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Banks' climate liability influenced by sustainability legislation

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Climate change is of growing (legal) interest to banks. According to the authors, banks should focus on an adequate climate plan, not excluding drastic measures. The threat of climate liability also necessitates this. In practice, it is mainly sustainability legislation that receives attention, which - although helpful for the climate plan - does not prevent climate liability.

1 Introduction

Since 2015, climate liability is no longer a purely hypothetical form of liability: on June 24 of that year, the District Court of The Hague ruled that the Dutch State committed an unlawful act by adopting a climate plan with an insufficiently ambitious emission reduction target.[1] The Court of Appeal and the Supreme Court even equated the lack of a proper state climate plan with an (imminent) violation of the right to life and the right to respect for private and family life.[2] Foreign courts did the same.[3]

We are now roughly eight years on. In that period, the legal significance of climate change has also developed significantly for private parties. Civil climate liability for an inadequate climate plan[4] is now also a reality for companies, as evidenced by the ruling of the District Court of The Hague in the case of Milieudefensie and others against Shell.[5] A stream of legislation has also emerged to encourage (and eventually even force) companies to adopt more sustainable business practices, including the adoption of an adequate climate plan.

Within these developments in climate law, banks occupy a special place, in line with their special role in society. This has translated into sector-specific voluntary climate initiatives, such as the Net-Zero Banking Alliance (NZBA),[6] but also into further regulation; since 2018, the European Union has introduced comprehensive sustainability legislation as part of the European Green Deal,[7] seamlessly

[1] District Court The Hague June 24, 2015, ECLI:NL:RBDHA:2015:7145. Our firm acted for Stichting Urgenda in these proceedings.
[2] Court of Appeal The Hague October 9, 2018, ECLI:NL:GHDHA:2018:2591 and Supreme Court December 20, 2019, ECLI:NL:HR:2019:2006.
[3] E.g. in France (Tribunal administratif de Paris February 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1), Germany (Bundesverfassungsgericht April 29, 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618) and Belgium (Tribunal de première instance francophone de Bruxelles June 17, 2015, 4585/A). Our firm is acting for the plaintiffs in the latter proceedings.
[4] For a description of the concept of a "climate plan", see par. 2.2.
[5] District Court The Hague May 26, 2021, ECLI:NL:RBDHA:2021:5337. We further refer to this ruling as the "Shell ruling. Our firm is acting for the plaintiffs in these proceedings.
[6] The NZBA is a global platform in the banking sector under the coordination of the United Nations, as part of the Race to Zero initiative. See www.unepfi.org/net-zero-banking. See further note 28 and 38.
[7] The starting point for this was the "Action Plan: Financing Sustainable Growth. See Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the

following the regulation that sprung from the 2008 financial crisis. Banking regulators are also giving climate issues top priority.[8] Yet for now, banks have not created climate plans that are generally considered adequate.[9] The possibility that banks' climate plans will be challenged in legal proceedings is gaining traction.[10] The first climate case against a bank is now a fact.[11]

Both in legal literature and among banks and their advisors, sustainability legislation receives a great deal of attention (that is, the aforementioned *regulatory* legislation). This is of course justified, if only because for a highly regulated business such as a bank, compliance with legislation is understandably essential. In addition, it leads to a growing awareness of the social necessity of sustainable banking and business, and helps to remove complexities that may hinder the implementation of an adequate climate plan. However, we also see the risk that within banks the main focus will be compliance with sustainability legislation, rather than the other task at hand: mitigating dangerous climate change through the adoption and effective implementation of a climate plan that ensures actual and sufficiently ambitious emission reductions. Yet the latter is especially important for managing civil climate liability and countering the (threatened) human rights violations upon which such liability is based.

This raises the very timely question of whether banks should not devote more of their time, budget and talent to establishing and implementing a sufficiently ambitious climate plan. Or put another way, how should the interests of sustainability legislation and climate liability be balanced? That question has a moral and business angle as well as a legal one. Partly to promote informed consideration, in this article we attempt to put bank climate liability in its proper perspective. To this end, we first outline our view of the civil law contours of bank climate liability (par. 2). We then discuss the relevance of sustainability legislation to this banks' climate liability (par. 3). We then conclude with some final remarks (par. 4).

2 Banks' climate liability

2.1 The relevance of a civil law general standard of care

Without an understanding of the utility and necessity of the notion of banks' climate liability, a discussion of its civil law contours may seem not so relevant. This calls for a spoiler of one of our conclusions in par. 3: neither existing nor planned sustainability legislation guarantees that companies, including banks, will achieve the emissions reductions necessary to meet the goals of the 2015 Paris

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European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM/2018/097 final. In par. 3.2 we touch on the main sources of this legislation.

[8] See, e.g., www.bankingsupervision.europa.eu/press/pr/date/2022/html/ssm.pr221102~2f7070c567.en.html.

[9] For the Minister of Finance, this recently prompted the announcement of research into further regulation. See Parliamentary letter from the Minister of Finance regarding 'Voortgang klimaatcommitment financiële sector', March 13, 2023, reference 2023-0000069111 (see also note 71). For the financial sector's response, see www.nvb.nl/nieuws/financiële-sector-samen-met-overheid-en-bedrijven-verduurzaming-versnellen. See additionally www.milieudefensie.nl/actueel/onderzoek-naar-de-klimaatplannen-van-29-grote-vervuilers, www.banktrack.org/page/banks_and_climate (including referenced sources) and the sources cited in note 37.

[10] See, e.g., M. Jongsma, Meerdere banken in vizier ngo's, Het Financieele Dagblad February 23, 2023, F. Elderson, The European Climate Law and the European Central Bank, keynote address at the lustrum symposium of the Society for Financial Law on December 1, 2022, and the report 'Climate-Related Litigation: Raising Awareness about a Growing Source of Risk' mentioned therein, Paris: Network for Greening the Financial System 2021, R. de Jong, De dreigende werking van klimaataansprakelijkheid van financiële instellingen, NTBR 2022/4 and J. Solana, Climate Litigation in Financial Markets: A Typology, Transnational Environmental Law (9), 2020, vol. 1, p. 103ff.

[11] M. Rosemain et al, Activists Sue BNP over Energy Loans, TotalEnergies over Human Rights, Reuters Feb. 3, 2023.

Agreement.[12] The European Union and its member states thus provide no protection against banks' share of climate change-induced (threatened) violations of the right to life and the right to respect for private and family life. Meanwhile, annual global CO_2 emissions are currently at record levels, despite record growth in low-emission energy.[13] While maintaining the (achievable!) 1.5°C scenario requires global CO_2 emissions to be reduced by at least 45% by 2030 (from 2010 levels) and then by (net) 100% by 2050 (or, net zero emissions by 2050).[14] This scientific finding was recognized and endorsed by all Paris Agreement countries in the Glasgow Climate Pact in 2021.[15]

That sustainability legislation falls short is a lamentable observation, but no surprise. There are several reasons for this. First, it fits into the broader phenomenon that sustainability legislation (including non-banking legislation) has limited effectiveness in protecting the interests of human rights and the environment. This phenomenon gave rise to the United Nations Guiding Principles on Business and Human Rights (UNGP), the United Nations Global Compact (UN Global Compact) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). It is the reason why companies are asked to take individual responsibility in protecting human rights and solving major environmental problems such as climate change. In the design and creation of these three international frameworks for business, it was widely recognized that the globalization of markets (and the ever-increasing size of multinational corporations as a result) has a major negative impact on the fragile interests of human rights and the environment. Within the system of international market thinking (in which, for example, economies of scale, shareholder value and short-term profit maximization are often key performance indicators), there is often little regard for protecting human rights and the environment. As a result, government regulation on those topics is seen as a barrier to success. This leads to lobbying by companies and business associations to oppose stricter human rights and environmental regulations.[16] The United Nations Human Rights Council (UN HRC) noted in 2008 that human rights and environmental violations by companies are on the rise, but national governments and public institutions do not have a sufficient grip on (especially) internationally operating companies due to the internationalization of business.[17] The UN HRC found that this phenomenon had created a power vacuum ("governance gap"), in which and as a result of which internationally operating companies could operate more and more easily without (enforceable) human rights and environmental limitations. The UNGP, the UN Global Compact and the OECD Guidelines therefore urge self-regulation by (multinational) companies to close this power

[12] The formal name in Dutch is ‘Overeenkomst van Parijs’.
[13] P. Friedlingstein et al, Global Carbon Budget 2022, Earth System Science Data 2022/11; Global Energy Review: CO2 Emissions in 2021. Global Emissions Rebound Sharply to Highest Ever Level, Paris: International Energy Agency 2022.
[14] On the feasibility of the required emissions reductions (and the measures required to achieve them) according to IPCC Working Group III (Mitigation of Climate Change), see www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease. For a more detailed (but nevertheless readable) overview of the possibilities, see IPCC, 2022: Summary for Policymakers, in: P.R. Shukla et al. (ed.), Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge/New York: Cambridge University Press 2022, p. 17ff. The IPCC's "Synthesis Report of the IPCC Sixth Assessment Report" (AR6 SYR), adopted on March 20, 2023, places this in a broader framework that includes the findings of Working Group I (Physical Science Basis) and Working Group II (Climate Change Impacts, Adaptation and Vulnerability). For the AR6 SYR's "Summary for Policy Makers" adopted on March 20, 2023 (and also a good read), see www.ipcc.ch/report/ar6/syr.
[15] See Glasgow Climate Pact, Decision 1/CMA.3 of Nov. 13, 2021, par. 1 to 3 (on the science and resulting urgency and severity of the climate problem) and par. 22 (on the necessary reduction from 45% by 2030 to net zero by 2050).
[16] See also note 75 regarding corporate lobbying activities under the CSDD discussed in par. 3.2.
[17] J.G. Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN HRC 2008.

vacuum as much as possible and to actively involve companies in solving increasing violations of human rights and the environment.

A second reason why the limited effectiveness of sustainability legislation for banks is not surprising is that, even without a governance gap, creating "rule-based" legislation for climate plans is difficult. By this we mean: legislation that specifies *in detail* what *concrete* measures are expected from an individual company. Ultimately, after all, this cannot be separated from the specifics of the individual company (a multinational company with extensive fossil operations is likely to need to transform more radically than a smaller company in a low-emission industry). Moreover, scientific and social developments are moving so fast that the frameworks to be derived from them cannot be translated into legislation sufficiently quickly. In any case, not fast enough to do justice to the scale and urgency of the emission reductions needed for a 1.5°C scenario.

Now that sustainability legislation does not yet offer any conclusive protection against human rights violations as a result of dangerous climate change, the question arises how the respect for these human rights can still be sufficiently guaranteed. This demonstrates the need for a general legal basis that enables stakeholders to defend their own human rights against a specific company (or specific group of companies) that fails to respect them sufficiently.

2.2 *A context-specific general standard of care*

Unlawful act

Such a basis can be found in Art. 6:162(2) of the Dutch Civil Code (DCC), from which it follows that an act or omission contrary to socially prudent conduct constitutes an unlawful act. The provision thus includes a 'principle-based' obligation of socially prudent conduct. As a result, everyone in society has a social duty of care to others. This duty of care must be specified within the specific circumstances of a concrete situation. When creating danger for others, this duty of care is shaped by the so-called endangerment doctrine.[18] It follows from this doctrine that Art. 6:162(2) DCC can create certain duties of care to protect the (by climate change threatened) human rights to life and the right to respect for private and family life.[19]

In our view, in simplified terms, these obligations mean that anyone with a legally relevant share in the causes of climate problems must take responsibility for their *fair share* in mitigating human rights violations resulting from the dangerous consequences of climate change.[20] Whoever neglects this duty of care commits an unlawful act, which leads to what we call climate liability for brevity's sake. This also applies to (multinational) companies, which have an explicit responsibility under the UNGP, the

[18] For a general overview of the doctrine, see Janssen, in: GS Onrechtmatige daad act, Art. 6:162 BW, aant. 6 (current through December 1, 2020).

[19] On the meaning of human rights and related instruments such as the UNGP (and NZBA) under Art. 6:162(2) CC, see among others Janssen, in: GS Onrechtmatige daad, Art. 6:162 CC, aant. 6.1.10 and 6.1.13 (current through December 1, 2020) and Asser/Sieburgh 6-IV 2019/71.

[20] The Dutch state has been held liable for its direct and indirect control over national greenhouse gas emissions, which represent 0.4% of global emissions (the Belgian state has been held liable for a 0.3% share). See note 1 to 3. Control over 1/250 part (or, assuming the situation in Belgium, 1/333 part) of global emissions is thus legally sufficiently large to lead to climate liability. Control over 1/1000 part (0.1%) of global emissions is also sufficient, in our opinion. We suspect that, given the seriousness of the climate problem and the need for the larger emitters in particular to take joint responsibility for solving it, even a smaller fraction of 1/5000 (0.02%) or less could lead to liability. Thus, most multinational companies have direct and indirect control over a share of global emissions that we believe is large enough to cause climate liability. At the same time, the above also makes it clear that smaller companies and individuals need not fear climate liability because their share in the global problem is so small that it has no legal relevance.

UN Global Compact and the OECD Guidelines to protect human rights (threatened by climate change). Not least because all states affiliated to the United Nations Framework Convention on Climate Change (UNFCCC) have indicated since 2014 that they cannot cope with the climate challenge alone and that this requires proactive action by (multinational) companies.[21]

In par. 2.3 to 2.5, we will discuss the applicability and more specific meaning of the foregoing in the banking context. But first, we will discuss some general features of climate liability.[22]

Rapidly developing doctrine
The first is that climate liability as a doctrine is developing rapidly, just like climate science and social developments around climate change. Open standards such as Section 6:162(2) DCC are well-suited to account for social and scientific developments.[23] In our opinion, these developments will increasingly support the adoption of a legally enforceable social duty of care. This also fits with the trend that recognizes (co-causing) climate change as a human rights issue.[24] Having said that, the general notion of climate liability as outlined above may by now no longer be called a novelty; the reduction obligations under the court rulings in both the Urgenda and Shell cases, the first of which dates back to 2015, trace back to this foundation.[25]

Climate plan for emissions reductions
This brings us to a second general feature of climate liability. The Urgenda and Shell cases are aimed at *emission reductions* (or more precisely, on the basis of Art. 3:296 DCC they claimed performance of the emission reduction obligations arising from Art. 6:162(2) DCC). There is therefore *no* claim for (financial) damages on the basis of Art. 6:162(1) DCC (with which the causality requirement as enshrined in that article and in Art. 6:98 DCC is therefore also not relevant). Given the nature of the climate problem, this should come as no surprise: the (imminent) violation of human rights as a result of climate change stems from the extensive, structural overshoot of the maximum annual emissions within which the objectives of the Paris Agreement are still within reach.[26] To get on track with these goals, and thus remove this threat, emission reductions are necessary. To take responsibility for its fair share in those necessary emission reductions, a company must demonstrably commit to appropriate emission reduction targets and also organize itself in such a way that they will be achieved.

[21] In 2014, the so-called Non-State Actor Zone for Climate Action (NAZCA) was established under the auspices of the United Nations. The purpose of the NAZCA is to promote and give visibility to climate action by businesses, investors and others, creating a second action agenda alongside that of states themselves. Non-state climate action has been communicated from then on under the UNFCCC as one of three pillars for closing the emissions gap (the gap between what needs to happen globally in emissions reductions and what actually happens). The other two pillars are ambitious climate action by states and mobilizing public and private finance for climate action. The Paris Agreement and associated Decision 1/CP.21 also refer to these three pillars. See, inter alia, par. 133 et seq. of that decision and Art. 2 of the Paris Agreement.
[22] We suffice here with a generic outline of some features, obviously without being exhaustive. See more extensively on the legal bases the considerations of the District Court, Court of Appeal and Supreme Court in the Urgenda and Shell cases (see note 1, 2, 5 and 25) and R.H.J. Cox, Revolution justified, Maastricht: Planet Prosperity Foundation 2011.
[23] Cf. Asser/Sieburgh 6-III 2018/330.
[24] See note 3 and (including the case law and other sources cited there), N.J. Schrijver, Internationaal klimaatrecht. Een kolkende stroom, RMThemis 2023, vol. 1, p. 1 et seq. and M.J. Wewerinke-Singh & S. Bookman, Intergenerationele rechtvaardigheid in besluitvorming over het klimaat: een wereldreis door de zich ontwikkelende jurisprudentie, RMThemis 2023, vol. 1, p. 59 et seq.
[25] See Supreme Court Dec. 20, 2019, ECLI:NL:HR:2019:2006 (esp. par. 2.2.2, 2.3.1, 2.3.2 and 5.9.1) and Shell ruling (esp. par. 4.4).
[26] See note 14.

The most appropriate means to this end is a "climate plan". A wide variety of climate plans now exist, and most banks have also published a climate plan in some form (spurred in part by the European Central Bank; ECB).[27] In general terms, a company can be expected to include in a climate plan appropriate absolute reductions for scope 1, 2 and 3 emissions in line with a 1.5 °C scenario, use time-bound targets from 2030 or earlier, and indicate how it will implement its targets in, for example, its business models, strategy and governance.[28] Clearly, merely *having* a climate plan is not enough; the company will have to actually and effectively implement it.

Contextual

And then a third general characteristic of climate liability, which determines the minimum level of ambition of the climate plan and the concrete measures that can be expected to implement it. This characteristic is that climate liability, as an exponent of the endangerment doctrine, is a *context-specific* issue.[29] In other words, a party's specific circumstances help determine what it is ultimately legally bound to do, and thus this may vary from party to party. This provides parties with the assurance that the "burden" of the climate problem is shared in a proportionate manner and that they are not required to take action that exceeds their fair share. This should not be confused with a guarantee of an effortless transition; the climate problem, by its nature and scale, is a challenge of unprecedented proportions, and even the most limited control of it requires urgent and far-reaching adjustments from everyone. Parties would do well to understand in depth the meaning of this within their context, so that they are not caught off guard by the meaning of the general standard of care in their specific situation (which for a bank may be much more far-reaching than assumed; see par. 2.4).[30] The circumstances to be taken into account will have to be determined and weighed partly on an individual basis. In our opinion, in general and in line with established case law on the endangerment doctrine, the main weight should be given to circumstances that influence the actual or presumed awareness of the risk of climate change (including its severity and the likelihood of its materialization) and the possibility and necessity of taking action, the effort and costs of which are in real proportion to the risk of climate change. For companies, the Shell ruling provides more specific pointers to relevant circumstances,[31] classified into fourteen sections, which can be traced back to these general principles. In particular, we point to the significance that the court attributes to the size of the Shell group's CO_2 emissions, the UNGP (cited above), the control and influence of Royal Dutch Shell plc (hereinafter: RDS) on the CO_2 emissions of the Shell group and its business relations, possible reduction paths, the objectivity for Shell to comply with the reduction obligation and the proportionality of RDS's reduction obligation. This, by the way, not meant to suggest that the Shell ruling provides a universal and exhaustive enumeration, or that the other circumstances considered by the court in it are of lesser importance.[32]

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[27] See par. 3.2. As explained in more detail there, the ECB guidelines do not guarantee that the bank's climate plan is also sufficient from a climate liability perspective.

[28] This follows in part from the "process criteria" of the Race to Zero initiative developed under the auspices of the United Nations, of which the NZBA is a part (see note 6). Race to Zero resides under the secretariat of the UNFCCC. More than 8,000 companies and financial institutions have now joined this initiative. See www.unfccc.int/climate-action/race-to-zero-campaign and https://racetozero.unfccc.int/system/criteria. See also note 34 (on the distinction between scope 1, 2 and 3 emissions) and 43 (on the distinction between absolute emissions reduction and emissions intensity reduction).

[29] With regard to the context-specific nature of standards of care in the event of endangerment , see a.o. Janssen, in: GS Onrechtmatige daad, Art. 6:162 CC, aant. 6.1.4 and 6.3.4 (current through December 1, 2020) and T. Hartlief et al, Verbintenissen uit de wet en schadevergoeding, Deventer: Wolters Kluwer 2018, no. 48 (S.D. Lindenbergh).

[30] See in similar vein with respect to financial institutions: De Jong 2022.

[31] Shell ruling, par. 4.4.

[32] In addition to the circumstances mentioned here, the District Court of The Hague includes a number of other equally important circumstances in its consideration, such as the consequences of CO_2 emissions for the Netherlands and the Wadden Sea region, the right to life and the right to respect for private and family life of the

2.3 The banking context

Having considered some general features of climate liability, we can now turn to the applicability and significance of climate liability in a banking context. A first question here is: can a bank be placed within these frameworks at all? To us the answer seems: yes. The causes of the climate problem, like the necessary measures, are so universal that the main question should be why a bank should *not* have to take responsibility for its fair share. We cannot find a reason for this. Moreover, any other conclusion would not be compatible with Principle 14 of the UNGP, which explicitly states that companies must respect (the human rights threatened by climate change) regardless of their size, sector, operational context, ownership and structure. The UNGP has been endorsed by all Dutch significant banks.[33]

Conversely, we see good reasons why banks, by taking responsibility for their fair share, could and should make a very meaningful contribution to limiting (human rights violations due to) climate change. The most important is that through their financing they facilitate a large volume of greenhouse gas emissions: the three largest Dutch banks already represent, based on their own self-reported data (which they claim is not comprehensive), a volume of financed emissions comparable to the emissions of many

Dutch residents and the inhabitants of the Wadden Sea region, what it takes to prevent dangerous climate change, the dual challenge of combating dangerous global warming and meeting the energy demands of the growing world population, the effectiveness of the reduction obligation and the responsibility of states and society.

[33] Of the seven Dutch significant banks, six have explicitly committed to the UNGP. See ABN AMRO Human Rights Statement 2020 (www.abnamro.com/en/about-abn-amro/product/human-rights), BNG Bank Human Rights Policy 2020 (www.bngbank.nl/over-BNG-Bank/Onze-duurzame-ontwikkelingsdoelen), ING Environmental and Social Risk Framework 2021 (www.ing.com/Sustainability/Sustainable-business/Environmental-and-social-risk-policies.htm), Rabobank Global Standard on Sustainable Development, undated (www.rabobank.com/en/about-rabobank/in-society/sustainability/records/human-rights/index.html), De Volksbank Human Rights Policy, undated (www.devolksbank.nl/en/corporate-responsibility/sustainability/sustainability-policy-documents) and NWB Bank Sustainability Policy, undated (www.nwbbank.com/en/investor-relations). From LeasePlan, the seventh significant bank, we were unable to find an explicit endorsement of the UNGP. However, since it requires its suppliers to respect the UNGP (www.leaseplan.com/corporate/site-services/supplier-code-of-conduct), we assume that it also considers itself bound by it. For that matter, whether or not a company has endorsed the UNGP to us seems irrelevant for the interpretation of the general standard of care on the basis of the UNGP. In this line, see also the Shell ruling, par. 4.4.11.

European countries.[34] The actual volume may be much higher.[35] As a financier, a bank can exert much influence on the reduction of this large volume of emissions. In the first place by the choices it makes whether or not to finance certain emission-intensive or low emission activities. The Intergovernmental Panel on Climate Change (IPCC) points here to sectoral and regional 'financing gaps': at the global level, the financing required for climate mitigation must still increase by a factor of 3 to 6 before 2030, while the financing of fossil activities is not decreasing fast enough.[36] But a bank also has influence by getting its customers to make emissions reductions, through informal means or by attaching conditions to its financing (such as an adequate climate plan, failing which the customer falls into a higher interest rate or loses financing).

That banks should use this influence is not controversial.[37] Especially since banks themselves recognize this. On an individual basis, banks frequently emphasize their commitment to the Paris Agreement, for example in climate plans, annual reports and marketing statements. On a sectoral level, this commitment

[34] Under the greenhouse gas reporting standards of the Greenhouse Gas Protocol (see www.ghgprotocol.org), a bank has several types of emissions, classified as scope 1, 2 and 3 emissions (with subcategories within them). Scope 1 and 2 emissions are associated with its own assets and the energy purchased for them (think real estate and its heating and lighting). The financed emissions are scope 3 category 15 emissions. ABN AMRO, ING and Rabobank report funded emission volumes of 26.2, 56 and 46.3 Mt CO_2e, respectively, for 2021 (a year with relatively low emissions due to the COVID-19 pandemic). All these banks indicate that their data are not comprehensive, e.g. because they do not cover the entire financing portfolio or because scope 3 emissions from customers are not included. See ABN AMRO Integrated Annual Report 2021 (www.abnamro.com/en/about-abn-amro/product/download-centre), ING 2022 Climate Report (www.ing.com/Newsroom/News/ING-publishes-climate-report.htm) and Rabobank Our Road to Paris report (www.rabobank.nl/en/about-us/organization/results-and-reports/downloads). The financed emission volume of the other Dutch significant banks is also large in absolute terms, but relatively significantly lower, with LeasePlan's being the highest at 4.2 Mt CO_2e. See LeasePlan Annual Report 2021 (www.leaseplan.com/corporate/investors/annual-report-2021). In 2019, emission volumes from e.g. Norway, Finland and Switzerland were 26.9, 58.4 and 44.3 Mt CO_2e, respectively. See www.climatewatchdata.org/ghg-emissions.

[35] W. Warmerdam et al, Dutch Financial Sector Financed Emissions: Financed Emissions from Corporate Finance and Investment Portfolios, Amsterdam: Profundo 2022.

[36] Although the focus is often on financing gaps in developing countries, an increase is still required by a factor of 2 to 4 in Europe, for example, and by a factor of 3 to 6 in North America. Sectoral differences are also significant. In the so-called AFOLU (Agriculture, Forestry and Other Land Use) sector, for example, an increase is required by a factor of 10 to 31. See S. Kreibiehl et al, Investment and Finance, in: P.R. Shukla et al (ed.), Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge/New York: Cambridge University Press 2022, par. 15.5.2.

[37] A first (generic) pointer was already given with Art. 2(1)(c) of the Paris Agreement. Since then, increasingly prescriptive pointers have been given. See, e.g., Marrakesh Partnership (Global Climate Action United Nations Climate Change), Climate Action Pathway Energy Action Table, 2021. In the context of COP27 in Sharm-el-Sheikh, see e.g. High Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions, 2022. See also United Nations Secretary-General António Guterres' comments on the publication of this report: 'The problem is that the criteria and benchmarks for these net-zero commitments have varying levels of rigor and loopholes wide enough to drive a diesel truck through. We must have zero tolerance for net-zero greenwashing. (...) Net-zero pledges must be in line with IPCC scenarios limiting warming to 1.5 degrees. That means global emissions must decline by at least 45 per cent by 2030 - and reach net zero by 2050. Pledges should have interim targets every five years starting in 2025. And these targets must cover all greenhouse gas emissions and all scopes of emissions. For financial institutions, this means all financed activities.' See www.un.org/sg/en/content/sg/statement/2022-11-08/secretary-generals-remarks-launch-of-report-of-high-level-expert-group-net-zero-commitments-delivered. In Dutch law, this can be placed within a more general development in which companies are increasingly explicitly given responsibility for their negative externalities, e.g. under the Corporate Governance Code 2022.

has been translated into several codes of conduct and commitments, such as the Dutch Climate Statement Banks, the Financial Sector Climate Commitment and the NZBA.[38] Moreover, it seems to us that a bank should also use its influence from its own interest to make its financing activities more sustainable. There are several reasons for this, not all of which can be discussed here, but one of them is that such sustainability seems crucial for the durability of the bank's business model; in addition to its strategic, reputational and commercial aspects, for example, there are also the financial consequences of unsustainable financing activities. These will increase the risk profile of the funding portfolio, for example through the impairment of non-sustainable collateral, which as a result of higher (mandatory) capital buffers will increase the bank's cost of capital. Unsurprisingly, the ECB, as prudential regulator, expects banks, with increasing coercion, to use their leverage to manage their exposure to climate and environmental risks.[39]

2.4 The obligations in an individual case

Given the preceding paragraphs, there seems little cause for debate about the nature and extent of climate change risk and the need to mitigate it, or about banks' awareness of it. Equally uncontroversial against that background, it seems to us that banks have influence over (a sometimes very large volume of) customer emissions and should use that influence. This is in stark contrast to the growing debate about what banks are actually doing; there are regular statements that banks are carrying out unacceptable activities or taking insufficiently far-reaching measures with a view to climate change, and thus risking climate liability.[40] We think that in several cases, these statements might be justified.

The foregoing implies that while banks should understand the climate problem and their role in it, their translation of this into concrete obligations at the individual level is too restricted. The cause of this seems to be that banks do not know what effort and costs are in real proportion to the risks of climate change and the opportunities to mitigate them, both for themselves and for their customers (or that they interpret these efforts and costs, unconsciously or for opportunistic reasons, too narrowly). They make, from the perspective of climate liability,[41] an incorrect assessment of what a fair share requires of them in terms of, for example, customer influence (how hard and far-reaching are financing conditions?), customer emissions reductions (how ambitious is their emissions reduction path?), commercial and financial sacrifices (how much return loss on fossil financing is acceptable?), the effectiveness of measures (what if the customer goes to a competitor?) and strategic, organizational or operational changes (how much investment is justified for better emissions data?).

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[38] See also note 6. According to the NZBA, financial institutions have an important role in reducing their scope 3 emissions and members are therefore committed to setting targets for carbon reductions in the most emission-intensive sectors, in line with the Paris Agreement's 1.5°C target based on transition paths with 'no/low overshoot' according to the best available science. In addition, members commit to scaling up funding for credible, safe and high-quality climate solutions. See NZBA Commitment Statement and NZBA Frequently Asked Questions, p. 4 ff. The Financial Sector Climate Commitment is part of the Dutch Climate Agreement and explicitly stipulates, among other things, that financial institutions participate in financing the energy transition and that they set reduction targets, in line with (international) developments and standards in this area. See in that context also recently the parliamentary letter mentioned in note 9.

[39] See more detail on this in par. 3.2.

[40] Cf. note 9 to 11.

[41] They may also be making misjudgments from the perspective of sustainability legislation. On the ECB's expectations (which include climate plans and management of "litigation risk"; see par. 3.2) and its critical findings in this regard, see www.bankingsupervision.europa.eu/press/pr/date/2022/html/ssm.pr221102~2f7070c567.en.html and F.W.J. van der Eerden, Duurzaamheid en banken, in: M.J. van Loopik et al. (ed.), The Twin Transition: Digital & Sustainable Finance, Deventer: Wolters Kluwer 2022, par. 3.1 to 3.3.

This assessment is in principle a consideration to be made on an individual level. But we would like to make the following general comment: the most important thing is that the true nature, scale and thus seriousness of the climate problem must be fully considered at all times, including the global far-reaching consequences for the human rights of current and future generations. This is particularly important when the bank's business interests have to be weighed against this. This weighing can be illustrated most simply by referring to the Shell judgment, in which the District Court of The Hague (after having studied the climate problem in detail, and following in the footsteps of the Urgenda judgment of the Supreme Court) stated that the commercial interests of the Shell group carry less weight than the interest in limiting dangerous climate change.[42] In doing so, the court expressly considers that this requires a change of course on the part of the Shell Group, may impose limits on the growth of the Shell Group, and may require drastic measures and financial sacrifices. This seems to us at least to rule out the possibility that a bank may finance activities that are incompatible with the goals of the Paris Agreement. This requires, first of all, that a bank stop financing a number of clearly incompatible activities, such as power generation from coal, the extraction and exploitation of new oil and gas fields and activities to support them. But this includes the activities of certain categories of emissions-intensive companies that fail to commit to an emissions reduction path that is sufficiently demonstrably compatible with the Paris Agreement. Moreover, it seems to us that in certain circumstances a bank should commit to a certain (minimum) reduction in the total emissions it finances. For example, we can imagine that a bank that finances a volume of emissions larger than that of many an (industrialized) country, operating in emissions-intensive sectors, should at least follow an emissions reduction path that represents a proportional *absolute*[43] decrease in the financed volume of emissions. It seems to us not unlikely that this reduction should amount to at least a 45% reduction by 2030, matching what the global average reduction level by 2030 should be.[44] After all, how *fair* is a *share* for such a bank that leaves room for emissions to remain the same or even increase, while - across all geographical, sectoral and other boundaries - far-reaching and urgent emissions reductions are unavoidable to even come close to the goals of the Paris Agreement (and thereby limit large-scale human rights violations to some extent)?

2.5 The relationship to banks' duty of care

The next general consideration we would like to share, which may also help in determining the obligations in an individual case, concerns the relationship between banks' climate liability and banks' duty of care. By the latter, we mean the "traditional" duty of care, as it has already been extensively developed in case law and literature.[45]

[42] Shell ruling, par. 4.4.53.
[43] In emission reduction targeting, it is very important to distinguish between reduction of *absolute emissions* and reduction of *emission intensity*. The former involves reducing real-world emissions, the latter involves reducing the volume of emissions per unit of production (e.g. KWh). Achieving the goals of the Paris Agreement requires a reduction in *absolute* emissions. A decrease in emission intensity does not guarantee a decrease in absolute emissions (since the decrease in emission intensity can be offset by a proportionately larger increase in production units).
[44] The global 45% reduction to be achieved by 2030 (compared to the 2010 global emission level) is an average. It is the average of the sum of reductions by developed countries (which must reduce more than the average under the Paris Agreement) and developing countries (which must reduce less than the average for now). Banks that generate most of their turnover in developed countries (the majority of banks) can therefore, in our opinion, at least be required to match this global average of 45%, while it can also be argued that, given the above, they should maintain a (much) higher reduction percentage for 2030.
[45] Depending on the situation, this banks' duty of care leads back to contractual bases such as Art. 6:248 and 7:401 CC or non-contractual bases such as Art. 6:162 CC, which is also the basis for climate liability; see par. 2.2. As early as 1957, the Supreme Court adopted a banks' duty of care to third parties. See Supreme Court 28 June 1957, ECLI:NL:PHR:1957:AG2021. The banks' duty of care, in relation to customers and third parties, was further developed in later case law, see e.g. Supreme Court 1 June 1990, ECLI:NL:PHR:1990:AB7632 and

Literature has previously highlighted the responsibility of banks in climate change from the perspective of this duty of care.[46] It has also pointed to the obstacles that may lie therein for banks' climate liability. The first of these are the obstacles that would follow from case law on the bank's duty of care to third parties, which shows that the circle of third parties enjoying protection is not unlimited.[47] In addition, it is argued that banks' duty of care to customers may conflict with banks' climate liability, because the traditional duty of care could interfere with the refusal or termination of services (necessary for emission reductions).[48] We think that, to the extent that obstacles can be spoken of at all, they are less complicating for a bank than sometimes seems to be thought. In any case, they do not a priori preclude banks' climate liability.

The traditional duty of care is expressed in particular in situations in which the bank must give way to its business interest in favor of the interests of the client,[49] and in situations in which the bank must actively concern itself with the interests of third parties.[50] This duty of care has so far developed within the context of the financial interests of clients and third parties (e.g. investors) in products and services of the bank and - within that context - indeed has limits.[51] Nevertheless, that duty of care is precisely a

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Supreme Court 9 January 1998, ECLI:NL:HR:1998:ZC2536, in which the Supreme Court ruled that "the social function of banks entails a special duty of care, both towards its customers by virtue of the contractual relationship existing with them, and towards third parties whose interests it ought to take into account on the basis of what is proper in social intercourse according to unwritten law," the scope of which depends on "the circumstances of the case" (par. 3.6.2). The banks' duty of care can extend beyond what regulations require. See Supreme Court June 5, 2009, ECLI:NL:PHR:2009:BH2815, Supreme Court June 5, 2009, ECLI:NL:PHR:2009:BH2811 and Supreme Court June 5, 2009, ECLI:NL:PHR:2009:BH2822.

[46] See, among others, B. Bierens, De bancaire zorgplicht, klimaatverandering en het Europese Actieplan: duurzame groei financieren, in: D. Busch et al. (ed.), Zorgplicht in de financiële sector (Onderneming en Recht nr. 122), Deventer: Wolters Kluwer 2020. See further note 47 and 48.

[47] See S.Y.T. Meijer et al, Climate Change and the Financial Sector: Soft Law in Public Interest Litigation, in: F.E.J. Beekhoven van den Boezem et al. (ed.), Sustainability and Financial Markets (Law of Business and Finance, Vol. 17), Deventer: Wolters Kluwer 2019, chapter 5, par. 4, Bierens 2020, par. 6.2.1 and D. Horeman, Aansprakelijkheid en duurzaamheid in de financiële sector, in: M.J. van Loopik et al. (ed.), The Twin Transition: Digital & Sustainable Finance, Deventer: Wolters Kluwer 2022, par. 3.1.

[48] See Bierens 2020, par. 6.9.2 and R. van den Bosch & P. Brouwer, Klimaat & Duurzaamheid, uitdagingen en dilemma's voor banken, NJB 2021/424, par. 5.

[49] This can go as far as requiring the bank to warn the customer about the risks of a product, advise the customer not to purchase a product, or even refuse the customer the product (even if the customer has requested the product of his own accord and supervisory rules of conduct do not require warning, advice or refusal). See, e.g., Supreme Court June 5, 2009, ECLI:NL:HR:2009:BH2815 and Supreme Court September 2, 2016, ECLI:NL:HR:2016:2012.

[50] See, in particular, Supreme Court 28 June 1957, ECLI:NL:PHR:1957:AG2021, Supreme Court 23 December 2005, ECLI:NL:HR:2005:AU3713 and Supreme Court 27 November 2015, ECLI:NL:HR:2015:3399. For an overview of the banks' duty of care towards third parties, see F.R.H. van der Leeuw & A.E.E. Verspyck Mijnssen, Zorgplicht van banken tegenover derden, in: D. Busch et al. (ed.), Aansprakelijkheid in de financiële sector (Onderneming en Recht nr. 78), Deventer: Kluwer 2013, chapter 17 and A.J.C.M. Meijs, Bank, zorgplicht en derden: enkele lessen voor de bancaire praktijk, MvV 2013, vol. 12, pp. 349-354.

[51] On the limitation of the term "third party," see Van der Leeuw & Verspyck Mijnssen 2013, par. 17.5. See specifically in the context of climate change S.Y.T. Meijer et al, Climate Change and the Financial Sector: Soft Law in Public Interest Litigation, in: F.E.J. Beekhoven van den Boezem et al. (ed.), Sustainability and Financial Markets (Law of Business and Finance, Vol. 17), Deventer: Wolters Kluwer 2019, Chapter 5, par. 4, in which the authors assume as preconditions that 'there has to be *actual knowledge* of a threat to the *financial interests* of third parties that have somehow *relied on* the bank's supervision (e.g. monitoring payments)'. If these elements should already be assumed as universal preconditions (which is not certain, since the authors apparently derive them from the available and thus *context-specific* case law), it is easily defensible that they are met in the case of climate liability: a bank is usually pre-eminently aware of the risks of climate change for the (also financial)

further indication of the existence of a basis for banks' climate liability; it can be deduced from both case law and literature that the banking duty of care is, at its core, based on the principle that a bank, because of its social function (and the related expertise), must take into account the interests of clients and third parties who are not able to stand up for their interests themselves or only to a limited extent.[52] Since this principle can stretch so far that a bank, because of its social function, must make its business interests subordinate to the purely financial interests of a single client or third party who uses its products and services on his own initiative (and even in defiance of warnings), it is hard to see why its social function should offer no protection against the large-scale violation of the human rights of countless individuals. All the more so because this social function in the context of climate change is colored not only by science and politics, but also by banks themselves, banks must have in-depth knowledge of the risks of climate change, virtually all banks claim to combat climate change (and human rights violations in general), the emissions on which a bank has an influence are out of all proportion to those of the individuals mentioned, and many of these individuals actively speak out and oppose climate change and the financial sector's share in it.

That the traditional duty of care to customers could conflict with banks' climate liability may be conceptually correct. But whether that conflict should also lead to many practical complications, we wonder. According to established case law, the scope of the traditional duty of care must always be assessed according to the circumstances of the case. Therefore, to the extent that a conflict arises at all, the bank will have to weigh the interests involved, whereby - in line with the Shell ruling - the business interests of itself and the customer may weigh less heavily than the overriding interest of limiting dangerous climate change.[53] Where this overriding interest means that the bank must refuse a new customer (or must refuse an existing customer new services), it seems to us that, in principle, this is the end of the matter: the duty of care only obliges a bank to offer a checking account, while banks' climate liability will mainly force it to refuse financing and the related products.[54] That the traditional duty of care can simply be stretched to that category of service seems far from obvious to us, and especially if it conflicts with the interest in mitigating climate change. The termination of existing services will usually be more complex. If only because other factors will also come into play here, such as contractual terms, legally relevant customer expectations and applicable law (which may be non-Dutch). But these circumstances as such do not yet constitute an insurmountable obstacle. There are two reasons for this. First, within Dutch contract law, several possibilities exist to weigh the importance of limiting climate change in the contractual relationship between the bank and its customer, even if contractual terms limit a bank's room for manoeuvre. An in-depth analysis would go too far here. But we think that starting points could be sought, for example, in general doctrines such as reasonableness and fairness (Art. 6:2

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interests of third parties (cf. par. 2.3 and 3.3) and these third parties may trust a bank to look after those interests (a.o. because most banks publicly emphasize their role in mitigating those risks through e.g. codes of conduct and undertakings). This aside, in the case of a claim that does not seek financial damages, it is not obvious that the duty of care should be limited to only the financial interests of third parties.

[52] See the aforementioned case law and for a more comprehensive overview D. Busch et al. (ed.), Zorgplicht in de financiële sector (Onderneming en Recht nr. 122), Deventer: Wolters Kluwer 2020 and D. Busch et al. (ed.), Aansprakelijkheid in de financiële sector (Onderneming en Recht nr. 78), Deventer: Kluwer 2013.

[53] See par. 2.4 and in particular note 42. We would also like to point out the principle 'client interests first', as also reflected in Art. 4:24a Dutch Financial Supervision Act (DFSA) and the banking oath required by Art. 4:15a DFSA. If interpreted grammatically, this principle can be interpreted to mean that the client's interests always prevail over other interests (including the interests of society, which must be explicitly taken into account under the banking oath). This interpretation does not seem correct to us, in part because the principle was established as a counterbalance to the bank's *own* interests. There is also a view in literature that although the client's interest is central, it is not always the exclusive interest. See, e.g., K.W.H. Broekhuizen, De pluriforme betekenis van klant centraal, FR 2017, vol. 7/8, pp. 330-340 and M.K.Z. Groot, Bankierseed, klantbelang centraal en bankmedewerkers, FRP 2015/397.

[54] Supreme Court Nov. 5, 2021, ECLI:NL:HR:2021:1652.

and 6:248 jo. Art. 3:12 DCC) and perhaps even unforeseen circumstances (Art. 6:258 DCC).[55] Or in more open powers and standards in contractual provisions (such as Articles 35 and 37 of the General Banking Conditions, material adverse change, illegality and unlawfulness clauses and - in relation to certain borrowers - possibly even compliance with laws obligations). Their application within the context of climate change requires shifting existing legal frameworks of thought. However, that is eminently what these standards are suited (and sometimes even intended) to do, especially in a problem of climate change proportions. This seems to us an excellent opportunity for practicing lawyers to exploit these possibilities from their own expertise and creativity and thus make a tangible positive contribution.

The second reason why the bank's duty of care when terminating services need not be an insurmountable obstacle is that the general standard of care for climate liability as such does not necessarily force the *abrupt* termination of services to *specific* customers. In other words, the bank can enter into timely discussions with customers about the required emission reductions and the consequences for service delivery if they fall short, and then has the room to implement the required due diligence towards customers in a proportionate manner. As shown above, the bank can also be expected to make (financial) sacrifices in that process (see par. 2.4). This could, of course, include interest rebates for positive scores on sustainability criteria. But perhaps also a termination payment to the customer if the bank believes that the departure of a customer is inevitable, but is hindered by contractual conditions and the bank's duty of care when terminating credit. All the more reason for a quick implementation of a sufficiently ambitious climate plan, so that the bank creates the possibility - targeted and with sufficient time - to reduce the volume of financed emissions through natural attrition (and thus without unnecessary sacrifices as mentioned above).

3 Meaning of sustainability legislation

3.1 The starting point

The intermediate position of par. 2 could be boiled down to the following: there is a general standard of care under which civil climate liability threatens banks that fail to take sufficient responsibility for their fair share in climate change mitigation, under which a bank's concrete obligations are context specific, but for the purposes of which the bank's own pure business interest in any case does not indemnify, and for the purposes of which policy changes, limits on growth, drastic measures and financial sacrifices may be required.

In addition to these obligations, banks will also have to account for their obligations under sustainability legislation, which is detailed, extensive and still evolving. One view of this confluence of obligations may be that it presents banks with a herculean task that they do not (or cannot) know how to discharge, despite the comprehensiveness of sustainability legislation and the implementation efforts involved. This uncertainty would then come at the expense of, for example, banks' efficiency, the business environment and the speed and effectiveness of measures to combat climate change.

We think a more optimistic view is more constructive and, moreover, justified.

3.2 The main features of sustainability legislation

[55] Cf. A. van der Hilst, Label C-verplichting voor kantoren: (vergaande) implicaties voor verhuurders én huurders, TvHB 2017, vol. 6, pp. 399-408, in which the author points to the possible obligation of tenants under Art. 6:258 CC to cooperate with the modifications to real estate necessary for a label C obligation.

The aforementioned sustainability legislation has been written about in detail in several places before.[56] This makes a detailed exposition here superfluous, nor does such an exposition serve the purpose of this article. However, we would like to give a brief overview of the most important sustainability legislation and discuss its main characteristics relevant to bank climate liability. In doing so, it can be categorized to a certain extent.

Prudential regulation
The first category of sustainability legislation seeks to protect banks from sustainability risks to which they themselves and their customers are exposed.[57] To this end, this legislation tightens the prudential oversight applicable to banks with respect to the risk of sustainability factors adversely *affecting* the bank and its customers (*outside-in*). These include climate-related credit risks in the form of both (1) physical risks (think loss of value of collateral due to flooding) and (2) transition risks (think loss of value of collateral that has no function in a non-fossil society, often called "stranded assets"). But it also involves reputational risks and litigation risk. These risks adversely *affecting* the bank should, for clarity's sake, be distinguished from the risks associated with the adverse sustainability effects *emanating from* the bank and its customers (*inside-out*). The heightened supervision of outside-in risks consists of additional requirements in areas such as governance, risk management and capital requirements. These requirements will be reflected in the CRR (Capital Requirements Regulation) and CRD (Capital Requirements Directive), for which amendments are pending.[58]

But we would also like to point to the already existing guidance from prudential supervisors: for example, in 2020, the ECB, as the supervisor of significant banks, announced detailed expectations on the significance of climate and environmental risks for banks.[59] These expectations are not non-binding; the ECB has announced that it requires banks to implement in stages and assumes full compliance by the end of 2024 (after which it will take enforcement action if necessary).[60] The expectations focus on business models, strategy, governance, risk appetite and risk management, among others.

One of its goals is to prevent a transition to a low-emission economy that is too abrupt and erratic. This means, among other things, that the ECB requires banks to develop transition scenarios for their business models based on long-term analyses (in line, for example, with the European Union's reduction targets). Against this background, the ECB draws banks' attention to the possibility of setting time-bound targets with respect to the emissions associated with their financing. The ECB also considers such scenarios and targets to be important for managing the reputational and litigation risks associated with initiatives

[56] Several useful theme issues and theme collections have been published. E.g. NTBR 2022, vol. 10, M.J. van Loopik et al. (ed.), The Twin Transition: Digital & Sustainable Finance, Deventer: Wolters Kluwer 2022, FR 2021, vol. 8/9 and F.E.J. Beekhoven van den Boezem et al. (ed.), Sustainability and Financial Markets (Law of Business and Finance, Vol. 17), Deventer: Wolters Kluwer 2019.
[57] On this category, see also Van der Eerden 2022.
[58] Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor, 2021/0342/COD; Proposal for a directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU, 2021/0341/COD.
[59] European Central Bank, Guide on Climate-Related and Environmental Risks. Supervisory Expectations Relating to Risk Management and Disclosure, November 2020. The ECB requires bank executives to have adequate knowledge of climate and environmental risks, to incorporate these risks into the bank's strategy, business objectives and risk management, and to monitor these risks effectively. See European Central Bank, Guide to Fit and Proper Assessments, December 2021.
[60] See www.bankingsupervision.europa.eu/press/pr/date/2022/html/ssm.pr221102~2f7070c567.en.html.

such as the NZBA, according to good practices shared by the ECB last autumn.[61] These good practices also provide guidance on how banks can further shape and achieve these scenarios and objectives, including guidance on how to promote sustainability among customers ("engagement") and, where necessary, terminate the customer relationship ("divestment").

Thus, to a certain extent, the ECB forces banks to draw up climate plans. However, this does not mean that these climate plans are sufficient. Above, we pointed out that rather the opposite is the case, also according to the ECB.[62] From a climate liability perspective, the ECB's guidelines will also not incentivize banks to make sufficiently far-reaching improvements to their climate plans; climate liability stems from inside-out risks, while the ECB's guidelines - as a tool for managing outside-in risks - do not provide regulations that ensure banks take responsibility for their fair share in mitigating dangerous climate change.

Regulation for sustainability of capital flows.
A second category of sustainability legislation facing banks aims to make capital flows more sustainable.[63] Important pillars of this are the SFDR (Sustainable Finance Disclosure Regulation) and the Taxonomy Regulation, but, for example, the Sustainability Benchmark Regulation and the future European Green Bond Standard can also be placed in this category.[64] Central to this legislation is that sustainability features (can) be given a more prominent place in investment decisions. The key to this is harmonization of standards and transparency, the thinking goes; investment decisions must be able to be made on the basis of the correct sustainability information (especially if the investor is aiming for a 'green' investment, because then 'greenwashing' is lurking).

This creates obligations for issuers and intermediaries (asset managers, insurers with insurance-based investment products and their intermediaries), among others. Banks often act in several of these capacities. These obligations should give investors better visibility into the sustainability characteristics of an investment product. That is, the sustainability risks to which the product is exposed (outside-in impact on returns), and the sustainability effects emanating from the product (inside-out impact on sustainability).[65] These obligations also give investors the opportunity to express their preferences in this regard, which their intermediary must then incorporate into its services.

Reporting regulation
The third category of sustainability legislation, which affects other large companies (financial and non-financial) in addition to banks, also aims to increase transparency. Here it revolves around reporting on the sustainability characteristics of the bank *itself*, from both an inside-out and an outside-in perspective. This is not entirely new, as the NFRD (Non-Financial Reporting Directive) already provides

[61] European Central Bank, Good Practices for Climate-Related and Environmental Risk Management. Observations from the 2022 Thematic Review, November 2022.
[62] See note 9 to 11 and 41.
[63] On this category see, among others, R.E. Labeur, Vermogensbeheerders en duurzaamheidstransparantie, R.P. Raas, Duurzaamheidsvoorkeuren: een hernieuwde kennismaking and W.F. Mulder, EU Green Bond Standard, all in: M.J. van Loopik et al (ed.), The Twin Transition: Digital & Sustainable Finance, Deventer: Wolters Kluwer 2022.
[64] In addition, see Commission Delegated Regulations 2021/1253, 2021/1255, 2021/1256 and 2021/1257 and Regulation 2019/2089.
[65] To what extent the Taxonomy Regulation succeeds in all cases is questionable, as it conditionally recognizes nuclear energy and gas as 'transition activity' under Art. 10(2). See also K. Abnett, Greenpeace to Sue EU over 'Green' Label for Gas and Nuclear, Reuters Feb. 9, 2023.

requirements in this area since 2018.[66] These requirements will be expanded under the Taxonomy Regulation already mentioned, which requires banks to report their GAR (green asset ratio, or the proportion of sustainable assets to total assets on the bank's balance sheet) starting in reporting year 2023. But of greater importance is the CSRD (Corporate Sustainability Reporting Directive), which will take effect from reporting year 2024.[67] Under the CSRD, reporting standards will be adopted that require much broader and more detailed reporting than the NFRD currently requires, with separate requirements for different sustainability topics.[68] Under the draft standards related to climate change[69] , banks and (CSRD in-scope) clients will be required to report scope 1, 2 and 3 emissions, among other things, but also, for example, to disclose climate plans, emission reduction targets, board and regulator assessments against them, climate mitigation and adaptation actions and resources allocated to them. And that is not all (by far).

'Due dilligence' regulation
And then the fourth category, in a sense an outer category; this sustainability legislation aims not only to *stimulate* banks (and other large financial and non-financial companies), but also to *require* them to limit their adverse (inside-out) sustainability impacts. In particular, this concerns the draft CSDD (Corporate Sustainability Due Diligence Directive),[70] which within the Netherlands cannot be seen separate from the earlier proposal for a Dutch Responsible and Sustainable International Business Act.[71] The formation of this legislation is still in progress, and what it will oblige to exactly is not yet certain.[72] This is partly because this fourth category of sustainability legislation goes beyond the first three, which are strictly limited to controlling (not limiting) outside-in risks (category 1) and stimulating (not bringing about) sustainability through information (categories 2 and 3).

The main instrument in this fourth category is an obligation of due diligence in the chain, referred to as "appropriate due diligence. That obligation amounts to taking "appropriate measures" to identify, prevent and remediate adverse sustainability impacts (arts. 4 to 11 CSDD). There is also an obligation to prepare a climate plan, which must make the company's business model and strategy 'compatible'

[66] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[67] 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.
[68] For the European Financial Reporting Advisory Group (EFRAG) concepts expected to be adopted by the European Commission in mid-2023, see www.efrag.org/Meetings/2211141505388508/EFRAG-SRB-Meeting-15-November.
[69] EFRAG Draft European Sustainability Reporting Standards, ESRS E1 Climate Change, November 2022.
[70] For the European Commission's original proposal, see Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.
[71] For the proposal in its most recent form, see Voorstel van wet van
de leden Van der Graaf, Jasper van Dijk, Thijssen, Van der Lee, Koekkoek en Hammelburg houdende regels voor gepaste zorgvuldigheid in waardeketens om schending van mensenrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Kamerstukken II 2022/23, 35761, no. 9. Within the Dutch context, reference should also be made to the recent Parliamentary Letter from the Minister of Finance (see note 9), in which she announced research into further regulation to increase the contribution of the financial sector to accelerating the climate transition. The 'current lines of thought' mentioned in this letter are currently so general that we will leave them out of consideration in this article. We do note, however, that the obligation mentioned in the parliamentary letter to bring financing and investments in line with the goals of the Paris Agreement should, in our opinion, be an *obligation of result*.
[72] Here and onwards we base ourselves on the proposals we refer to in note 70 and 71.

with the transition to a sustainable economy and the Paris Agreement (Art. 15 CSDD). These obligations gain strength because the CSDD provides for regulatory oversight (Art. 17 to 21 CSDD) and, in addition, express civil liability (Art. 22 CSDD). This is without prejudice to existing, stricter liability regimes (Art. 1 (2) and 22 (4) CSDD).

Although the European Commission will be able to provide further guidance (Art. 13 and 14(4) CSDD), we expect that a significant interpretative and concretization effort will continue to be required to determine what the CSDD demands in an individual case.[73] This underscores the need for an effective mechanism to enforce obligations (including civil law, as the European Commission recognizes in its proposal).[74] Indeed, it is to be expected that some companies may interpret their obligations too loosely and possibly even opportunistically. All the more so since both the draft CSDD and the Dutch proposal have been subject to criticism. Both initiatives do have shortcomings from a legislative point of view, also from the perspective of green interests, but the discussion goes further; the fact that sustainability (including respect for human rights) is no longer optional seems to be the real stumbling block for some parties.[75]

3.3 The relationship to banks' climate liability

Now how to consider this sustainability legislation in relation to bank climate liability?[76] One thing is certain: it does not provide a ready-made means of avoiding bank climate liability.

The first three categories of sustainability legislation serve an entirely different purpose than banks' climate liability (managing outside-in risks and encouraging sustainability through information). The fourth category does touch on liability, but the obligations under this sustainability legislation are context-specific, as is the general standard of care for climate liability. And moreover, the obligations under the fourth category do not affect climate liability under the general standard of care of Section 6:162(2) DCC. Thus, what a bank should do to fulfil its climate change obligations remains above all a context-specific issue.

Conceptually, we can live with that, reasoned from both the climate interest and the bank's interest. The climate interest has the assurance that a bank is obliged to make no less than its reasonable contribution to solving the climate problem, which is to be welcomed given the scale and urgency of the necessary measures. The bank's interest is served by ensuring that the "burden" of mitigating climate change is shared proportionately (see par. 2.2), and also by the flexibility to shape its obligations as it sees fit. But,

[73] The Dutch proposal is more prescriptive in parts. In its most recent form, the bill, in Art. 2.4.2, requires a climate plan that, if potential or actual risks of adverse climate change impacts are found, also includes targets for the reduction of net greenhouse gas emissions of at least 55% by 2030 compared to 1990 levels.
[74] Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, p. 16.
[75] See, e.g., B. van Dijk, Boskalis top executive: 'Aanzien van Nederland op het wereldtoneel bladdert af', Het Financieele Dagblad January 2, 2023. As a result, a robust lobby for backlash against the CSDD has begun. See also L. van Lonkhuyzen et al, De lat voor verantwoord ondernemen moet niet te hoog liggen, vindt de bedrijvenlobby, NRC Feb. 28, 2023. While we fully endorse the importance of quality legislation, we regret the more material dissent. Not only because of the urgency of the climate problem. But also because a European, generally and widely enforced framework for the inevitable due diligence obligations of companies seems to us to be in *everyone's* interest, including the naysayers. After all, in its absence, these obligations will only be enforceable through incidental (civil) actions, which, for both sustainability frontrunners and laggards, is to the detriment of the level playing field often considered so important.
[76] The sustainability legislation also affects other forms of banks' liability, e.g., to customers who rely on advice or information in a sustainable remodeling or investment. These other forms of liability are beyond the scope of this article. On these forms of liability, see, among others, Bierens 2020.

on a more practical note, the bank itself still faces the task of objectively determining what its fair share actually is and how to flesh it out concretely. Since this could lead to the conclusion that it must reduce its volume of financed absolute emissions by at least 45% by 2030 (see par. 2.4), this means that the bank itself will have to decide on changes in course, limits to growth, drastic measures and financial sacrifices (see par. 2.4). This challenge is great, but no less necessary. It seems to us a challenge in which sustainability legislation could be welcomed as a helpful incentive.

A key reason for this is, first of all, that sustainability legislation is supportive in *creating* a sufficient and more verifiable climate plan, by forcing - but thereby also helping - the bank to obtain and provide insight. First, sustainability legislation is bringing about more and better quality sustainability information with respect to its *portfolio*. The bank obtains greater insight into, for example, the climate risks to which its portfolio is exposed (outside-in), the adverse effects of that portfolio (inside-out), the increase or decrease in those effects and the reasonable prospects, as well as the untapped potential in this regard (based on insight into, for example, the customer's strategy, reduction targets and actions). This promotes the bank's ability to define a more informed and ambitious climate plan. A similar helpful constraint emanates from the bank's obligation to publish *its own* sustainability information, such as scope 1, 2 and 3 emissions and the GAR, as well as transition plans and emission reduction targets. Not least because, thanks to sustainability legislation, this will have to be done in a more uniform manner. As a result, emission volumes and reduction targets, for example, will allow a fairer comparison with those of other banks. An ambitious step forward by the bank will therefore also be better appreciated by customers and other stakeholders.

Sustainability legislation also serves the bank when *implementing* an ambitious climate plan, for example because sustainability risks will be priced in more adequately and, moreover, in a more harmonized way, and better information will also enable the bank to better manage clients' sustainability performance. Moreover, sustainability legislation seems to us a very suitable starting point for intensifying discussions with clients. First and foremost, of course, because the availability of better information makes it possible to have a more focused conversation ('engagement') about the customer's sustainability performance. But it need not stop there, especially where larger clients in more emission-intensive sectors are concerned: the bank could certainly use the fourth category of sustainability legislation (which *requires* both the bank and the client to limit adverse sustainability effects) as an extra starting point for entering into discussions about (a tightening of) the sustainability criteria under which the bank wishes to continue the relationship with the client or, conversely, wants to be able to terminate it ('divestment'). After all, the bank has an interest in ensuring that it does not finance any clients who do not comply with this legislation.

Thus, in light of climate liability, sustainability legislation is a welcome incentive for a bank because it can help the bank better implement its obligations in mitigating dangerous climate change. In terms of the *purport* of those obligations, this implies that sustainability legislation will intensify rather than alleviate them. But banks would do well not to overestimate this intensifying influence of sustainability legislation. At least not to such an extent that it leads to the conclusion that, in anticipation of the (partly future) sustainability legislation, a bank has no concrete obligations. Even now, based on the general standard of care of Section 6:162(2) DCC, banks may already be expected to take responsibility for their fair share in limiting dangerous climate change, which may require far-reaching measures in an individual case (par. 2, in particular par. 2.4). Especially since the scale and urgency of the measures necessary for a 1.5 °C scenario mean that these measures simply cannot tolerate any delay in order to stay on course (par. 2.1).

4 Final remarks

The message will be clear: compliance with sustainability legislation is important, but for banks, a greater interest lies in establishing and effectively implementing an adequate climate plan. From a legal perspective, that interest lies in avoiding climate liability. But the ultimate interest, of course, is mitigating dangerous climate change, and the threat to human rights as a result. That is not only (as far as we are concerned) a moral obligation, but also (and this is more relevant here) a legal obligation.[77]

A sufficient climate plan is one that guarantees actual and sufficiently ambitious emission reductions. And in such a way that it represents the bank's fair share in mitigating dangerous climate change. As discussed in par. 2.4, this may require a more far-reaching climate plan than assumed; the volume of absolute emissions financed may have to be reduced by at least 45% and changes in course, limits to growth, drastic measures and financial sacrifices are unavoidable. Because climate liability is a context-specific issue, which is also colored by changing scientific and societal developments, there is only limited clarity beforehand about what exactly this means in an individual case. And that is also inherent in the ambiguity that accompanies major transitions: we know that the traditional framework no longer fits, but the new framework has yet to take shape. So the bank will have to determine, and continue to reconsider, its own legal obligations above all, despite the associated uncertainty. This demands a lot from the bank, especially when painful decisions are necessary.

But with that comes a task not only for the bank and its directors. There is also a responsibility for other actors involved in the bank. They can help the bank get a better grip on its individual obligations and their actual fulfilment. Societal organisations by expressing their expectations. Regulators by creating clear frameworks for the implementation of sustainability legislation and recognizing the meaning and impact of (measures to prevent) climate liability. Customers through a willingness to engage with the bank based on the realization that sustainability is inevitable for both the bank and themselves. Advisors, internally and externally, by providing accurate information about the position of the bank and its clients, from the understanding that traditional frameworks are changing and from the creativity to make use of the possibilities this creates (such as re-approaching open standards in the contractual relationship with the client, or taking advantage of the positive incentive provided by sustainability legislation).

After all, climate change is ultimately a task for all of us. And is it not obvious that everyone should take responsibility for making a meaningful contribution, within their own sphere of influence? That call may seem like an open door, but it may well mean much more than imagined, also for (legal) professionals. In terms of challenges (after all, most climate plans are still grossly inadequate), but especially also in terms of opportunities to use knowledge and experience in an innovative and intellectually stimulating way to solve one of the biggest problems of our time.

[77] Still, it seems to us that it may be valuable (even from a practical standpoint) to keep the morality of that obligation in mind as well, if only because the motivation for a value-driven transition is likely to be greater than that for a compliance-driven implementation process.