

The implementation process of Directive 2014/95/EU in the Netherlands

Creemers, Jan

Published in:

Dimaso-Lab Directive 2014/95/EU – Impact Assessment on Labour Relations

Document version:

Publisher's PDF, also known as Version of record

Publication date:

2017

[Link to publication](#)

Citation for published version (APA):

Creemers, J. (2017). The implementation process of Directive 2014/95/EU in the Netherlands. In *Dimaso-Lab Directive 2014/95/EU – Impact Assessment on Labour Relations* (pp. 1-7)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright, please contact us providing details, and we will remove access to the work immediately and investigate your claim.

The implementation process of Directive 2014/95/EU in the Netherlands
Jan Cremers - Tilburg Law School

In this report, two basic research questions are treated:

I Social reporting in the Netherlands

- Voluntary social reporting – national background
- The rights of employee representatives

II The implementation of the Directive 2014/95/EU

- The implementation process and the possible extension
- The influence of social partner organisations (trade unions and employers' organisations) in the implementation of the Directive
- Company-level experiences

I Social reporting in the Netherlands

Voluntary social reporting – national background

Social reporting is seen as a part of the CSR-policy in the Netherlands. The government is quite active in promoting CSR and encourages companies in various ways to take up CSR. The Dutch approach to CSR is based on the European Commission's definition: corporate social responsibility refers to companies taking responsibility for their impact on society. Some activities related to social reporting are worth mentioning:

- The transparency benchmark. The company with the highest score on the transparency benchmark is awarded a prize: the Crystal. The Transparency benchmark is an annual research on the content and quality of corporate social responsibility reports of Dutch companies. Each year, the government assesses 500 corporate annual reports concerning companies' CSR activities. Through the Transparency Benchmark the participating companies contend for the Crystal prize, a leading price in the area of social reporting in the Netherlands. Participants acquire knowledge of the generally accepted criteria for corporate social responsibility reporting, obtain insight into possible improvements and have the possibility to compare their own score with other companies inside and outside their own industry. The criteria are content-oriented and quality-oriented.ⁱ
- The government has established a national knowledge centre and network organisation for CSR, MVO Nederland (CSR Netherlands). It is the first port of call for any company wanting to make its operations more sustainable.

Several guidelines and tools are available for companies that want to put CSR into practice. Some of these guidelines refer to non-financial reporting.

- OECD Guidelines for Multinational Enterprises. These are the main CSR guidelines used in the Netherlands. They include recommendations on environmentally responsible production, anti-corruption, equal treatment of men and women, forced labour and exploitation.
- CSR Navigator. This tool shows companies what guidelines and codes of conduct apply to their sector.
- ISO 26000. This performance standard for businesses, governments, civil society organisations and unions offers guidance on, for instance, saving energy, combating discrimination in the workplace, and giving consumers honest information.
- CSR implementation plan. An online tool provided by MVO Nederland to companies that want to implement CSR.
- Global Compact is an international network run by the United Nations. Participating companies and organisations pledge to comply with ten principles concerning human rights, labour conditions, environmental protection and anti-corruption.
- SCCM, the platform for certification of environmental and occupational health & safety (OHS) management systems, helps companies improve their policy on the internal and external environment.

The rights of employee representatives

Trade unions stress the importance of nonfinancial reporting. This type of reporting is also well established in the Netherlands, especially among the largest (listed) companies. Unions prefer integrated reporting to separate reports. In the past, the social partners in the Netherlands have – both separately and jointly – produced several statements on sustainability and CSR.

In general terms, worker representatives are not prominently involved in the development of reporting systems. And so far, the influence of employee representatives in this area has neither been subject of research nor of publications. Nevertheless, both the Dutch Works Council Act (hereafter WORⁱⁱ) and Book 2 of the Civil code (company law) contain several possibilities and tasks for works councils in this area.

According to the WOR, works councils have information rights with regard to labour force data. In order to facilitate proper discussion of the general operation of the enterprise, the entrepreneur shall, at least twice a year, provide the works council, either orally or in writing, with general information concerning the activities and financial results of the enterprise and the expectations with respect to the activities and the financial results of the enterprise in the coming period (article 31a WOR). Beyond this, the WOR prescribes that, at least once a year, for the purposes of discussing the general operation of the enterprise, the entrepreneur shall provide the works council with general information in writing concerning the number of persons working in the enterprise, the various groups thereof and their size, and the social policy pursued (art. 31b WOR). This covers workplace related subjects like turnover, working time, working conditions, types of contract (e.g. number of temp workers), but also environmental issues. Works councils have the right of advice with regard to outsourcing and supply chain management. They even have a right of consent with regard to (the introduction, change or abolishment of) collective arrangements on training, skills and workforce development. In the field of health and safety extended rights of information and consultation have been developed.

Works councils also have the right of information on broader themes like diversity, anti-discrimination, environmental issues and they have the right of advice when the employer intends to take measures related to the environment. Article 25 formulates a list of items related to the right to render advice. Next to items that are related to restructuring, reduction, expansion et cetera, this list also contains items like important measures ‘regarding the management of the natural environment by the enterprise, including the taking or changing of policy-related, organisational or administrative measures relating to the natural environment’ (WOR, article 25). Very often, these items are an integral part of investment decisions, on which the works council also has a right of advice. When the employer does not follow their advice and in case of conflict, the works council may go to court to challenge decisions. In case the decision is considered ‘unreasonable’, the works council will win the case. But, there have been no cases in which environmental issues were at stake. If the entrepreneur publishes an environmental report, this report shall be submitted to the works council for the purposes of discussion as soon as possible after it has been drawn up. This obligation

also applies with respect to the statement on corporate governance as mentioned in Article 391 of the Civil Code.

The WOR formulates several tasks with regard to equal treatment, general human rights and environmental issues in article 28 (3 and 4):

3 The Works Council shall guard against discrimination in general within the enterprise, and shall in particular promote the equal treatment of men and women and the employment of disabled persons and minorities in the enterprise.

4 The Works Council shall do all in its power to promote environmental care on the part of the enterprise, including the taking or changing of policy-related, organisational or administrative measures relating to the natural environment.

Finally, it has to be said that the WOR provides works councils with a very open and general right to start consultations on relevant issues (art 23). The works council may submit proposals and present its views. Any such proposal shall be submitted to the entrepreneur in writing and be accompanied by explanatory notes. The entrepreneur shall not take a decision on the proposal until it has been discussed at least once at a consultation meeting.

II The implementation of the Directive 2014/95/EU

The implementation process and the possible extension

The implementation of the Directive has passed through a legal track in two stages.

- a. The government has integrated the reporting obligation into the Civil Code through an amendment of this Code.

The regulations of annual accounts and company reporting for legal entities are formulated in the Civil Code (Book 2 Legal entities – Title 9 The annual account and company reporting – Section 7 Company reporting). Article 391 (1 to 6) prescribes the content, the conditions for the reporting and details regarding the company policy. The general transposition into Dutch law of Directive 2014/95/EU has been implemented in this part of the Civil Code. A proposal by the government passed the Senate on 27 September 2016. In the 5th section of article 391 Book 2 of the Civil Code the phrase ‘a statement on corporate governance’ is modified into ‘a statement on corporate governance and a non-financial statement as referred to in Directive 2013/34/EU’. This amendment passed the parliament and senate in the summer of 2016. The amended text was published in the Official Journal (20-11-2018) and entered into law as from 6-12-2016. Through this procedure, the EU-deadline for the implementation was met. As a consequence, Dutch companies will have to report from 2017 on, with reports being published as of 2018. It is estimated that around 120 companies will have to comply with this obligation. The implementation was seen as a formality and as a political insensitive issue. Therefore, no direct involvement of social partner organisations at this stage can be signalled.

- b. The concretisation of the different provisions of the Directive is formulated in a ‘general decision of public order’

The government initiated a consultation on the possible content of this Decision (hereafter Decision), based on a basic document in the form of a draft regulation. The Decision, a general administrative regulation, was formulated, circulated and, by mid-June 2016, discussed in the parliament. During the debate in the parliament about the outcome of the consultation and the draft, it became clear that the government intended to transpose the provisions of the Directive with a low profile.ⁱⁱⁱ

The order becomes effective for reporting periods starting 1 January 2017. The core content of the Decision follows the articles and does not go beyond the provisions of the Directive.^{iv} Companies with at least 500 workers that do not fulfil in 2 consecutive years the obligations of the civil code (art. 397.1, part a and b) have to comply with the obligations mentioned in the Directive. There is no obligation if the financial reporting takes place in a consolidated report of another legal entity.

The non-financial reporting is necessary in order to provide good understanding of the development, the results, the position of the entity and the effects of its actions with regard to the corporate structure, and:

- the environmental, social and personnel policy,
- respect for human rights,
- fight against corruption and bribery.

With regard to the themes mentioned, the report has to indicate the risks related to its activities, its commercial relations, products and services, which negative effect there could be and how these risks are managed. The report has to treat non-financial indicators that are relevant for the activities and functioning of the company. If the company has no policy in these areas, the 'comply and explain' principle has to be applied. If the entity consolidates other entities, the report has to include information on the other entities as well.

Information on current affairs that could harm negotiations or ongoing developments and therefore bears risks for the commercial position is exempted. However, this exemption should not hamper a real and balanced understanding of the development and state of the art.

It is possible to draw a separate non-financial report next to and intertwined with the financial report, under the condition that the reference period is the same as the management report and the other reporting, as an annex or in an electronic version open for the general public (within 6 months after the reference period). And if notified it is permitted to use national and European framework regulations.

The influence of social partner organisations (trade unions and employers' organisations) on the implementation of the Directive

Overall, the role of the legislator is limited to issues related to disclosure in general or the securities law. The civil code prescribes that large companies pay attention in their reporting to non-financial indicators. The implementation of the Directive has specified this obligation. The rules on corporate governance are mainly supervised and enforced privately. Social partners have had the lead in the formulation of a corporate governance code. This code is seen by the signatories as an integral part of the Dutch regulatory frame of corporate governance policy, in combination with national and international legislation and jurisprudence. The code, revised in 2015-2016, states that the company leadership and the board have to take into account all relevant societal matters in their functioning. Listed companies have the obligation to report on their compliance with the code.^v

The draft Decision was discussed in the social economic council (SER) as part of a broader revision of the corporate governance code under preparation. The council is the platform for negotiating corporate governance covenants. This tripartite approach is a crucial aspect of the Dutch governance culture. There have been no separate consultations of the social partners outside that frame.

The above-mentioned public consultation that was organised by the government led to only 16 replies, mainly from NGO's, business consultants and accountants. The trade unions did not react directly. However, the training fund for works councils, an organisation associated to the trade unions, participated in the online public consultation.^{vi} The training fund was of the opinion that the point of view of one important stakeholder was missing in the proposals, i.e. the position of the works council. Reference was made to the extensive information, consultation and advisory right of works councils. According to the fund, the content of the reporting should be discussed and, if appropriate, agreed with the works council before publishing.

Company-level experiences

Notwithstanding extensive rights for workers' representatives, as described in the first part, non-financial reporting continues to be a part of a unilateral process. Items going beyond the workplace are scarcely reported and the reporting tends to stay a management prerogative.

In January 2012 Akzo Nobel, DSM, FrieslandCampina, Heineken, KLM, Philips, Shell and Unilever launched in Davos the Dutch Sustainable Growth Coalition, supported by the employers' confederation VNO-NCW. The basic philosophy was: 'shape' (development of sustainable strategies that lead to added value), 'share' (exchange of good practices) and 'stimulate' (development of policy recommendations). However, in the list of stakeholders (international and Dutch communities, governments, consumers, investors and civil society, including NGOs and universities) there was no explicit reference to workers' representatives.

In 2016 a pilot study was executed among leading Dutch companies with the aim to assess their compliance with the obligations as formulated by the EU Directive.^{vii} The finding was that 50% of the companies included the non-financial statement in the management report. Although the companies were seen as frontrunners, no company fulfilled all the demands in the 2015 reporting. None of the companies in the pilot group gave motivated explanations about why certain elements and/or themes were not included in the report. Companies reported much less on human rights and bribery & anti-corruption items as compared to social and environmental matters. The researchers concluded that most companies have achieved significant maturity in terms of social and environmental matters, but very few provide risk information relevant to human rights issues and bribery & anti-corruption (EY 2016).

ⁱ The 2015 report:

https://www.transparantiebenchmark.nl/sites/transparantiebenchmark.nl/files/afbeeldingen/87579_web_transparantiebenchmark_eng.pdf

The benchmark criteria:

<https://www.transparantiebenchmark.nl/sites/transparantiebenchmark.nl/files/afbeeldingen/criteriatbeng.pdf>

ⁱⁱ <https://www.ser.nl/~media/files/internet/talen/engels/2013/works-councils-act.ashx>

ⁱⁱⁱ The draft Decision passed the parliament and senate in the autumn of 2016. It was approved by the State Council (with the constitutional task to examine draft legislation). In the Official Journal, dated 23-03-2017, the final text was published: <https://zoek.officielebekendmakingen.nl/stb-2017-100.html>

^{iv} The legislator decided to integrate the reporting provisions on diversity in a separate instrument, the Decision disclosure diversity policy (Besluit bekendmaking diversiteitsbeleid), published in the Official Journal, 22-12-2016, <https://zoek.officielebekendmakingen.nl/stb-2016-559.html>

^v The Code goes beyond the provisions of the EU Directive in the reporting of the diversity policy. Companies have to explain the measures taken and, if not realised, which measures are to be taken in order to reach the main aims of their diversity policy.

^{vi} See: https://www.internetconsultatie.nl/bekendmaking_niet_financiele_informatie/reacties/datum/2

^{vii} The pilot was commissioned by the ministry of economics to EY:

https://www.transparantiebenchmark.nl/sites/transparantiebenchmark.nl/files/afbeeldingen/a_closer_look_at_reporting_criteria.pdf