Statutory human rights due diligence duties in the Netherlands

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I. Introduction

1. Two recent developments in The Netherlands show that legislation in the area of business and human rights is gaining momentum. In June, the Dutch government expressed its intention to make **voluntary International CSR agreements legally binding**. These agreements are currently negotiated in various industry sectors. Second, a private members bill introduced in Dutch Parliament proposes to introduce a compulsory declaration of responsible sourcing with respect to **child labour**. These two developments will be briefly outlined below.

2. The Dutch developments are part of a consistent **international growth of legislative measures** and proposals in the area of business and human rights. Recently, the EU adopted the Directive on Non-Financial Reporting[2] and the Regulation on conflict minerals.[3] Last year, the United Kingdom adopted its Modern Slavery Act,[4] in the French parliament a bill on a duty of vigilance is pending[5] and in Switzerland a popular initiative is being prepared on a statutory duty to conduct human rights due diligence.[6] This spring, representatives of eight national parliaments called upon the European Commission to consider legislation to implement a human rights due diligence duty of care for European companies.[7] Also outside Europe, particularly in the United States, legislation is clearly on the menu.[8]

3. The call for legislation is born from growing frustration with the lack of uptake by companies of the UN Guiding Principles on Business and Human Rights. It was hoped and expected that companies would voluntarily take on their responsibility to respect human rights. Five years on, there are some frontrunners but at most companies this process is

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[2] 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.

[3] Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas Brussels, 5.3.2014 COM(2014) 111 final 2014/0059 (COD). Council and Parliament reached political agreement in June 2016.

[4] Modern Slavery Act 2015: https://www.gov.uk/government/collections/modern-slavery-bill.

[5] See https://business-humanrights.org/en/france-natl-assembly-adopts-bill-on-corporate-duty-of-care-in-supply-chains-ngos-welcome-move.

[6] The Responsible Business Initiative: protecting human rights and the environment: http://konzern-initiative.ch/?lang=en.

[7] Parliaments of Estonia, Lithuania, Slovakia and Portugal, the UK House of Lords, the Dutch House of Representatives, the Italian Senate, and the French National Assembly. See European Coalition for Corporate Justice, Members of 8 European Parliaments support duty of care legislation for EU corporations, 18 May 2016: http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations. See for the French text of the Declaration: https://christophepremat.files.wordpress.com/2016/05/signature-statement.pdf.

[8] Dodd Frank Act; California.

still in its infancy. Even though the number of corporate human rights policies is growing, the practice often still lags behind.

II. The Dutch International CSR Agreements ('covenants')

4. One of the cornerstones of the Dutch **National Action Plan** on Business and Human Rights (NAP)[9] is to encourage and facilitate voluntary CSR agreements between companies, NGOs and governments for various industry sectors. Such International CSR (ICSR) covenants would provide industry sectors with an opportunity to flesh out their **responsibility to respect**. They would serve a twofold purpose: first, to take substantial steps in 3-5 years time to avoid adverse effects of specific risks and, second, to provide joint solutions to problems that individual companies cannot entirely solve individually. The platform for negotiating these covenants is the Dutch **Social-Economic Council** (SER). This tripartite approach has been a crucial aspect of the Dutch governance culture.[10]

5. In September 2014, twelve **CSR risk sectors** were identified with respect to environment, labour, human rights, corruption and tax: construction, chemicals, retail, energy, financial sector, wholesale, wood and paper, agriculture, metal and electronics, oil and gas, textile and clothing, food.[11]

6. After the first negotiations got on their way in 2015, the **first covenant** (textile and clothing) was concluded in June 2016. At the moment, four covenants are more or less on their way (financial sector, wood and paper, metal and electronics, and food), whilst in the other seven sectors no progress was made.[12]

7. Although this is not yet a resounding success, the covenants discussion is an **on-going process** that will continue for some time. As the initiative for setting up negotiations on a covenant is with the business sectors, the overview indicates that the majority of sectors is not yet keen to bring the business and human rights agenda forward.

8. During the negotiations on covenants, **competition law** appeared to pose a major obstacle, as a covenant could be perceived as an agreement that may aim or result in preventing, restricting or distorting competition on the Dutch market.[13] Companies that are party to a covenant would run the risk of being fined for up to € 450.000 or 10% of the annual turnover.[14]

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[9] https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf.
[10] Sociaal-Economische Raad, *Agreements on International Responsible Business Conduct* (The Hague, 2014): https://www.ser.nl/~/media/files/internet/talen/engels/2014/international-responsible-business-conduct.ashx. Sociaal Economische Raad, *IMVO-convenanten* (Den Haag, 2014): https://www.ser.nl/~/media/db_adviezen/2010_2019/2014/imvo-convenanten.ashx.
[11] KPMG, *MVO Sector Risico Analyse. Aandachtspunten voor dialoog* (September 2014): https://www.kpmg.com/nl/nl/issuesandinsights/articlespublications/documents/pdf/sustainability/mvo-sector-risico-analyse.pdf.
[12] MVO Platform, *Bijlage Overzicht voortgang IMVO-convenanten per risicosector* (juni 2016): http://mvoplatform.nl/publications-en/Publication_4307-nl.
[13] Article 6 Mededingingswet, the Dutch counterpart of article 101 TFEU
[14] Articles 56 and 57 Mededingingswet.

9. In competition law, even agreements aimed at making the world a better place are looked at with a high level of suspicion. Only few exceptions to this cartel ban are allowed. The **first exception** is that the agreements are justified by overriding public interests, provided that the limitations are inherent in the pursuit of the public interest and not disproportionately restrictive. In the current state of the law it is, however, unclear whether sustainability and CSR can provide for such public interests.

10. The **second exception** applies if there is an objective justification for the agreement.[15] This implies that sustainability initiatives may only limit competition if (a) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, (b) the agreement allows consumers a fair share of the benefits, (c) the restrictions imposed on undertakings are indispensable to attain these objectives and do not go further than is strictly necessary, and (d) the agreement does not eliminate competition in respect of a substantial part of the products in question.

11. For this exception to be applied the promotion of welfare must outweigh the anti-competitive effects of the agreement. Generally, a **broad welfare concept** is applied in which not only economic interests are taken into account but also cultural, environmental, labour, consumer and social interests. Basically, the test is whether a consumer would be willing to pay the higher price for a more sustainable or responsible product or service as a consequence of the agreement.

12. This approach is telling for the **near-sightedness** of competition law. The best deal for the consumer on the local market is often a bad deal for the environmental, labour and social interests in the feeding market abroad.[16] It has been rightly argued that society as a whole does not benefit from an efficient exhaustion of human and environmental resources in the interest of consumers for whom the price is still the main decisive factor.[17]

13. Although the responsible Dutch Minister of Economic Affairs made an effort to **amend the policy rule** to cover sustainability and CSR agreements, both the Dutch Consumer and Market Authority (ACM) and the European Commission did not see space to move within the current legal framework. They (over)cautiously consider it for the legislators to act.

14. The only space available in this framework is for the competition authority to also look at the benefits arising in the long term, at advantages of the agreements in conjunction with each other, and at the advantages for society as a whole. However, **benefits for non-users** still cannot be taken into account. This policy will be implemented in due

[15] Article 6(3) Mededingingswet, the Dutch counterpart of article 101(3) TFEU.
[16] See Dutch Advisory Council on International Affairs, *The Dutch Diamond Dynamic. Doing Business in the Context of the New Sustainable Development Goals*, 2016 / Adviesraad Internationale Vraagstukken, *Daadkracht door de Dutch Diamond: ondernemen in het licht van de nieuwe duurzame ontwikkelingsdoelen*, 2016: http://aiv-advies.nl/8r4.
[17] T.R. Ottervanger, *Maatschappelijk verantwoord concurreren: Mededingingsrecht in een veranderende wereld*', Inaugural lecture Leiden University, 2010: http://media.leidenuniv.nl/legacy/oratie-ottervanger.pdf.

course but it will not provide enough certainty to companies signing up to an ISCR covenant.

15. The minister of Economic Affairs has therefore concluded that **legislation** is inevitable and that he will prepare a bill to make ICSR covenants legally binding for the whole sector. After the summer, he will inform Parliament over the direction and planning of the bill, which will be a joint enterprise of several ministers. The minister also ensured that legislation would not unnecessarily restrict competition.

16. The companies negotiating and signing up for ICSR covenants are headquartered in the Netherlands. **Foreign companies** will generally not be keen to participate as this may interfere with their global company policies. This was a tricky part of the Dutch government policy, as it may potentially disadvantage Dutch companies on the Dutch market. By making the agreements binding for the whole sector, this problem will no longer occur.

17. To be continued in the **autumn of 2016**.

III. Statutory due diligence duty re child labour prevention

18. In June 2016, Dutch MP introduced a private member bill concerning a **due diligence duty** to prevent the delivery of goods and services that have come about with the help of **child labour**.[18] With over 150 million children working, child labour in the supply chain is still a salient problem.

19. Key of the proposal is article 3, holding that a company that is established in the Netherlands and goods or services provides to ultimate consumers in the Netherlands or systematically delivers goods or services to ultimate consumers in the Netherlands must **declare that it has exercised due diligence**[19] to prevent these goods and services to have come about with the help of child labour. Hence, the duty is not to guarantee that no child labour occurs in the supply chain (which is usually next to impossible) but that the company has done what can reasonably be required to prevent this from happening.

20. The Bill **defines child labour** as labour conducted by children under 13yo, and children between 12 and 16 with respect to the worst forms of child labour as indicated in article 3 of ILO Convention 182.[20]

21. The declaration has to be submitted to the **regulator**, the Dutch Consumer and Market Authority (ACM).

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[18] Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen ('Wet zorgplicht kinderarbeid'): Kamerstukken 34506, nr. 1-3.
[19] The Bill uses a translation of the due diligence concept, in line with the terminology adopted in the UN Guiding Principles: see Explanatory Memorandum (Memorie van Toelichting), p. 15.
[20] Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour, Geneva, 17 June 1999.

22. According to article 4(1), a company exercises **due diligence** by:
    (a) Investigating whether there is a reasonable presumption that the goods and services to be supplied have been produced with the help of child labour.
    (b) Drawing up an action plan if the investigation mentioned under (a) indicates that there is a reasonable presumption that the goods and services to be supplied have been produced with the help of child labour.

23. The investigation must focus on sources that can be reasonably known and that are accessible (article 4(2)). The action plan must be in line with **international guidelines** and must include measures to prevent delivery by the company of goods and services that have come about with the help of child labour (article 4(3)).

24. The **government may approve an action plan** to exercise due diligence to prevent child labour if this is drawn up by various companies, companies associations and NGOs. A company that acts in accordance with such an approved plan exercises due care (article 4(6)). This provision links the private Bill with the government plans to make voluntary ICSR covenants legally binding for a complete industry sector.

25. A **company can be fined** for not submitting the declaration as well as for not conducting due care. In the latter case the fine is € 820.000 max or 10% of the company's turnover.

26. Both individuals and NGOs are entitled to file complaints. Complaints first have to be filed with the company or an industry sector grievance mechanism. If this does not lead to a solution, the complaint needs to be filed with the Dutch **National Contact Point** (NCP). And only if this does not lead to a solution either, the complaint can be escalated to the ACM.[21] This is a cumbersome procedure, which seems to be designed to prevent the ACM from being flooded with complaints for which it currently has no specific expertise.[22] The crucial part of the enforcement chain is therefore the Dutch NCP, which yet has to show its teeth when it comes to scrutinising business behaviour as regards respecting human rights.

27. According to the sponsor of the bill, the new due diligence duty would contribute to a more **levelled playing field** for companies operating on the Dutch market. It would also enhance knowledge as to how to effectively carry out due diligence with respect to child labour in the supply chain.

28. Whether the bill will get sufficient parliamentary support is uncertain. Even if both chambers of Dutch Parliament approve the Bill, the **Act will not enter into force before 1 January 2020** (article 9), to allow companies time to scrutinise their supply chains and help children found working in the supply chain getting a better future.[23]

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[21] Explanatory Memorandum (Memorie van Toelichting), p. 2-3 and 11.
[22] In the future, this role may be taken up by a separate International CSR supervisor.
[23] Explanatory Memorandum (Memorie van Toelichting), p. 17.