Assessment VNO-NCW and MKB-Nederland of the Omnibus proposals for changes in the CSDDD – May 2025

Overall assessment of the CSDDD changes in the Omnibus Act

- The Omnibus Act proposes changes in 12 articles of the CSDDD.
- **Our three main concerns** with the CSDDD **remain unresolved**. They relate to:

1. **lack of harmonisation** (see assessment under article 4),
2. **lack of clarity on suspension as a measure of last resort** (see assessments under articles 10 and 11)
3. **too open material norms in the annex** which are unworkable in practice (see at the end of the text under annex).

- The Omnibus proposals lead to **some real limitation of administrative burdens**; however a **very substantial due diligence obligation for companies, including SMEs, remains**.
- The **proposed changes of private international law provisions related to civil liability are important**. They limit the risk that EU and Dutch courts are seized with a large inflow from cases from in third countries.
- It is **essential that the Commission supports businesses** to have real impact in the chain, and provides timely the needed guidelines.
- The **US administration and US business have the EU sustainability legislation in the cross hairs**; his may have substantial implications.

General policy lines of Dutch business on CSDDD

- Dutch business remains in favour of effective and workable ESG standards established at the European level. Companies are motivated to implement the ESG agenda.
- Companies have already invested substantial money, fte's and effort in preparing the implementation of EU rules.
- It is positive that the Commission has realised itself that the CSDDD was in practice too burdensome for companies, and that the Omnibus text proposes to adapt the CSDDD.
- Dutch business will continue to use the OECD RBC Guidelines as an important voluntary, widely internationally recognised RBC instrument.
- As long as the legislative process to adopt the Omnibus proposal has not been finalised, it is important that the Dutch implementation process of the existing CSDDD is put on hold. Thus companies have certainty that what they do now in terms of RBC should be considered voluntary and can be communicated as such. This will avoid discussions on any retroactive effect about which we wrote a letter to the Dutch Parliament.

Assessment per article

Art 3.1.n, Definition of stakeholder

The definition has been limited to employees, trade unions and workers' representatives plus individuals and communities which are *directly* affected, as well as their legitimate representatives.

Assessment:

- The fact that stakeholders must be *directly* affected implies a certain limitation. It will be more difficult for institutions and organisations without direct link to the adverse impact to be considered stakeholder. But as legitimate representatives are considered stakeholder, and as supposedly any person or organisation that is mandated by a stakeholder to be its legitimate representative will be considered a stakeholder too, the practical consequences will be limited. The stakeholder group is still broad and includes the relevant stakeholders from a business point of view.

Art 4, Level of harmonization

The level of harmonisation has been extended to include now the following articles

- 6 (Due diligence support at a group level)
- 8 (Identifying and assessing actual and potential adverse impacts)
- 10 (1) to (5) (Preventing potential adverse impacts)
- 11 (1) to (6) (Bringing actual impacts to an end)
- 14 (Notification mechanism and complaints procedure),

Assessment:

- Further harmonisation than is proposed here of the national implementation of the CSDDD is essential for business to obtain workability and a level playing field.
- Even with the proposed extensions, the level of harmonisation here still will lead to chaos.
- The number of harmonised articles is slightly extended in art 4.1. However, what is given in art 4.1 with one hand, is taken back in art 4.2 with the other hand, as art 4.2 plus the text of recital 31[1] provide an explicit invitation to all Member States to 'goldplate' all other articles of the CSDDD and make them more stringent and more specific. Art 4.2 plus recital 31 thus provide a mechanism to circumvent effectively the harmonization provisions.
  NB: E.g. 9 of the 12 changes proposed in the Omnibus Act (relating to articles 3.1.n, 4, 13, 15, 19, 22, 27, 29 and 36) to adapt the CSDDD can, according to art 4.2, be turned back to the original CSDDD text or otherwise be changed. Arguably, even art 4 itself could be changed in national implementation legislation.

[1] Text of recital 31, Directive 2024/1760 (CSDDD): It is essential to establish a Union framework for a responsible and sustainable approach to global value chains, given the importance of companies as a pillar in the construction of a sustainable society and economy. The emergence of binding law in several Member States has given rise to the need for a **level playing field** for companies in order to **avoid fragmentation and to provide legal certainty** for businesses operating in the internal market. **Nonetheless**, this Directive **should not preclude Member States from introducing more stringent provisions of national law diverging** from those laid down in Articles other than Article 8(1) and (2), Article 10(1) and Article 11(1), **including where such provisions may indirectly raise the level of** protection of Article 8(1) and (2), Article 10(1) and Article 11(1), **such as the provisions on the scope, on the definitions, on the appropriate measures for the remediation of actual adverse impacts, on the carrying out of meaningful engagement with stakeholders and on civil liability; or from introducing provisions of national law that are more specific in terms of their objective or the field covered, such as provisions of national law regulating specific adverse impacts or specific sectors of activity, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate**.

- This will lead to chaos in the EU and beyond, as the 27 resulting national implementation legislations can diverge from each other or even be contradictory, while at the same time they all have to apply to the same value chains, and products.

Solution:

- Art 4.2 and the related text in recital 31 should therefore be deleted and replaced by the text which was agreed in art 3a of the Report of the European Parliament:

  'The Commission and Member States shall coordinate during the transposition of this Directive and thereafter in view of a full level of harmonization between Member States, in order to ensure a level playing field for companies and to prevent the fragmentation of the Single Market.'
  'The Commission shall consider, six years after the entry into force of this Directive, whether changes to the level of harmonization of this Directive are required to ensure a level playing field for companies in the Single Market, including whether the provisions of this Directive could be converted into a Regulation.'

- This text contains a political commitment, not a legal provision.
- It does not exclude, at least not as long as the Directive has not been transposed in a Regulation, that in exceptional circumstances, some element of goldplating may be introduced, except in the harmonised articles of paragraph 1 of art 4. So the system would still have a safety valve in cases a national exception would be really required for legitimate reasons.

Art 8, Scope of due diligence; position of SMEs

Art 8 now provides the following due diligence steps:

- Art 8.2.(a) requires a *pro-active mapping* of the operations of the company itself, its subsidiaries and its business partners in the chain to *identify general areas* where adverse impacts are most likely to occur and to be most severe
- Art 8.2.(b) requires a *pro-active in depth assessment* of the operations of the company itself, its subsidiaries and its ***direct*** business partners based on the mapping in 8.2(a)
- Art 8.2a requires companies to seek *contractual assurances* from direct business partners that it will ensure compliance with the company's code of conduct by establishing corresponding contractual assurances from its business partners
- Art 8.2a requires a *reactive in depth assessment* of the operations of an *indirect* business partner, if plausible information suggests that adverse impact may arise.
- Art 8.2a and 8.3 forbid two forms of possible circumvention of the provisions of art 8.
- Art 8.5 stipulates that *for the mapping of art 8.2(a)* extensive sustainability information according to the VSME standard can be demanded from companies < 500 employees, and that if necessary also additional information can be demanded from business partners.

Assessment:

- Compared to the original CSDDD, the Omnibus text proposes a distinction of the level of due diligence applicable to direct versus indirect business partners. But the due diligence effort demanded from companies, also SMEs, and also beyond the first tier remains substantial.

Art 10.6, Preventing potential adverse impacts

The new text says that regarding potential adverse impacts that could not be prevented, the company shall adopt an enhanced prevention plan, provided that there is a reasonable expectation that those efforts will succeed, and use the company's leverage through the suspension of the business relationship. As long as there is a reasonable expectation that the enhanced prevention action plan will succeed, the mere fact of continuing to engage shall not trigger the company's liability.

Assessment:

- The last resort obligation to temporarily suspend *or terminate* in the original CSDDD has now been replaced by an obligation to suspend if there is no reasonable expectation of improvement.
- In certain countries, a reasonable expectation that the situation will improve exists. But there are quite some countries where it is not reasonable to expect improvement of the situation, e.g. due to government policies forbidding due diligence action. The Omnibus text would require (possibly indefinite) suspension of trade and investment relations in these countries on a massive scale, with possibly enormous damage for the local people, the companies concerned, but also EU public interests such as the adequate provisions of critical raw materials or manufacturing inputs.
- Art 10.6 provides insufficient clarity for companies as to what they should do in countries and situations where no reasonable expectation of improvement exists.

Solution:

- The text of the Omnibus act or of the recitals should explicitly provide this clarity. More specifically, it should be clarified whether the sentences 'where the law governing their relations so entitles them' (art 10.6, para 1) and 'whether the adverse impacts from doing so can be reasonably expected to be manifestly more severe' (art 10.6, para 2) also cover adverse impacts related to 1) massive simultaneous terminations of trade and investment relations, or 2) related to the adequate provision of strategic raw materials or manufacturing inputs to the EU.

Art 11.7, Bringing actual adverse impacts to an end

Our comments under art 10.6 apply m.m. also to art 11.7.

Art 13.3, Consultation of *relevant* stakeholders

The word relevant is added, but the concept of relevant stakeholder is not defined. Consultation is no longer required in cases of suspending a business relationship or in relation to indicators related to the monitoring in art 15.

Assessment:

- It seems reasonable that the concept of relevant stakeholder coincides with the new definition of stakeholder in art 3.1.n.
- Then the effect of the change would probably be limited.

Art 15, Monitoring

Monitoring in the form of periodic assessments of their operations to assess the due diligence actions is, as a rule and if no significant change occurs, reduced from at least every 12 months to at least every 5 years.

Assessment:

- This is a substantial and welcome limitation of administrative burdens for companies, whereas the obligation of swift action remains in case of doubts about the adequacy of measures.

Art 19, Guidelines

The Commission's guidelines for some provisions of the CSDDD should be made available six months earlier.

Assessment:

- In general, the guidelines should be available well in time before the new Omnibus text of the CSDDD enters into force. The proposed dates are still rather late.
- It is very confusing that the guidelines on various provisions of the CSDDD enter into force on three different dates.

Art 22, Combating climate change

Companies should adopt a transition plan for climate change mitigation. The obligation to put the plan into effect has been deleted, but the plan should now also contain implementing actions.

Assessment:

- The implications of these changes are unclear and seem to depend very much on the interpretation of supervisors and judges.

Art 27, Penalties

Art 27.4 now says that the Commission, in collaboration with Member States, shall issue guidance to assist supervisory authorities in determining the level of penalties; Member States shall not set a maximum limit on penalties that would prevent them from being in accordance with the principles and factors set out in art 29.
The minimum level of the maximum limit (!) of penalties (5% of the net worldwide turnover) in the original CSDDD has been removed.

Assessment:

- It is positive that the link with net worldwide turnover and the excessively high minimum threshold of the maximum limit of the penalty have been removed. It is also positive that there will be more coordination between Commission and Member States.
- It remains to be seen how much effect this will have in practice.

Art 29, Civil liability of companies and the right to full compensation

The Omnibus Act stipulates that liability is determined by the national law of the Member States. Where liability exists, Member States shall ensure a right to full compensation.
The provisions on the conditions under which trade unions and ngo's may be authorised to bring actions have been removed.
The provision that national Member State law would be of overriding mandatory application in cases where the law applicable to the claims is not the national law of a Member State has been removed.

Assessment:

- These changes clarify and improve the rules on liability. It is positive that the national rules on liability are not widened, although in some instances this may lead to an unlevel playing field.
- It is of particular importance to Dutch business that the rule of overriding mandatory application has been removed.

Art 36, Review and reporting

The paragraph demanding the Commission the submit additional due diligence rules for regulated financial undertakings has been removed.

Assessment:

- We have always taken the position that such rules for regulated financial undertakings should only be adopted if they have EU-wide application.

Annex: Too open material norms

Assessment:

- Our concern, which we have expressed from the beginning, that the excessively open and possibly contradictory norms as laid down in the Annex of the CSDDD cannot be applied by companies has not been addressed at all in the proposed changes to the CSDDD. The material norms with which companies should comply are contained in the Annex to the CSDDD. They are mostly norms contained in government-to-government human rights and environmental agreements which cannot simply be transposed into obligations for companies. The Dutch academic legal community is in a large majority of the opinion that the norms are in this form not applicable in practice for companies, supervisors and judges alike. There is a large number of norms contained in the Annex, and the norms may also be contradictory.

Solution

- The solution to this issue would involve two changes.
  First, the rule of reason, which applies to governments in the case where they have to apply the agreements contained in the Annex to the CSDDD, should also apply to companies when they apply these agreements. This would leave discretionary room for business on how to implement the norms in practice.
  Second, the supervisor and the judge, when called to assess the due diligence actions of a company, should only marginally review these actions, not integrally.

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