

-Non-paper-

Mandatory due diligence:

Building blocks for effective and ambitious European due diligence legislation

Since the adoption of the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights (UNGPs), significant steps have been taken to foster business' respect for people and planet in their value chain. The Netherlands has consistently been at the forefront of these developments, being one of the first countries in the world to adopt a National Action Plan on Business and Human Rights and an ambitious policy on Responsible Business Conduct (RBC). However, Dutch evaluations have shown that although voluntary measures make a valuable contribution, they have been insufficiently effective at making global value chains more sustainable. The Netherlands therefore takes the position that human rights and environmental due diligence legislation – preferably at EU level – is needed. With this non-paper, The Netherlands sets out how this could be enacted at EU level in order to generate maximum positive impact in third countries while safeguarding a level playing field for EU companies.

The Netherlands commends the European Commission for the lead it is taking. In her State of the Union speech, President Von Der Leyen demonstrated the urgency of the matter with her assertion that the EU market should be free of products made by forced labour. To tackle this and other issues related to human rights violations and environmental damage in supply chains, several EU Member States already have due diligence legislation in place or are in the process of developing it. However, the initiatives vary widely in their approach, thus making the case for harmonisation at EU level. In the EU, the Conflict Minerals Regulation is already in force. The time is now to adopt broad due diligence legislation, covering all risks to people and planet and all sectors throughout the market. The Netherlands looks forward to a timely Commission proposal for mandatory due diligence.

The Netherlands has developed building blocks for due diligence legislation, to be put at the disposal of all parties involved, to help make the upcoming proposal ambitious, effective and feasible. The building blocks for due diligence legislation cover **the scope, the requirements and the enforcement**. Finally, The Netherlands favours embedding due diligence legislation in a **smart mix of policy measures to foster RBC by means of an EU RBC action plan**.

Scope

The internationally accepted frameworks for RBC (the OECD Guidelines and UNGPs) apply to all companies. However in determining the scope of due diligence legislation careful demarcation is important and should take into account effectiveness and proportionality. The Netherlands advocates that EU due diligence legislation cover **all large companies and listed SMEs** in line with the definition set in the EU Accounting Directive (2013/34/EU). In addition, The Netherlands favours including **medium-sized companies in high risk sectors** within the scope, provided that the sectors labelled "high risk" can be identified objectively and it is clear for companies whether they are considered part of these sectors or not. For medium-sized companies in high risk sectors, the requirements should be applied in line with the abovementioned international frameworks but proportionally to their size, e.g. by applying less detailed requirements. Besides companies domiciled in the EU, the legislation should also cover **companies domiciled outside the EU that sell goods or services on the EU market**, on the precondition that the European Commission can substantiate (for instance on the basis of research) how EU member states can practically and legally enforce such an obligation (considering the limitations to extraterritorial supervision and enforcement, and considering the WTO rules).

The Netherlands favours the introduction of a **statutory, general duty of care for all companies**. A statutory, general duty of care sets out that every company has a duty of care to respect human rights and the environment in the value chain. Unlike the specific requirements outlined below, the general duty of care would not be enforced through administrative law. A statutory, general duty of care makes clear that the business community has a duty of care, even in the absence of specific due diligence requirements. The statutory, general duty of care has the

nature of a safety net provision and should therefore be formulated in general terms. If a case is brought against a company, a civil court would have to establish whether the company in question has indeed violated its duty of care under the specific circumstances of the case, and whether the company should therefore provide remedy for harm that has occurred as a result.

The Netherlands wishes to underline the importance of measuring the effectiveness of future EU due diligence legislation, in particular regarding the scope. The measure should therefore allow for a timely adaptation of the scope if the evaluation gives reason to do so.

Requirements

The Netherlands is of the opinion that EU due diligence legislation ought to be aligned with the international frameworks for RBC (the OECD Guidelines¹ and UNGPs). This implies that the **six step framework of the due diligence process** should be included in the requirements. In order to provide legal certainty to companies, it is important to make these norms as specific as possible. In addition, the norms should be interpreted proportionally for medium-sized companies in high risk sectors. This may be done by applying less detailed requirements while safeguarding alignment with the OECD Guidelines and UNGPs.

The Netherlands stresses the importance of coherence between the upcoming Commission proposal and the existing and nascent EU legislative instruments which include sectoral or thematic due diligence obligations, such as the Conflict Minerals Regulation, the Batteries Regulation which is currently being examined by the Council, and the upcoming legislative proposal to combat deforestation. A lack of coherence may lead to duplication of obligations or legal uncertainty for companies.

Enforcement

The Netherlands believes that **administrative enforcement** of EU due diligence legislation is the most suitable. The due diligence process is a continuous and flexible process. It includes feedback loops to ensure learning. Through the due diligence process a company must be able to respond adequately to change of circumstances. The nature and scope of the due diligence process can also depend on factors such as the size of the company, the business model, the context of its activities and its position in the value chain. When designing the enforcement mechanism, these elements must be taken in to account.

Moreover, the Netherlands believes that enforcement should not primarily focus on sanctions, but should be aimed at encouraging companies to continuously improve their due diligence. This is also known as "**positive enforcement**". This is all the more important because the (partly) open norms on which the due diligence process is based require a tailored approach by the regulatory body. For these reasons, it is important to designate a regulatory body with a wide range of options for intervention. Obviously, it remains important that the regulatory body is also empowered to impose sanctions in the event of violations.

In order to safeguard the level playing field within the Union, it is crucial that the due diligence obligation is **enforced uniformly** in all Member States. The Netherlands is of the opinion that the appointment of national competent authorities could have added value since national institutions are better equipped to oversee the context in which individual companies operate. However, EU-wide supervision could benefit the uniformity of enforcement in Member States. The Netherlands wishes to invite the Commission to consider whether (partially) organising the enforcement at EU level would be appropriate. In the case of national enforcement, there would be a need for detailed requirements and guidelines for national regulatory bodies as well as peer review or peer learning mechanisms among these bodies.

A smart mix of policy measures to foster responsible business conduct

The Netherlands believes that human rights and environmental due diligence legislation should be embedded within a smart mix of policy measures, as envisaged in the UNGPs. Accompanying measures should support companies and promote compliance with the due diligence obligation.

¹ Including the ILO MNE Declaration

Moreover, accompanying measures should have a reinforcing effect to help maximise the combined, positive impact in third countries.

A European smart mix of policy measures, preferably by means of an EU Action Plan, would support the **coherent implementation of the OECD guidelines and the UNGPs**. Reinforcing measures will furthermore help prevent fragmentation of services and help alleviate the regulatory burden on European companies. As has been called upon by EU Member States in Council Conclusions on Human Rights and Decent Work in Global Supply Chains², an EU Action Plan should focus on shaping global supply chains sustainably, promoting human rights, social and environmental due diligence standards and transparency, while taking experiences and lessons learned from the COVID-19 pandemic into account. Also, the EU Action Plan should be in line with the broader EU environmental policy, such as the EU Green Deal. Measures to include in a European smart mix of policy measures could very well include:

- The scaling up of existing national sectoral initiatives;
- The creation of peer-learning structures for member states' national action plans on business and human rights (NAPs);
- Efforts to promote sustainable trade;
- Efforts to improve access to remedy for victims of business-related human rights abuse;
- Leveraging the role of the EU as a market actor, for example with regard to EU public procurement.

In particular, The Netherlands is interested in a European exploration of the potential of sectoral schemes at EU level, combining forces of the European business community, as a complement to due diligence legislation in fostering a race to the top. The Commission could consider setting up a system to assess and recognise such schemes, taking the lessons learned from the Conflict Minerals Regulation into account. Strict conditions, e.g. in terms of quality and governance, would have to be met in order for schemes to be recognised. Such schemes should inspire confidence to the regulatory body that member companies abide by their commitments. Under such circumstances, recognition of schemes could lead to simplification of the enforcement duties for regulatory bodies. Under no condition, however, should membership of a sectoral scheme lead to an exemption of individual company duties under the law.

Furthermore, the Netherlands believes that an EU action plan must at least work towards coherence and consistency in EU policies with regard to risks to people and planet in global value chains. Measures to support the implementation of the UNGPs and the OECD Guidelines could be complemented with appropriate development cooperation instruments and external policy measures in order to encourage both companies and governments in production countries to address value chain risks. The Netherlands would like to recall and urge the European Commission to launch an EU Action Plan in line with the aforementioned Council Conclusions.

² [st13512-en20.pdf \(europa.eu\)](#)