

Non-paper

A due diligence obligation for businesses as part and parcel of a European smart mix of measures

Fostering sustainable global supply chains

Introduction

The global COVID-19 pandemic has had, and is still having, enormous repercussions. First and foremost a public health crisis, it has also had major economic consequences, not only in Europe, but also for Europe's trading partners. The crisis is having a direct impact on employees around the world, for instance, many of whom are forced to work in unsafe conditions or face the threat of losing their livelihoods.

We argue that the pandemic reinforces the need for responsible business conduct (RBC), in which businesses identify risks in their international supply chains, take action to cease, prevent, or mitigate these risks, and communicate about their efforts in this regard. These risks concern human rights violations, such as forced labour and exploitation, as well as the risk of environmental damage. International norms for RBC as laid down in the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) point the way.

Looking beyond the COVID-19 crisis, we emphasise that RBC is crucial in the long run. It enhances the positive effects of business activity, such as employment and economic growth, while mitigating any negative effects. In this way, RBC helps to build resilient and shock-proof supply chains and makes a substantial contribution to the United Nations' Sustainable Development Goals (SDGs). It is essential for societies' sustainable recovery, the promotion of decent work, a living wage, and social and labour protection, as well as for the fight against child labour, forced labour, climate change and environmental degradation.

The Netherlands strongly advocates a coordinated European approach. We therefore welcome the initiative of the European Commission to prepare a European approach for due diligence. By means of this non-paper and our attached policy paper, the Netherlands is pleased to share its views on fostering RBC practices within the European Union with a view to due diligence, building on extensive research and evaluation at national level of current RBC policies. We trust this input will be useful for further deliberations on shaping effective and efficient European measures on RBC due diligence.

The need for a due diligence obligation to foster responsible business conduct

Despite the fact that many businesses have taken positive steps in recent years, current

policies on RBC are not producing sufficient results. Extensive Dutch evaluation studies¹ have shown that, still, too few companies are doing business in accordance with international standards for RBC. The Netherlands is not unique in this. This indicates that existing measures need to be improved and supplemented by additional measures.

Insights drawn from studies and stakeholder consultations on new policy options indicate that in fact a combination of different measures is required, since this is the only way to engage effectively with a heterogeneous group of companies.

This finding is in line with RBC policy as prescribed by the UN Guiding Principles. It is necessary to introduce a mix of mutually reinforcing measures which – together – will lead to an effective change in behaviour among all different types of companies. This smart mix of policy measures – national and international, mandatory and voluntary – ensures adequacy and effectiveness and allows for a response that is tailored to specific circumstances and target groups. It includes imposing obligations, setting conditions, incentivising, facilitating and informing.

Many studies advocate including a general due diligence obligation in the smart mix. The main effect of this key element would be to spur laggards into action, by obliging them to implement RBC principles. A general obligation to carry out due diligence supports adherence to the OECD Guidelines and UN Guiding Principles and recognises that risks are not confined to one particular sector or theme. This conclusion is supported by a growing number of companies.²

Studies and consultations demonstrate, moreover, that such an obligation is much more effective when formulated at supranational level: a European approach would have a greater impact on supply chains and would safeguard a level playing field for companies within the EU. A legal framework for due diligence would be an important step towards fostering RBC practices within the EU.

Aside from a general due diligence obligation, existing mandatory transparency requirements must be taken into account as well. The non-financial reporting directive (NFRD) is currently being revised. Even though the directive clearly requires companies to disclose information on risks to people and the environment, research by the Dutch Authority for the Financial Markets (AFM)³ shows that the information provided mostly concerns risks to companies. It would appear necessary to align the NFRD with international frameworks for RBC, such as the OECD Guidelines for Multinational Enterprises and the UN

¹ Such as: Royal Tropical Institute (2020), 'Evaluation of the Dutch RBC Agreements 2014 – 2020'; The Terrace (2020), 'Business Perspective on RBC measures'; EY (2020), 'Onderschrijven OESO-richtlijnen en UNGP's' [Monitoring report on adherence to OECD Guidelines and UNGPs].

² https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf; <https://tonyschocolonely.com/nl/en/our-mission/news/due-diligence-legislation-puts-an-end-to-negative-impact-on-people-and-the-environment>.

³ Dutch Authority for the Financial Markets, *In Balans* (2018).

Guiding Principles Reporting Framework, as well as with recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) in order to avoid overlapping requirements for companies.

Based on the evaluation of Dutch policy, scientific research and the exploration of policy options, the Netherlands can provide useful input for the Commission initiative for a European due diligence obligation. Further study is needed in order to work out the details of the proposed obligation and its scope, as proportionality, regulatory burden and effectiveness are key aspects of any such measure. Furthermore, the expected effects (including costs and benefits) on the environment and on all stakeholders in the European Union and third countries should be examined. The Netherlands will provide relevant input during the entire process, including during the current public consultation, and remains at the Commission's disposal for further questions.

Towards a common European framework on responsible business conduct

In line with the UN Guiding Principles, and as confirmed by studies, consultations and advice, a general due diligence obligation should be accompanied by measures to inform, facilitate, incentivise and set conditions for companies to conduct due diligence. Reinforcing measures target different groups of companies, for example those in the leading pack, the peloton or laggards with regard to RBC. An EU action plan consisting of a smart mix of measures therefore offers the best opportunity for taking RBC forward.

An EU action plan must help create a European level playing field when it comes to RBC and increase the combined impact in producer countries by addressing risks to people and the environment in businesses' global value chains.

As recently stressed by France and the Netherlands,⁴ an EU action plan should include the scaling up of existing national sectoral measures, create peer-learning structures for member states' national action plans on business and human rights (NAP), combine the efforts on sustainable trade promotion, provide guidelines (notably based on the OECD's work on RBC, including sector-specific guides) on what is expected of companies within its jurisdiction and define the role of the EU as a market actor, for example with regard to EU public procurement. Furthermore, the Netherlands believes that an EU action plan must at least work towards coherence and consistency in European policies with regard to risks to people and the environment in businesses' global value chains. Measures to support the implementation of the UN Guiding Principles and the OECD Guidelines could be complemented with, for instance, appropriate development cooperation instruments and external policy measures in order to encourage both companies and governments in producer countries to address supply-side risks. The Commission is asked to develop this action plan before 2022 in cooperation with the Council – where the responsible Council

⁴ Non-paper from France and the Netherlands on Trade and Social Economic Effects and Sustainable Development (2020).

preparatory bodies should be tasked with RBC – and in conjunction with the private sector and civil society.

The Netherlands encourages the European Commission to work towards a comprehensive RBC framework that includes a general due diligence obligation in order to enhance the coordination and coherence of actions at EU level. It is therefore pleased with the recently adopted Council Conclusions on Human Rights and Decent Work in Global Supply Chains, as they provide endorsement among member states for bringing this agenda further. We look forward to contributing to a European strategy that meets the needs of its member states, businesses and citizens, and that benefits people and the environment in all parts of the value chain.

Annexe

- Policy document 'From giving information to imposing obligations; a new impulse for responsible business conduct' (English version)
- Summary of policy document 'From giving information to imposing obligations; a new impulse for responsible business conduct' (English version)