

## III

*(Preparatory acts)*

## EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 6 June 2023

on the proposal for a Directive on corporate sustainability due diligence

(CON/2023/15)

(2023/C 249/03)

**Introduction and legal basis**

On 23 February 2022 the European Commission published the proposal for a Directive on corporate sustainability due diligence and amending Directive (EU) 2019/1937 <sup>(1)</sup> (hereinafter the 'proposed Directive').

The European Central Bank (ECB) has decided to deliver an own initiative opinion on the proposed Directive. The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed Directive contains provisions affecting the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty and the European System of Central Banks' contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

**1. General observations**

1.1. The proposed Directive imposes obligations on certain large companies to conduct human rights and environmental due diligence <sup>(2)</sup>, including identifying actual and potential adverse impacts <sup>(3)</sup>, integrating due diligence into companies' policies <sup>(4)</sup>, preventing or mitigating adverse impacts <sup>(5)</sup>, establishing a complaints procedure <sup>(6)</sup>, monitoring measures and policies <sup>(7)</sup>, and reporting <sup>(8)</sup>. For this purpose, the proposed Directive defines a 'company' to which it applies as including 'a regulated financial undertaking' <sup>(9)</sup>, which, in turn, includes, among others, a credit institution as defined in Regulation (EU) No 575/2013 of the European Parliament and of the Council <sup>(10)</sup> (hereinafter a 'credit institution', and collectively 'credit institutions').

1.2. Furthermore, the proposed Directive requires companies to which it applies to take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships <sup>(11)</sup>. In the case of regulated financial undertakings, including credit institutions, the term 'value chain' is

<sup>(1)</sup> COM (2022) 71 final.

<sup>(2)</sup> See Article 4 of the proposed Directive.

<sup>(3)</sup> See Article 6 of the proposed Directive.

<sup>(4)</sup> See Article 5 of the proposed Directive.

<sup>(5)</sup> See Articles 7 and 8 of the proposed Directive.

<sup>(6)</sup> See Article 9 of the proposed Directive.

<sup>(7)</sup> See Article 10 of the proposed Directive.

<sup>(8)</sup> See Article 11 of the proposed Directive.

<sup>(9)</sup> See Article 3, point (a)(iv), of the proposed Directive.

<sup>(10)</sup> See Article 4(1), point 1, of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>(11)</sup> See Article 6(1) of the proposed Directive.

defined in the proposed Directive as including the activities of clients receiving loan, credit and other financial services <sup>(12)</sup>. While human rights and environmental due diligence fall outside the ECB's fields of competence, the proposed Directive could have important practical implications for credit institutions. From this perspective, it is recommended that the proposed Directive envisages arrangements for cooperation and information exchange between the authorities responsible for supervising credit institutions' compliance with the proposed Directive and the authorities responsible for the prudential supervision of credit institutions, including the ECB. In this respect, the ECB notes that the Union co-legislators have established arrangements for cooperation and information exchange between prudential supervisory authorities on the one hand, and the competent supervisory authorities responsible for supervising credit institutions' compliance with Union legislation regulating other areas of activity that fall outside the ECB's competences for the prudential supervision of credit institutions, on the other. Such arrangements have been established, for example, in the areas of anti-money laundering and counter terrorist financing requirements <sup>(13)</sup>, markets in financial instruments <sup>(14)</sup>, and market infrastructures <sup>(15)</sup>.

1.3. The proposed Directive introduces civil liability for companies which fail to comply with their obligations to prevent potential adverse impacts and to bring actual adverse impacts to an end, if such failure leads to damages <sup>(16)</sup>. While further details of the civil liability regime (for example, the definition of covered damages and the burden of proof) need to be defined, it is expected that the litigation risks for banks may substantially increase as a result of this liability regime. The ECB's expectation is that supervised credit institutions manage these risks in line with the ECB's prudential supervisory expectations communicated by the ECB. It is noted in this context that the ECB has so far taken a risk-based approach when assessing a bank's exposure to environmental social governance (ESG) risks. For example, the ECB has communicated that banks need to understand the consequences that the transition to a more sustainable economy entails for their transactions and exposures, and to reflect such risks in their overall risk management strategy <sup>(17)</sup>. From this perspective, continued lending to fund activities that are exposed to high transition risks can be regarded as consistent with sound risk management only if the borrower has a credible and science-based, Paris-aligned transition plan <sup>(18)</sup> to manage and reduce its transition risk over time. In particular, sound management of transition risk also encompasses sound management of litigation risk. In this context, the ECB stresses that the introduction of civil liability related to the adverse impact of such lending would need to take into account and recognise the role of transition planning in corporations. In line with the above-mentioned supervisory approach, lending to fund activities that are exposed to high transition risks may nevertheless be regarded as consistent with sound risk management approaches, as long as the marginal contribution of the intended or conducted activities remains coherent with credible transition plans. This is key to ensuring that banks are able to finance transition efforts for clients that are not yet – but have plans to become – aligned with the EU's climate goals and the Paris agreement.

1.4. The proposed Directive imposes an obligation on those companies to which it applies to adopt a transition plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement <sup>(19)</sup>. Specifically, a company must include emission reduction objectives in its plan if the company identifies climate change as a principal risk. While the obligation to adopt a transition plan is imposed by the proposed Directive, the content and practical requirements for the disclosure of a transition plan are prescribed separately in Directive (EU) 2022/2464 of

<sup>(12)</sup> See Article 3, point (g), of the proposed Directive.

<sup>(13)</sup> See Article 49 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73); paragraphs 3.1 to 3.8 of ECB Opinion CON/2022/4. All ECB opinions are available on EUR-Lex.

<sup>(14)</sup> See Article 79 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014 p. 349).

<sup>(15)</sup> See Article 84 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

<sup>(16)</sup> See Article 22 of the proposed Directive.

<sup>(17)</sup> See the ECB's 'Guide on climate-related and environmental risks,' available on the ECB's banking supervision website at [www.bankingsupervision.europa.eu](http://www.bankingsupervision.europa.eu). See also the press release 'ECB sets deadlines for banks to deal with climate risks,' available on the ECB's banking supervision website at [www.bankingsupervision.europa.eu](http://www.bankingsupervision.europa.eu)

<sup>(18)</sup> See speech by Frank Elderson, "Running up that hill" – how climate-related and environmental risks turned mainstream in banking supervision and next steps for banks' risk management practices', available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu)

<sup>(19)</sup> See Article 15 of the proposed Directive.

the European Parliament and of the Council <sup>(20)</sup> (hereinafter the 'Corporate Sustainability Reporting Directive' or 'CSRD'). Close coordination and coherence between the definitions and requirements of the proposed Directive and the CSRD is therefore of the utmost importance. The ECB stresses the need to ensure consistency and interoperability for transition plans under these two pieces of legislation. It is important to note that transition plans as required under the proposed Directive and the CSRD could differ in both their aims and purpose from transition plans required from a prudential perspective under Directive 2013/36/EU of the European Parliament and of the Council <sup>(21)</sup> (hereinafter the 'Capital Requirements Directive' or 'CRD'), currently under revision. The CRD aims to ensure that credit institutions comprehensively assess ESG risks and embed forward-looking considerations of those risks into their strategies, pricing, ongoing risk monitoring, and management, with a view to ensuring the resilience of the credit institution.

1.5. The proposed Directive mandates Member States to designate one or more supervisory authorities to supervise compliance with the obligations laid down in it <sup>(22)</sup>. In that context, authorities currently designated as competent authorities for the supervision of regulated financial undertakings might also be designated as supervisory authorities for the purposes of the proposed Directive in respect of those financial undertakings that are within the scope of the proposed Directive <sup>(23)</sup>. The ECB stresses that the supervision of compliance with the obligations laid down in the proposed Directive represents a task distinct from the prudential tasks of the national competent authorities (NCAs) within the Single Supervisory Mechanism (SSM) <sup>(24)</sup>. If the NCAs within the SSM are to be designated as supervisory authority by Member States under the proposed Directive, they should be provided with the means and resources to perform those new tasks without detriment to their current prudential responsibilities. Furthermore, the ECB reiterates the need for proper arrangements for coordination, cooperation and information exchange between the authorities responsible for supervising credit institutions' compliance with their obligations under the proposed Directive on the one hand, and the authorities responsible for the prudential supervision of credit institutions, including the ECB, on the other. Such arrangements should help to prevent, as far as possible, unnecessary double reporting requirements and inconsistent decision-making in relation to supervised credit institutions.

1.6. The Commission is to set up a European Network of Supervisory Authorities composed of the representatives of the supervisory authorities designated by the Member States, to which the Commission may invite the participation of European agencies with the purpose of exchanging information, providing mutual assistance and establishing measures for effective cooperation <sup>(25)</sup>. The proposed Directive rightly excludes the possibility that the ECB is given the task of supervising compliance with the proposed Directive by those significant credit institutions that are under its direct supervision. This is consistent with the ECB's understanding that this task does not fall within the scope of the prudential supervisory tasks that may be conferred upon the ECB under Article 127(6) of the Treaty. Nevertheless, the ECB considers it to be of key importance that the proposed European Network of Supervisory Authorities is expanded to include the ECB in its capacity as prudential supervisor of credit institutions. This would ensure coordination and provide a sound legal basis for the establishment of cooperation and information exchange arrangements between the ECB and the supervisory authorities designated under the proposed Directive, in particular as regards those regulated financial undertakings which fall under the direct prudential supervision of the ECB (i.e. significant credit institutions), but which would at the same time be subject to the supervision of the national supervisory authorities designated by the Member States for the purposes of the proposed Directive.

<sup>(20)</sup> See Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 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 L 322, 16.12.2022, p.15).

<sup>(21)</sup> See Article 76 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

<sup>(22)</sup> Article 17(1) of the proposed Directive.

<sup>(23)</sup> Article 17(5) of the proposed Directive.

<sup>(24)</sup> See Article 2(2) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

<sup>(25)</sup> Article 21 of the proposed Directive.

- 1.7. The proposed Directive provides a definition of the value chain of regulated financial undertakings. This could have an impact on future regulatory frameworks, for example, the European Sustainability Reporting Standards produced by the European Financial Reporting Advisory Group <sup>(26)</sup>, to be adopted by the Commission in the context of the CSRD. The definition should be carefully assessed in the context of prudential regulatory frameworks, as it may not be appropriate for use in prudential regulatory frameworks. This is because from the prudential supervision perspective it is important that regulated financial undertakings have a comprehensive overview of the transition risks inherent in their value chain. As such, a more in-depth analysis and further consideration of the definition of the value chain may be needed in so far as it relates to regulated financial undertakings.
- 1.8. Finally, the ECB emphasises the importance of a gradual and orderly entry into force of the proposed Directive in order to allow companies to adjust their internal processes and business relationships to accommodate the new requirements. This is of particular importance so that regulated financial undertakings are able to ensure an orderly re-assessment of risks and avoid cliff effects that might generate sudden terminations of financial services with potentially negative effects on financial stability.

Where the ECB recommends that the proposed Directive is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 6 June 2023.

*The President of the ECB*  
Christine LAGARDE

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<sup>(26)</sup> See European Financial Reporting Advisory Group, '<https://www.efrag.org/lab6>', November 2022, available on EFRAG's website at [www.efrag.org](http://www.efrag.org)