

Implementation of European Sustainability Reporting in Dutch law

July 2024



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1 Introduction

The transposition of the Corporate Sustainability Reporting Directive (CSRD) into Dutch law has come one step closer with the publication of both the draft decree and the draft law, both including explanatory notes, in June 2024.

The legislative proposal for the Implementation of Sustainability Reporting (hereinafter: the proposal) sets forth, among other things, amendments to the Dutch Audit Firms Supervision Act (WTA), the Financial Supervision Act (Wft), and Book 2 of the Dutch Civil Code (DCC) in the form of a new Article 2:391a BW.

The draft Implementation Decree on the Directive for Sustainability Reporting (hereinafter: the decree) regulates a further implementation of the reporting requirements from the CSRD.

The legislator has chosen to implement the CSRD in Dutch law without introducing additional policies. This means that the various provisions from the CSRD have been adopted quite literally, and that the requirements have not been extended further. However, the member state options offered by the CSRD have been utilized in some instances. As the first group of companies will already have to report for the financial year 2024, including “limited assurance” from an external auditor, time is of the essence. In this publication, we present the key points from the proposal and (in particular) the decree in nine sections:

- ▶ Scope of application (Section 2)
- ▶ Exemptions (Section 3)
- ▶ Content (Section 4)
- ▶ EU-Taxonomy Regulation (Section 5)
- ▶ Reporting on key intangible resources (Section 6)
- ▶ Publication (Section 7)
- ▶ Auditor, level of assurance, and temporary provision regarding the auditor’s appointment (Section 8)
- ▶ Non-compliance with CSRD/ESRS (Section 9)
- ▶ Conclusion and implementation process (Section 10)

The regulation are not yet final, which means that changes may still occur. Additionally, some of the topics discussed below are subject to interpretation.

2 Scope of Sustainability Reporting

Large cooperatives and large commercial foundations are not required to prepare a sustainability report.

2.1 General application and phased implementation

The table below shows when the requirement to prepare a sustainability report will first apply for different groups of companies. The following sections of this publication will delve into a number of these situations.

EU-companies	From when?
Large public interest entities, regardless of legal form (banks, insurers, listed entities) with more than 500 employees.	Reporting periods starting on or after 1 January 2024 (reporting in 2025).
Large companies (with or without listing) and large banks and insurers (with or without listing and regardless of legal form).	Reporting periods starting on or after 1 January 2025 (reporting in 2026).
Medium-sized and small listed entities.	Reporting periods starting on or after 1 January 2026 (reporting in 2027), with a possibility to opt-out for two years and report as from reporting periods starting on or after 1 January 2028 (reporting in 2029).
Third country companies with listing in the EU	From when?
Large companies with listing in the EU and with more than 500 employees.	Reporting periods starting on or after 1 January 2024 (reporting in 2025).
Large companies with listing in the EU.	Reporting periods starting on or after 1 January 2025 (reporting in 2026).
Medium-sized and small entities with listing in the EU, and listed medium-sized and small banks and insurers.	Reporting periods starting on or after 1 January 2026 (reporting in 2027), with a possibility to opt-out for two years and report as from reporting periods starting on or after 1 January 2028 (reporting in 2029).
Activities of a non-EU institution in the EU	From when?
Non-EU parent companies with net turnover > €150 million in the EU – large subsidiary in the EU.	Reporting periods starting on or after 1 January 2028 (reporting in 2029).
Non-EU parent companies with net turnover > €150 million in the EU – listed SME subsidiary in the EU.	Reporting periods starting on or after 1 January 2028 (reporting in 2029).
Non-EU parent companies with net turnover > €150 million in the EU – branch in the EU generates net turnover > €40 million.	Reporting periods starting on or after 1 January 2028 (reporting in 2029).

The requirement to prepare a sustainability report will first apply to large¹ public interest entities (PIEs) with more than 500 employees, regardless of the legal form. In the Netherlands, this includes listed institutions, banks, and insurance companies. The PIEs designated in the Netherlands, such as pension funds, housing corporations, etc., are not in scope of the new legislation because they are designated as PIEs under the Dutch Audit Firms Supervision Act (WTA) and not under the DCC. Also, such undertakings are generally not operating through the legal form of a “vennootschap”, and therefore are generally not in scope of the new legislation based on their legal form, as explained below.

The requirement to prepare a sustainability report will also apply to large public limited companies (NVs) and private limited companies (BVs), as well as large partnerships (VOFs/CVs) where all liable partners are capital companies established under foreign law. The Dutch legislator thus follows the (mandatory) scope of the EU Accounting Directive (2013/34), without further expanding it. This means that, for example, large cooperatives or large commercial foundations are not required to prepare a sustainability report, despite the fact that they are in scope of Title 9 Book 2 of the DCC for the preparation of financial statements and the management report.

2.2 Investment entity/personal holding

An investment entity is not required to prepare a sustainability report if it makes use of the consolidation exemption based on the exit strategy and as a result would not be considered a large company. In our opinion, a personal holding will often not need to prepare a sustainability report because the personal holding will not be considered the head of a group and therefore will often not be a large company. If the personal holding meets the size criteria for a large company, it must prepare a company-only sustainability report.

The legislator has now explicitly confirmed that the scope of consolidation as referred to in Sections 2:406 and Section 2:407 DCC also applies to sustainability reporting. This means that group companies and subsidiaries included in the consolidated financial statements of a parent company must also be included in the consolidated sustainability report.

Investment entities have a consolidation exemption for majority participations for which an exit strategy applies. Accordingly, they have the same exemption for sustainability reporting.

The decree and the accompanying explanatory notes do not pay specific attention to the so-called personal holding. However, in this context, it is important that a parent company in the decree is defined as a company that is the head of a group as referred to in Section 2:24b DCC. A personal holding is generally not considered the head of a group. This means that the personal holding will not consolidate the interests held and the size of the personal holding will generally be determined based on the standalone company data. This will often lead to the personal holding being classified as a small company, which is not required to prepare a sustainability report. If the personal holding meets the size criteria for a large company, it will have to prepare a company-only sustainability report. Whether a personal holding should be considered the head of a group is subject to interpretation.

¹ The size of an entity is determined on consolidated basis in accordance with Section 2:397 (1) DCC.

2.3 Non-EU companies with activities in the EU

Companies from third countries that conduct considerable activities in the EU are also required to provide sustainability information to ensure a “level playing field” with EU companies. For non-EU parent companies of EU subsidiaries, a separate requirement to prepare a sustainability report applies if the following two requirements are met:

- ▶ There is a large subsidiary, a small or medium-sized listed subsidiary, and/or a branch office generating net turnover of more than €40 million in the EU; and
- ▶ The ultimate non-EU parent company has a consolidated net turnover of more than €150 million in the entire EU.

The purpose of this requirement is to provide insight in the way the ultimate parent company, which is active in the EU, deals with sustainability. The report must cover the total (global) group headed by the parent company. This report will be prepared in accordance with specific standards to be developed that will be less extensive than the regular “European Sustainability Reporting Standards” (ESRS). However, the European Commission has not yet developed a standard for these situations and it is currently unclear when they will do so.

The parent company from the third country may also prepare a sustainability report in accordance with the CSRD/ESRS or in an equivalent manner.

The EU subsidiary/branch is required to file the sustainability report, which has been prepared by the ultimate parent company from the third country at group level (i.e., globally), as a separate document at the trade register.

2.4 Asset managers

Asset managers are not required to report about their clients' investments.

Investment institutions and undertakings for collective investment in transferable securities (UCITs) as referred to in Section 1:1 of the Financial Supervision Act (Wft) are exempt from the sustainability reporting requirement. It has been clarified that managers of such investment institutions and UCITs are not required to report on the sustainability impact of the investments. Furthermore, the explanatory notes to the decree clarify that managers of investment institutions, managers of UCITs, and investment undertakings that manage assets of individual clients do not have to report on their clients' investments. These financial undertakings do, however, need to report on investments for their own account.

This does not automatically mean that these asset managers do not need to prepare a sustainability report. Whether such a requirement exists depends on their size, as described above, and legal form.

3 Exemptions

Exemptions summarized

- ▶ Exemption for an EU subsidiary with an EU parent entity
- ▶ Exemption for an EU subsidiary with a non-EU parent entity
- ▶ Temporary possibility of artificial consolidation by an EU subsidiary of a non-EU parent
- ▶ Exemption if there is commercially sensitive information

3.1 Exemption from preparing a sustainability report

There is an exemption for a Dutch subsidiary if the information is included in the consolidated sustainability report of the EU parent entity, or if the information is included in the consolidated sustainability report of the non-EU parent entity if that consolidated sustainability report has been prepared in accordance with the CSRD/ESRS.

The decree contains an exemption from the requirement to prepare a sustainability report if the sustainability information of the Dutch subsidiary is included in the consolidated sustainability report (included limited assurance) at a higher level by a Dutch parent entity, an EU parent entity, or a non-EU parent entity.

If there is a non-EU parent company, amongst others, the consolidated sustainability report must have been prepared in accordance with the CSRD/ESRS or an international standard for sustainability reporting equivalent to the ESRS. The European Commission has yet to determine which (international) standards or third country standards can be considered equivalent to the European standards. Until then, EU subsidiaries can only make use of the exemption if the non-EU parent entity voluntarily prepares the consolidated sustainability report in accordance with the CSRD/ESRS.

Note that there is no exemption for large listed entities; they will have to prepare a sustainability report in all cases.

3.2 Interaction between Section 2:408 DCC and exemption for sustainability reporting, and consequences for the size of the group

The exemption of Section 2:408 DCC for the financial statements of an intermediate holding company is not related to the exemption regime for preparing the sustainability report. A Dutch intermediate holding company of a large group is required to prepare a consolidated sustainability report regardless of its own size. However, an exemption is possible if a consolidated sustainability report is prepared at a higher level in the group in accordance with the CSRD/ESRS.

The exemption regime for sustainability reporting described above should not be confused with the current exemption regime for preparing consolidated financial statements and a management report based on Section 2:408 DCC. The (consolidation) exemption regime of Section 2:408 DCC concerns the financial statements and the management report, and is not related to the exemption regime for preparing a sustainability report. For example, a company may be exempt from preparing consolidated

financial statements but not exempt from preparing a (consolidated) sustainability report. An intermediate holding company with a large group is required to prepare a consolidated sustainability report regardless of its own size. Section 2:408 DCC allows, for the financial statements, to use the entity's standalone size (without taking into account the data of the underlying group). Therefore it is possible that such an intermediate holding company is classified as a small entity for the financial statements (based on its own size) and as a large entity for the sustainability report (based on the size of the underlying group).

Example of a Dutch subsidiary with a US parent entity

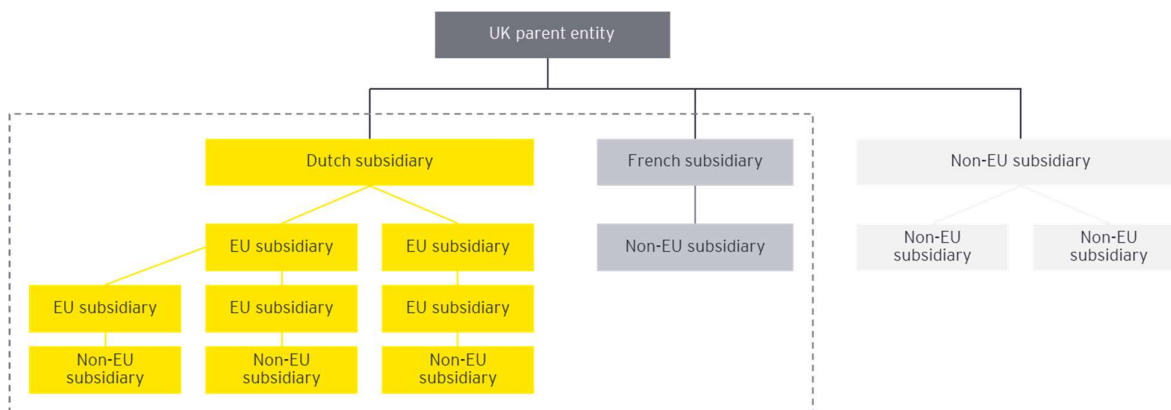
A Dutch intermediate holding company with a large group makes use of the exemption for consolidation under Section 2:408 DCC. Individually, this Dutch intermediate holding company qualifies as a small entity. The intermediate holding company has a US parent entity that prepares consolidated financial statements based on US GAAP. The US parent entity does not prepare a consolidated sustainability report. This means that the Dutch intermediate holding company, despite the (financial statements) exemption for consolidation under Section 2:408 DCC and regardless of its own size, must still prepare a consolidated sustainability report.

For an intermediate holding company that is exempt from preparing the management report under Section 2:408 DCC based on its own size, the consolidated sustainability report is considered to represent its management report in such a case.

3.3 Artificial consolidation

The possibility of artificial consolidation is included in the decree. The legislator has clarified that non-EU sister companies are not consolidated by a Dutch subsidiary. The non-EU subsidiaries that belong to the EU (sub)group(s) should however be consolidated.

The CSRD includes a temporary possibility of so-called artificial consolidation, which has been adopted in the decree. This possibility applies until reporting periods ending on 6 January 2030, and offers EU subsidiaries of a non-EU parent entity an exemption from preparing their own sustainability report. Applying this exemption, the largest of the EU subsidiaries must prepare an (artificial) consolidated sustainability report in which it includes its EU sister companies.



In the picture above, there is a UK parent entity with subsidiaries in France, the Netherlands, and other countries outside the EU.

If the Dutch subsidiary is the largest entity in the EU, the Dutch subsidiary can apply artificial consolidation, which includes the French (sub)group and thereby exempts the French subsidiary from preparing its own sustainability report. The Dutch legislator has clarified that the non-EU sister companies are not consolidated by the Dutch subsidiary. The non-EU subsidiaries that belong to the Dutch and French (sub)group should however be consolidated.

3.4 Exemption in case of commercially sensitive information

The Netherlands applies the member state option that allows certain information to be omitted in exceptional cases if its disclosure would cause serious harm. However, this exemption cannot be used lightly.

The Dutch legislator applies the member state option that allows companies to omit certain information from the sustainability report in exceptional cases if its disclosure would cause serious harm to the commercial position of the undertaking. This exception only applies to imminent developments or matters under negotiation if the disclosure of that information, in the justified opinion of the managing and supervisory bodies, could cause serious harm to the commercial position of the company. On the other hand, the omission of the information may not prevent a true and balanced understanding of the development, results, and position of the company and the effects of its activities. This exemption cannot be used lightly.

4 Content of the sustainability report

The Dutch legislator has not set any other additional requirements regarding the content of the sustainability report than those set forth by the CSRD/ESRS.

The decree does not set any requirements regarding the content of the sustainability report in addition to what the CSRD has already published and it closely follows the European directive in terms of content. The disclosure requirements for the sustainability report have been set forth by the EU in the ESRS. The ESRS are applicable immediately and do not require implementation in national legislation.

For information that must be disclosed about the value chain, the principle of “apply or explain” applies during the first three reporting periods to which the reporting requirement applies. If the necessary information about the value chain is not (fully) available during that period, the company may be required to explain the efforts made to collect the data, the reasons for any shortcomings, and how it plans to obtain that data in the future. This exemption has a phased application, depending on the moment a company is required to prepare a sustainability report.

5 Scope extension EU-Taxonomy Regulation

The scope of the EU-Taxonomy Regulation has been extended to all companies that are required to prepare a sustainability report.

The CSRD also affects the application of the EU Taxonomy Regulation, which contains a classification system for sustainable activities. The EU Taxonomy Regulation, among other things, sets the criteria for determining whether an economic activity can be considered environmentally sustainable and what should be reported in this context.

The undertakings that are required to prepare a sustainability report under the decree will also have to comply with the disclosure requirements of Article 8 of the EU Taxonomy Regulation.

6 Reporting on key intangible resources

A Dutch company must report on key intangible resources. This information is included in the sustainability report or in another part of the management report, depending on the specific information.

The CSRD includes a requirement for large (listed and non-listed) companies and small and medium-sized listed companies to report on key intangible resources in the management report. This requirement does not apply to banks and insurers that have a legal form other than a NV or BV. This requirement is about providing information about the resources without physical substance on which the business model of the undertaking fundamentally depends on and which are a source of value creation for the undertaking.

The company explains how its business model fundamentally depends on those assets and how these assets are a source of value creation for the company. This information is not necessarily included in the sustainability report, but can also be provided in another part of the management report.

However, certain information about intangible resources may be related to sustainability issues. In this case, this information is included in the sustainability report. Thereafter there is no need to repeat this information in the other part of the management report. This has been explained in the explanatory notes using several examples. For example, information included in the sustainability report about the skills, competencies, and experience of employees, their loyalty to the company, and motivation to improve processes, products, and services can be considered information about intangible resources. Also, sustainability information related to social or governance issues, including information about the quality of the company's relationships with its stakeholders, such as customers, suppliers, and the communities affected by its activities, can be considered information about intangible resources. If it is not possible to make a clear distinction between information about intangible resources and information about sustainability issues, the sustainability report may refer to the information in the management report about the key intangible resources.

7 Publication of the sustainability report

The management report, including the sustainability report, must be published on the company's website in addition to the mandatory filing with the trade register.

The Dutch legislator has applied the member state option to mandate companies to publish their sustainability reports as a component of the management report, on their company website in addition to filing the report with the Chamber of Commerce's trade register. For companies required to prepare a sustainability report, the option to keep the management report available at the office of the company will no longer be available.

Companies that do not have a company website should, at request, provide a (complete or partial) copy of the management report free of charge, in addition to filing the management report with the trade register.

The management report, including the sustainability report, must be published on the company's website in addition to the mandatory filing with the trade register.

8 Auditor, level of assurance and temporary provision regarding the auditor's appointment

8.1 Evaluation by an auditor

The statutory auditor of the financial statements, or an auditor ("accountant") from the same or different audit firm shall provide assurance on the sustainability report.

As from 2024, the sustainability report, as an integral part of the management report, must undergo an independent review. In this context, an external assurance provider shall provide at least a limited level of assurance. Member states have the freedom, under the CSRD, to determine whether assurance providers other than the statutory auditors of the financial statements may also perform these assurance engagements. Although initially receptive to this member state option, the Dutch legislator has, for the time being and due to tight implementation deadlines, opted to permit solely external auditors ("accountants") to perform these assurance engagements. It is permissible, however, to appoint a different auditor (whether from the same audit firm or another) than the statutory auditor of the financial statements to review the sustainability report.

8.2 Level of assurance

Both a conclusion with a limited level of assurance and an opinion with a reasonable level of assurance are possible, as well as a combination of the two.

The procedures performed by the auditor to arrive at a conclusion with a limited level of assurance regarding the sustainability report are significantly more extensive than the current procedures performed by the statutory auditor on the management report. However, these assurance procedures are less comprehensive than the audit procedures for the financial statements, which are performed to express an opinion with a reasonable level of assurance. The legislator permits both possibilities (limited assurance and reasonable assurance) for the sustainability report. Furthermore, a combination is also possible: a conclusion with a limited level of assurance for the sustainability report as a whole, and an opinion with a reasonable level of assurance for specifically identified components from the report.

8.3 Temporary provision regarding the auditor's appointment

The Dutch legislator has introduced a temporary provision in the law for the period from 1 January 2024 to 31 December 2024 to allow an auditor to be appointed by the supervisory board or, if there is no supervisory board, by management.

The legislative proposal includes a temporary provision concerning the appointment of an auditor. Typically, the auditor is appointed by the general assembly preceding or at the beginning of the reporting period for which the auditor will first examine the annual reporting. For companies required to prepare a sustainability report for the fiscal year 2024 to be reviewed by an auditor, this may not have been feasible.

The temporary provision stipulates that, if the general assembly has not appointed an auditor yet, the supervisory board may appoint the auditor, and in the absence of a supervisory board, management may do so. If the general assembly has already appointed an auditor for an assurance engagement on the sustainability report in 2023 or 2024, then that appointment is valid. If the general assembly has not been able to appoint an auditor, then the appointment for the subsequent reporting period must be put on the agenda for the general assembly in the subsequent year to allow the general assembly to exercise its authority to appoint the auditor. This ensures that the temporary provision does not result in management appointing the auditor for several years, thus prohibiting the general assembly from exercising its legal right to do so. The temporary provision applies only to the first reporting period commencing on or after 1 January 2024. Therefore, the temporary provision is valid for all reporting periods starting between 1 January 2024 and 31 December 2024.

9 Non-compliance with CSRD and/or ESRS

Failure to prepare or timely file the sustainability report is an economic offense.

The CSRD requires companies to disclose in their sustainability report the impact of sustainability factors on the undertaking and the undertaking's impact on people and the environment. A company meets the disclosure requirements when it discloses all material information in the sustainability report. Thus, even if a company is not (fully) sustainable, it can comply with the ESRS, as long as the sustainability report reflects the sustainability of the company's operations. A company does not comply or does not fully comply with the CSRD/ESRS when material information is omitted from the sustainability report or when the report does not meet the requirements of the ESRS.

Regarding the filing of the sustainability report, any stakeholder may demand compliance with these requirements. The failure to prepare or to timely file the sustainability report with the trade register constitutes an economic offense (Article 1 under 4 WED).

10 Conclusion and implementation process

It took a while before the implementation legislation was published, but there is now more clarity about the chosen direction. The Dutch legislator has chosen to implement the CSRD without adding additional policies, in order to expedite the introduction of the sustainability reporting requirement for companies. The legislative proposal has been submitted for advice to the Council of State and will subsequently be discussed in the Dutch parliament (the House of Representatives and the Senate). The decree was first presented to the House of Representatives and the Senate and will be finalized after advice from the Council of State. It is anticipated that the CSRD will be implemented in Dutch law by the end of 2024, ensuring that the application of the regulations is not delayed.

It is important to continue monitoring the implementation process to identify any potential changes.

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