natura 2000 areas that are protected based on the Habitats and Birds Directive there have a poor conservation status as a result of excessive nitrogen deposition. Therefore, companies that cause pollution near Natura 2000 areas (for example significant nitrogen deposits) might need to address this in more detail on the basis of ESRS E4.

7.3 ESRS E5

Under ESRS E5 (*Resource use and circular economy*), companies are required to indicate to what extent their use of raw materials (now and in the future) aligns with the system of a circular economy. As a result, under ESRS E5 companies will principally need to describe how they use (or will use) raw materials, explaining to what extent they realize efficient use of raw materials, prevent raw material depletion and use renewable sources. More specifically, ESRS E5 requires that companies indicate what actions they take and what policies they pursue to minimize the volume of their waste, maintain the value of the products and materials that they use and optimize their efficient use during both the production and the consumption phase.[134]

ESRS E5 is based on the premise that raw material consumption is a major driver of climate change and pollution, and that policies aimed at achieving a more circular system will result in reductions of (for example) air emissions (both greenhouse gases and other air emissions). As such, policies aimed at reducing air emissions (and emissions into water and soil) will often include components that fall within the scope of ESRS E5.[135] In addition, ESRS E5 states specifically that much of the materiality assessment for this ESRS is effectively covered by ESRS E1 and ESRS E2.[136] Another relevant consideration is that ESRS E5 requires companies to identify what relevant raw materials/products enter the company and what raw materials/products leave the company, either as products or as waste.[137] They must also indicate what proportion of the waste qualifies as 'hazardous'.[138] Thus, it is very well possible that particularly companies that manufacture products for which they use SCs or SVHCs and/or that contain SCs or SVHCs, should prepare for having to report in line with this under ESRS E5 as well. In more general terms, the disclosure requirement under ESRS E5 is likely to help the national governments to focus its policies more clearly and possibly also demand action.

VIII. Conclusion

The CSRD is a substantial piece of legislation, and it is important for companies to identify the basic obligations first, by mapping what topics are material to their operations, what the associated disclosure

[129] ESRS E3 AR 11.
[130] ESRS E4 paras 1/2.
[131] ESRS E4 para. 4.
[132] ESRS E4 AR 4.
[133] ESRS E4 para. 16.
[134] ESRS E5 para. 1.
[135] ESRS E5 para. 6.
[136] ESRS E5 AR 2.
[137] ESRS E5 paras 4–6.
[138] ESRS E5 para. 37.

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requirements are and what information is already available within the company. By identifying 'gaps', they can decide whether to generate particular information or otherwise establish that the information is unavailable, even if only for that moment. In some situations, disclosing that information will be mandatory under the CSRD, and therefore we believe that it is important for companies to keep meticulous records of their internal decision-making concerning the CSRD. It should be noted that this begins with the question of which 'corporate level' to report at.

Collecting emission data and other information will be a vital part of the process, and it will be incredibly important to structure the organization in such a way that (1) the data are available and reliable, (2) the available data are coordinated and aligned, to ensure that (3) the data are fit for use for the various legal obligations that apply. This is the case not only at the level of individual production sites but also, and more importantly, within corporate groups and (in so far as relevant) across the entire value chain. One option to consider in order to simultaneously keep the regulatory functions of the data separate is to 'label' the information. Another important aspect of the CSRD, including in comparison with existing legislation, is that it deals with more than just disclosure of raw data. Companies will have to provide context and explanations for their emission and environmental data and other information. This will also place great demands on organizations. It is fair to assume that companies drawing up the CSRD reports will require closer coordination, perhaps even much closer, between their financial department and their environmental department. This more 'situational' information will also be very important, in that it is likely to significantly influence matters such as the company's valuation and its ability to raise financing.

Companies will need to identify their existing plans and policies and consider what they aim to achieve, partly in view of what 'the world at large' expects. Already companies and large enterprises have generally been reviewing or reconsidering their climate change plans in recent years, in part under pressure from the judgment in the infamous *Shell*-case, in which Shell was ordered by the District Court of The Hague to reduce its CO_2 emissions worldwide with 45% in 2030 compared to its emissions in 2019.[139] Companies mostly possess large quantities of data about pollution. However, they have fewer policies, particularly policies that drive operations, and generally possess little information about the value chain. The transparency about policies that is required under the CSRD could, more than previously, expose companies that do not have (specific) environmental policies. It will also reveal differences between companies. NGOs might include this information in their decisions to focus on particular issues or parties, which could lead to further recourse to 'climate and environmental litigation'. It is possible that companies in turn will seize on the CSRD to align their policy structures more closely with the CSRD disclosure requirements, incorporating existing obligations where possible and perhaps switching to a more integrated reporting form. What 'level of ambition' to pursue will be an important boardroom topic in this connection, including over time.

Lastly, disclosure under the 'E' of the CSRD will have various effects on how companies give shape to national environmental law. We expect that some form of dynamic will emerge between the two sets of legislation at EU and national level, particularly as they relate to the environment. As this article has shown, some of the information that is required for the CSRD can derive from national obligations. However, CSRD reports may also contain information that is of interest to supervisory and other competent authorities. It is possible, for example, that the situational reporting on emission data will alert authorities that emission limit values are generally lower than the targets that the majority of companies set, which could lead to stricter general rules or permit revisions. In addition, the entering into force of the CSRD and the concepts and notions defined therein could lead to even further harmonization and/or acceleration of environmental laws in the European Union and additional regulation on topics that the CSRD addresses such as soil contamination. Altogether, we believe that the impact that the CSRD might have on European and national environmental law should not be underestimated.

[139] District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337. Shell has since appealed this decision. It is expected that the Court of Appeal will decide on this appeal in the last quarter of 2024.