

FEEDBACK STATEMENT

DATE: 23 May 2022

SUBJECT: Corporate Sustainability Due Diligence Directive

Feedback statement CSDDD proposal

The Federation of the Dutch Pension Funds welcomes the initiative to introduce due diligence obligations on adverse impact on human rights and environment in order to strengthen human rights and environmental objectives. The OECD Guidelines and UN Guiding Principles should serve as the basis for this initiative and the Corporate Sustainability Due Diligence Directive (CSDDD) should be drafted in consistency with these international standards. Even before the publication of the Commission's proposal, the Dutch Federation of Pension Funds strongly supported the principle of corporate sustainability due diligence¹.

Since 2018, the majority of the Dutch pension sector has worked together with the Dutch government, NGOs and trade unions to implement the OECD guidelines². By the end of 2022, participating Dutch pension funds will have embedded due diligence in their policies, contracts with asset management and engagement policies. The sector also cooperates on joint engagement to address adverse impacts in high-risk sectors, together with NGOs, trade unions and government.

Many pension funds believe that implementing due diligence not only aligns the investments with the values of the participants, but investing in responsible companies also leads to good long-term financial results. Mandatory due diligence for companies that we invest in will help pension funds to meet their responsible investment goals.

The Federation of Dutch Pension Funds is currently seeking clarification on the impact of the proposal through analysis and discussions with relevant policymakers. While we are still working with members towards an official position regarding the CSDDD, we believe the proposals merits clarifications on the follow topics.

¹ <https://www.pensioenfederatie.nl/stream/consultatiereactie-scg-pensioenfederatie.pdf>

² More than 80 pension funds, representing more than 95% of AUM and participants in the Netherlands, signed the International Responsible Business Conduct (IRBC) Agreement for Pension Funds in 2018. Under this agreement, the pension funds undertake to implement the OECD guidelines for multinational companies and the UN Guiding Principles on Business and Human Rights in their investment policy. This agreement is a unique cooperation between 80 pension funds, 6 NGOs, 3 trade unions and 3 Ministries. The aim is to identify, address and mitigate potential abuses in supply chains behind investee companies.

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The extent to which institutional investing falls within the scope of the CSDDD

The proposal brings into the personal scope regulated financial sector entities irrespective of legal personality, including pension funds. A major activity of a pension fund is investing on behalf of employees in a diversified portfolio of assets, including shares, corporate and government bonds, credits, real estate, infrastructure and private equity, amongst others. In most asset classes, pension funds are minority shareholders with only a fraction of the shares.

Under the current proposal, it is unclear whether these activities fall within the scope of the due diligence requirements of the CSDDD. A number of definitions and provisions seem to indicate that this is not the case or merit clarification.

- The proposal states that for the purpose of sustainability due diligence, the value chain of regulated financial undertakings is restricted to the activities of the clients to whom financial services are being provided.³ As a result, the proposal seems to require due diligence only where there is a (contractual) client relationship and where financing is directly provided to an entity⁴. These provisions may either be interpreted to exclude all investments made by pension funds, or possibly only include cases where a pension fund is providing funding directly to companies, instead of buying securities on the secondary markets.⁵ This would then only apply to very limited part of the portfolio of pension funds, such as investments in direct private equity.
- It is not clear what are considered to be the *activities of the client*. We believe the proposal would also benefit from a description of what is considered to be the *own operations* of a regulated financial undertaking, taking into the regulated nature of those activities and the permitted activities per type of financial undertaking and per type of license.

Nevertheless, we understand it is the intention of the European Commission that investments in companies through shares and corporate bonds bought on the secondary markets would be in scope of the due diligence requirement. In this case, several definitions and provisions would require clarification, in particular “value chain” and “business relationship”. Moreover, it is unclear how to interpret the provision of Article 6(3) that states that when providing, “financial services, identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only before providing that service”. This provision seems tailored towards services such as banking and insurance, where a contractual client relationship is

³ Article 3(g): “As regards financial services companies, “value chain’ (...) shall only include the activities of the clients receiving such loan, credit, and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question.”

⁴ Article 3(e)i: “business relationship” means a relationship with a contractor, subcontractor or any other legal entities with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance.

⁵ More broadly the concepts ‘shareholder’ and ‘investments’ have not been defined in the legislative proposal nor are they adequately covered – nor brought out of scope - by the current text;

established. Does the provision mean that adverse impacts should only be identified when a pension fund takes the decision to invest in a particular company or whenever shares or bonds are bought? As long-term investors, pension funds often remain invested in companies for a very long period, but still trade small amounts of securities of the company when investing inflowing contributions or rebalancing the portfolio.

Moreover, in case investments are considered as part of the value chain, the proposal would require clarification and an explanation how this is aligned with the measures and initiatives such as the SFDR and the CSRD that also contain due diligence obligations.

Alignment with the OECD guidelines

The Federation of Dutch Pension Funds notes that the CSDDD proposal diverges from the OECD guidelines in a number of ways. While we still aim to get a better understanding of the ramifications of the proposal, it seems that these divergences result in a framework that do not sit well with the practice of institutional investment.

- The OECD guidelines establish different levels of involvement in an adverse impact (“linked to”, “contribute to” and “cause”), that seem to be missing from the CSDDD proposal.
- The OECD published a specific set of recommendations⁶ for institutional investors, acknowledging the different role an institutional investor can play compared to a company. These recommendations state that minority shareholding can be seen as linking investors to adverse impacts through a business relationship with the investee company. The investor can be held accountable for using its leverage as a shareholder through stewardship and potentially divestment. However, the investor cannot be held responsible itself for addressing the adverse impact. This implies that investors should not be held responsible for remediation or face liability for adverse impacts caused by investee companies, as could be the case under the current proposal.⁷
- Contractual cascading is supposed to play an important role in enforcing the impact of due diligence down the value chain. However, contractual cascading is difficult for investors, who most often do not have a contractual relationship with an investee company. This makes more difficult it for investors than for normal companies to obtain guarantees that they cannot be held liable.
- Shareholder engagement and voting, which does play a vital role in the OECD guidelines, does not seem to play a significant role in the CSDDD proposal.

Due to the aforementioned, it is currently difficult to assess the impact of the proposal on pension funds. At the same time, the Dutch Federation of Pension Funds is a strong proponent of the principle of sustainability due diligence, as laid down in the OECD guidelines. We strongly hope that the European Commission and co-legislators can align the proposal with the OECD guidelines and provide clarity on the scope, so that we can fully support the proposal.

⁶ OECD (2017), Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises ([link](#))

⁷ See e.g. *ibid.* page 20.