

# POSITION PAPER

## NVB position Corporate Sustainability Due Diligence Directive 24 March 2023

The Dutch Banking Association (NVB) supports the introduction of a binding 'due diligence' obligation as proposed by the European Commission in the Corporate Sustainability Due Diligence Directive (CS3D). This would make companies and financial institutions more aware of (potential) adverse human rights and environmental impacts of their activities and requires them to act on it. Financial institutions should be included in the scope of the EU due diligence framework. For our sector specifically we call for activities such as lending and credits, guarantees and underwriting commitments to fall within the scope of the Directive.

The Dutch financial industry has already established policies for due diligence on business relationships and risk management processes. These are based on international soft law principles laid down in the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). In order to meet the objectives of the CS3D, the NVB believes that the EU proposal should be better aligned with the OECD Guidelines and the UNGPs.

In light of the negotiations on the CS3D in the European Parliament, we recommend policymakers to take account of the following suggestions in the next steps of the EU legislative process:

- **Include the financial sector in scope and apply a risk-based approach.** To provide clarity on the value chain in scope of the due diligence obligation for financial institutions, the NVB proposes to align the scope of the due diligence obligation with existing voluntary standards and best practices as laid down in the UNGPs, OECD Guidelines and sector specific OECD Guidance documents. Due diligence obligations should be made consistent with the risk-based approach and limitation of liability included in the OECD Guidelines and the UNGPs (as further set out in the third bullet below). After all, these guidelines have also already been endorsed by the EU Member States. In practice, we expect that only the core business relationships will be included in the due diligence obligations of financial institutions.
- **A harmonized approach that sets an ambitious standard on EU and international level.** An important element of the proposal should be full harmonization. Gold-plating by Member States should be avoided to prevent a patchwork of obligations. A level playing field is required that allows all corporate players to effectively conduct due diligence adhering to the same definitions, interpretations sanctions and enforcement. If not, this would reduce its effectiveness.
- **Legislation should be practically workable and risk-based.** In the absence of full alignment with the UNGPs and OECD Guidelines, it is insufficiently clear how the requirements of the CS3D currently relate to these guidelines and how these principles should be applied. Notably, the CS3D should avoid a 'tick-the box exercise' and allow a risk-based approach in the monitoring and identification of (potential) adverse environmental and human rights impacts.
- **Incentivize good business behavior.** We believe that the civil liability regime in the CS3D proposal is not justified by the objective of this Directive as it is focused on punishing



companies for failure not to comply with the CS3D obligations, rather than incentivizing good business behavior. We are concerned that this risk may discourage investors to engage in countries with higher contextual risks, hampering related prosperity and developments. This could negatively affect prosperity and development in these countries. It is still not always clear when a company has done enough to prevent negative impact in the supply chain (which may result in de-risking of portfolio's) and further clarification and guidance on best practices is needed (e.g., application of IFC Performance Standards for Due diligence in emerging markets). The envisaged supervisory framework could cater for this i.e., not limiting its mandate to oversee compliance, but also taking a role in further clarifying norms, standards and best practices. In addition, civil liability should be limited to the adverse impact 'caused by' a company.

- **Directors' duties.** NVB supports the concept that directors of the company have a duty of care as described in the proposal of the Commission. However, introducing criminal liability and a prohibition from managing, directing or administrating a company as appears to be considered, will not contribute to the effectiveness of the proposed Directive and would therefore not be proportionate or justified. We should not discourage directors that are willing to pave the way in the transition to a sustainable economy by increasing criminal liability that pushes them into compliance mode. We strongly support aligning liability with existing national and European legal liability standards to create certainty, predictability and thereby support the European investment climate as much as possible.
- **Level playing field for non-EU subsidiaries.** We believe there should be a level playing field between third country firms which are a subsidiary of an EU company and a third country firm which does not have an EU parent company. Therefore, the thresholds of Article 2 paragraph 2 for companies which are formed in accordance with the legislation of a third country should be applicable to both types of third country firms. This is not completely clear in the proposal. For example, Articles 1 and 6 do not differentiate between EU and non-EU subsidiaries. It should be clarified (e.g., in a recital) that the threshold of Article 2 paragraph 2 is applicable to all third country firms with and without an EU parent company.