Options for enforceable IRBC instruments

Evaluation of legal design and enforcement of enforceable IRBC instruments

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EXECUTIVE SUMMARY

What does due diligence entail? (Chapter 2)
In the business community, due diligence is understood as a process that a company applies in order to analyse potential business risks when doing activities such as investments, mergers and acquisitions. In the context of responsible business conduct (RBC), due diligence concerns the identification and assessment of the risks that business activities may entail for society and the environment in which the company operates.

The UN "Protect, Respect and Remedy" framework and the accompanying UN Guiding Principles have introduced the responsibility for businesses to conduct human rights due diligence by focusing on negative social impacts of their business activities rather than their own business risks. The revised 2011 OECD Guidelines for Multinational Enterprises not only adopted this concept of human rights due diligence but also extended it to other themes in the area of RBC.

The OECD Guidelines consider human rights due diligence to be an ongoing investigatory process in which different steps can be distinguished. An internationally operating company should draw up an IRBC policy and integrate this into all its policy and management systems. On the basis of this RBC policy, an ongoing due diligence investigation needs to be carried out, which primarily consists of identifying and analysing risks related to RBC themes. After identifying and analysing these risks and determining the company's level of involvement, it needs to take appropriate measures to prevent or limit the risks from materialising. To improve the due diligence process and the measures to be taken, the company needs to monitor the effectiveness of its due diligence policy and also communicate the progress made with its stakeholders. If the company has caused or contributed to adverse effects, it should provide for an appropriate remedy. This can be achieved through legitimate processes, including legal processes or non-legal complaint mechanisms.

Choices between types of enforcement (Chapter 3)
As regards the enforcement of a statutory due diligence instrument, the authors conclude that most benefits can be achieved with a public enforcement regime through a single supervisor. Unlike private enforcement, public enforcement can take place in a structured and systematic way, which may result in more and faster clarity about the standards to be complied with by businesses and thus contribute to more legal certainty. Particularly open standards can be specified and detailed in a faster way than is possible with private enforcement.

Public enforcement can apply to a broad spectrum of RBC measures, regulating as many activities and companies as possible and, hence, as many risks as possible. In addition, a regulator can monitor and check whether the adjustments and/or improvements which are required from a company are actually implemented. This allows the regulator to support a continuous improvement process.

A limitation of public enforcement is that it does not offer a remedy for victims of human rights violations. In general, the general aim of regulation and enforcement is not to oblige companies to compensate victims in individual cases. This means that private enforcement still has an important role to play, holding companies liable under tort law for the harmful effects of human rights violations.

Next to private and public enforcement, criminal law may play an important role in cases of serious corporate wrongdoing. Prosecution is possible both under general criminal law (provisions on anti-corruption, soil pollution and money laundering) and as an economic crime in case of repeatedly not complying with public law obligations (section 3.2).

Legislation per sector or theme, or general legislation? (Chapter 3)
In principle, legislation with a general scope has more advantages than legislation per sector (such as the garment industry or the financial sector) or per theme (such as child labour or modern slavery). General legislation may broadly follow the OECD guidelines and send a signal that all sectors and all themes matter. A sector approach or a thematic approach disregards the fact that many problems are not limited to one sector or theme and it is often not possible to deal with them in isolation. Moreover, such an approach may cause problems for companies having to deal with different rules, different regulators and with higher implementation costs (section 3.3).

Legislation only for larger companies or for all companies? (Chapter 3)
Legislation may apply to larger companies only or to all companies. A restriction to larger companies would be in line with existing legislation regarding reporting obligations of companies. However, such a restriction would imply that a significant proportion of internationally operating companies is not covered by the legislation, even though they may be involved in human rights violations. If a choice is made for legislation applying to all companies, it should be considered how the obligations of smaller companies can be adapted to their size, their position in the chain and their leverage (section 3.4).

Legislation for Dutch companies only or for all companies on the Dutch market? (Chapter 3)
Finally, the question is whether legislation should apply to Dutch companies or to all companies on the Dutch market. The latter option provides a better level playing field, especially in sectors where foreign companies have large market share. However, this option also raises the question whether and, if so to what extent, this would compatible with WTO rules, in particular as regards possible non-tariff trade barriers. This question was not part of this study and will therefore need to be researched if the legislative option of a market-wide scope is considered (section 3.5).

Legislative options and the effects on the due diligence cycle (Chapter 4)
This chapter identifies and analyses eighteen options for legislative intervention. It assesses to what extent each of these options fit in or is consistent with the existing regulatory framework at national, EU and international level. It also indicates whether these options could (potentially) contribute to the implementation of OECD due diligence by companies, as the Dutch Ministry of Foreign Affairs expects Dutch companies to do so. The findings of this analysis are summarised in a table. This table shows that both mandatory OECD due diligence and mandatory tendering are in line with the existing (international) regulatory framework and have (potential) impact on the implementation of OECD due diligence. Also in line with the (international) regulatory framework but having slightly less (though still reasonable) impact on the implementation of OECD due diligence, are the legislative options regarding information on products, corporate governance and an extension of rules applicable to unfair business practices. Import bans and the obligatory use of technologies may have a clear (potential) impact on the implementation of OECD due diligence but these options seem to be less compatible with the international regulatory framework.

This analysis only provides a general answer to the question of whether a legislative option promotes or may promote the implementation of OECD due diligence. In order to be able to draw more detailed conclusions, it was considered useful to look more specifically at the six steps of the OECD due diligence cycle and to analyse to what extent the eighteen options affect each of the six steps of the OECD due diligence cycle, assuming that this may differ per step. As this connection between legislative options and the six steps of OECD due diligence have not been investigated before, this analysis was exploratory in nature. The analysis is included in a table in which the various legislative options and their (likely) impact on the due diligence cycle are identified. It follows from this analysis that mandatory OECD due diligence is likely to have the largest impact on all steps, although this is more doubtful for step 6 (contributing to recovery if a breach of the OECD Guidelines has been or is caused by a company contributed). As is elaborated in chapters 5 and 6, the level of impact also depends to a large extent on the manner in which the legal obligations are formulated and the manner in which they are (publicly) enforced.

Legislative options potentially having an impact on most steps of the OECD due diligence cycle are information on products (labelling), prescribing the use new technologies and, to some extent (depending on the type of enforcement), mandatory tendering and establishment a regulator for OECD due diligence compliance. However, as discussed above, the option of prescribing the use of new technologies seems to be less compatible with the international regulatory framework. This analysis also shows that not all legislative options, the general analysis of which (without looking at the specific steps of the OECD due diligence cycle) showed an impact on the implementation of OECD due diligence, did not live up to this by closer scrutiny. This shows that this further analysis based on the steps of the OECD due diligence cycle in weighing up legislative options is useful and necessary.

Making the due diligence cycle legally enforceable: four options (Chapter 5)
It follows from the analysis in sections 5.3 and 5.4 that material change of company behaviour is most likely in case of more detailed legislation and a combination of public and private enforcement (Option B2). Material change of company behaviour is least likely in case of less detailed legislation and only private enforcement (Option A1).

More generally, it was concluded that legislation that is not limited to general abstract norms but contains more specific norms, is more likely to bring about a material change in company behaviour. Another important condition for material change in corporate behaviour is a form of public enforcement. In this respect it is particularly important that a form of dynamic supervision is applied (see Chapter 6).

As regard the different steps in the due diligence cycle, it appeared (section 5.5) that a material change in company behaviour change is most likely to be expected when steps 2-4 and 6 of the OECD due diligence cycle are being regulated. However, enforcing these steps (if regulated) is expected to be suboptimal when applying classic command and control or rule compliance methods. It is therefore very important in this context to develop forms of dynamic regulation (See Chapter 6).

The analysis in section 5.6 with regard to the effect on legal certainty confirms the picture outlined above because also legal certainty is better served by Option B2 than by other option. Also here, Option A1 is the least attractive one as it probably offers the least legal certainty.

As regards the practical applicability (section 5.7.1), the options with public enforcement (A2 and B2) score better than the options that are exclusively privately enforced (A1 and B1).

Options A1 (less detailed legislation and only private law enforcement) only scores best in terms of the regulatory burden (section 5.7.2). However, it does not seem useful to consider the regulatory burden in isolation and not in conjunction with the purpose of the legislation. Legislation with a low regulatory burden that does not meet its purpose is a cost item without revenue. What is relevant, is whether the regulatory burden is proportionate to the objective to be achieved. This is particularly relevant for the question whether legislation should apply to all companies or only to larger companies (section 3.4).

Legislation to make the ICRC practices enforceable will not have a negative effect on the business climate. It is therefore unlikely that companies will decide to leave the Netherlands or not to settle here (section 5.7.3).

As regards the competitive position of Dutch companies on the European market (section 5.7.3), a difference in regulatory burden may become apparent if the RBC practices are made enforceable in the Netherlands. In Europe, national legislation in this area differs but in itself does not give rise to substantial problems. Moreover, depending on how the relevant legislation will be structured, the actual difference in the regulatory burden may be limited.

Moreover, it is a long-standing policy of the Dutch government that Dutch companies are expected to work according to the OECD guidelines. There is no evidence that companies meeting this expectation have a competitive disadvantage. And even if this were the case, this may be compensated for by advantages, including better risk management, a stronger market and credit position and a larger contribution to value creation.

Dynamic supervision (Chapter 6)
An important objective of public supervision on compliance with the OECD guidelines should be incentivizing material changes to enable desired behavior of companies and preventing as much as possible administrative burdens, ticking the box exercises and discouraging effective multi-stakeholder initiatives. Beyond this, public supervision on due diligence requirements is a little at odds with traditional command and control or rule compliance public supervisory approaches as the areas it should be applied to sets forward specific dynamics. It is pivotal public supervision does not focus on mistakes made by companies (road to the bottom) but on the contrary incentivizes companies to continuously improve (road to the top) and, thus, elicits as much as possible positive changes in corporate behavior. This especially applies to obligations of means regarding OECD due diligence implemented through legislation and based on open norms. However, obligations of result are conceivable in connection with some aspects of OECD due diligence. In connection with the latter more traditional public supervision may be deployed. Thus, a combination of both types of public supervision seems to be most effective.

It is most logical to establish one public supervisor in connection with OECD due diligence (or a collaborative body in which relevant public supervisors participate and which avails over powers granted by law to exchange information on supervised entities). It is obvious a supervisor should avail over sufficient budget. A relatively new type of public supervision, which is used in connection with supervision in other sectors, for example in the financial sector, may fit best with these requirements: dynamic supervision.

Dynamic supervision is based on existing best practices in markets which have at least partially matured. It is dynamic as these best practices are not fixed but change over time. It incentivizes the desired continuous improvement. Different instruments may be deployed in connection with dynamic supervision. One may think of benchmarking development and implementation of best practices, development of best practices in collaboration with business and relevant stakeholders, establishing minimum due diligence requirements based on these best practices, using these benchmarks in public procurement and in connection with subsidy requirements as well as through labelling on consumer markets.

1. INTRODUCTION

1.1 Overview

In this report we report on our research into options for enforceable IRBC instruments. This study was commissioned by the Dutch Ministry of Foreign Affairs.

This study addresses the following main questions:
1. Which enforceable IRBC instruments are conceivable (e.g. transparency, due diligence, duty of care, breakthrough of liability)?
2. How can these IRBC instruments be given legal form (e.g. contractual anchoring or legal imposition)?
3. What are the enforcement options for the various instruments (e.g. arbitration, judicial intervention, government intervention)?

In addition, where possible, the study will map out a number of characteristics and/or expected consequences of the various instruments, legal design and enforcement options. In any case, the questions below will be addressed.
1. To what extent are businesses forced to implement all six steps of due diligence of the OECD guidelines in the aforementioned IRBC instruments, and if not all six, which steps are?
2. What effort and result obligations do the IRBC instruments impose on (small/large) enterprises and the government?
3. How are the IRBC instruments enforceable/unenforceable, and if so, what is the best way to enforce them (e.g. which supervisor and/or powers)?
4. In what way are the IRBC instruments enforceable/not enforceable?
5. To what extent can legal certainty for businesses be ensured within the IRBC instruments?
6. To what extent is it expected that the IRBC instruments will contribute to behavioural change or that companies will focus on compliance/tick the box?
7. What is the expected regulatory burden of the aforementioned IRBC instruments, including administrative burdens?
8. What are the expected consequences of these IRBC instruments for the establishment climate of companies?
9. What are the expected consequences of these IRBC instruments for the national and international competitive position?
10. What are the possible side-effects and unforeseen or unintended effects of these IRBC instruments?

Instruments that are not aimed at the implementation of the OECD guidelines by companies fall outside the scope of the study. These guidelines relate not only to human rights but also to corporate social responsibility in a broader sense: they also concern employment and labour relations, the environment, bribery and corruption, the provision of information and consumer interests.

In this context, the question arises to what extent (the obligation of) measures (to be taken by companies) to combat climate change are also covered by these directives. It follows from a recent initial and final statements of the Dutch NCP in the specific instance filed against ING that the climate is covered by the OECD guidelines.[1] This can also be found in the literature.[2] The question therefore arises whether the climate due diligence cycle included in the OECD guidelines can play a role.[3] The same question can be asked for Artificial Intelligence. Insofar as the measures in this area are covered by the due diligence prescribed in the guidelines, these will be included in the study. However, the study does not deal with legal measures specifically aimed at this, for example in the area of climate. The legislative initiatives and possible options proposed in connection with the climate agreement are therefore not included.

1.2 Methodology

1.2.1 Determination of research questions

The research concerns three main questions, as well as a (non-exhaustive) number of subcategories. The research focuses on the question which options (or combination of options) are possible in legislation and what the advantages and disadvantages are. This concerns both reporting and due diligence oriented legislation as well as liability and breakthrough liability legislation.

In particular, it will be considered whether and how the six steps of the OECD Guidelines could be enshrined in legislation. It will also be considered whether framework legislation or more specific legislation (or a combination of both) could be chosen. It will also consider how compliance monitoring should be designed. It also examines whether turnover thresholds or imports of products or services in the Netherlands could be a starting point for legislation. Finally, it is examined whether legislation (e.g. greater transparency) can contribute to enforcement by parties other than the government, with due regard for (procedural) obstacles to this.

The starting point in all this is that the UNGPs recommend a 'smart mix' of instruments: national and international, compulsory and voluntary.[4] During the meeting organized by the European Commission on 2 December 2019 on possible European (due diligence) legislation, John Ruggie emphasized in his presentation the importance of this smart mix.[5] Given the time available and the wishes of the client,

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[1] See https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing.

[2] See for example H. Mulder & M. Scheltema, 'Synthesis and further perspectives', in: H. Mulder & M. Scheltema (red.), *OECD-Guidelines for Multinational Enterprises, A Glass Half Full*, Paris: OECD 2018, p. 15, accessible via https://www.oecd.org/investment/mne/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.pdf.

[3] For example K. Arts en M.W. Scheltema, 'Territorialiteit te boven – Klimaatverandering en mensenrechten', in: *De grenzen voorbij. De actualiteit van territorialiteit en jurisdictie. Preadviezen*, Deventer: Wolters Kluwer 2019, p. 96 et seq.

[4] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011, UN Doc A/HRC/17/31, commentary, p. 8.

[5] See https://www.shiftproject.org/news/conference-fi2019eu/. See further for example 'Transnationale private normen in het bestuursrecht', in: J.H. Gerards, M.W. Scheltema & A.R. Neerhof, *Hybride bestuursrecht* (VAR-reeks 156), Den Haag: Boom juridisch 2016, p. 99-101 (with examples); https://www.business-humanrights.org/en/shift-outlines-elements-of-a-smart-mix-of-measures-on-business-human-rights; L. Smit et al., *Study on due diligence requirements through the supply chain*, (study for the European Commission) 2020 (DG Just), p. 115-120, accessible via https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en. See also the Agenda for Action Business & Human Rights, 2019, published by Finland which also mentions a mix of measures. This is accessible via https://eu2019.fi/documents/11707387/0/Agenda+for+action+final+02122019.pdf/bb6d6705-04c1-2897-98d9-

the research is limited to legislative measures. The investigation will identify the possible options, but will not itself indicate a preferred option.

1.2.2 Execution of the research

The research primarily consists of literature research into the possible instruments, their design and the associated enforcement options. Of course, this study not only concerns the situation in the Netherlands, but also the situation in other countries where various forms of legislation have meanwhile been introduced (see Appendix 1).

The PwC report is involved in this study, in which, among other things, various dwindling measures are mapped out that are deployed abroad. This also applies to the study commissioned by the European Commission into due diligence obligations in the various EU member states.[6] Finally, this study includes the results of the meeting organised by SHIFT and the European Commission on 2 December on regulatory options.

The literature review resulted in an interim report containing the initial findings. These findings were then discussed with the client. Following this discussion, a number of adjustments were made.

On 18 February 2020, a stakeholder meeting took place with representatives from the business community (both companies with large footprint projects and companies with chain issues), financial institutions, the legal profession, NGOs and the SER. In total there were 50 participants.[7]

This stakeholder meeting focused on seven legislative options. This stakeholder meeting was not about the question of whether these options are politically or socially acceptable, but whether the options are legally feasible. The stakeholder meeting made it possible to discuss this question not only from different angles (companies, NGOs and supervisors) but also from different sectors. In addition, the impact of the various legislative options was examined as far as possible: do they provide an incentive for companies to perform (even) better or do they lead to ticking-box exercises?

The stakeholder meeting was attended not only by lawyers (who in many companies are rather indirectly involved in this issue) but also by people working in sustainability departments and NGOs, who have knowledge of the practice and how the different legislative options relate to it.

Feedback from stakeholders has made it possible to get a realistic picture of the proposed options and their advantages and disadvantages in terms of their legal feasibility. The insights from the stakeholder meeting have been incorporated in Chapter 4.

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[6] L. Smit et al., *Study on due diligence requirements through the supply chain* (study for the European Commission), DG Just 2020, accessible via https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en; *Government policy to stimulate international responsible business conduct* (Change in Context, 2018) and *Government policy to stimulate international responsible business conduct* (PwC, 2019).

[7] See Appendix 2 for a report of the stakeholder consultation.

In addition to the stakeholder meeting, three informal expert sessions took place on 18 and 19 February: one with experts from industry, one with experts from NGOs and the SER and one with representatives of supervisors. In these expert sessions the ideas about dynamic monitoring were central. The insights from these expert sessions have been incorporated in Chapter 6.

1.2.3 Plan

In Chapter 2 we explain what OECD due diligence involves and what six steps it consists of.

In Chapter 3 we discuss the advantages and disadvantages of a number of generic legislative options: which forms of supervision (private, administrative or criminal), broad legislation or legislation only for certain sectors or themes, legislation only for larger companies or for all companies and legislation only for companies established in the Netherlands or for all companies doing business on the Dutch market).

Chapter 4 deals with 18 legislative options.

Chapter 5 deals with the advantages and disadvantages of making the six steps of the OECD due diligence cycle enforceable, partly in combination with either purely private-law enforcement or a combination of private-law and administrative-law enforcement.

Chapter 6 discusses in detail how best to supervise enforceable IRBC measures and describes what a form of dynamic supervision could look like.

2. WHAT DOES DUE DILIGENCE ENTAIL?

2.1 Due diligence in business

In commercial practice, the concept of due diligence is generally associated with conducting an investigation into the business risks that may be associated with a company's activities. A due diligence investigation may be required for various commercial transactions, including acquisitions, mergers and investments. For example, a potential buyer of a company needs information about the business operations and accounts of that company. On the basis of the information, the buyer examines the risks of the potential acquisition and determines whether or not to enter into further negotiations.[8]

The reasons that a company may have for a due diligence investigation may vary, but broadly speaking it is a question of avoiding business risks, liability and, in addition, obtaining a better understanding of the processes within a company that is the subject of a potential transaction and other processes related to potential business risks that may affect a company.[9]

2.2 Human rights and IRBC due diligence

Due diligence for companies has taken on a different meaning in the context of human rights. Where 'traditional' due diligence includes a risk analysis for the company's own activities, 'human rights due diligence' refers to a risk analysis for third parties who may, directly or indirectly, be adversely affected in their human rights by the business activities carried out.[10] Human rights due diligence thus refers to the measures that a multinational corporation must take to identify, anticipate and, if necessary, address the adverse effects of its activities on the human rights of third parties.[11] Another characteristic is the permanent nature of the process, whereas this is not always necessary in traditional due diligence.[12] Companies that wish to carry out sufficient due diligence in the area of human rights should therefore not carry out a one-off, but continuous due diligence.[13] This concept of due diligence, in which research into risks for the societal context is central and not the company's own business risks, has subsequently

[8] T.E. Lambooy, *Corporate Social Responsibility. Legal and semi-legal frameworks supporting CSR. Developments 2000-2010 and case studies* (diss. Leiden Universiteit Leiden), Deventer: Kluwer 2010, p. 282-283, 287-288.

[9] J. Bonnitcha & R. McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', *EJIL* 2017, afl. 3, p. 901-902; see also Lambooy 2010, p. 289-290; L.S Spedding, *Due Diligence Handbook. Corporate Governance, Risk Management and Business Planning*, Amsterdam; Boston; London: CIMA 2009, p. 3-4.

[10] O. Martin-Ortega,'Human rights due diligence for corporations: From voluntary standards to hard law at last?', *Netherlands Quarterly of Human Rights* 2014, afl. 1, p. 50; see also C. van Dam, 'Corporate governance en respect voor mensenrechten', in: M. Lückerath-Rovers et al. (red.), *Jaarboek Corporate Governance 2018-2019*, Deventer: Kluwer 2018, p. 106.

[11] UNHRC, '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, John Ruggie', 2008, UN Doc A/HRC/8/5, par. 56, p. 17.

[12] Van Dam 2018, p. 106; differently: L.S. Spedding 2009, p.4.

[13] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011, UN Doc A/HRC/17/31, principle 18 commentary, p. 17; see also Van Dam 2018, p. 106.

been extended to other IRBC themes, so that the focus of this due diligence concept is not only on human rights.[14]

2.3 UN Guiding Principles on Business and Human Rights (UNGPs)

Human rights due diligence was put on the map worldwide with the advent of the UN Guiding Principles on Business and Human Rights. The Guiding Principles are non-binding recommendations for states and companies, intended to uncover, prevent and address human rights violations by multinational companies. The UNGPs were published in 2011 by the UN Special Representative of the Secretary-General on Human Rights and Multinational Enterprises (SRSG), John Ruggie, as a set of concrete principles resulting from the policy framework 'Protect, Respect and Remedy' from 2008. Protect, Respect and Remedy' can be seen as an attempt to encapsulate the existing, fragmented concepts and practices of international corporate social responsibility in a single authoritative framework.[15] This framework rests on three essential pillars within the context of international corporate social responsibility.[16] The first pillar refers to the duty of states to ensure that companies do not violate the human rights of third parties as a result of their business activities. Pillar two describes the responsibility of companies to respect the human rights of third parties. The third pillar emphasizes the importance of access to redress and/or redress for individuals whose human rights have been adversely affected by business activities.[17]

In other words, the UNGPs are intended to make the 'Protect, Respect and Remedy' framework implementable for states and companies. They show how each of the three pillars of the framework could be implemented, distinguishing between 'fundamental principles' and 'operational principles'. For example, in a 'fundamental principle' of the first pillar, the document states that states have a duty to protect against human rights violations by third parties, including companies.[18] In order to fulfil this duty to protect, the document recommends, among other things, that states issue rules requiring companies to respect human rights. In addition, states should, for example, also guide companies to promote human rights-friendly business practices.[19] According to the second pillar, companies should themselves avoid violations of human rights and deal with any adverse effects on human rights. If a company has not contributed to such effects, but these can be 'directly related' to its activities, products or services through the conduct of a business relationship, it should also take measures to prevent or mitigate the adverse effects.[20] In order to bear this responsibility successfully, companies would do well to make an explicit commitment to an appropriate internal human rights policy.[21] In order to prevent, recognise, limit and account for human rights violations, companies will also have to implement an effective due diligence process in their business operations.[22] If a company has itself violated human rights, or has

[14] K. Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human rights and the Juridification of CSR', *Journal of Business Ethics* 2016, vol. 136, issue 4, p. 708; see also C. Shavin, 'Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct', *Business and Human Rights Journal* 2019, issue 1, p. 145.
[15] UNHRC 2011, p. 3.
[16] UNHRC 2011, p. 4.
[17] UNHRC 2008, p. 6-9; see also L. Enneking e.a., *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen*, Den Haag: Boom Juridisch 2016, p. 70.
[18] UNHRC 2011, principle 1, p. 6.
[19] UNHRC 2011, principle 3, p. 8.
[20] UNHRC 2011, principle 11-14, p. 13-14.
[21] UNHRC 2011, principle 16, p. 15-16.
[22] UNHRC 2011, principles 17-21, p. 16-20.

contributed to human rights violations, the UNGPs prescribe that the company must provide for, or cooperate with, active and effective remedial mechanisms.[23] In this way, a company must respond adequately to complaints from stakeholders and actively help to detect and deal with complaints about human rights violations as early as possible.[24] According to the third pillar of UNGPs, it is the duty of states to take appropriate measures to ensure that stakeholders, who have been negatively affected by business activities in their human rights, have access to effective redress. This mainly means ensuring and facilitating access to legal and non-legal public and non-public complaint mechanisms.[25] Under the third pillar, companies also bear responsibility for access to effective redress. Remedial mechanisms at the operational level must be accessible to individuals and the community concerned, so that remedy can be achieved quickly and easily.[26]

The UNGPs are unanimously supported by the Human Rights Council (UNHRC) and also widely accepted by states and companies. Partly because of this, the UNGPs, although explicitly non-binding, form an authoritative framework in the field of business and human rights.[27] The authority of the UNGPs is also evident from the fact that they were a source of inspiration for the OECD guidelines, revised in 2011, that will be discussed below.[28]

2.4 OECD Guidelines for Multinational Enterprises

Like the UNGPs, the OECD Guidelines are non-binding recommendations addressed to multinational companies on principles and standards for international corporate social responsibility. The OECD Guidelines, now endorsed by 48 countries, were first published in 1976 by the Organisation for Economic Cooperation and Development (OECD). In 2011, the OECD guidelines were revised, partly to bring them into line with the UN 'Protect, Respect, Remedy' framework and the associated UNGPs.[29]

Like the UNGPs, the OECD guidelines do not create binding rules for multinational corporations. The governments of the states that adhere to the Guidelines do, however, commit themselves to the obligation to put the OECD Guidelines into practice and to promote their application. More specifically, this includes the duty of subscribing states to establish National Contact Points (NCPs) which, in principle, deal with all matters relating to the guidelines.[30]

The OECD guidelines provide for recommendations on various IRBC issues. For example, the document sets out general principles for business policy, in addition to chapters on the individual IRBC topics. In the area of due diligence, the OECD guidelines were aligned with the UNGPs and the UN

[23] UNHRC 2011, principle 22, p. 20-21.
[24] OHCHR, *The Corporate Responsibility to Respect Human Rights: An interpretive guide*, New York – Geneva: United Nations 2012, p. 65.
[25] UNHRC 2011, principles 25- 28, p. 21-25.
[26] UNHRC 2011, principle 29, p. 25; see also UNHRC 2008, par. 84, p. 22.
[27] J.G. Ruggie & J. F. Sherman,' The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale', *EJIL* 2017, vol. 28, no. 3, p. 921; see also S. Bijlmakers, *Corporate Social Responsibility, Human Rights, and the Law*, Abingdon, Oxon – New York: Routledge 2019, p. 51.
[28] OECD, *OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2011, p. 3-4.
[29] OECD 2011, p. 3-4; see also P. Simons, 'The governance gap: multistakeholder and intergovernmental initiatives' in: P. Simons & A. Macklin, *The Governance Gap. Extractive industries, human rights, and the home state advantage*, Abingdon, Oxon – New York: Routledge 2014, p. 102-103.
[30] OECD 2011, p. 13.

Protect, Respect and Remedy framework during the review in 2011. However, the OECD guidelines are not limited to human rights due diligence. Ongoing due diligence research is also recommended for other IRBC topics covered by the guidelines. These include: information, employment and industrial relations, anti-corruption, environment and competition. The steps of the human rights due diligence process, as described in the UNGP's 'corporate responsibility to respect' pillar, have been taken over by the OECD Guidelines and thus declared for wider application, through general principles of corporate policy, to the aforementioned IRBC themes.[31]

To interpret the IRBC due diligence process recommended by the guidelines, the OECD has issued a detailed due diligence guidance.[32] In addition, the OECD has issued several due diligence guidance documents that are focused on specific sectors, including agriculture, clothing, mineral extraction and banking.[33]

To date, the OECD guidelines are the only international regulations in the field of international corporate social responsibility whose endorsing governments have agreed to support and promote them.[34]

2.5 IRBC (OECD) due diligence cycle

According to UNGPs and OECD guidelines, multinational corporations should implement an ongoing due diligence process in their business operations to meet their responsibility to respect human rights and the other IRBC issues. Multinational companies may already have developed due diligence mechanisms to identify business risks. These existing traditional due diligence tools can also be used to conduct human rights/IRBC due diligence.[35] In addition, the UNGPs and the OECD guidelines inform in a global way how IRBC (OECD) due diligence can be carried out in a series of steps. The intention is to repeat the steps so that the due diligence process is continuous and progressive.

Illustration of the OECD due diligence cycle:[36]

[31] J.G. Ruggie & T. Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges OECD 2011', *Brown Journal of World Affairs* 2015, issue 1, p. 105-106; see also OECD 2011, p. 20.

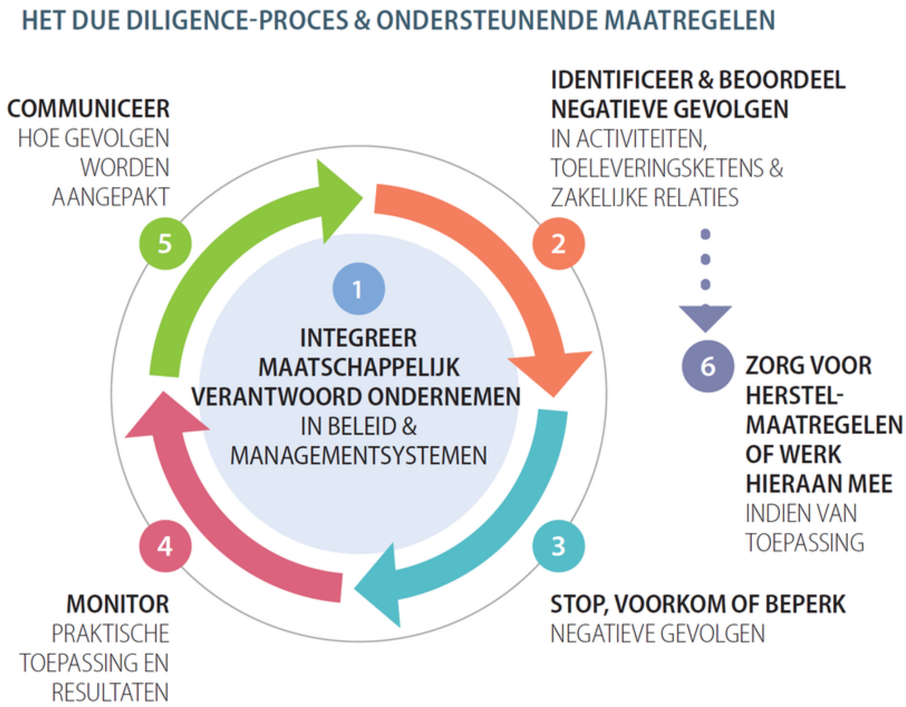
[32] OECD, *Due Diligence Guidance for Responsible Business Conduct*, Paris: OECD Publishing 2018.

[33] OECD, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Paris: OECD Publishing 2016; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Paris: OECD Publishing 2016; OECD, *OECD Due Diligence Guidance for Responbsible Supply Chains in the Garment and Footwear Sector,* Paris: OECD Publishing 2018; OECD, *OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2019; for more sector-specific guidances see mneguidelines.oecd.org

[34] OECD 2011, p. 3; see also L. Heckendorn Urscheler & J. Fournier, *Regulating Human Rights Due Diligence for Corporations: A Comparative View*, Publications of the Swiss Institute of Comparative Law, Geneve – Zurich: Schulthess Editions Romandes 2017, p. 20.

[35] UNHRC 2011, principle 17 commentary, p. 16; see also OECD 2011, II par. 10, IV commentary par. 45, p. 20, 34; Bijlmakers 2019, p. 103.

[36] OECD, *Due Diligence Guidance for Responsible Business Conduct*, Parijs: OECD Publishing 2018, p. 21.



2.5.1 *Step 1: Integrate corporate social responsibility into policy and management systems*

The integration of IRBC-due diligence processes throughout the organization of a multinational enterprise is unlikely to be initiated and sustained without a plan. In the first place, the company will have to commit itself to its own IRBC policy that serves as a basis for ongoing due diligence processes. According to OECD guidelines, an effective policy can be achieved by meeting at least certain conditions.

- The policy should be communicated and made available by the company to the public, including staff, business partners and other parties directly related to the company's activities.
- In connection with the aforementioned visibility, the company should make clear its expectations of its personnel, business partners and other relevant parties through the policy statement. With a clear statement that is accessible to stakeholders, the company can avoid deviating too easily from its IRBC policy under certain circumstances.[37]
- The policy should be approved at the highest level of the company. Part of the management's role is to check that policies are properly implemented and adhered to.[38]
- The policy has been developed with the input of relevant internal and/or external expertise.
- Policies at operational level reflect the overarching IRBC policy and put it into practice.

When a multinational corporation has committed to an appropriate IRBC policy that has subsequently been successfully implemented in all parts of the organization, a basis has been laid that allows for ongoing due diligence (steps 2 to 5).[39]

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[37] OHCHR, *The Corporate Responsibility to Respect Human Rights: An interpretive guide*, New York – Geneva: United Nations 2012, p. 27.
[38] OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2019, p. 32-33.
[39] See illustration above, steps 2 to 5.

An example of a policy commitment that emphasizes the integration of the IRBC policy throughout the organization is Unilever's Code of business principles and code policies. This multinational company expects, under the term 'living the code', its employees to understand and comply with the CSR policy and report violations of the policies.[40] In the area of human rights, the multinational company Nestlé has developed a due diligence programme with the Danish Institute for Human Rights based on eight pillars, including integrating human rights due diligence into new and existing company policies and training employees on human rights issues.[41]

2.5.2 Step 2: Identification and assessment of actual and potential adverse effects

a. Mapping of risk areas

A multinational company is expected to investigate the (potential) IRBC risks associated with its activities, supply chains and business relationships.[42] In order to obtain an overview of actual and potential adverse impacts, a broader investigation of the sectoral, geographic and political context of those activities is needed. For example, a multinational company may map the structure of its supply chains and collect information on significant risks associated with the sector, products, geographical context and its own behaviour.[43] Once the enterprise has identified the significant risks relevant to it, priority should be given to the most important risks in the event that it is unable to address a multitude of identified risks at the same time. Rather, according to the OECD due diligence guidance, priority should be given to activities that take place in areas with an increased risk of adverse impacts, such as conflict areas, areas with vulnerable groups and individuals, or areas where there is a high level of corruption. The nature of the business activities concerned should also be taken into account. If, for example, they involve a high level of hazardous substances and machines, they should rather be prioritized for deeper analysis. In addition, priority should rather be given to business activities that have been associated with negative societal impacts in previous analyses.[44]

The UNGPs provide starting points for prioritizing adverse societal impacts. The most serious risks must first be addressed. The seriousness is determined on the basis of the scope, scale and (un)repairable nature of the adverse effect, in relation to the other adverse effects identified. In the case of a potential adverse effect, the likelihood that the risk will materialize must also be included in the prioritization.[45]

An example is the prioritization of human rights risks by multinational companies such as Nestlé and H&M Group, which they consider to be the most urgent to address in their context because of the significant potential adverse effects that may materialize in relation to these risks.[46] In its human rights reporting, Marks & Spencer also shows per product type which human rights issues are prioritized in which country.[47]

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[40] Unilever, *Code of business principles and code policies*, Unilever plc 2017, version November 2019, p. 8.
[41] Danish Institute for Human Rights & Nestlé, *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*, 2013, p. 11.

[42] OECD 2018, p. 25, 62; see UNHRC 2011, principle 18 commentary, p. 17.
[43] OECD 2018, p. 25, 63.
[44] OECD 2018, Q24, p. 66.
[45] OHCHR, *The Corporate Responsibility to Respect Human Rights: An interpretive guide*, New York – Genève: United Nations 2012, p. 82-84.
[46] 'Our salient human rights issues', *Nestlé*, www.Nestle.com; see 'Update on salient issues 2017', *H&*M, sustainability.hm.com.
[47] Marks & Spencer, *Human Rights Report 2017*, Marks & Spencer 2017, p. 7-8.

b. Further research into prioritized risk areas

A multinational corporation which, as a result of a broader exploration, has made an inventory of the risk areas can deepen its analysis in order to identify and assess concrete risks or actual adverse social effects.[48] The manner and thoroughness of research into concrete actual or potential adverse social effects depends on the circumstances and the characteristics of the company.[49]

For example, the analysis may involve studying risk profiles of counterfactors and other links further down the production or supply chain. Business relationships can be assessed on the basis of their own due diligence efforts. Stakeholders, including the relevant employees, can be consulted. Consultation of independent expertise is also possible. Special attention should also be paid to the more vulnerable groups and individuals, who may be at increased risk of marginalization of their interests.[50]

c. Assess how the company is involved in these risks

In order to take appropriate action against the actual and potential adverse effects examined, a multinational company will first have to determine how it is involved. It will have to be examined whether it is the culprit or has made a contribution or is 'directly linked' to the socially unfavourable effects.

- The company has caused the adverse effects when its own actions are already of sufficient weight to create the adverse effects.
- The company has contributed to the negative effects if the combination of its activities with the activities of another party has created the negative effects. It may have caused negative consequences together with another entity or it may have facilitated or exacerbated the negative consequences caused by another entity. However, the OECD due diligence guidance emphasises that the contribution must be 'substantial', which means that not every minor involvement of the company is equivalent to a 'contribution' as meant here.
- The company is 'directly connected' when negative social effects are caused by someone else and the company can be associated with the causer through its services, products, activities or business relations.

The company must take appropriate measures, the choice of which depends on the manner of involvement in the negative impact it wishes to address.[51]

2.5.3 Step 3: Terminating, preventing and mitigating adverse effects

Once the multinational company has completed the in-depth analysis of risk areas and has come to take measures against concrete, prioritized negative effects, various (combinations of) options may be possible. In the third step of the OECD due diligence cycle, a distinction is made between measures that can prevent, terminate or mitigate adverse effects.

- Prevent negative effects: Characteristic of IRBC due diligence processes is that they are primarily intended as mechanisms that multinational companies can use to avoid negative impacts on people, the environment, and society when conducting their business activities. Only if adverse effects cannot be avoided should the multinational enterprise concerned take mitigating

[48] OECD 2018, p. 26-27.
[49] OECD 2011, p. 20; see OECD, *Due Diligence Guidance for Responsible Business Conduct*, Parijs: OECD Publishing 2018, p. 31, 61; Ruggie 2012, Q28, p. 32-33; P. Simons & A. Macklin 2014, p. 297.
[50] OECD 2018, p. 51; zie ook OHCHR 2012, p. 17.
[51] OECD 2018, Q29, p. 70-72.

measures.[52] Such measures may include embedding policy protocols, providing training and technical investments that reduce risks of adverse effects.[53]

- Discontinuing activities: If the multinational company discovers that it has been unable to prevent certain (risks of achieving) negative effects, the cessation of the generating or contributing activities is a first step towards combating this.[54]
- Limiting negative effects: Where the MNE is involved in activities that may have a negative impact on at least one of the IRBC themes, it should have taken measures to mitigate potential adverse consequences of those activities. However, the situation may arise where it is not the company itself, but a business relationship, that causes the negative impact. The company can then use the influence it has to persuade the business relationship to stop or adjust the activity, to reduce actual negative effects and to prevent and reduce future negative effects. For example, the company may enter into contractual IRBC arrangements, or it may attempt to constructively engage in dialogue with the business relationship about the relevant IRBC policy. In addition, in the event of a similar IRBC problem, contact can be sought with government agencies.[55]

An example of CSR requirements that a multinational company can impose on business relations with whom a contractual relationship is entered into are contractual IRBC conditions for suppliers. For example, IKEA sets minimum requirements for the behaviour of suppliers. In its code of conduct, IKEA sets out CSR terms and conditions that suppliers must adhere to. The conditions include issues such as the prevention of environmental pollution, serious safety risks for workers and forced labour.[56] The multinational company Marks & Spencer uses 'Global Sourcing Principles', which must be signed by suppliers. Among other things, suppliers are expected to facilitate feedback and complaints mechanisms for their employees, provide healthy and safe working conditions, and apply due diligence processes to their own supply chains. In addition, M&S makes it clear that suppliers will be guided in the development of their IRBC standards and complaints mechanisms. Suppliers must also agree to regular inspections at production sites. If suppliers continue to fail to comply with the Global Sourcing Principles, M&S will ultimately terminate the business relationship.[57]

A multinational corporation's influence on a business relationship may be too limited to bring about a change in behaviour. The company will then have to find ways to increase its influence on its business relationship. In this context, the OECD due diligence guide emphasizes that initiatives between several companies in the sector and/or the environment can lead to higher mutual expectations in the field of corporate social responsibility. In addition, the joint influence of several companies can improve the CSR policy of the entity that caused the adverse impacts.[58]

Companies that are active in the mineral extraction supply chains in (potential) conflict areas are recommended by the sector-specific OECD due diligence guide to take appropriate mitigating measures

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[52] OECD 2018, p. 16, 74.
[53] OECD 2018, p. 75.
[54] OECD 2018, p. 75.
[55] OECD 2018, Q36, p. 78; OECD, *OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Parijs: OECD Publishing 2019, p. 49.
[56] IKEA, *IWAY Standard: Minimum Requirements for Environment and Social & Working Conditions when Purchasing Products, Materials and Services*, editie 5.2, IKEA IWAY Council 2016.
[57] Marks & Spencer, *Global Sourcing Principles,* Marks & Spencer 2018.
[58] OECD 2018, Q 37, p. 79; see also H. Hofmann, C. Schleper & C. Blome, 'Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-tier Supply Chains', *Journal of Business Ethics* 2018, issue 1, p. 127; OHCHR 2012, p. 18.

with regard to different types of risks. For example, companies sourcing certain minerals from areas where local miners work on a small scale are encouraged to protect this vulnerable group from exploitation practices by other upstream entities in the supply chain. This can be done, for example, by supporting host country authorities in measures to formalize and professionalize the local sector.[59]

Investment banks are encouraged, for example when providing business loans, to incorporate their IRBC policies and clients' expectations in their contracts and other written documents. The fact that the bank's IRBC policy is agreed upon conclusion of the contract gives a bank more influence to address IRBC issues with clients that may arise after the conclusion of the contract.[60]

For the agricultural sector, the sector-specific OECD Guidance recommends mitigating measures on a number of IRBC issues. With respect to labour, the protection of workers, the facilitation of reasonable working conditions, and the facilitation of adequate training and education are highlighted. In relation to hazardous activities in the agricultural sector, mitigation measures to promote health and safety are addressed. Recommended measures include avoiding and minimizing exposure to hazardous materials and substances, avoiding and minimizing the risk of the environment being exposed to certain diseases that may arise from agricultural activities, and complying with global food safety standards.[61]

The way in which the company is involved in negative consequences determines the nature of the measures to be taken. If the company has caused, or contributed to, a negative impact, discontinuing or adjusting its own activity is a measure that the company is likely to have at its disposal. If the company has contributed to the negative effect, or its activities, products or services are linked to harmful activities of a business relationship, the cessation or modification of its own activity is less likely to have an effect on combating negative effects caused by another company. In that case, the company will have to exercise - and if necessary, increase - its influence in order to encourage the other to reduce the actual negative effects and to avoid potential (future) negative effects.[62]

2.5.4 Step 4: Monitoring the effectiveness of measures and the implementation of the IRBC policy

In addition to identifying consequences and risks for CSR themes, the repetitive nature of the due diligence process also lends itself to periodic assessment of the effectiveness of measures taken against adverse impacts and assessment of the implementation of due diligence processes. First and foremost, it should be noted that the method of assessment largely depends on the characteristics of the company and its activities. Assessments should in any case be made on the basis of appropriate qualitative and quantitative indicators. The concrete indicators that need to be kept up to date also depend on the activities and context of the company.[63]

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[59] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Paris: OECD Publishing 2016, p. 27.
[60] OECD 2019, *OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2019, p. 47-49.
[61] OECD, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Paris: OECD Publishing 2016, p. 55-59.
[62] OECD 2018, p. 72; UNHRC 2011, p. 19.

[63] OECD 2018, p. 82; see also OHCHR 2012, p. 19.

The OECD due diligence guide for banks recommends that the prevention and mitigation efforts of prioritized clients should also be monitored by monitoring indicators such as the percentage of agreed due diligence measures implemented by the client, the percentage of complaints on which the client has taken action and the changes in the negative impacts involving clients. In addition, the bank may assess the results of its own due diligence measures against relevant indicators, including the number of clients associated with actual or potential adverse impacts and the number of prevention and mitigation efforts undertaken by the bank with a successful outcome.[64]

The OECD due diligence guidance for companies active in the supply chains in which minerals from (potential) conflict areas are extracted, recommends that one of the parties also carry out independent monitoring of their due diligence efforts.[65] In addition, this guidance also includes specific recommendations for companies operating closer to the source ('upstream') of the supply chain on the one hand and companies operating at the end ('downstream') of supply chains in tin, tantalum, tungsten and gold on the other hand. For example, upstream companies, such as miners and local traders, are specifically recommended to monitor the results of risk reduction and prevention, including consultation with local authorities, NGOs and stakeholders.[66]

Internal and external feedback should also be taken into account in order to obtain a complete picture and interpretation of the indicators tracked and thus the effectiveness of measures taken against negative impacts. For example, the company may request internal feedback on the spot from employees or their representatives on the progress of the IRBC themes to be investigated, such as working conditions, human rights or the environment.[67] External feedback may come from stakeholders outside the company, such as the local community, authorities and business relations in the relevant supply chain. Complaint mechanisms at an operational level can act as an important source of internal and external feedback.[68]

2.5.5 Step 5: Communication and reporting on IRBC policy and dealing with negative impacts

The final step in the due diligence cycle is to communicate and report on the progress of the IRBC policy. In this way, the multinational company demonstrates to stakeholders how it deals with the identification and approach of IRBC issues in practice.[69]

Communication to the outside world about the due diligence policy should take place in such a way that the information is as accessible as possible to the target groups of the company.[70] This also includes ongoing communication with stakeholders who may be affected by the activities of the multinational company.[71] On the other hand, sensitive and confidential information will have to be taken into account.

[64] OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2019, p. 54-55.
[65] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Paris: OECD Publishing 2016, p. 18-19.
[66] OECD 2016, p. 46.
[67] OECD 2018, p. 82-83.
[68] OHCHR 2012, p. 55.
[69] OECD 2018, p. 85-86; see also OHCHR 2011, p. 20.
[70] OECD 2018, p. 85.
[71] OECD 2018, p. 86; see also OECD, '*OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, Paris: OECD Publishing 2017, p. 17-20.

Legal requirements or certain terms of agreements with other parties could prevent the external communication of certain due diligence information. Nevertheless, the communication of such information may be urgent because of a concrete threat to the human rights of certain stakeholders. The company should report the information effectively, taking into account confidential elements as much as possible. For example, the company could provide a justification for non-publication of certain information. Anonymization of sources, business relationships and restrictions on access to sensitive information could also be considered.[72]

2.5.6 Step 6: providing remedial action

Even if a multinational company carries out extensive and sophisticated IRBC due diligence, causing or contributing to adverse impacts on IRBC issues cannot always be avoided. In causing or contributing to actual neo-gative effects (not in the case of a direct link), the MNE is responsible for providing an appropriate form of redress. Which form of recovery is appropriate will depend on the nature and scope of the negative effect. In the OECD Guidelines and the OECD Due Diligence Guidance, the term 'recovery' refers to the provision of or participation in legitimate processes for recovery, but also the substantive measures that, as a result of the processes, restore the situation in question.[73]

Legitimate remediation processes can be initiated by the government. For example, in order to obtain redress and justice, the company will have to cooperate in criminal or civil proceedings before a judicial authority. Participation in proceedings before a non-judicial complaints mechanism facilitated by public authorities may also constitute an appropriate solution. For example, IMVO complaints or disputes about the adherence to the OECD Guidelines can be submitted to the NCP of a subscribing state.[74]

A legitimate non-legal procedure that is not managed by the State involves the use of a complaints mechanism at the operational level managed by the company. This mechanism should be directly accessible to stakeholders negatively affected by business activities. It should be possible for a complaint to be quickly brought to the attention of the company through the Complaints Mechanism and for it to be analyzed. If it turns out that there is actually a negative effect, an outcome can be agreed that restores the old situation as far as possible.[75] A complaints mechanism that is part of a multi-stakeholder initiative can also provide appropriate redress.[76]

An example of a complaints mechanism on an operational level is the 'Third Party Complaint Process' of the Adidas Group. This complaints mechanism handles complaints from employees and third parties about alleged violations of the Adidas Group Workplace Standards and alleged violations of international human rights standards by, for example, suppliers, employees or other entities associated with the Adidas Group. Part of the mechanism are the worker hotlines. These are telephone numbers that

[72] OECD 2018, p. 87.
[73] OECD 2018, p. 88; see also OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises,* Paris: OECD Publishing 2019, p. 59; OHCHR 2012, p. 64-65.
[74] OECD 2018, p. 35, 89.
[75] OHCHR 2012, p. 68-69; zie ook OECD 2011. par. 46, p. 34; OECD 2018, p. 89; UNHRC 2011, principle 31, p. 26.
[76] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, Paris: OECD Publishing 2018, p. 99-100.

factory workers can use to report concerns and abuses about working conditions (anonymously) via text messages received by the Social & Environmental Affairs department, or an independent third party.[77]

An example of a complaints mechanism via a multi-stakeholder initiative is the 'Child Labor Monitoring & Remediation System' of the International Cocoa Initiative (ICI). Contacts of the initiative can identify concrete problems related to child labour in cocoa production at local level. Specific cases are then reported to the ICI, which draws up a recovery plan. The recovery measures are then implemented on behalf of the children and/or their parents involved and the effectiveness of the measures is then monitored.[78]

According to OECD guidelines, a complaints mechanism is legitimate when it meets the following core criteria: accessibility, predictability, fairness, compatibility with OECD guidelines, transparency, solution orientation and based on dialogue.[79]

If a company acknowledges that it has caused or contributed to a negative impact, it can provide for an appropriate remedy. The company and the affected stakeholders agree on the form in which the recovery takes place. The company could, for example, compensate the affected stakeholders financially or in some other way. Harmful activities can be discontinued and sometimes it is sufficient to apologize.[80]

Strictly speaking, offering recovery is not part of the due diligence cycle. Recovery will only be considered when a company, precisely as a result of identification and analysis in the performance of ongoing due diligence, has come to the conclusion that it has caused or contributed to a negative consequence (no obligation to recover in the case of direct involvement).[81] However, new potential and actual negative effects are also brought to the company's attention by means of a complaints mechanism at operational level. These can then be subject to further identification and analysis in the due diligence process. Thus, a complaints mechanism at operational level brings new information into the due diligence process of the company, but also acts as a procedure that can be used by the company and its stakeholders to achieve recovery.[82]

2.6 Conclusion

Due diligence is understood in business as a research process that can be applied by a company to analyze potential business risks when undertaking activities such as investments, mergers and acquisitions. In the context of international corporate social responsibility due diligence is about identifying and assessing the risks that business activities may entail for society and the environment in which the company operates.

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[77] Adidas Group, ‘Third Party Complaint Process for Breaches to adidas Group Workplace Standards or Violations of International Human Rights Norms’, *Adidas Group* 2014; see also Adidas Group, *Adidas Sustainability Progress Report*, Herzogenaurach: Adidas Group 2016, p. 41.
[78] International Cocoa Initiative, ‘Supply Chain: Child Labor Monitoring & Remediation System’, *cocoainitiative.org.*
[79] OECD 2011, par. 46, p.34; zie ook UNHRC 2011, p. 26-27; OHCHR 2012, p. 73-75.
[80] OHCHR 2012, p. 64; zie ook UNHRC 2011, p. 22.
[81] OECD 2018, Q46, p. 88.
[82] UNHRC 2011, p. 25; zie ook OECD 2018, Q46, p. 88.

With the advent of the UN 'Protect, Respect and Remedy' framework and the accompanying UN Guiding Principles, due diligence, in which the negative social impact is central instead of the company's own business risk, has been introduced in the area of human rights. In the revised OECD Guidelines of 2011, the concept of human rights due diligence was adopted from the UN Guiding Principles. In addition, the OECD guidelines have extended the application of human rights due diligence to other IMVO themes.

Due diligence according to the OECD guidelines is recommended in the form of a continuous investigation process in which various steps can be distinguished. An internationally operating company should draw up an IMVO policy and integrate it into all its policy and management systems. On the basis of the IMVO policy, continuous due diligence research can be carried out, which primarily consists of identifying and analyzing risks related to IMVO themes. After identification and analysis of the risks and determination of the degree of involvement, the undertaking can take appropriate measures to prevent or limit the risks from materializing. To improve the due diligence process and the measures to be taken, the company will have to monitor the effectiveness of the due diligence policy and also communicate the progress to its stakeholders. In order to improve the due diligence process and the measures to be taken, the company will have to monitor the effectiveness of the due diligence policy and also communicate progress to its stakeholders. If the company has caused or contributed to negative consequences, it will have to provide for appropriate recovery. This can be achieved through legitimate processes, including legal processes or non-legal complaint mechanisms.

3. ENFORCEABLE IRBC-INSTRUMENTS: GENERAL CHOICES

3.1 Introduction

When introducing mandatory IRBC-measures, the legislator is faced with a large number of choices. This chapter discusses the advantages and disadvantages of a number of these choices.

Section 3.2 is about the choice of how the IRBC measures are maintained: through criminal law, administrative law, private law or a combination of these. Chapters 4-6 will build on this analysis.

Section 3.3 deals with the question of whether the IRBC-measures should apply to all companies, or only to companies in certain sectors (clothing, banks) or on certain themes (such as child labour and modern slavery). This section outlines the advantages and disadvantages of these options.

Section 3.4 focuses on the question of whether the IRBC-measures should apply to all companies or only to companies with a certain minimum size. This paragraph shows the advantages and disadvantages of these options.

Finally, section 3.5 deals with the question whether the IRBC-measures should apply only to companies established in the Netherlands or to all companies active on the Dutch market. This section outlines the advantages and disadvantages of these options.

3.2 Private, administrative and criminal law enforcement

In principle, there are three options for the enforcement of legal IRBC-measures: private, administrative and criminal. In practice there will be a combination of enforcement instruments that can be used in parallel. However, in most cases, one of the instruments will be dominant and the others supportive.

3.2.1 Private law enforcement

Introduction
The option of private law enforcement is given automatically when a legal regulation is introduced. There is therefore no need to regulate it explicitly. If an undertaking does not comply with an enforceable IRBC-measure, individuals and interest groups may apply to the court for damages, an injunction or prohibition. The basis for this is the wrongful act regulated in the Dutch Civil Code (article 6:162 et seq.).

A claim for compensation is conceivable if one or more individuals have suffered damage as a result of violating an enforceable IRBC-measure, e.g. the ineffective detection or inadequate prevention of negative consequences for rightsholders. If the violation of the IRBC-measure was the cause of the damage suffered by the individual (causal link), the company must compensate this damage.

In addition to or instead of compensation, an injured party or an interest group may apply to the court for an injunction or prohibition if a company acts or threatens to act unlawfully. For example, if a company fails to comply with an obligation to draw up a due diligence plan and it does not comply with this obligation, the court can order it to comply with the legal obligation by drawing up a due diligence plan, with or without forfeiture of a penalty payment.

Private law enforcement and the obtaining of damages can be done not only through the public courts but also through private dispute resolution (such as *non-judicial* mechanisms (NCPs or (local) *dialogue based* mechanisms) and arbitration or other binding mechanisms such as in the IRBC Textiles Covenant).

Conditions for effective private law enforcement
Proceedings by individuals and interest groups cost money and they will therefore only make sporadic and occasional use of this possibility. In order to stimulate private law enforcement, financial support by the government will be needed from aggrieved stakeholders and rightsholders, whether or not together with interest groups. Other types of adjustments to (procedural) law may also be considered, for example, allowing for *no cure no pay* representation of victims, especially in the case of binding dispute resolution.

Advantages of private law enforcement
In addition to the injunction or prohibition, the main purpose of private law enforcement is to obtain a remedy (damages) for the injured stakeholders and rightsholders. In contrast to the recovery sanction in administrative law, in this case the company and the supervisor are not opposed to each other, but rather the company and the injured parties. Injured parties can also use this route if the supervisor does not take the matter into consideration or does not proceed to impose a recovery sanction. Moreover, private law enforcement concerns full compensation for the injured party, whereas in the case of an administrative recovery sanction (in principle a restoration to the previous or at least the lawful state of affairs) this is not the case.

Contrary to dispute resolution by public rule, private litigation (see above) can be more flexible and more focused on local problems/culture. This is the case because private dispute resolution can also take place where the adverse consequences have occurred. Moreover, private dispute resolution is less formal and can be better tailored to the context of the dispute.

Private law enforcement outside the Netherlands can also be more effective. Different certification initiatives, for example, have trademark rights which, according to the (licensing) conditions, may only be used if the certification conditions are met. Such trademark rights can be enforced internationally (by means of the Trips- and other treaties). In practice, however, this form of enforcement is only used to a limited extent, partly due to the costs involved.

Disadvantages of private enforcement
In view of the costs involved, private law enforcement is sporadic and incidental. Because the initiative for private law enforcement lies with individuals and interest groups, there is no structural and/or planned enforcement. Moreover, it can take a long time before it is clear what exactly is expected of companies, because civil courts will usually only answer questions about what is legally applicable in specific situations and will not provide general guidelines. Moreover, many forms of private dispute resolution are confidential and therefore contribute little or nothing to the development of the law.

Interest groups will, in principle, focus on matters of public interest. This means that companies operating further away from the media will not quickly become the subject of private law enforcement, although this might be desirable from an enforcement point of view.

Private law proceedings can be long to very long and are costly. Four to six years is no exception. Such procedures have a clear impact on the reputation of companies, even if the claim(s) are ultimately rejected.

Finally, the behavioural impact on companies appears to be limited. In practice, at the time of litigation at a company, there is an enhanced defensive attitude that focuses on all kinds of legal defenses rather than a reason to solve the problem in cooperation with stakeholders or to improve processes for the future.

3.2.2 Administrative enforcement

Introduction

Administrative law enforcement takes place by an independent or independent board of directors, often referred to here as supervisor. This supervisor is charged with supervising compliance with a statutory regulation (in this case: enforceable IRBC measures). For the enforcement of this compliance, a supervisor can, in principle, dispose of several sanctions if companies do not comply with their legal obligations, in particular the imposition of a penalty, the administrative coercion and the administrative fine.

Orders subject to a periodic penalty payment and administrative coercion are recovery sanctions. The purpose of these sanctions is to wholly or partially undo or end a violation, to prevent a repetition of a violation, or to remove or limit the consequences of a violation. The administrative fine is a punitive sanction of a punitive nature.

Conditions for effective administrative enforcement

The legal regulation should be sufficiently specific and concrete to be enforceable by means of coercive charges, administrative coercion and administrative fines. Insofar as there are open standards, they must be translated by the supervisor into sufficiently specific and concrete obligations.

It is advisable to combine specific rules with open standards: specific rules can be more easily enforced. The supervisor can also promote the interpretation of open standards in other ways, for example by means of internal ranking / benchmarking by the supervisor, nudging, best practices and (organizing or insisting on) (internal) training. See more detailed Chapter 6 on dynamic supervision.

It is also important for the effectiveness of administrative law enforcement that the supervisor has an effective set of sanctioning instruments at his disposal. In the first instance, a connection can be sought with the penalty system chosen in Article 7 of the Child Labor Obligation (Care) Act. This offers the possibility to impose a fine up to a maximum of the amount of the fine in the sixth category of Article 23 paragraph 4 of the Penal Code (currently € 870,000).

Finally, the supervisor must be well-equipped and have enough financial resources and substantive expertise. In order to promote this, a single supervisor in the field of OECD due diligence may be better than assigning this supervision (depending on the sector or theme) to different supervisors, for whom this will be a small part of their duties.

Benefits of administrative enforcement

Administrative law enforcement is a more flexible and faster way to enforce specific norms and to fill in and concretize open standards than private law enforcement. By formulating policy, a supervisor can also flexibly deal with specific risks, sectors or themes, and can also urge companies in other ways to take (effective) measures, even if they are not automatically required by law. This is discussed in more detail in Chapter 6 on dynamic supervision.

An administrative law supervisor can also set requirements in the policy for how companies report on their approach and progress. This increases the comparability of reports and performance.

Administrative law enforcement can relate to a broad spectrum of IRBC measures with which as many activities and companies as possible and thus as many risks as possible can be regulated.

An administrative law supervisor can, by monitoring, checking whether adjustments/improvements required of a company are actually implemented and steer towards a continuous process of improvement.

Third party stakeholders can request enforcement in an administrative law procedure (in which process representation is not mandatory). Depending on whether or not an 'obligation to enforce' will be assumed in this area as well, this will be more or less effective. The court will eventually decide whether enforcement could and should have taken place, which is also important for the concrete interpretation of the (open) standards.[83]

Disadvantages of administrative law enforcement
Administrative law enforcement does not provide a remedy for victims of human rights violations, unless the sixth step in the due diligence cycle is also codified (see section 5.5.4). However, even if this were to happen, administrative law enforcement would appear to be difficult, if only in the context of monitoring the implementation of best practices in this area. In general, supervision does not serve to oblige companies to compensate victims in individual cases. Only in more structural cases where this is systematically refused does a supervisor seem to be able to intervene.[84]

The costs of supervision are (possibly) (partly) passed on to those under supervision,

Enforcement outside the Netherlands is difficult. Moreover, the origin of products/semi-manufactures/raw materials is not always easy to determine.[85] This makes it difficult to determine whether a company is associated with human rights violations that have been observed in a certain area (e.g. by third parties such as NGOs). In a number of cases, supervision also takes place in combination with private supervisors (certification/audits). Combining such supervision (e.g. exchanging information and responding to observed violations) is difficult and, if possible, requires a legal basis in several cases (e.g. for exchanging information). Furthermore, it is not easy for the public supervisor to determine the effectiveness of private enforcement by means of certification/audits.

Because enforcement decisions that are annulled by the administrative courts (or revoked by the supervisor on grounds of lawfulness) are unlawful and result to compensating the person to whom the decision is addressed, this may encourage the supervisor's reluctance to act (quickly) to deal with more controversial cases. It is precisely these more controversial cases, however, that are relevant for the further interpretation of the (open) standards (by the judge). It may therefore take longer before there is clarity about the content of companies' obligations, which also has an impact on legal certainty.

83 For an example of due diligence in the European timber regulation (Regulation EU 995/2010), see ABRvS 20 May 2019, ECLI:NL:RVS:2019:1615; Rb Noord-Nederland 24 May 2017, ECLI:NL:RBNHO:2017:4474.
84 See ABRvS 3 October 2018, AB 2018/440 m.nt. Kortmann
85 It is possible that new IT solutions could improve this.

3.2.3 Criminal law enforcement

Criminal law enforcement may involve enforcement by means of existing criminal law provisions, or enforcement by means of criminal law provisions to be introduced specifically for this scheme.

Existing general criminal law standards
Criminal law offers various possibilities to promote compliance with IRBC standards.[86] First, there are communal criminal provisions on anti-corruption, soil pollution and money laundering.

In addition, there are a variety of special criminal provisions in criminal law that include conduct that can be regarded as violations of IRBC standards. These include sectoral legislation, such as Article 10.2 of the Environmental Management Act, which, via Article 1a of the Economic Offences Act, criminalizes the unlawful disposal of waste materials.

This means that protection of IRBC standards is possible through criminal law. Criminal law can also apply to a Dutch parent company of a group if it has led the commission of criminal offences.

Finally, there are criminal provisions in which the Dutch court has extraterritorial jurisdiction, such as the international crimes of the International Crimes Act, which can therefore also bring involvement in foreign violations of IRBC standards within the scope of Dutch criminal law. This specifically concerns genocide, crimes against humanity, war crimes, torture and forced disappearance of persons.[87]

Further criminal law options
A (supplementary) criminal law provision can be chosen in a legal regulation. This can, for example, be made an economic offence by the repeated failure to comply with administrative law obligations. This has happened, for example, in the Child Duty of Care Act.

Conditions
For the criminal enforcement of violations of IRBC standards, it is essential that not only is sufficient budget and capacity available within the Public Prosecution Services, but also that sufficient priority is given to the prosecution of similar offences.

Benefits
The advantage of criminal enforcement is that it sends the strongest signal that serious human rights violations will not be tolerated.

In the case of economic crimes, the advantage is that they are an effective sanction for unwilling companies and/or their managers.

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[86] See in detail L. Enneking e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles* (rapport in opdracht van het WODC), Utrecht: UCall/Universiteit Utrecht 2015, p.130-200.
[87] This International Crimes Act implements the penal provisions of the Rome Statute of the International Criminal Court in Dutch law.

International criminal cooperation and enforcement is better institutionalized, for example in the form of requests for legal assistance. It can therefore be more effective than administrative law enforcement in which Dutch supervisors have less clout internationally.

Disadvantages
Criminal enforcement is suitable for either (very) serious cases of human rights violations, or for repeated but less serious cases of human rights violations.

In principle, criminal enforcement does not offer a remedy in the form of compensation for victims of human rights violations. However, a victim can join the criminal proceedings as an injured party, but liability and damages are determined based on the general rules of tort. However, a criminal conviction can contribute to other forms of redress.

International cooperation in criminal cases is difficult in countries in which the rule of law is less well established, the government (in certain areas) does not have effective control or is itself involved in human rights violations by companies, or does not want to tackle those human rights violations, for example because of corruption or because they are state-owned companies.

(Strict) criminal sanctions can lead to defensive behaviour that is not aimed at solving the human rights violation (in cooperation with stakeholders) but only at internal (legal) compliance and defending the accusation.

3.3 Sectoral and thematic regulation versus general regulation

This paragraph raises the question of whether the IRBC measures should apply to all enterprises, or only to enterprises in certain sectors (clothing, banks) or on certain themes (such as child labour and modern slavery).

This paragraph outlines the general advantages and disadvantages of these options. For the sake of overview, other aspects (such as the method of enforcement) will continue to be considered. In principle, they are relevant to all options of enforceable legislation elaborated in Chapters 4 and 6.

3.3.1 Regulation per sector (clothing, banks) or theme (child labour, modern slavery)

Benefits
One advantage of legislation by sector or theme is that it gives more scope for specific rules tailored to the characteristics or circumstances of the sector or theme. The effects of regulation may also be somewhat better assessed. In the case of general legislation covering all business sectors, this is often more difficult.

Because sectoral or thematic legislation may have more specific rules, effective enforcement may be somewhat easier, although substantive regulation also remains difficult on a sectoral and thematic basis. On the other hand, it will be more difficult to build up sufficient expertise if enforcement is carried out by different supervisors.

Disadvantages
Regulation by theme covers only part of the problems covered by the OECD guidelines (in a sectoral approach, the OECD guidelines are followed more broadly but not industry-wide regulation).

Regulation by sector or by theme may suggest that other sectors or themes are less important. For example, regulation of the clothing sector but not that of oil and gas extraction. Or, for example, regulating child labour separately while in practice child labour cannot be solved without taking a much broader approach that also focuses on living wages for parents, for example.

A regulation per theme or per sector can immediately or eventually raise the question of why other sectors or themes are not also regulated. This in turn may call for consistency of regulation and lead to multiple implementation costs for companies.

Questions regarding demarcation can be problematic for companies for which several sectors or themes are relevant and can also make public supervision more difficult, so that questions of competence may arise regarding the competent regulators. Furthermore, there is a risk of incoherent assessments by supervisors which could also lead to divergent requirements.

3.3.2 General regulation

The advantages and disadvantages of generally regulating enforceable IRBC obligations are, of course, to a large extent the mirror image of the pros and cons of a sector-by-sector or thematic approach.

Advantages
A general arrangement could regulate the whole area covered by OECD due diligence. It also sends a strong signal that all sectors are important.

In terms of supervision, a public oversight body can pool expertise from different sectors/themes. Moreover, there is no risk that companies will be subject to questions regarding barriers if they are active in several sectors or themes. A general form of regulation may therefore contribute most to a level playing field between companies.

Disadvantages
A disadvantage of generally regulating enforceable IRBC measures may be that it may not be possible to formulate the rules in a sufficiently specific manner. In practice, however, this disadvantage will not be great compared to thematic or sector-specific regulation, because there too, the variations in actual circumstances can be great, and standards there, too, often need to be formulated openly and generally.

This (slight) disadvantage could also have an impact on enforcement, which could then be (somewhat) less facilitated by means of specific standards. This may also mean that the effects of regulation may be somewhat less easy to assess.

For the legislative options discussed in Chapter 4 and for making the six steps in the OECD due diligence cycle mandatory (Chapter 5), in principle it makes no difference whether a general, sectoral or thematic form of regulation is chosen.

3.4 Application only to larger enterprises or to all enterprises?

When making IMVO measures legally enforceable, the legislator is faced with the choice of making a regulation applicable to all companies or only to companies with a certain minimum size. The following examines the advantages and disadvantages of a scheme that only applies to large(er) enterprises. The advantages and disadvantages of a scheme applicable to all firms are the mirror image of this.

Advantages
A legal regime of enforceable IMP measures applicable only to larger companies is in line with the already existing rules. It is particularly consistent with the implementation of the EU Directive on non-financial reporting[88] in Article 2:391 et seq. of the Dutch Civil Code. This provision obliges larger companies to include non-financial information in the management report. Section 2:396(1) of the Dutch Civil Code provides that this obligation does not apply to legal entities that meet two of the following three requirements: a balance sheet total of less than €6 million, an annual turnover of less than €12 million, or fewer than 50 employees.

A legal regime limited to larger companies applies to standard addressees to companies that have the financial means to fulfil due diligence obligations.

Disadvantages
Restricting the scope of a statutory scheme to larger undertakings excludes a significant proportion of undertakings which may be involved in human rights infringements. After all, smaller companies may be more or less directly involved in negative impacts through an international chain.

The costs of a general legal regime for smaller companies can be relatively high. This could (partly) be solved by limiting their obligations, as indicated in the UNGPs and the OECD guidelines. This means, in particular, that for smaller companies it should be considered how the extent of their obligations can be aligned with their place in the chain and their influence on it.

Such a nuance could always be considered in the legislative options discussed in Chapter 4 and in making the six steps of the OECD due diligence cycle mandatory (Chapter 5).

With regard to Step 5 of the OECD due diligence cycle (Reporting on due dili-gence), the following applies. The Netherlands already has a reporting obligation for larger companies on the basis of the European Non-Financial Reporting Directive. The information to be provided on the basis of this Directive relates, among other things, to subjects that are important in connection with OECD due diligence (such as human rights and the environment) but does not include reporting on the OECD due diligence as such. This means that Article 2:391 of the Dutch Civil Code and the decision based thereon do not yet include a reporting obligation in respect of OECD due diligence.[89] If an additional reporting requirement were to be introduced for OECD due diligence as well, it would have to be in accordance with the European Directive and Article 2:391 of the Dutch Civil Code based thereon. On the disadvantages of a reporting obligation and more generally of transparency obligations, as well as a possible extension of this obligation to smaller companies, see section 4.2.1.

[88] Directive 2013/34/EU
[89] The same applies to the obligation in the Corporate Governance Code to provide an explanation of long-term value creation in the management report; this obligation also does not relate to the reporting on due diligence as such (see section 4.2.1).

3.5 Application to Dutch companies or to companies on the Dutch market?

3.5.1 Application only to companies established in the Netherlands

Benefits
Legislation applicable only to companies established in the Netherlands[90] is in line with the approach taken in French legislation and in the preparation of legislation in Switzerland and the European Union.[91]

Disadvantages
A legal approach that applies only to companies established in the Netherlands does not lead to a equal playing field. This is all the more true the higher the market share of non-established companies in certain sectors.

This problem is greater with general regulation than with sector-by-sector or thematic regulation. The disadvantages could be reduced by legislation that is only applicable in sectors with a low market share of foreign companies. Such a choice would, however, be subject to the disadvantages mentioned above with regard to a sectoral approach (section 3.3.1).

3.5.2 Application to all companies offering products or services on the Dutch market

Benefits
The advantage of a legal regime applicable to all companies offering products or services on the Dutch market (market-wide application) leads to a more equal playing field. This will be all the more true in sectors where foreign companies have a high market share.

Disadvantages
In the case of a market-wide scope of legislation, the question is whether, and if so to what extent, it is compatible with WTO rules, in particular whether it leads to non-tariff trade barriers. This question is not included in this investigation and will therefore have to be examined yet if the option of a market-wide scope is being considered.

Chapter 4 will indicate for the legislative options whether there is an area of tension with WTO regulation.

For the six steps in the due diligence cycle (Chapter 5), it makes no difference whether a regulation is chosen that applies only to companies established in the Netherlands or to companies offering business or services on the Dutch market. However, it is conceivable that if the legislation also reaches foreign companies, there may be a greater incentive in a market to develop best practices in order to comply with the legal standard, for example in contracts or in multi-stakeholder cooperation. In such cases, it is more likely that there will be a material change in the behaviour of companies in one or more of the steps of the due diligence cycle.

[90] The Netherlands stands here for the country of the Kingdom of the Netherlands located in Europe.
[91] See Annex 1.

3.6 Conclusion

On the question of how best to enforce a legal regime, most of the benefits can be achieved with a form of administrative enforcement through a single supervisor. Unlike private law enforcement, administrative enforcement takes place on a structural and systematic basis, which will lead to more and quicker clarity about the setting of standards and thus contribute to legal certainty. In this way, open standards can be specified more quickly than in the case of private law enforcement.

Administrative law enforcement can cover a broad spectrum of IRBC measures that can regulate as many activities and companies as possible and thus as many risks as possible. In addition, by monitoring, an administrative law supervisor can check whether any adaptations/improvements required of a company are actually implemented and steer for continuous improvement.

One limitation of administrative enforcement is that it does not provide a remedy for slaughter sacrifices of human rights violations. In general, supervision does not serve to oblige companies to compensate victims in individual cases. This means that private law enforcement continues to have an important role to play, in which companies can be held liable for the harmful consequences of human rights violations on the basis of tort.

In addition to private law and administrative enforcement, criminal law enforcement can play an important role for serious misconduct by companies. This can occur both under Community criminal law (provisions on anti-corruption, soil contamination and money laundering) and in cases of repeated failure to comply with administrative obligations, by making it an economic offence (point 3.2).

In principle, general legislation has more advantages than legislation by sector (clothing, banks) or by theme (child labour, modern slavery). A general legal regime can follow the OECD guidelines more widely and sends a signal that all sectors and themes matter. A sector-by-sector approach ignores the fact that many problems are not limited to a sector or theme and cannot often be tackled in isolation. Moreover, delimitation problems may arise and companies may have to deal with different rules, regulators and higher implementation costs (section 3.3).

In the question of whether a statutory regulation should apply only to larger companies, or to all companies, a limitation to larger companies is in line with the current regulation of companies' reporting obligations. However, such a restriction would mean that a significant proportion of relevant companies would not be covered by the legislation, as smaller companies may also be affected by human rights violations. If the choice is made to apply the statutory regulation to all companies, it will be necessary for smaller companies to consider how the extent of their obligations can be brought into line with their place in the chain and their influence on it (section 3.4).

Finally, it is questionable whether a legal regulation should apply only to Dutch companies or to companies on the Dutch market. The latter leads to a better level playing field, in particular in sectors with a high market share of foreign companies. However, in the case of such a market-wide scope, the question is whether, and if so to what extent, this is compatible with WTO rules, in particular whether it leads to non-tariff trade barriers. This question has not been addressed in this study and will therefore have to be examined if the option of a market-wide scope is considered (section 3.5).

4. LEGISLATIVE OPTIONS AND EXPECTED IMPACTS ON DUE DILIGENCE CYCLE

4.1 Introduction

Until now, as far as we know, only limited consideration has been given to the impact of legislation on the OECD guidelines.[92] Moreover, as far as we know, no link has been made with the specific elements of the OECD due diligence cycle. Hereafter, we have included an initial exploration in which the various legislative options and their (likely) impact on the due diligence cycle have been mapped out. We start with the description of the legislative options and the extent to which they fit in or are in line with the existing regulatory framework at national, EU and international level. At the end of this reflection, we summarize our findings in a table. This analysis has not yet been carried out for Dutch law.

This chapter also contains a table on different options and their impact (advantages and disadvantages) with regard to the elements of the OECD due diligence cycle. As far as we know, this systemic analysis of legislative options and their impact on the due diligence cycle has not yet been carried out. It is based on our experience and insights and the advantages and disadvantages of foreign initiatives described above. This table, incidentally, still (largely) lacks an answer to the question of to whom exactly this should apply and how it should be monitored. These questions will be addressed in Chapters 5 and 6. Furthermore, this chapter also refers to legislation already introduced or proposed abroad and in the EU, in particular when describing the options. We have included a brief overview of these in an annex to this report.[93]

4.2 Description of the options

4.2.1 Reporting

Due diligence reporting is the first form of legislation introduced in several countries and in the European Union (for larger companies). For example, Denmark (in the field of corporate social responsibility), the United Kingdom (modern Slavery), Sweden (public companies), the United States (in the field of Conflict Minerals (at federal level), Modern Slavery, Forced Labour and Human Trafficking (in California)), Australia (Modern Slavery), Hong Kong (Modern Slavery) and the European Union (non-financial information, which also includes information on corporate social responsibility) have such a reporting obligation. In most countries, however, this obligation only applies to larger (e.g. listed) companies.

[92] For a recent example of an analysis of the potential economic, social, human rights and environmental impact of such legislation, see L. Smit e.a., *Study on due diligence requirements through the supply chain*, research for the European Commission, DG Just 2020, p. 290 e.v., consultation via https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[93] For a more detailed description of much of this legislation and legislation in other countries, see L. Smit e.a., *Study on due diligence requirements through the supply chain* , DG Just 2020, p. 192-198 en L. Smit e.a., *Study on due diligence requirements through the supply chain* (research for the European Commission), DG Just 2020, Part III, Country Reports, consultation via https://op.europa.eu/en/publication-detail/-/publication/0268dfcf-4c85-11ea-b8b7-01aa75ed71a1/language-en.

In the Netherlands, the European Directive on Non-Financial Reporting[94] has been introduced in Section 2:391(1) of the Dutch Civil Code by means of the obligation (for large companies)[95] to include non-financial information in the management report.[96] In this context, Article 2:391(5) of the DCC has created the possibility to lay down rules for non-financial reporting in the case of an governmental decree (AMvB).[97] This has been done for the non-financial information referred to in the Directive in the Non-Financial Information Disclosure Decree.[98] Article 3 of this Decree determines what information must be disclosed. That information also covers issues of OECD due diligence (such as human rights and the environment) but does not include reporting on the OECD due diligence as such.[99] To that extent, Article 2:391 of the Netherlands Civil Code and the decision based thereon do not yet include a reporting obligation in respect of OECD due diligence. Furthermore, the Corporate Governance Code 2016 is important in this respect. Article 1.1.4 of the Code stipulates that the management board's report should provide information on long-term value creation and on the strategy for its realization, both in terms of short-term and long-term developments.[100] Now that long-term value creation also includes the (eligible) interests of stakeholders (including those outside the company), the Corporate Governance Code therefore also stipulates here that the subjects included in the OECD guidelines should be reported on, although also not about doing OECD due diligence as such.[101]

In the Netherlands this option has therefore been implemented for larger companies.[102] This obligation could be extended to smaller companies or even to all companies offering goods or services in the Netherlands. Extension to smaller companies[103], however, does not fit well into the Dutch system because Article 2:396(1) in conjunction with Article 2:7 of the Civil Code exempts these companies from drawing up a management report as referred to in Article 2:391 of the Civil Code. It is therefore less obvious to have such small companies report (by means of a management report) on OECD due diligence. Transparency in value chains or interests in other (subsidiaries) companies or joint ventures is also conceivable in this context.[104] However, these latter information obligations may encounter competition law objections and are therefore less easy to implement.

One disadvantage of reporting is that reporting on observed violations and the measures taken in this respect may give rise to liability. Companies can therefore, by reporting, stir up proceedings against them.[105] In the US, in particular, it has been accepted in case law that companies cannot be held liable

94 Directive 2013/34/EU.

95 Enterprises which employ more than 500 persons or have a combined turnover of more than Euro 20 million or a turnover of more than Euro 40 million.

96 See for example E.D.G. Kiersch, commentaar op art. 2:391 BW, aant 1, in: H.B. Krans, C.J.J.M. Stolker & W.L. Valk (red.), *Tekst & Commentaar Burgerlijk Wetboek*, Deventer: Wolters Kluwer 2019

97 Example Kiersch, in: *T&C Burgerlijk Wetboek*, art. 2:391 BW, aant. 6

98 Decision of 14 March 2017, Stb. 2017, 100.

99 Also compare Kiersch, in: *T&C Burgerlijk Wetboek*, art. 2:391 BW, aant. 6

100 Consultation via https://www.mccg.nl/download/?id=3364.

101 For (the desirability of) a regulation at European level, see L. Smit e.a., *Study on due diligence requirements through the supply chain* (research for the European Commission), DG Just 2020, p. 245-249.

102 Incidentally, the Netherlands is going a little further than the European directive in this respect because the companies that have to draw up a management report (including non-financial information) do not have to be as large as stipulated in the European directive. Section 2:396(1) of the Dutch Civil Code stipulates the scope from which it is necessary to draw up a management report.

103 Section 2:396 (1) of the Dutch Civil Code stipulates that this applies to companies that meet two of the following three requirements: balance sheet total of less than EUR 6 million, annual turnover of less than EUR 12 million or fewer than 50 employees.

104 See for example L. Smit e.a., (research fort he European Commission), DG Just 2020, p. 72-74.

105 See for example L. Esveld, 'De keerzijde van IMVO-transparantieverplichtingen', in: L.F.H. Enneking, M.W. Scheltema & I. Tillema (red.), *People, Planet, Privaatrecht*, Den Haag: Boom 2018, p. 186, 198-199

for failing to provide sufficient information on their products in connection with the subject of the legal obligation to provide information if they comply with the legal obligation of transparency, the so-called 'safe harbour' principle.[106] Article 2:391 of the Dutch Civil Code or the decision based thereon does not provide for such a 'safe harbour', although it cannot be ruled out that judges will take the obligation to disclose information into account in their assessment in the context of enforcement or in the context of a claim based on tort or delict.[107] In any case, it seems wise to harmonize the information obligations that apply to companies. If, therefore, an additional reporting obligation for OECD due diligence were to be introduced, it would have to be in accordance with the European Directive and Article 2:391 of the Dutch Civil Code based thereon, and it would also be wise to state explicitly in (the explanatory notes to) the new statutory regulation that there is a more far-reaching obligation.

Imposing such an obligation on foreign parties that supply products or services in the Netherlands, but are not established in the Netherlands, is also less obvious. After all, the reporting obligations referred to above tie in with companies established in the Netherlands and also in foreign laws, as well as in the EU Directive. This is in line with the principle that the reporting obligations of companies established abroad are regulated in the country of establishment. It is also possible that there could be a conflict with those foreign obligations if companies established abroad were also subject to a reporting obligation in the Netherlands.

This option does not appear to raise any specific problems in the WTO context.[108] Because no specific requirements are imposed on the conduct of OECD due diligence, this option is less in line with the basic principle that companies must conduct OECD due diligence.

4.2.2 Warning obligation/information on products or in the provision of services

One option could be to require companies to carry out a probable-wing on their products (e.g. 'this product has not been checked for possible human rights abuses/climate impact in the production chain'/'this product may have been produced with human rights abuses/child labour and not checked for climate impact') or, for example, a benchmark for companies in relation to the OECD due diligence they carry out.[109] It is also conceivable that companies may need to provide other types of information, for example by indicating the difference between the price paid by the buyer and the actual price if all external costs were taken into account ('true price') or which certification initiative ('eco-labels' such as UTZ/Rainforest, Fair Trade, Fair Wear) they are participating in or that they are not participating in a certification initiative.

As such, warnings and communications about a product or service provided or provided to consumers[110] in the European Union are not unusual. For example, Article 6:193b(3)(a) in conjunction with Article 6:193c of the Dutch Civil Code, based on European law, contains provisions on misleading commercial practices. In this context, Article 6:193c (2c) (b) of the Civil Code already provides, for example, that

[106] See for example Esveld (2018), p. 206-209.
[107] As far as we know, there have not yet been any concrete examples of this in the Netherlands.
[108] We only touch on the WTO framework in this chapter in view of the limited time available for this investigation. More detailed research should be carried out in order to obtain a more detailed picture.
[109] We will come back to that in Chapter 6.
[110] The scheme does not apply to trade between companies. See for example C.J.J.C. Van Nispen, commentaar op art. 6:193c BW, aant. 9, in: C.J.J.M. Stolker e.a. (red.), *Groene Serie Onrechtmatige Daad*, Deventer: Wolters Kluwer 2019.

it is considered misleading if a company indicates that it is bound by a certain la-bel/certification initiative but does not comply with it.[111] Furthermore, Article 6:193d(2) of the Civil Code stipulates that the omission of essential information that a consumer needs to make an informed decision about the transaction is also regarded as an unfair practice.[112] Moreover, pursuant to Article 6:193g(a), (b) and (d) of the Civil Code, it is always considered misleading to state that a consumer is participating in a code of conduct (such as an 'eco-label') when in reality this is not the case, to use a label when consent has not been obtained, or to suggest that the requirements of such a label have been met when this is not the case.[113]

As an extension of this regulation, products or services aimed at consumers could include OECD due diligence related warnings or information obligations in order to avoid giving a false impression to consumers about how a product or service is produced or provided. At present, this is still mainly a negative obligation in the sense that reporting participation in an initiative, when this is not the case or a company does not comply with the standards, constitutes an unfair commercial practice.

In this context, however, it should also be noted that the (European)[114] background to the regulation of unfair commercial practices is, above all, the prevention of economic disadvantage for consumers.[115] The texts of Article 6:193b and d of the Dutch Civil Code do not contain this restriction and speak of a restriction to make an informed decision about the purchase (which means that the product or service would otherwise not have been purchased or accepted).[116] As sustainability becomes more and more important for consumers in their purchasing decisions, in the light of the text of Articles 6:193b and d of the Civil Code, there is therefore a case, now that this is not yet the case, for including unfair commercial practices relating to sustainability/human rights. A more far-reaching statutory obligation to provide information could therefore be in line with this. Nevertheless, the Dutch measure could be regarded as a distortion of the internal market (now that it goes further than the Directive allows) and must therefore meet the test of Article 36 TFEU. It is not inconceivable that the importance of protecting human rights and the environment could meet this test, now that this is also seen as a major issue within the EU itself.

It should, however, be borne in mind that information about the 'true price' of a product or service cannot, for practical reasons, be implemented very easily at present. The models behind the calculation of the 'true price' are still being developed (particularly in the field of human rights) and do not yet offer enough broadly accepted certainty and scientific education to be able to base all legislation that informs

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[111] Also see Van Nispen, in: *GS Onrechtmatige daad*, art. 6:193c BW, aant. 10. However, the question is still being raised as to whether this can only be a code that (partly) includes obligations towards consumers or other codes of conduct/labels. The latter interpretation seems to prevail. See Van Nispen, in: *GS Onrechtmatige daad,* art. 6:193c BW, aant. 1.

[112] Moreover, this provision seems to focus on cases where the omission of such information puts a consumer at a disadvantage (usually in economic terms). See Van Nispen, in: *GS Onrechtmatige daad*, art. 6:193d BW, aant. 2 en 3.

[113] Insofar as there is a trademark right to the 'eco-label', the owner of the label will also be able to take action under trademark law against this use. See Van Nispen, in: *GS Onrechtmatige daad*, art. 6:193d, aant. 4.

[114] Directive 2005/29/EC (in particular Article 6 of that Directive). See Van Nispen, in: *GS Onrechtmatige daad*, art. 6:193c BW, aant. 1.

[115] Article 5 of the Directive therefore refers to disrupting materially the economic behaviour of consumers. See Kamerstukken I 2007/08, 30 928, C, toelichting op art. 6:193b BW.

[116] Kamerstukken I 2007/08, 30 928, C, toelichting op art. 6:193b BW.

consumers about the difference between the price of the product they buy and the price including external costs.[117]

For business-to-business trade, such an arrangement is less in line with existing legislation because it is aimed only at consumers. For companies, it is also less easy to implement in this sense since, in the area relevant to OECD due diligence, there is a lot of trade with companies outside the Netherlands which, in principle, are not subject to a Dutch obligation to provide information, unless it applies to all companies supplying products or services to the Dutch market. However, as the legislative option of import bans is elaborated below, this could encounter WTO-related objections. Even in that case, however, the previous links in value chains will often fail because they do not supply the Dutch market. The question is therefore whether a similar obligation will have much effect on relations between companies. Moreover, unlike in the case of consumers, companies seem to be able to obtain such information in their commercial relations (as far as they wish and as far as it is available) even in the absence of legislation, for example by means of a contact obligation.[118] Such an obligation to provide information therefore seems to be in line with current legislation, in particular with regard to consumers.

This option seems to fit in less well with the WTO framework, especially if the labels apply to all goods traded on the Dutch (consumer) markets. It is not inconceivable that sound labelling should be seen as a barrier to trade because foreign companies are less able to comply with it.[119] Because no specific requirements are set for carrying out OECD due diligence, this option is less in line with the principle that companies should carry out OECD due diligence. Because the labelling does refer to whether or not OECD due diligence is carried out, there seems to be a certain incentive to carry out OECD due diligence.

4.2.3 Due diligence obligation

Consideration could also be given to making (parts of) OECD due diligence directly mandatory by law. This has been done in the French law discussed above, and is also provided for in the Swiss proposal and (leaked) German draft. With regard to child labour the (not yet introduced) Article 5 paragraph 1 of the Child Labour Duty of Care Act[120] also contains such an obligation, which, according to paragraph 3 of the governmental decree (AMvB), can be elaborated.[121]

Furthermore, it is important to note that Article 5 paragraph 4 of the Child Labour Duty of Care Act stipulates that the minister may approve a joint plan of approach to address child labour developed in a multi-stakeholder initiative. This could include plans developed in IMVO covenants in the clothing

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[117] In the autumn, True Price held a consultation on its vision paper. See https://trueprice.org/a-roadmap-for-true-pricing/. However, for some products, such as coffee, chocolate and cotton, indications are already available to clarify this price difference. See https://trueprice.org/consumer/.
[118] See for example M.W. Scheltema, ‘The mismatch between human rights policies and contract law; improving contractual mechanisms to advance human rights compliance in supply chains’, in: L.F.H. Enneking e.a. (red.), *Accountability, International business operations, and the law*, Londen: Routledge 2020, p. 268
[119] Moreover, it is not inconceivable that a fair defence could be found for this (for example under Article XX GATT). However, within the time available for this study, it is not possible to go into this in more detail.
[120] Law of 24 October 2019, Stb 2019, 401. See, for example, L. Smit e.a, research for the European Commission, DG Just 2020, p. 173 et seq.
[121] It is often assumed that a legal obligation to carry out OECD due diligence presupposes that there is a duty of care to the extent that those who fall victim to failure to carry out due diligence adequately can hold the perpetrator liable. This also presupposes that OECD due diligence goes beyond a few 'ticking the box' practices. See, for example, L. Smit e.a., research for the European Commission, DG Just 2020, p. 260-266.

sector and in which OECD due diligence is the starting point. Approval implies that the participants in the initiative are deemed to have taken sufficient care. Extending this law to include an obligation to carry out due diligence in a broad sense is therefore in line with the Dutch legal system. OECD due diligence does go further, however, because the Child Labour Duty of Care Act, in short, only requires the identification of risks and the drawing up of a plan of approach if these are encountered.

Incidentally, one may wonder whether the 'child labour due diligence' does not already require a broader approach because child labour is not an isolated problem, but should be seen in a broader context (exploitation of workers, human trafficking, lack of living wage and the like). The meaningful addressing of child labour therefore probably requires a much broader OECD due diligence. This underlines once again that a broader due diligence obligation (as also included in French law and also provided for in the Swiss initiative and German draft) can be in line with the existing Dutch legal system.[122] In fact, this would be a broadening or generalization of the Child Duty of Care Act. Whether or not this is actually the case depends on how specifically OECD due diligence is prescribed in the law. In the Child Labour Duty of Care Act, this is still described in a general way (with the possibility of an AMvB). It would be conceivable to formulate this obligation more specifically. We will discuss this in Chapter 5 below.

It is also important to make explicit the extent of the due diligence obligation in the value chains. French law, for example, provides that it applies to 'lasting commercial relationships', in relation to which some argue that the due diligence obligation extends only to the first link in the value chains (i.e. to leveranciers with whom a contractual relationship exists). However, the OECD due diligence goes further and covers the whole value chain. This is also the starting point, for example, in the EU Conflict Minerals Regulation discussed above, as far as the chain up to the importer in Europe is concerned. This due diligence therefore does not yet cover the entire value chain. An OECD due diligence obligation extending to the entire value chain therefore does not yet fully fit in with this European approach.[123]

With this legal embedding of OECD due diligence, it would still be conceivable (for example by means of an Order in Council or a ministerial decree) to make due diligence dependent on a benchmark of countries or risk(sectors), whereby, the higher a country or risk(sector) is on the benchmark, a smaller (in terms of countries) or larger (risk(sector)) effort would be required with regard to the OECD due diligence.[124] Of course, the position of countries on the benchmark can change. This means that the OECD due diligence must be in line with the current position of a country on the benchmark. Such an approach is included in the OECD due diligence because it is risk-oriented, but has not been applied as such in the legislation introduced or proposed so far. However, under the EU Conflict Minerals Regulation, there is a manual for high-risk areas and this regulation also requires increased due diligence there. This is therefore comparable to the benchmark I have just mentioned. However, the benchmarking of other countries may be difficult in an international diplomatic context. Nevertheless, it is conceivable to differentiate according to risk(sector).

[122] In this context, it is left open to what extent it is possible in the Netherlands to achieve a result - (aimed in particular at the process of due diligence) or a best effort obligation (aimed at the actual mitigation of risks as described in the OECD guidelines) or a combination of both. This will be discussed in chapter 6. Foreign laws differ in this respect.

[123] For the question of whether a general due diligence obligation is also desirable at European level, see L. Smit e.a., Research for the European Commission, DG Just 2020, p. 250-259.

[124] Compare also L. Smit e.a,, research for the European Commission, DG Just 2020, p. 281, which proposes the use of a card system involving dialogue with countries that have received a yellow card and goods from countries with a red card are affected by an import ban.

In connection with a due diligence obligation, consideration could also be given to recognizing the implementation of adequate due diligence as a defense against liability for violations in connection with the subjects listed in the OECD guidelines. Once adequate due diligence has been carried out, liability for nonetheless occurring violations of, for example, human rights or the environment (abroad) could no longer be assumed. In the UK, such a defense exists in relation to liability for corruption and it has been proposed to introduce it for OECD due diligence as well.[125]

Regarding the WTO framework, no specific problems are foreseen here, unless the legal obligation would apply to all companies trading goods on the Dutch market or importing goods into the Netherlands. In that case, if foreign companies find it more difficult to comply with such an obligation, it could be seen as a barrier to trade.[126]

Chapter 5 elaborates on the question of what such due diligence legislation could look like.

4.2.4 (Compulsory) certification

It is conceivable to include in a statutory regulation that companies can meet (or be expected to meet) a statutory duty of care (in connection with OECD due diligence) by implementing a certification initiative (approved by the Minister), such as Fairtrade, UTZ/Rainforest Alliance or FSC, in one or more areas of the OECD guidelines. If such an option is taken as a starting point, it is in fact an elaboration of a due diligence obligation, subject to the obligation to report and contribute to recovery, and it applies to this under 4.2.3 to the extent mutatis mutandis, although in that case reporting and contributing to recovery are not included now that the certification does not cover it. A point of attention may be that the standards that are certified are not available (free of charge) to anyone, whereas statutory regulations are based on the principle that they are publicly available. With such a form of certification as an option to comply with a legal standard, the question could arise whether the standards to be certified should not also be publicly available. Non-publication is not simply inadmissible[127], but the starting point is now that legislation only refers to standards that are also publicly accessible. In many certification initiatives in the field of the OECD guidelines, this problem plays a limited role because they are publicly accessible (via the Internet).[128] Furthermore, in the question of whether legislation can be complied with by means of certification, the effectiveness of such initiatives to actually bring about a material change in behaviour will be relevant. After all, it is not obvious to assume that OECD due diligence is met when participating in ineffective initiatives. There is yet no generally accepted method for determining such effectiveness. As a result, there is a risk that OECD due diligence will be assumed too quickly or in too few cases, and a discussion may arise as to why one initiative is considered sufficient and others are not, while in the absence of a generally accepted methodology it may not be possible to sufficiently objectify why one initiative is sufficient and another not. In the European Directive on (mandatory use

[125] I. Pietropaoli and others, *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms*, BIICL 2017, p. 48 et seq. and in particular p. 51, consultation via https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf. See also L. Smit e.a., DG Just 2020, p. 110-112, where respondents to an EU survey note that this should not result in a 'tick the box' being sufficient to avoid liability. See L. Smit e.a., DG Just 2020, p. 111.
[126] Moreover, it is not inconceivable that a fair defence could be found for this (for example under Article XX GATT). However, within the time available for this study, it is not possible to go into this in more detail.
[127] HR 22 juni 2012, AB 2012, 212 m.nt. Van Ommeren (Knooble).
[128] Incidentally, this does not apply to ISO standards (such as the ISO 26000 standard, which is not certifiable) and environmental standards.

of sustainable) biofuels[129], in which such certification to determine whether the sustainability criteria have been met is permitted in Art. 18 paragraph 3, this point has been resolved by including in Art. 17 a number of minimum criteria with which a company must comply. When assessing whether a certification initiative, which is used to demonstrate compliance with the requirements, can be approved, the Commission assesses whether those minimum requirements are met.[130] As some of the initiatives used by companies in this context were not just biofuels, the initiatives did not always meet all the requirements. The Commission has, moreover, allowed some of the requirements to be demonstrated by implementing a certification initiative such as FSC or RSPO and carrying out additional audits for the other requirements.[131]

Such legal use of certification does, however, create the risk of increasing the number of (cheaper) certification initiatives that set lower requirements by moving closer to the minimum standard.[132] This may reduce the effectiveness of and participation in more effective (but also more expensive) sustainability certification. The fewer participants per initiative, the higher the cost of participation and the more competition between initiatives that can reduce their reliability.[133] Furthermore, such certification, especially if it becomes a de facto requirement for market access as a result of the legal re-certification, especially for smaller companies that are less able to spread the costs of certification, has an impact on fair competition.[134] Also, these (Western) economic operators who have already implemented such standards may have an advantage over parties who use other production methods that do not fit in well with the certification systems.[135] That too is a point to keep an eye on in this context. Another problem is the cooperation between public regulators and private certifiers. For example, a private certifier would like to grant six months to comply with the standard after it has been established that the standard has not been met, while the public supervisor might want to intervene more quickly. The exchange of information between the private supervisor and the public supervisor regarding violations identified by the private supervisor is also not always possible. Such forms of the use of certification therefore fit into the existing legal systems, albeit with the aforementioned caveats.

A further step could be to make certification a legal requirement. Leaving aside the fact that the same caveats apply to this as to the solution described above, this could also cause competition law problems. Because of the costs associated with certification, larger companies are generally better able to afford these costs than smaller ones. It is therefore considerably more difficult for smaller companies to gain access to the market through certification than it is for larger ones. It also means that the legislator in fact transposes private standards into legislation, whereas the standards as such have not been submitted to the States General and are sometimes, contrary to the publicity requirement in legislation, not public (i.e. they can only be obtained for a fee). This appears to be contrary to the principles of the parliamentary (democratic) constitutional state and, from that perspective too, does not fit in well with the current system.[136] Moreover, if certification leads to a restriction of competition, making it compulsory by law

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[129] Directive 2009/28/EC.
[130] See J. Lin, 'Governing Biofuels: A Principal-Agent Analysis of the European Union Certification Regime and the Clean Development Mechanism', *Journal of Environmental Law* 2012, issue 1, under 3.1 and 3.2.2.
[131] Lin, *Journal of Environmental Law* 2012, issue 1, under 3.2.2
[132] In relation to sustainable wood, see for example M.W. Scheltema, 'The need for an integrated comparison of the effectiveness of international sustainable forestry, coffee and cocoa initiatives', *Recht der Werkelijkheid* 2014, issue 3, p. 143
[133] M.W. Scheltema, 'Assessing effectiveness of international private regulation in the CSR arena', *Richmond Journal of Global Law & Business* 2014, issue 2, p. 299, 324 (Scheltema 2014 I).
[134] Scheltema 2014 I, p. 347.
[135] Scheltema 2014 I, p. 347.
[136] Compare Kamerstukken II 2018/19, 35 247, no. 3, p. 23; no. 4, p. 5-8.

will not make the restriction of competition lawful. On the contrary, this will result in the government itself also acting in violation of competition law.[137] In this respect, it seems necessary for the (delegated) legislator to make an independent assessment of whether it is in the public interest to lay down rules and to develop those rules itself.[138]

Whether (mandatory) certification contributes to the implementation of OECD due diligence obviously depends to a large extent on whether the standards used prescribe (parts of) such due diligence. If that is the case, certification can lead to certified companies carrying out such due diligence. Incidentally, certification sometimes leads to 'ticking the box' rather than actual implementation.[139] In the past, compulsory certification has given rise to discussions within the framework of the WTO in connection with sustainable timber. This therefore seems to fit in less well with the WTO framework.

4.2.5 Liability for environmental and/or human rights violations in the Netherlands or abroad

It is conceivable to include a liability provision in Dutch law for companies for environmental damage or human rights violations in the Netherlands and abroad, also for violations committed by subsidiaries.[140] In addition, it is conceivable to introduce liability for directors. In The Netherlands, however, a heavier threshold generally applies to directors' liability than to the liability of the company itself, because there must be a 'serious accusation' against the director.[141] Abandoning that requirement would be less appropriate in the Dutch system. It is conceivable, however, to demonstrate this liability in respect of serious culpable conduct by directors in connection with human rights or environmental violations by the company. In addition, it is, of course, conceivable that directors can be held liable under criminal or administrative law, for example on account of de facto management of a violation of the OECD Guidelines.

A liability provision is in line with Dutch law to the extent that it already contains a general liability provision (Article 6:162 of the Dutch Civil Code), which contains a general open standard. In particular, the social due diligence included in this article could also relate to due diligence with respect to human rights and the climate. A specific standard would therefore partly duplicate the existing standard. It is only with regard to violations that occur abroad that this could perhaps be (partly) different. For that matter, there is already criminal liability of directors for very serious forms of human rights violations by companies and, moreover, companies can be criminally liable if they profit from modern slavery, even if this takes place in other countries.[142] Moreover, in English (civil) case law, in the context of the question of the jurisdiction of the court, for which it is important whether a 'real triable issue' exists, it has already been assumed that liability for the acts or omissions of foreign subsidiaries is conceivable

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[137] For a general explanation of private rules, see Kamerstukken II 2018/19, 35 247, no. 3, p. 8-9.
[138] For example, Kamerstukken II 2018/19, 35 247, no 3, p. 7, 9-10, 14-15, 18; no 4, p. 7-8.
[139] For example see Scheltema 2014 I, p. 324-325
[140] The question is whether the risk of liability will lead to a change in companies' behaviour. An EU survey showed that the five most important reasons for companies to carry out due diligence do not lie in liability (reputation comes first). On the other hand, this is seen as an incentive by industry representatives and NGOs. See L. Smit e.a., DG Just 2020, p. 89.
[141] For example see, recent HR 17 January 2020, NJ 2020/51.
[142] For directors' liability, see for example M. Cupido, M.J. Hornman & W. Huisman, 'Holding businessmen criminally liable for international crimes; lessons from the Netherlands on how to address remote involvement', in: L.F.H. Enneking e.a. (red.), *Accountability, International business operations, and the law*, London: Routledge 2020, p. 170 et seq. and in particular p. 178-183; for criminal liability of perpetrators of modern slavery, see A-J Schaap, 'Legally binding duties for corporations under domestic criminal law not to commit modern slavery', in: L.F.H. En-neking e.a. (red.), *Accountability, International business operations, and the law*, Londen: Routledge 2020, p. 192 et seq.

if a worldwide code of conduct has been drawn up and is also enforced and the subsidiary acts in violation of that code.[143]

However, a specific private law liability standard for violations of the OECD guidelines abroad (also when these are committed by subsidiaries) seems to fit less well in the Dutch (and international) system. The starting point for the law applicable abroad to such attacks and violations is that the law of the country where the damage occurred applies regardless of where the event causing the damage occurred and regardless of where indirect consequences occur. In such cases, therefore, this will not be the law of the Nation and the specific liability provision would therefore often not apply.[144] This could now be solved by including in private international law regulations that Dutch law applies to such violations, but this does not relate to European private international law rules (the Articles 4 and 7 of the Rome II Regulation)[145] in this area and also seems to be difficult internationally because of the extraterritorial effect.[146] After all, such a regulation implies that Dutch law would apply to such infringements, and not the law of the country where the infringement took place. It would also mean that Dutch companies would have to comply with both Dutch and (possibly conflicting) human rights and environmental standards applicable in the country concerned. This also seems difficult from a practical point of view. Nevertheless, the Swiss proposal does contain such a rule that Swiss law would apply if private international law led to the application of the local law of the host country.[147] Furthermore, the question arises as to when a butter company is involved (there must be at least a 50% shareholding; this is often not the case because joint ventures are entered into with local companies) or is influence on management sufficient (and if so, how much) and might tend to outsource activities in order to avoid liability.[148] Moreover, many companies have (long) value chains in which environmental and human rights abuses also occur, which are not covered by the Swiss proposal. This would mean that liability would be borne in particular by (large) companies with projects (whether or not of subsidiaries) with a large footprint

[143] Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines [2019] UKSC 20. More on these claims in L. Smit e.a, DG Just 2020, p. 175-177.

[144] Article 4(1) Rome II Regulation. See also Enneking et al. 2016, p. 151; L. Smit e.a., Research for the European Commission, DG Just 2020, p. 278-279. Nevertheless, some see possibilities for the application of the law of the country of the company's registered office based on public policy exception. See A. Marx, C. Bright & J. Wouters, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries*, European Parliament 2019, p. 113, to be consulted via https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf. Vgl. L. Smit e.a., research fort he European Commission, DG Just 2020, p. 279-280.

[145] Regulation EC 864/2007. Article 4 provides that, in principle, the law applicable is the law of the place where the damage occurred and, specifically for environmental damage, Article 7 allows the claimant to choose between the place where the damage occurred or the place where the event giving rise to the damage occurred (in the case of transboundary environmental damage). See also L. Smit e.a., DG Just 2020, p. 278.

[146] This is, incidentally, what some people are proposing at European level. See Marx, Bright and Wouters 2019, p. 114; cf. L. Smit e.a, DG Just 2020, p. 280. Furthermore, this is not to say that legislation with extraterritorial effect is simply illegal. For a number of examples of EU legislation with a direct or indirect extraterritorial effect, see for example The Circle, *Towards a legal framework for a living wage*, Newcastle Upon Tyne: The Circle 2019, pp. 38-71, available at https://thecircle.ngo/wp-content/uploads/2015/11/Fashion-Focus-Towards-a-Legal-Framework-for-a-Living-Wage_Small.pdf. A characteristic of these rules, however, is that they are either requirements for goods imported into the EU or (management) acts and/or procedures of companies that take place in the EU or are also applicable in the EU.

[147] For example see L. Smit e.a., DG Just 2020, p. 280; D. Gaukrodger, *Business Responsibilities and Investment Treaties, Consultation Paper*, OECD Secretariat 15 januari 2020, p. 48, to be consulted via http://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf.

[148] It is also interesting that this distinction is not made in order to answer the question of who can be considered an investor in the context of investment agreements. See, for example, Gaukrodger 2020, p. 63-67.

abroad. Moreover, these problems could be partly alleviated by demonstrating liability for lack of litigation or OECD due diligence. However, this option is often of no help to those who suffer from human rights or environmental violations by subsidiaries or suppliers of companies, because the link between failure to conduct OECD due diligence and their disadvantage is often difficult to demonstrate. After all, it is often difficult to prove that, with adequate OECD due diligence, this disadvantage would not have arisen.

Particularly in the case of human rights violations, it can be difficult in general to prove that a Dutch company or a subsidiary is responsible for them. In that context, it is important to distinguish between seeking an injunction or prohibition to perform a particular act and seeking damages. Meanwhile, in the field of the environment and human rights, more and more claims based on wrongful acts are being brought, which only seek to bring about an injunction or prohibition and not damages.[149] The advantage is that plaintiffs in these cases do not have to prove a (causal) link between the breach of the standard and the damage and such proceedings may therefore be less costly than when damages are claimed. For example, it is conceivable that in proceedings only an order to carry out adequate OECD due diligence could be demanded, without any claim for damages. This limits the debate because there is no need to establish a causal link between the failure to carry out OECD due diligence and a specific violation (for example, the violation of human rights in a particular factory), nor to substantiate the damage.[150] However, one problem may be which interests are protected by (a legal arrangement to) carry out OECD due diligence. This is relevant in relation to Section 6:163 of the Dutch Civil Code (the relativity requirement). It is likely that this requirement has been met for NGOs that do not act specifically for injured parties, but claim such a ban or injunction from a general interest perspective. This would be made more difficult if the Consumers' Association, in the context of representing the interests of consumers, were to demand compliance with the legislation and, even more so, if competitors claiming to have been harmed in their competitive position were to carry out proper OECD due diligence.

More generally, however, (more far-reaching) corporate liability often leads to defensive behaviour, which does not promote openness about possible problems and the development of best practices in cooperation with other stakeholders and the implementation of OECD due diligence.

Few specific problems seem to arise here from the WTO framework.

4.2.6 Obligation for governments to procure responsibly

It is conceivable for (Dutch) governments to include a legal obligation to impose requirements in the field of sustainability, the environment and human rights in the context of tenders. Such a requirement fits in well with the current policy of the central government to set such requirements in tenders and also with the requirements set by lower authorities in this area.[151] A legal regulation could possibly partially unify the different approaches of different governments, particularly in the area of human rights.

In the European context, too, more and more attention is being paid to sustainability in connection with tendering, so this option also fits in with this. Whether it also leads to the implementation of OECD due

[149] For example see HR 20 December 2019, AB 2020, 24 m.nt. Backes and Van der Veen (Urgenda).
[150] However, the obstacles identified in 4.2.17 may still exist.
[151] For criteria used in this area, see for example the PIANOO website to be consulted via https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen-mvi-duurzaam-inkopen/productgroepen.

diligence is more difficult. So far, procurement, particularly in the area of human rights and climate change, still imposes limited verifiable requirements, which can lead to exclusion or score points in the context of award criteria. In addition, there is still little clarity as to how these requirements can be formulated in such a way that compliance can also be verified and actually monitored. The impact of mandatory criteria in procurement in the area of OECD due diligence therefore appears to be limited for the time being. Nonetheless, there is great potential here if the OECD due diligence requirements can lead to exclusion in tenders and are formulated in such a way that they and their compliance can be monitored. We do not foresee any particular problems in the WTO framework.

4.2.7 Corporate governance requirements

It is conceivable to lay down legal standards with regard to OECD due diligence concerning the way in which these issues should be dealt with in corporate governance. Such requirements are in line with already existing legislation. The Corporate Governance Code (the first version dates from 2008, the current version from 2016) has for some time paid attention to human rights and OECD due diligence in a broader sense. This code is already anchored in existing legislation in the sense that the governmental decree (AMvB), based on Section 2:391 subsection 5 of the Dutch Civil Code[152], refers to this Corporate Governance Code as the line to be followed in the reporting in the management report.[153] However, it would be conceivable to anchor such obligations more broadly by, for example, requiring the Board of Management to take certain decisions or sign certain statements, as was done for the report under the UK Modern Slavery Act. It is also conceivable to require that procedures exist within a company that ensure that the relevant sections within a company are involved in (developing policy for) OECD due diligence (e.g. in addition to the sustainability department, the legal department).

In a European context, such requirements do not seem to encounter problems, but this option has not already been implemented or proposed. Because the current Dutch Corporate Governance Code only sets very general requirements in the field of OECD due diligence, it seems to contribute only to a limited extent to the implementation of OECD due diligence. Within the WTO framework, few specific problems seem to arise here.

4.2.8 Prescribing the use of certain technologies

A problem with regard to OECD due diligence is that value chains, in particular, are often lacking in transparency. It is therefore not easy for companies to get to grips with and carry out OECD due diligence in those value chains, particularly because good quality and reliable information on what is happening in them is not easy to obtain. New technologies, such as blockchain and artificial intelligence or a combination of these[154], can contribute to greater transparency in this area.[155] In part, such information is already being generated through certification and (third-party) audits, but these provide more of a snapshot, while the technologies mentioned enable continuous monitoring and can also be more fraud-

[152] AMvB of 29 August 2017, Stb. 2017, 747.
[153] For example with further references Dam van, C., ‘Corporate governance en respect voor mensenrechten’, in: M. Lückerath-Rovers e.a. (red.), Jaarboek Corporate Governance 2018-2019, Deventer: Kluwer 2018, par. 8.2, p. 99-100.
[154] For example see https://twitter.com/RspSrcngLedger.
[155] For a further elaboration of the usefulness (and limitations) of blockchain technology in the OECD area, see due diligence OECD, *Is there a role for blockchain in responsible supply chains?*, Paris: OECD 2019, consultation via http://mneguidelines.oecd.org/Is-there-a-role-for-blockchain-in-responsible-supply-chains.pdf.

resistant. However, the legal prescription of the use of these technologies encounters similar objections as statutory certification, in particular because of the restriction of market access for companies which, because of their size, for example, have less access to such technologies and because the legislator is faced with the problem of having to consider which technologies are compliant, where the prescription of certain technologies can distort the market and therefore only describe what is compliant in a technical sense. However, such technical knowledge is not available to the legislator and may also be subject to rapid change. The technical requirements in legislation can therefore quickly become obsolete.

In the European context, there is talk of an important role for new technologies in the context of sustainability (for example, in the European Commission's Green Deal), but making them compulsory does not appear to be an issue. The WTO framework can also oppose this, in a similar way to certification. To the extent that such technologies help companies to carry out OECD due diligence, it may contribute to the implementation of OECD due diligence.

4.2.9 Establishing a regulatory body for OECD due diligence

It is conceivable to establish by law a public regulator to monitor compliance with OECD due diligence by companies. However, without the OECD due diligence itself being required by law, such a supervisor will not be able to impose sanctions on companies that do not carry out OECD due diligence or do not carry out adequate OECD due diligence. However, such a regulator may draw up guidelines on what is considered responsible and adequate OECD due diligence and discuss them with companies. Those guidelines could also be used by governments and public procurement, as a requirement for access to trade missions and, for example, in the context of export credit or subsidies. Surely this would give these guidelines a certain binding effect. In addition, this regulator could (to the extent permitted by law) also rank companies in a public benchmark. This could also have an incentive effect.

To a certain extent, such a regulator already fits into the Dutch regulatory landscape because the OECD Guidelines for Multinational Enterprises oblige Member States, including the Netherlands, to establish a National Contact Point (NCP) whose tasks include promoting the OECD Guidelines and encouraging compliance with them (in a general sense) in addition to dealing with specific instances. However, the Dutch NCP has not (yet) developed general guidelines or best practices on the implementation of the OECD guidelines and cannot do so because monitoring is not part of its mandate.

In a European context, such supervision does not seem to encounter problems, since, for example, in the context of the Conflict Minerals Regulation, a national regulator should already be established to monitor due diligence in that area. However, it has not yet been proposed that a European supervisor should be set up in this area. It is clear that such a supervisor could have an impact on the implementation of OECD due diligence. However, as this is not a legal obligation and the regulator cannot sanction compliance to a limited extent, the question is whether this will be effective. It will also depend, in particular, on the way in which supervision is organized. The WTO framework does not seem to raise any particular problems here.

4.2.10 Prohibition of imports of goods without OECD due diligence

A ban could be introduced in the Netherlands on importing goods or offering services without (adequate) OECD due diligence having been carried out. Such systems are not unknown and are used, for example, in the US and the EU with regard to legally harvested timber (and from 1 January 2021 also for conflict minerals).[156] In the EU, a somewhat similar system applies to illegal fishing (i.e. not involving OECD due diligence) which affects countries that do not comply with the rules to prevent illegal, unrecorded and unregulated fishing, rather than goods. After a yellow card is issued, dialogue is entered into with those countries, and after a red card, imports of fish from those countries into the EU are banned.[157]

Incidentally, the timber and conflict minerals regulatory frameworks do not cover all aspects of OECD due diligence, but the legal origin of timber (Timber Regulation) and the prevention of child labour and forced labour (regulations in the US). The Conflict Minerals Regulation does cover all aspects of OECD due diligence relating to human rights violations in the extraction of specific minerals in designated conflict zones. A certain parallel can also be found in the Unfair Commercial Practices Directive between commercial parties in agribusiness chains, which prohibits, for example, late payments, denial of written agreements and untimely cancellations in and outside Europe.[158] Such practices can also lead to environmental and human rights abuses, including the exploitation of workers. In principle, such a ban on the import of goods (and the provision of services) for which no OECD due diligence has been carried out fits in with existing regulations, although the extraterritorial effect, particularly in the WTO context, is not uncontroversial. This is not to say that legislation with an extraterritorial effect is simply not permissible.[159] A characteristic of existing rules with extraterritorial effect, however, is that they are either requirements for goods imported into the EU, or (management) actions and/or procedures of companies that take place in the EU or are also applicable in the EU. To a lesser extent, however, this applies to the regulation in the field of conflict minerals, since it focuses on what happens outside the EU. Apart from WTO objections (which could lead to complaints and countermeasures), a disadvantage of such regulation in the Netherlands is that it also applies to imports from other EU Member States, which distorts interstate trade and is in principle contrary to the free movement of goods and services. Therefore, a justification as referred to in Article 36 TFEU will have to be found in an overriding reason relating to the public interest. The question is whether this can be found for the Netherlands in problems that arise mainly outside the EU. It is therefore more likely that such regulations would be introduced at EU level.

Such a ban would appear to be able to contribute to the implementation of OECD due diligence, certainly if compliance with the ban can be monitored effectively.

4.2.11 Tax measures

The conduct of OECD due diligence could be encouraged by giving tax incentives to companies carrying out such due diligence. For example, in the area of VAT, a rebate could be applied to products or services for which OECD due diligence has been carried out, which would make these products (which might otherwise be slightly more expensive) cheaper. Also, companies that have implemented OECD due diligence at the company level and in their value chains could receive tax benefits, e.g. corporation

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[156] With regard to timber, this is EU Regulation 995/2010 and, with regard to conflict minerals, EU Regulation 2017/821. The latter regulation is based on the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf. On the Timber Regulation, see for example T. Bartley, 'Transnational governance and the re-centered state: Sustainability or legality', *Regulation & Governance* 2014, issue 1, p. 95 et seq.
[157] On that subject see L. Smit e.a., DG Just 2020, p. 281.
[158] Directive 2019/633.
[159] For some examples of EU legislation with a direct or indirect extraterritorial effect, see for example The Circle 2019, p. 38-71, available at https://thecircle.ngo/wp-content/uploads/2015/11/Fashion-Focus-Towards-a-Legal-Framework-for-a-Living-Wage_Small.pdf.

tax. The question is how much the latter will be an incentive for large multinationals if they pay little corporation tax in the Netherlands. The former, of course, will also provide an incentive for them. In itself, tax measures to stimulate sustainable behaviour are appropriate in the Dutch system. For example, such measures have been applied to electric vehicles. However, this option implies that the government (collectivity) takes over (part of) the costs of OECD due diligence of companies. The problem with this solution is that the Tax and Customs Administration must check whether sufficient OECD due diligence has been carried out (also abroad). The question is whether it has sufficient capacity, knowledge and budget to actually do this. This option therefore seems somewhat susceptible to fraud, especially if there is insufficient capacity and knowledge to check compliance. This raises the question of whether it will contribute much to the implementation of OECD due diligence.

Now that the Netherlands is, in principle, still able to adopt its own tax measures, neither the European (nor the WTO framework) seems to oppose this. In the European context, however, OECD due diligence does not seem to be directly concerned with tax measures.

4.2.12 Ombudsman

A legal regulation could be introduced establishing an ombudsman for (complaints about) OECD due diligence and giving companies the possibility to request documents (through the courts) from companies about carrying out OECD due diligence, which companies are also obliged to provide. It is possible that the Ombudsman's complaints could also have consequences in areas such as procurement, trade missions, export credit or subsidies. Canada has partially introduced such a system. It would partly fit into the Dutch system where the NCP in fact already performs part of this function in the context of specific instances. The Dutch central and local authorities could, as Canada does, also draw consequences from the outcome of such specific instances in the sense referred to above. However, the Netherlands NCP does not have the possibility (through the courts) to request information from companies about the conduct of OECD due diligence which companies are also obliged to provide. This may also fit less well in a model in which the NCP also mediates in order to bring parties to an agreement.

An obligation for companies to provide information to a supervisor fits in with the Dutch legal system in itself. For example, Article 5:17 of the General Administrative Law Act contains such a general power for supervisors appointed by law. In principle, they can exercise this power without judicial intervention, although subsequent review by the court is possible on the grounds of unlawful acts by the supervisor (before the civil court) or in the context of the sanction imposed as a result of the information obtained (before the administrative court). The position of supervisor is somewhat different, however, since a supervisor also supervises on his own initiative and is (precisely not) dependent on complaints. Therefore, combining such supervisory powers with the ombudsman function does not seem obvious. Nevertheless, for the National Ombudsman, who deals with complaints against the central government, the provision of information is regulated in Article 9:31, paragraphs 3 and 4 of the General Administrative Law Act (Awb), which stipulates that, upon written request, information must be provided to the person lodging the complaint by the central government (insofar as it relates to that person), unless there is a justified interest in it not being provided, or only to the Ombudsman. It would be conceivable to follow this line, which might, incidentally, involve more cases in which the complainant does not receive any information (but only the Ombudsman), on the grounds that the information is company confidential. Moreover, it is not self-evident that the way in which an ombudsman supervises the (national) government also applies to companies, although the OECD due diligence does, of course, overlap with the general interest of a clean environment and the prevention of human rights violations.

Although European law does not provide for such an ombudsman for OECD due diligence, it does not seem to oppose it. The same applies to the WTO framework. Whether a similar ombudsman contributes to the implementation of OECD due diligence depends, as is evident from the above, to a large extent on the type of powers that the ombudsman is given and the consequences that the government attaches to the results of the Ombudsman's inquiries.

4.2.13 Declaring IRBC covenants generally binding

One option could be to declare the current IRBC covenants (insofar as they are sufficiently representative in the sense of participants from the sector) universally binding. This has a parallel in Dutch legislation to the extent that, pursuant to Article 2 of the Act declaring provisions of collective agreements (WAVV) to be generally binding and non-binding, this can be done with a sufficiently representative collective agreement (for a limited period of time). However, pursuant to Section 4, subsection 1, of the WAVV, only certain parties (employers or trade unions that are party to the Collective Labour Agreement) have the opportunity to request this. However, this regulation relates to very specific matters that cannot simply be transplanted to OECD due diligence. However, in connection with waste substances, Article 15.36 of the Environmental Management Act does contain the possibility of declaring an agreement on a waste management levy generally binding on those who import or market a product, substance or mixture in the Netherlands. Based on Article 15.37 of the Environmental Management Act, such a request can only be made if the persons or representative organizations of those persons constitute a substantial majority of the parties who place the product, substance or mixture on the market or import it into the Netherlands. An arrangement similar to the Environmental Management Act is conceivable for IRBC covenants in certain sectors, with the restriction that a significant part of this sector concerned must be a party to the covenant. It should be borne in mind, however, that Article 15.36 of the Environmental Management Act only refers to a waste disposal contribution and is therefore relatively easy to regulate and monitor. OECD due diligence is, by its nature, considerably more complex and difficult to monitor. Moreover, in the field of the Environmental Management Act, there are already public supervisors for monitoring compliance. Declaring IRBC covenants generally binding only, at least in the absence of public control, therefore does not seem to fit in with the current system.

The IRBC covenants are a model which, in addition to the Netherlands, is only applied in Germany. As such, they do not fit in very well with the European approach. This is why it is even more true of declaring them generally binding. The WTO framework can also oppose this because it seems more difficult for foreign parties to participate in such covenants. This could therefore constitute a barrier to trade. Declaring them universally applicable will contribute to the implementation of OECD due diligence throughout the market to the extent that OECD due diligence is part of the agreements made in the Covenant. However, there is a risk that very pro-active parties will be hampered in their efforts to achieve even better due diligence practices by more reactive parties only participating in the Covenant because it is required by law.

4.2.14 Extending the unfair commercial practices regime to OECD due diligence

It is conceivable to extend the EU Directive on unfair commercial practices to include OECD due diligence. This can be done in two ways. Firstly, the obligation to provide information to consumers on the conduct of OECD due diligence and the failure to do so (under circumstances) could be regarded as an unfair commercial practice. This option has been discussed in section 4.2.2 above.

In addition, it is conceivable that selling goods or providing services to consumers without carrying out OECD due diligence could be regarded as an unfair commercial practice as such. Depending on the type of defects in the OECD due diligence, this would be in line with existing legislation. For example, Article 6:193c (2c) (b) of the Dutch Civil Code states that it is considered misleading for a company to indicate that it is bound by a certain label/certification initiative, but does not comply with it.[160] Furthermore, pursuant to Section 6:193g under a, b and d of the Civil Code, it is always considered misleading to state that a company is participating in a code of conduct (such as an 'eco-label') when in reality this is not the case, to use a label when no permission has been obtained for this, or to suggest that the requirements of such a label have been met when this is not the case.[161] However, failure to carry out OECD due diligence as such goes much further, with compliance being less easy to verify than, for example, whether a company is a member of a particular label. There is also the question of whether the GCM, which pays particular attention to consumer interests in this context, has the knowledge, capacity and budget to also check compliance with such an obligation. In addition, one disadvantage of this option, over and above the legal obligation to carry out OECD due diligence, is that it only applies to companies that supply to consumers and therefore do not reach a large part of the market/sectors.

It should also be pointed out in this connection, as explained in point 4.2.2 above, that the (European)[162] background to the regulation of unfair commercial practices is, above all, the prevention of economic disadvantage for consumers.[163] The texts of Article 6:193b and d of the Civil Code do not contain this restriction and speak of a restriction to make an informed decision about the purchase (which means that the product or service would otherwise not have been purchased or accepted).[164] As sustainability becomes more and more important for consumers in their purchasing decisions, in the light of the texts of Articles 6:193b and d of the Civil Code, it is therefore necessary to rule out unfair commercial practices relating to sustainability/human rights. The scheme referred to above could be in line with this.

In the WTO context, no problems seem to arise here, unless it would be more difficult for foreign companies to comply with the regulations. In itself, this option could lead to the implementation of OECD due diligence, but, as indicated above, it only reaches part of the market/sectors.

4.2.15 Extension of the scope of the law for sustainability initiatives

On the basis of Article 2 of the proposal for the Room for Sustainability Initiatives Act, a governmental decree may lay down rules in response to a request to this effect in the interests of sustainable development, which, according to Article 2(2), refers to the reduction of greenhouse gas emissions, sustainable energy production or energy conservation and animal welfare.[165] Article 2(3) of the decree allows these

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[160] See Van Nispen, in: *GS Onrechtmatige daad*, art. 193c, aant. 10. However, the question is still being raised as to whether this can only be a code that (partly) includes obligations towards consumers or other codes of conduct/labels. The latter interpretation seems to prevail. See Van Nispen, in: *GS Onrechtmatige daad*, art. 193c, aant. 10.

[161] Insofar as there is a trademark right to the 'eco-label', the owner of the label will also be able to take action under trademark law against this use. See Van Nispen, in: *GS Onrechtmatige daad*, art. 193d, aant. 4.

[162] Directive 2005/29/EC (in particular Article 6 of that Directive). See also Van Nispen, in: *GS Onrechtmatige Daad*, art. 193c, aant. 1.

[163] Article 5 of the Directive therefore speaks of disrupting materially the economic behaviour of consumers. See Kamerstukken I 2007/08, 30 928, C, commentary on article 193b.

[164] Kamerstukken I 2007/08, 30 928, C, commentary on art. 193b.

[165] Kamerstukken II 2018/19, 35 247, no. 2.

areas to be extended to other areas. A request must be able to demonstrate sufficient support under Article 3 and must include, inter alia, the sustainable development effects of the rules to be set, the market effects and other effects of the rules to be set, as well as the way in which market participants intend to contribute to the monitoring of compliance. According to Article 4(1), when assessing the request, the Minister shall take into account the degree of feasibility and enforceability, the existence of less intrusive alternatives that achieve equivalent sustainable development and the relationship between the effects of the rules to be set and the sustainable development to be achieved. Article 4(2) also stipulates that the rules may not conflict with treaties or other decisions of organizations under international law and/or with higher rules. According to Article 8, an exemption from the rules is also possible if an actor can demonstrate that he is demonstrably achieving at least as much sustainable development. In addition, the rules under Article 10(1) apply for five years and then lapse by operation of law, unless the five-year extension option of Article 10(2) is chosen.

Therefore, if this Act is in place, an governmental decree could also provide that it applies to the other OECD subjects due diligence. Of course, an important difference with a legal act requiring OECD due diligence is that the market or a sector, at least a sufficiently representative part of it, must itself request the establishment of rules (and in doing so it must also provide a sound justification under Article 3). Moreover, the market itself must also contribute to supervision and enforcement, and the establishment of a public oversight body is less obvious. This option is particularly interesting if it is left to the market or certain sectors to determine whether rules are necessary and enforcement is also left to the market or certain sectors. However, if there is insufficient support in the market or sector for such an initiative, it may result in no regulation being put in place.

This option fits in with European law in the sense that it seeks to solve the problems that arise with (European) competition law in the implementation of sustainability initiatives by the market. This solution is not proposed in Europe itself. The WTO could oppose it because it may be more difficult for foreign companies to join such initiatives. To the extent that these initiatives require OECD due diligence, they contribute to their implementation. However, it depends on how they are monitored (private or public only) whether and to what extent this will be done in practice.

4.2.16 Approval of (production) facilities

An option could also be that a legal regulation stipulates that companies (Dutch or even companies supplying products or services on the Dutch market) may only supply goods produced on certain (production) facilities approved by the Dutch government. Such a regime would, of course, only provide relief if all market participants could reasonably be required to purchase from such production facilities. This is certainly not the case in all sectors/products. An example that touches on this is the EU Regulation on the recycling of EU-flagged ships.[166] This regulation requires that EU-flagged ships can only be dismantled in EU-approved (EU listed) shipyards. It is also relatively easy to circumvent the regulation by changing flags. However, this seems to be less easy in the case of production sites, which are located in a particular country or area for which approval is required, and which are not always easy to change, as is the case with raw materials. It is, of course, conceivable, as is a risk in the case of conflict minerals, that fraud may occur with the origin of goods or raw materials. In principle, the European Commission only includes environmental standards in this approval in the context of ship recycling, but this could

[166] Regulation (EU) 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling, and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC (OJEU 2013, L 330/1).

be extended to other OECD due diligence subjects (for example, working conditions at some dismantling sites are also poor).[167] Such legislation could be conceivable with regard to certain raw materials mined in large mines. Such legislation could then be used in addition to the conflict minerals regulation for companies based in the Netherlands that import and/or use sound raw materials. Of course, this option would entail considerable implementation costs for the Dutch authorities, as the production sites would have to be visited and monitored. The costs of OECD due diligence are then (largely) borne by the government.

Dutch law does not yet have any regulations that implement the approval described above, and to that extent this system is less in line with Dutch law. It may contribute to the implementation of OECD due diligence, especially at the (approved) production facility itself. However, this applies to a lesser extent to other actors in the chain.

4.2.17 Adjustments in procedural law and/or private international law

In addition to, or in combination with, the options mentioned above, options could also be considered to provide private actors with tools to facilitate OECD due diligence procedures. This could be done by means of adjustments in the area of civil procedural law.[168] For example, allowing legal aid providers to claim, in the event of a favourable judgment, a percentage of the damages obtained, whereas in the event of a negative judgment, applicants would not have to pay ('contingency fees'), reversal of the burden of proof in relation to carrying out adequate due diligence, and specific provisions on witness protection, sharing of costs and access to information.[169] However, it is questionable whether such adjustments will lead to more readiness to litigate, partly because it may be difficult for litigants in other countries to find their way to Dutch courts.[170] Moreover, litigation on the basis of part of the damages obtained does not fit in well with the Dutch system, where this is only permitted on a trial basis in the case of personal injury. In the field of private international law, too, plaintiffs in such cases may face the necessary problems in relation to the competence of the Dutch court and the applicable law.[171] With respect to jurisdiction, it also applies that the Dutch court has already assumed jurisdiction in cases concerning the OECD guidelines, in particular the cases concerning environmental pollution in Nigeria, and adjustment is not necessary to that extent.[172] As discussed under 4.2.5 above, such adjustments with respect to the applicable law are less easy to achieve. Moreover, these adjustments are mainly relevant to the liability option discussed above under 4.2.5.

[167] Incidentally, a number of banks have drawn up standards for ship financing in which scrapping in responsible yards is encouraged and in which the human rights aspect is also included. See the Responsible Ship Recycling Standards, p. 4, which can be consulted via https://www.nordea.com/Images/33-248171/Nordea%20RSRS.pdf.
[168] For the procedural problems that complainants may face, see for example Enneking and others, 2016, p. 196 et seq.
[169] On the last three possibilities relating to human rights arbitration, see also The Hague Rules, Articles 32, 33 and 53, which can be consulted at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.
[170] However, in the UK, where such contingency fees are permitted, law firms are able to find a number of litigants in the area of human rights and environmental violations.
[171] See section 4.2.5 and further examples, e.g. L. Smit e.a., DG Just 2020, p. 278-280; Marx, Bright and Wouters 2019; Enneking 2016, p. 141 et seq.
[172] Gerechtshof Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3587. However, the Supreme Court (HR) has not yet ruled on this matter. Incidentally, this is not unique to this case. Under Article 8 of the Brussels I-bis Regulation or Article 7 of the Dutch Code of Civil Procedure, the Dutch court more often assumes jurisdiction for foreign (subsidiary) companies if there is a sufficient link between the claim against the Dutch and foreign defendant. See for example HR 29 March 2019, NJ 2019/259 m.nt. Strikwerda; Hof Amsterdam 14 August 2018, ECLI:NL:GHAMS:2018:2951.

This option does not seem to fit in well with European law, which, as discussed in the context of the liability option, relies on other rules, in particular with regard to the applicable law. The WTO framework does not seem to raise any particular problems here. As set out in Chapter 3 above, it is likely that such adjustments will only facilitate proceedings against companies and thus the implementation of OECD due diligence in occasional cases. Therefore, a more general contribution to the implementation of OECD due diligence does not seem to offer this option.

Adjustments to civil procedural law and private international law in order to promote OECD due diligence require further research which, however, falls outside the scope of this research, partly because it does not concern (new) legislative options, but partly adjustment of existing regulations and also changes that can be shaped in case law.

4.2.18 Regulating unfair business-to-business commercial practices

Part of the human rights/workplace conditions/environmental impact of companies can be caused by contractual requirements agreed with suppliers, such as options for late payment, the ability to change numbers and specifications at short notice, discounts on goods and termination of all contracts if a contract is found to be deficient. It is conceivable to regulate such practices.[173] In particular, these are commercial practices outside the Netherlands and therefore these rules should apply to all Dutch companies, including when they conclude contracts with foreign companies. Such regulation fits within the Dutch (European) framework, now that this approach has been taken in Directive EU 2019/633 on unfair commercial practices between companies in agricultural supply chains. This Directive applies both to contracts between businesses in the EU and between a business in the EU on the one hand and a business outside the EU on the other hand. Article 3 of this Directive sets out a number of commercial practices which are considered unfair, including late payment. The Directive also provides for a public oversight body. Now that this directive also must be transposed into Dutch legislation, it is conceivable to include a number of additional practices in Dutch legislation that contribute to human rights/labour conditions/environmental impact of companies, examples of which have been mentioned above. The directive does not assume full harmonization and therefore allows this, insofar as the additional provisions are in line with European law. It is also conceivable that more emphasis could be placed on shared responsibilities between purchasers and suppliers in the area of human rights, working conditions and the environment and that a joint obligation is implemented to contribute to remedy, insofar as the purchaser has contributed to this (partly due to commercial practices). The latter is not included in the aforementioned directive and therefore does not automatically fit into the system chosen in the directive. It also seems more complicated to legislate, apart from contractual clauses, on how such shared responsibility should be implemented. However, a supervisor could, of course, discuss this with the supervised persons within the framework of supervision.

This directive will have to be implemented in Dutch law (and in the other EU Member States) and, to that extent, this option is also in line with it. The WTO does not seem to raise any specific problems with regard to this option. The implementation of OECD due diligence is promoted to a limited extent as it only concerns contractual provisions and OECD due diligence is not only contractual but covers a much wider range of activities (although at present it is often not recognised that good contractual

[173] See about the current contractual systems around OECD due diligence and opportunities for improvement, e.g. Scheltema 2020, p. 259-278.

mechanisms can contribute to good OECD due diligence and, perhaps more importantly, bad contractual mechanisms can seriously undermine it).

4.2.19 Summary table

A table summarising the above is given below. The table indicates whether the option (i) is in line with Dutch and (ii) EU law, or (iii) could raise similar problems with the WTO by implementing such an option, (iv) to what extent the option is in line with the principle that companies should carry out OECD due diligence, and finally whether (v) the option has been proposed or is being applied abroad.[174] The extent to which an option conforms to or is consistent with any of the subjects listed under (i)-(v) is indicated by -- (bad/non) - (moderate/limited) +/- (reasonable/in a number of cases) or + (well/ generally applied).

Option	**Dutch law**	**EU law**	**WTO**	**OECD dd**	**Foreign countries**
Reporting	+	+	+	-	+
Product info	+	+/-	+/-	+/-	--
DD obligation	+	+	+/-	+	+
Mandatory certification	-	+/-	-	+/-	--
Liability	--	--	+/-	-	-
Procure responsibly	+	+	+	+	-
Corporate governance	+	+/-	+	+/-	+
Prescribe technology	-	-	-	+	--
Supervisor OECD DD	+	+/-	+	+/-	--
Prohibit import	+/-	+/-	--	+	+
Tax measures	+	+/-	+	+/-	-
Ombudsman	+/-	+/-	+	+/-	+
Declaring IRBC covenants generally binding	+/-	--	-	+/-	--
Expanding misleading commercial practices	+	+/-	+/-	+/-	--
Extension of the law on sustainability initiatives	+/-	+/-	+/-	+/-	--
Approval of production facilities	+/-	+	-	+/-	--
Changing of procedural law	+/-	-	+/-	-	--
Unfair business practices	+	+	+	+/-	+

4.3 Exploration of the impact of legislative options on the OECD due diligence cycle

As explained above, the table below explores the impact of the options discussed above on the various (6) elements of the due diligence cycle. Incidentally, the question of what qualifies as an impact on the due diligence cycle depends on the objective of legislation. If the objective of legislation is that every company has developed policy for carrying out OECD due diligence and implements this plan, impact will mainly be related to whether such policy has actually been developed and implemented. However,

174 The latter insofar as the legislative options identified in the annex to this report are used or proposed abroad. If there is no use of a specific option identified in the annex, the table below indicates that that option is not used abroad.

even if this has been done, it does not necessarily mean that a change in behaviour is actually taking place within a company (there is a risk of ticking-the-box exercises) and therefore changes are taking place on the ground in the areas where this is relevant. The diagram below assumes that the aim of legislation is also to encourage such behavioural change as far as possible.

Legislative options	**Embedding in policy and management systems**	**Identify and assess negative impacts**	**Stop, prevent or mitigate negative impact**	**Monitor effectiveness of measures**	**Communicate and report**	**Provide remedial action**
1. Reporting on RBC (for large companies).	**Impact** if the report relates to the existence of policies and their content, where external pressure can be exerted if the policy is inadequate and the company is known to a wider public.	**Limited**, only if the report contains individual RBC problems that may cause external pressure, the assessment was inadequate and the company is known to a wider public.	**Limited**, only if the report contains individual RBC problems that may cause external pressure, the assessment was inadequate and the company is known to a wider public.	**Limited**, only if the report contains individual RBC problems that may cause external pressure, the assessment was inadequate and depended on the public interaction of the company.	**Impact** Advantage: third parties can follow the progress. Disadvantages: Costs for (smaller) companies, no (mandatory) uniform reporting framework and therefore difficult to compare, impact on human rights difficult to measure, largely only information about company and not about customers or supply chain partners (can be confidential).	**Limited**, only if the report contains individual RBC problems that may cause external pressure, the assessment was inadequate and the company is known to a wider public.
2. Information on products for consumers.	**Impact** as a company sells products in consumer markets and is known to a wider public, because there is an incentive to improve policies if consumers are inclined to buy more responsible products and the label reflects the performance of the producer.	**Impact** as a company sells products in consumer markets and is known to a wider public, because there is an incentive to improve the policy if consumers are inclined to buy more responsible products and the label reflects the producer's performance.	**Impact** as a company sells products in consumer markets and is known to a wider public, because there is an incentive to improve the policy if consumers are inclined to buy more responsible products and the label reflects the producer's performance.	**Impact** as a company sells products in consumer markets and is known to a wider public, because there is an incentive to improve the policy if consumers are inclined to buy more responsible products and the label reflects the producer's performance.	**Impact** Benefits: third parties can buy products from better performing companies if companies sell products in consumer markets and are known to a wider audience. Disadvantages: Costs for (smaller) companies to tackle problems, human rights impact difficult to measure, generally only information about company and not about customers or supply chain partners (may be confidential).	**No impact.**
3. Mandatory due diligence.	**Impact** depends on the type of supervision Benefit: unlike reporting requirements, this approach requires effective implementation	**Impact** as an external supervisor is able and willing to monitor, more challenging outside the Netherlands. Benefit: in contrast to re-	**Impact** depends on the type of supervision Advantage: unlike reporting obligations, this approach requires actual	**Impact** depends on the type of supervision Advantage: unlike reporting obligations, this approach requires actual	See *Report on RBC.*	**Limited**, external supervisor must be able and willing to supervise and it is difficult to draw up rules for an adequate remedy.

	Disadvantage: expensive, especially for smaller companies, practical obstacles, alignment with government policy, legislation and enforcement in countries where companies come from or where they are active (benchmark of countries and position improving due diligence?) and can drive companies out of more high-risk countries/areas.	porting requirements, this approach requires actual implementation. Disadvantage: expensive, especially for smaller companies, practical obstacles, alignment with government policy, legislation and enforcement in countries where companies come from or where they are active (benchmark of countries and position improving due diligence?).	implementation. Disadvantage: expensive, especially for smaller companies, practical obstacles, alignment with government policy, legislation and enforcement in countries where companies come from or where they are active (benchmark of countries and position improving due diligence?) and can drive companies out of more high-risk countries/areas.	implementation. Disadvantage: expensive, especially for smaller companies, practical obstacles, alignment with government policy, legislation and enforcement in countries where companies come from or where they are active (benchmark of countries and position improving due diligence?) and can drive companies out of more high-risk countries/areas.		
4. Mandatory certification certificering if available.	**Impact** Benefit: Certification not only monitors performance, but can also help implement best practices. Disadvantage: not available in all sectors or for all suppliers, costly, risk of 'race to the bottom' if requirements are removed by certification bodies to attract customers, certificate may not reflect actual performance.	**Impact** Benefit: Certification not only monitors performance, but can also help implement best practices. Disadvantage: not available in all sectors or for all suppliers, costly, risk of 'race to the bottom' if requirements are removed by certification bodies to attract customers, certificate may not reflect actual performance.	**Impact** Benefit: Certification not only monitors performance, but can also help implement best practices. Disadvantage: not available in all sectors or for all suppliers, costly, risk of 'race to the bottom' if requirements are removed by certification bodies to attract customers, certificate may not reflect actual performance.	**Impact** Benefit: Certification not only monitors performance, but can also help implement best practices. Disadvantage: not available in all sectors or for all suppliers, costly, risk of 'race to the bottom' if requirements are removed by certification bodies to attract customers, certificate may not reflect actual performance.	**Limited**, as certificate is public, but no results of evaluation by certifying body. However, standards that have been certified may be public.	**No impact**, since certification generally does not assess whether a remedy is provided.
5. Liability for subsidiaries and for causing or contributing to human rights violations/environmental damage	**Limited**, indirect if liability would be an incentive to act (which is disputed and depends, among other things, on the number of	**Limited**, indirect if liability would be an incentive to act (which is disputed and depends, among other things, on the	**Limited**, indirect if liability would be an incentive to act (which is disputed and depends, among other things, on the	**Limited**, indirect if liability would be an incentive to act (which is disputed and depends, among other things, on the number	**Unwanted impact,** because communication can lead to liability.	**Impact** if the national legal system provides sufficient access to remedies for right holders, e.g. reversal of the burden of

outside the Netherlands (duty of care).	claims honoured). Disadvantage: can drive companies out of more risky countries/territories.	number of claims honoured). Disadvantage: can drive companies out of more risky countries/territories.	number of claims honoured). Disadvantage: can drive companies out of more risky countries/territories.	of claims honoured). Disadvantage: can drive companies out of more risky countries/territories.		proof, class actions and 'no cure no pay' schemes (often challenging in practice and local solutions score better if available). Disadvantage: may cause extraterritoriality problems.
6. Obligation for public authorities to buy responsibly.	**Impact** if the market sells or provides services to the public authorities Advantage: the government stimulates such policies and best practices and can check whether companies comply with them. Disadvantage: not all markets depend on public contracts.	**Limited**, because it is difficult for governments to assess what companies do in practice. However, depending on the type of monitoring of companies' performance, these assessments can be facilitated.	**Limited**, because it is difficult for governments to assess what companies do in practice. However, depending on the type of monitoring of companies' performance, these assessments can be facilitated.	**Limited**, because it is difficult for governments to assess what companies do in practice. However, depending on the type of monitoring of companies' performance, these assessments can be facilitated.	**Impact** if part of procurement requirements Advantage: third parties can follow the progress. Disadvantages: Costs for (smaller) companies, no (mandatory) uniform reporting framework and therefore difficult to compare, impact of human rights difficult to measure, largely only information about company and not about customers or supply chain partners (can be confidential).	**No impact**, unless part of procurement requirements, but difficult for public authorities to assess what companies are doing in practice.
7. Corporate governance obligations (e.g. RBC mandated board member, corporate governance code addressing these issues).	**Impact** where implementation of RBC governance models are required Disadvantage: indirect because it focuses on internal business operations instead of risks for external parties.	**Limited**, because changes in governance do not directly change business practice.	**Limited**, because changes in governance do not directly change business practice.	**Limited**, because changes in governance do not directly change business practice.	**Impact** if part of governance requirements Advantage: third parties can follow the progress. Disadvantages: Costs for (smaller) companies, no (mandatory) uniform reporting framework and therefore difficult to compare, impact on human rights difficult to measure, mostly information about the company and not about customers or supply chain partners (can be confidential).	**No impact**, unless governance code would contain requirements in this area (which is hitherto unusual).
8. Prescribing the use of (new) technologies (e.g. blockchains, artificial intelligence).	**No impact.**	**Impact** if these adverse effects can be derived from technology	**Impact** if these adverse effects can be derived from technology	**Impact** if these adverse effects can be derived from technology	**Impact** if data provided by new technologies are public.	**Impact** when technologies are used to improve access to solutions (e.g. mechanisms

		Benefit: can reduce the cost of assessments Disadvantage: use of new technologies not well developed/permanent market practice, only works if companies engage in uniform systems (otherwise no data interoperability and thus no improved transparency).	Benefit: can reduce the cost of assessments Disadvantage: use of new technologies not well developed/permanent market practice, only works if companies engage in uniform systems (otherwise no data interoperability and thus no improved transparency).	Benefit: can reduce the cost of assessments Disadvantage: use of new technologies not well developed/permanent market practice, only works if companies engage in uniform systems (otherwise no data interoperability and thus no improved transparency).		using mobile phones).
9. Establish only public oversight of compliance with OECD guidelines (e.g. with benchmark).	**Impact** as companies are obliged to provide information and to cooperate, especially if the company is known to a wider public with a public regulator. Advantage: still voluntary for companies to comply with OECD guidelines, no problems in transposing a non-legal framework into hard law, dialogue-based solutions can stimulate intrinsic motivation among companies. Disadvantage: still voluntary, less power of public oversight and no hard sanctions in case of non-compliance, as such sanctions require mandatory legal standards.	**Impact** as companies are obliged to provide information and to cooperate, especially if the company is known to a wider public with a public regulator. Advantage: still voluntary for companies to comply with OECD guidelines, no problems in transposing a non-legal framework into hard law, dialogue-based solutions can stimulate intrinsic motivation among companies. Disadvantage: still voluntary, less power of public oversight and no hard sanctions in case of non-compliance.	**Impact** as companies are obliged to provide information and to cooperate, especially if the company is known to a wider public with a public regulator. Advantage: still voluntary for companies to comply with OECD guidelines, no problems in transposing a non-legal framework into hard law, dialogue-based solutions can stimulate intrinsic motivation among companies. Disadvantage: still voluntary, less power of public oversight and no hard sanctions in case of non-compliance.	**Impact** as companies are obliged to provide information and to cooperate, especially if the company is known to a wider public with a public regulator. Advantage: still voluntary for companies to comply with OECD guidelines, no problems in transposing a non-legal framework into hard law, dialogue-based solutions can stimulate intrinsic motivation among companies. Disadvantage: still voluntary, less power of public oversight and no hard sanctions in case of non-compliance.	**Impact** if the public oversight body has the power to publish results (e.g. benchmark).	**Impact** as companies are obliged to provide information and to cooperate, especially if the company is known to a wider public with a public regulator. Advantage: still voluntary for companies to comply with OECD guidelines, no problems in transposing a non-legal framework into hard law, dialogue-based solutions can stimulate intrinsic motivation among companies. Disadvantage: still voluntary, less power of public oversight and no hard sanctions in case of non-compliance.
10. Prohibition of imports of goods produced or services provided in a manner inconsistent with	**Impact** if the policy is considered adequate and can demon-	**Impact** if the policy is deemed adequate and can demonstrate compliance	**Limited impact**, because it is difficult to assess whether this has been achieved (e.g.	**No impact** (not required).	**No impact** (not required).	**Limited impact**, because it is difficult to assess whether this has been achieved (e.g.

OECD guidelines.	strate compliance with guidelines Benefit: direct application of OECD guidelines (and supportive guidance) to meet authoritative global standard. Disadvantage: costs for companies, can result in 'ticking the box'.	with guidelines. Benefit: direct application of OECD guidelines (and supporting guidance) to meet authoritative global standard Disadvantage: costs for companies, can result in 'ticking the box', difficult to assess by the public regulator.	due to confidentiality issues).			because of confidentiality issues).
11. Tax exemptions (e.g. tax credits for carrying out due diligence or reporting).	**Impact** if tax authorities supervise.	**Limited**, because it is difficult to develop objective criteria for assessing whether it is necessary to receive a tax reduction.	**Beperkt**, because it is difficult to develop objective criteria for assessing whether it is necessary to receive a tax reduction.	**Beperkt**, because it is difficult to develop objective criteria for assessing whether it is necessary to receive a tax reduction	**Impact** if required and supervise tax authorities.	**No impact**, because it is unrealistic to assume that the tax authorities make this part of the requirement and assess it.
12. Ombudsman function with legislative support (to obtain legal orders to produce documents) and implications for grants, trade missions or public procurements.	**Limited**, because the Ombudsman is likely to concentrate on incidents and not on general policy, but analysis can have an indirect effect on policy.	**Limited**, because the Ombudsman is likely to concentrate on incidents and not on the obligation to carry out (general) risk assessments, but analyses may have an indirect effect.	**Impact** if beneficiaries (supported by NGOs) have access to the Ombudsman and the Ombudsman can obtain relevant documents.	**Limited**, because the Ombudsman may not consider this to be part of his assessment, but if it has an impact, it may be assumed.	**Limited**, because the Ombudsman is likely to concentrate on incidents and not on reporting, in addition, the Ombudsman's assessments could remain confidential.	**Impact** if rightholders (supported by NGOs) have access to the Ombudsman and the Ombudsman can obtain relevant documents.
13. Make sectoral IRBC agreements binding on the whole sector.	**Impact** if monitored (although especially for companies not voluntarily complying with the IRBC agreement, this could slow down the performance of voluntary participants and hamper effective cooperation between them) and of course not in sectors without	**Negative impact,** because involvement of involuntary participants can hamper effective cooperation between voluntary participants.	**Negative impact,** because involvement of involuntary participants can hamper effective cooperation between voluntary participants..	**Impact** if supervised (although especially for companies that do not voluntarily comply with the IRBC agreement, this could slow down the performance of voluntary participants) and of course not in sectors without an IRBC agreement;	**Impact** if mandatory in sectoral agreements and, of course, not in sectors without an IRBC agreement; does not affect foreign entities.	**Limited**, if present, if not part of the majority of agreements and even if so, difficult to assess (e.g. due to confidentiality requirements) and obviously not in sectors without an IRBC agreement; does not affect foreign entities.

	an IRBC agreement; does not affect foreign entities and actors in sectors without an agreement.			does not affect foreign entities.		
14. Broadening the legislation on misleading advertising to include specific human rights issues or specific information on products in this context.	**Impact** especially if information about the policy is required on the product and the product is sold on the consumer market.	**Impact** when policies require assessments and these are not carried out.	**No impact.**	**No impact.**	**No impact.**	**No impact.**
15. Widen the legislative proposal on sustainability initiatives to include human rights issues (which provide for public regulation and resemble private rules, but make public authorities responsible for development, implementation and enforcement).	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision. Risk of too many of these rules.	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision.	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision.	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision. Risk of too many of these rules.	**Impact** depends on the type of rules implemented (i.e. one of the options above) but will ensure faster implementation of rules and public supervision.
16. Requirements/approval facilities to be used by companies for activities.	**Impact** if policy includes the use of facilities.	**No impact**, because it depends on government approval.	**No impact**, because it depends on government approval.	**No impact**, because it depends on government approval.	**Impact** if the company has to report on the facilities used.	**No impact**, because it depends on government approval.
17. Adjustments to procedural and private international law (e.g. reversal of the burden of proof, jurisdiction of national courts or applicable law).	**Indirect impact** if more court cases are conducted and the outcome is more successful.	**Indirect impact** if more court cases are conducted and the outcome is more successful.	**Indirect impact** if more court cases are conducted and the outcome is more successful.	**No impact.**	**No impact.**	**Impact** if more court cases are conducted and the outcome is more successful.
18. Legislation on unfair commercial practices in business relationships (supply chains).	**No impact**, because legislation does not require it.	**No impact**, because legislation does not require it.	**Indirect impact** if unfavourable (contractual) commercial practices contribute to infringements.	**Indirect impact** as more shared responsibility, generated by legislation, leads actors to better keep track of the results of efforts to reduce impact.	**No impact**, because legislation does not require it.	**Indirect impact** if legislation in this area leads to shared responsibility.

4.4 Conclusion

This chapter has identified 18 legislative options and analyzed to what extent they fit in or are in line with the existing regulatory framework at national, EU and international level, as well as whether they can (potentially) contribute to the implementation of OECD due diligence by companies, as the Ministry of Foreign Affairs expects companies to do so. The findings of this analysis are summarized in a table. This shows that the obligation of OECD due diligence and mandatory tendering are both in line with the existing (international) regulatory framework and also have (potential) impact on the implementation of OECD due diligence. Slightly less but still reasonable impact on the implementation of OECD due diligence, the options have information on products, corporate governance and expansion of unfair trading practices by companies, which also seem to be in line with the (international) regulatory framework. There is also a clear (potential) impact on the implementation of OECD due diligence in terms of making technologies and import bans mandatory, but these appear to be less compatible with the international shut upregulatory framework.

The question whether a legislative option would or could facilitate the implementation of OECD due diligence has only been answered in a very general sense. In order to be able to make more detailed statements about this, we thought it useful to look more specifically at the different 6 steps of the OECD due diligence cycle. Therefore, the extent to which the 18 options affect the specific steps of the OECD due diligence cycle has been examined, since the assumption is that this may vary from step to step. As far as we know, the link between legislative options and the different steps of OECD due diligence has not been examined before, this examination was of an explorative nature. This initial exploration has been included in a table mapping the different legislative options and their (likely) impact on the due diligence cycle. It follows that the obligation of OECD due diligence seems to have the most impact on all steps, although this is also the case for step 6 (contributing to recovery if a violation of the OECD guidelines by a company has been caused or contributed to by a company).[175] As we will elaborate below in chapters 5 and 6, this impact will also depend to a large extent on the way in which this obligation is formulated and the way in which it is supervised (under public law). Furthermore, the options of information on products, prescribing new technologies and, to a certain extent (depending on the design of the compliance monitoring), mandatory tendering and the establishment of a post-company OECD due diligence supervisor also appear to have an impact on many steps of the OECD due diligence cycle. However, as discussed above, the option of prescribing new technologies appears to be less compatible with the international regulatory framework. Furthermore, this analysis has shown that not all legislative options, whose overall analysis (without looking at the specific steps of the OECD due diligence cycle) showed an impact on the implementation of OECD due diligence, are also true when further analysis is carried out using the different steps. This shows that this further analysis, using the steps of the OECD due diligence cycle, is useful and necessary when considering legislative options.

[175] An EU survey also shows that a large majority of respondents expect this option to have an impact in the OECD due diligence area. See L. Smit e.a.., DG Just 2020, p. 105. A further advantage that is mentioned is that legislation leads to more sections of a company (including management) being involved. See L. Smit e.a., DG Just 2020, p. 107 and 108.

5. ENFORCEABLE DUE DILIGENCE CYCLE: FOUR OPTIONS

5.1 Introduction

5.1.1 Arrangements for the statutory regulation of the due diligence cycle

A due diligence obligation is the option that is most directly linked to the legal anchoring of OECD due diligence. This option will be further elaborated in this chapter, partly in the light of the questions posed by the client. Within the time available for the search it was not possible to do this in the same way for all options mentioned in chapter 4. This requires further investigation.[176]

The OECD Guidance on the due diligence cycle consists of six steps[177]:

1. Integrate the OECD guidelines into policies and management systems
2. Identify and assess negative impacts of business activities and partners
3. Stop, prevent and limit negative consequences
4. Monitor practical application and results
5. Communicate how negative impacts are addressed
6. Provide or participate in remedial measures

These steps have been discussed and explained in more detail in Chapter 2.

A statutory due diligence obligation for companies is currently in place in France and is being considered in Switzerland and Germany (section 4.2.3). The Dutch Child Labour Obligation (Care) Act also contains such an obligation.[178] These existing and proposed regulations illustrate that different modalities can be chosen for a statutory due diligence obligation.

In the first place, a choice can be made between, on the one hand, a sectoral or thematic regulation and, on the other hand, a general regulation. The Child Labour Duty of Care Act contains a due diligence obligation that only covers risks related to child labour.[179] On the other hand, the French law, the Swiss initiative and the German draft are based on a general due diligence obligation. See section 3.3 on the pros and cons of these two approaches.

Secondly, the depth of the due diligence obligation in the value chain can be chosen. In French law, this obligation applies to 'resistant commercial relations', which may mean that the due diligence obligation extends only to the first customer in the value chain (suppliers with whom a contractual relationship exists). In the EU Regulation on conflict minerals, due diligence applies as far as the importer in Europe is concerned. The Child Duty of Care Act has no restrictions in this respect. The OECD due diligence also covers the entire value chain. See section 4.2.3 on restricting a statutory due diligence regulation to certain links in the chain.

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[176] This is particularly obvious if there is an intention to implement one of the other options.

[177] Ministerie van Buitenlandse Zaken, *OESO due diligence handreiking voor maatschappelijk verantwoord ondernemen* (Nederlandse editie), 2019. Unless otherwise stated, this guide will be used as the basis for the analysis below.

[178] See Annex 1 for an overview of existing legislation.

[179] It should be noted, however, that 'child labour due diligence' in principle calls for a broader approach, because child labour is not an isolated problem but is usually linked to the exploitation of workers, trafficking in human beings, lack of a living wage and the like.

Thirdly, a choice can be made to make all six steps of the due diligence cycle, or only part of it, mandatory. In the Child Labour Duty of Care Act, the due diligence obligation is limited to, in brief, identifying risks and drawing up a plan of approach (in principle steps 1 and 2 of the due diligence cycle). Below, for the six steps, it will be indicated what a scheme could look like and what the expected consequences would be. Which of the six steps will ultimately be included in a statutory regulation is closely related to the other choices made here.

Fourthly, a due diligence regime covering all OECD areas (workers, human rights, the environment, bribery, consumers and good corporate governance) or just one or some of these areas can be chosen.

Fifthly, a further limitation may be chosen. For example, French law is limited to serious violations of human rights and fundamental freedoms, serious bodily injury, environmental damage or health risks. The OECD due diligence cycle does not make such a restriction and covers all negative consequences, serious and less serious.

The OECD due diligence cycle does not make such a restriction and extends to all negative consequences, serious and less serious. These five choices are in addition to the other choices discussed in chapter 3 with regard to the method of enforcement (discussed in detail in this chapter and the next), the choice between applicability of a statutory regulation to all companies or only large(er) companies (section 3.4) and the choice between applicability to all companies established in the Netherlands or to all companies active on the Dutch market (section 3.5).

5.1.2 Structure of this chapter: four regulatory options

The legal enforcement of the six steps of the OECD due diligence cycle can take place in a variety of ways. Four options will be presented and analyzed in this chapter. Firstly, a narrow option (Option A) and a broad option (Option B). In the narrow option, the law only regulates the main obligations, in the broad option the law regulates the obligations in a more detailed way (either in the law itself or in substantive legislation).

For each option, first of all, the consequences are assessed if the statutory regulation is enforced exclusively under private law, and then the consequences if the statutory regulation is enforced both under private law and under administrative law. In this way, four basic options are created, the advantages and disadvantages of which can be mapped out schematically.

A1: concise regulations with only private law enforcement
A2: concise regulation with both private law and administrative enforcement
B1: more detailed regulation with private law enforcement only
B2: more detailed rules with both private law and administrative enforcement

Of course, all kinds of intermediate options are conceivable between these options. The aim is to simplify the discussion with a discussion of four options and thus better facilitate the policy considerations and political decisions to be made.

Section 5.2 sets out the choice between a limited and a broad (more detailed) regulatory option. In the case of the broad regulatory option, conclusive by way of illustration and thought-provoking, an overview is also given of what can be included in such an option: (a) provisions that could be included in a law in a formal sense, (b) minimum requirements that could be included in an implementing regulation, and (c) directives that could serve to implement open standards (effort obligations), whether or not as a basis for the policy to be developed by the supervisor and the policy rules to be developed on that basis.

Section 5.3 sets out the various effects of, on the one hand, exclusively private-law enforcement and, on the other hand, a combination of private-law and administrative-law enforcement.

Subsequently, in section 5.4 the results of sections 5.2 and 5.3 are combined to determine which regulatory and enforcement option is the most suitable to lead to a material change in the behaviour of companies. Section 5.5 considers this rejection in more detail in relation to each of the six steps of the due diligence cycle.

Sections 5.6 and 5.7 consider a number of additional weighting factors. These include legal certainty (section 5.6), the feasibility of the regulation, the impact on the regulatory burden, the climate for establishment, the international competitive position and the possible side-effects of making the steps of the due diligence cycle enforceable (section 5.7).

Section 5.8 brings the lines of this chapter together in a conclusion.

5.1.3 Option A1 as parallel to the French due diligence law

Option A1 (concise regulations with only private law enforcement, elaborated in section 5.2) broadly corresponds to the French law on the duty of vigilance.[180] This law has opted for an outline regulation. Moreover, this regulation is only enforced under private law and not also under administrative law.
The relevant provision of this regulation reads as follows:

The vigilance plan shall be drawn up in cooperation with the relevant stakeholders of the company and, where appropriate, within multi-stakeholder initiatives. It shall include the following measures:
1. An overview of the identification, analysis and ranking of the relevant risks.
2. Procedures to re-evaluate, in accordance with the risks identified, the situation of subsidiaries, contractors or suppliers with which the company has an established commercial relationship.
3. Appropriate measures to reduce risks or prevent serious violations.
4. An alert mechanism that collects data of existing or actual risks, developed in cooperation with the trade union representatives of the company concerned.
5. A monitoring mechanism to follow up the measures taken and assess their effectiveness.

5.1.4 Terminology

Various terms are used in this chapter, which will be briefly described here.

Forerunners, followers and laggards
In the analysis of the possible consequences of making due diligence mandatory, reference is made to forerunners, followers and laggards.

[180] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. See on this among others S. Cossart, J. Chaplier & T. Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All', *Business and Human Rights Journal* 2017, issue 2, p. 317-323.

Forerunners are companies that already have an active policy plan that is also applied in practice and is constantly tested and developed. For these companies, making due diligence mandatory is superfluous, because they already comply with the requirements. For these companies, it is important that they are not hindered by additional (formal) legal requirements, or by testing them.

Leaders are companies that respond to external stimuli, such as from investors, customers and the government, in order to adapt their policy and practice. A few co-operating companies will have developed a due diligence policy (in response to the expectation of the Dutch government), but for most co-operating companies this will not be the case. They are inclined to follow external incentives (such as legislation), but usually do no more than is necessary.

Finally, there are lagging companies, which do not have a due diligence policy and tend to follow legislation as sparingly as possible. These companies are more inclined to follow rules only if there is strict enforcement and a high probability of being caught. For these companies, there are usually fewer other procurers (investors, clients, reputation) for having a due diligence policy and actually implementing it.

The forerunners are a relatively small minority in quantitative terms, although they include a number of large Dutch companies as well as a significant number of start-ups.

The vast majority of Dutch companies can probably be qualified as 'going-along', while the laggards constitute a not inconsiderable minority.

This classification is based on distinctions made in management literature.[181] It mainly serves to illustrate the possible consequences of legislation in this area.

Due diligence
This chapter follows the internationally accepted terminology 'due diligence', as used in the OECD Handbook. It goes without saying that a different term may be used instead in a legal regulation.

Policy
The term refers to the policies relating to the principles and standards of responsible entrepreneurship in the areas of human rights, employment and industrial relations, the environment, bribery and corruption, information and consumer interests, as set out in the OECD Guidelines for Multinational Enterprises.

Negative consequences
In this chapter it is indicated that the due diligence cycle relates to detecting and dealing with (risks of) negative consequences (also: negative impact). The term 'negative impact' is in line with the OECD Guidance Document (p. 17), which indicates that negative impacts are related to human rights, employment and labour relations, the environment, bribery and corruption, the provision of information, and consumer interests.

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[181] In particular those between inactive companies (laggards), reactive companies (joiners) and active and proactive companies (forerunners). See Tulder, R. of e.a., *Managing the transition to a sustainable enterprise* (Rotterdam: The Partnerships Resource Centre (PrC), 2013) and Dam, van C. (2015) *Enhancing human rights protection, a company lawyer's business*, inaugural lecture 18 September 2015 (Rotterdam: RSM, 2017).

The purpose of due diligence is not to identify risks of negative consequences for the company, but to identify risks of negative consequences for right holders and other stakeholders, such as employees and local communities (Guidance, p. 5).

Effort commitments and result obligations

The rules discussed in this chapter are partly result obligations and partly effort obligations. The formal obligations are mainly result obligations (having a policy document, a due diligence plan, a reporting obligation, offering a remedy).

Many other obligations are of an effort nature (is the due diligence plan adequate and effective, is the detection of risks of adverse effects in an adequate manner, etc.). They do not require the achievement of a certain result, but an effort (i.e. an adequate degree of care). The amount of effort required depends on the circumstances of the case. In general, the greater the risk of negative consequences, the more care the company has to provide.

In the case of effort obligations, the greater the risk, the more effort a company has to put in. The company is therefore not judged on the result achieved but on the care to be taken. The content of these effort obligations is often problematic because it has not been sufficiently defined: it depends on the circumstances of the case, such as the extent of the risk of adverse consequences, the nature of the adverse consequences, the degree of involvement of the company, the nature and size of the company, the place where the risks are situated, etc. The company is therefore not assessed on the basis of the result achieved. The specification of these best efforts obligations, in particular the development of minimum requirements, can be done either by civil courts in the context of private law enforcement or by the supervisor on the basis of policies to be developed and on the basis of dynamic supervision (Chapter 6).

Formal and material change in behaviour

The aim of making due diligence enforceable is that it leads to behavioural change within the company. More specifically, the objective is that it leads not only to formal behavioural change but also, and above all, to material behavioural change. If a company has met a formal requirement (e.g. it has a policy document, including a due diligence plan), this does not mean that there has also been a material behavioural change. This means, for example, that the company not only has to have a due diligence plan (formal behavioural change) but also that it implements this plan adequately, effectively and efficiently (material behavioural change).

The starting point for the analysis to be carried out in this chapter is that a statutory regulation must be capable of bringing about material behavioural change in companies.

In this respect, the following remark should be made. Changing the formal behaviour of the company may be the result of a ticking-box exercise that does not result in a material change in the behaviour of the company. Nevertheless, it is quite conceivable that, as a result of these mandatory formal steps, companies may also choose to take material steps to ensure that the due diligence process of the company operates adequately and effectively in practice. This is then the result of the combination of a legal obligation and the company's own decision to do more than what is formally required of it. This effect is particularly to be expected in co-operating companies. The magnitude of this effect in practice is beyond the scope of this investigation.

5.2 Limited and broad regulatory options

5.2.1 Limited regulatory option (Option A)

Option A represents a narrow form of regulation, in which the obligations of non-companies are only included in the main body of the law and are not detailed in either formal or substantive legislation. In this option, six provisions codify the six steps of the due diligence cycle.

Article 1
The company has a policy document, which indicates how the policy[182] *is embedded in the organization of the company. The policy document also contains the company's due diligence plan.*

Article 2
The company identifies, assesses and prioritizes the potential and actual risks of negative consequences in its activities and in those of its business partners.

Article 3
The company has a plan to discontinue, prevent and mitigate potential and actual negative effects of its activities.

Article 4
The company has a plan to monitor the application and effectiveness of its due diligence measures.

Article 5
The company reports externally on its due diligence policy and on the findings and outcomes of the due diligence measures it has taken.

Article 6
If the undertaking has caused or contributed to actual negative consequences, it must provide adequate opportunities for recovery or assist in recovery.

The following is a brief analysis of the possible effects of such a regulation on the basis of the aspects referred to in paragraph 1.

5.2.2 Wide regulatory option (Option B)

Option B represents a broad form of regulation in which the obligations of companies are not only set out in broad outline but also included in more detail in formal and substantive legislation and policy guidelines.

Also in this option, six provisions codify the six steps of the due diligence cycle. Each step consists of three parts:[183]
(a) Legal obligations: general obligations which can, in principle, be included in a law in a formal sense.
(b) Implementing rules: specification of the legal obligations in a lower regulatory level.

[182] See par. 5.1.4.

[183] The content of these provisions, minimum requirements and guidelines are based on the OECD Guidelines for Multinational Enterprises and the OECD Handbook. See Chapter 2 on the six steps of the OECD due diligence cycle.

(c) Policy rules: these can result from the policy to be developed by the supervisor.[184]

This overview is not intended as a blueprint for a statutory regulation but serves only to indicate which elements can be part of a broad regimen (Option B), as opposed to a narrow regulation (Option A) and how they could be distinguished in terms of regulations.

Perhaps unnecessarily, it should be noted that not all details of a broad regulation (Option B) necessarily need to be included. It is quite possible that a middle ground is chosen between the (narrow) Option A (6.2) and the (broad) Option B discussed here.

Article 1 (Step 1: Integrate due diligence into policy and management systems)

a. Legal obligations

1. *The company shall publish a policy document in which it commits itself to the principles and standards of the OECD Guidelines for Multinational Enterprises.*
2. *This policy document shall include the company's due diligence plan approved by the board. This plan covers the company's activities and those of its business relations.*
3. *The company's management shall ensure that the policy set out in the policy document is integrated into the management systems and forms part of the regular business processes.*

b. Implementation rules

- The company publishes the above information in an accessible manner on the company's website, as well as on the relevant local websites and at the company's business locations, both in English and in the local language(s).
- The company updates the policy every year/every two years in response to changes and developments in the risks associated with its activities, supply chain and business relationships.[185]
- The company has an effective complaints procedure for employees with complaints about relevant OECD issues.[186]
- The company has a process to respond to policy non-compliance and to take remedial action where necessary.[187]
- The company includes conditions and expectations in agreements with suppliers and other business relationships.
- The company communicates the policy internally to the relevant employees.
- The company communicates the relevant parts of the policy externally to relevant business partners by means of information and training courses that are repeated periodically if necessary.

c. Policy rules

- Provide adequate resources and training to suppliers and other business relations so that they understand and apply the relevant policies and due diligence.

[184] These policy rules will often be about giving substance to obligations of effort or duty of care, whereby content and result may differ per case and per company. Classical enforcement is often less possible here and dynamic supervision can be more effective: see more extensive chapter 6 on this subject.
[185] It is conceivable to make this period dependent on the size of the company and the nature of the risks involved in the business activities.
[186] In doing so, words can also be used to describe existing procedures, whether or not they have been adapted.
[187] This could include the collection of additional evidence, capacity building or discipient measures/sanctions.

- Identify the main risks of negative impact and develop specific policies for this.
- Assign supervision and responsibility for the due diligence plan to the relevant senior management and spread responsibility at board level.
- Ensure effective communication between executive departments and senior management for sharing and capturing information on risks and decision making.
- Develop or modify existing information systems to gather information on due diligence processes and related decision making and actions.
- Develop incentives for employees and business units that comply with company policies.
- Free up resources appropriate to the identified necessary scope of the due diligence process.
- Promote coordination between teams and business units on relevant aspects of the company's policy, for example through multidisciplinary groups and by involving business units that can influence CSR compliance in decision-making.
- Identify and address the way in which the company does business if this interferes with the implementation of CSR policy by suppliers and other business relations.[188]

Article 2 (Step 2: Identify and assess negative impacts)

a. Legal obligations

1. *The company shall identify and analyze the potential and actual risks of negative consequences in its activities and those of its business partners.*
2. *The company shall determine its degree of involvement in the potential and actual negative consequences.*[189]
3. *The company shall provide an adequate approach to the potential and actual negative impacts identified.*
4. *If it is not possible for an enterprise to address all potential and actual negative consequences directly, it shall prioritize them on the basis of their severity and degree of probability. Once the most serious consequences have been identified and addressed, the company will address the less serious negative consequences.*

b. Implementation rules

- The company lays down specific standards and issues relevant to the risks under investigation.[190]
- The company makes an inventory of its activities and business relationships in order to determine which information is relevant.

[188] This applies in particular to procurement practice and to commercial incentives provided by the company, such as short delivery times.
[189] The company may have caused (or may cause) the negative effect, contributed (or may contribute) to it, or the negative effect is directly related (or may be related) to the activities, products or services of a business relationship.
[190] In doing so, the company should make use of the relevant provisions of the OECD guidelines for MNEs, applicable national legislation and relevant international and sector-specific frameworks.

- The company collects information in order to understand the main risks of negative consequences.[191] These can be related to the sector[192], geography[193] or company-specific risk factors.[194]
- Where applicable, the company collects relevant information about business relationships other than contractual relationships (e.g. indirect suppliers).[195]

c. Policy rules

(i) Collect sufficient and adequate information on risks of adverse effects

- Sources for this information may be:
  - Reports from governments, international organisations, civil society organisations, trade unions, human rights institutes, media and other experts;
  - Affected entitled parties and other relevant stakeholders, including workers' contractors and trade unions.[196]
  - Information from early warning systems (such as hotlines) and dispute resolution mechanisms.

(ii) Prioritisation

- Identify the most important risk areas (based on the degree of involvement of the company).
- Prioritise the risk areas on the basis of the severity and likelihood of the potential and actual negative consequences.[197]
- Identify which potential or actual impacts can be directly addressed or mitigated.[198]
- Consult on prioritisation decisions with business relations, other relevant companies, (potentially) involved stakeholders and rightholders.
- Call in internal or external expertise where necessary.

(iii) Review and updating

- Regularly review the findings from the inventory.
- Update the risk inventory when the company undergoes major changes.[199]

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[191] In addition to information from the company itself, use can be made of information from third parties, such as Environmental Impact Assessments (EIA), Social and Environmental Impact Assessments (ESIA), Human Rights Impact Assessments (HRIA), legal reviews, compliance management systems in the area of corruption, financial audits (for publication), inspections of working conditions, health and safety. A company can also make use of environmental, social and labour audits, corruption and KYC processes.

[192] For example, products and their supply chains, services and other activities.

[193] For example, governance and the rule of law, conflicts, human rights or negative environmental consequences.

[194] For example, known cases of corruption and misconduct.

[195] If a company consists of different parts, support local entities in carrying out their own assessments.

[196] This should take into account possible obstacles to effective stakeholder involvement. Where necessary, alternatives should be sought, such as reliable independent experts, such as human rights defenders, trade unions and civil society groups.

[197] In determining the impact on human rights, special attention should be paid to potential negative consequences for individuals from groups or population groups that are vulnerable or at high risk of marginalisation. Possible differential effects on men and women should also be taken into account.

[198] For example: update contract terms with suppliers, adjust audit protocols by focusing on risks that may have been overlooked during previous audits.

[199] For example, in the case of activities or purchasing from a new country; development of new product or service lines; reorganisations, mergers, takeovers, new customers and markets, or increasing social tensions in a relevant area.

(iv) Disputes

- If stakeholders or rightholders disagree with the company's assessment of its involvement in a negative outcome, the company should cooperate favourably with official dispute and redress mechanisms.

Article 3 (Step 3: Stop, prevent and limit negative consequences)

a. Legal obligations

1. *The company has a plan to prevent and limit potential and actual negative consequences of its own activities.*
2. *The undertaking shall cease its own activities if they cause or contribute to negative consequences.*
3. *The undertaking shall have a plan to prevent or mitigate actual and potential adverse effects through business relationships.*
4. *In the event of an actual negative impact on a business relationship, the company will not terminate the relationship until sufficient efforts have been made to mitigate the risks.*

b. Implementation rules

- The company appoints someone at senior management level who is responsible for discontinuing activities that cause or contribute to adverse consequences and who is responsible for preventing activities from causing or contributing to adverse consequences in the future.
- The company appoints a person at senior management level who is responsible for developing, implementing and monitoring plans to stop, prevent or mitigate adverse effects.
- The company will include in the policy guidelines on how to avoid and address negative consequences in the future and ensure their practical application.
- The company updates and strengthens its risk management systems based on the findings, so that risks are identified before the negative consequences occur.
- The company has a plan to discontinue activities that cause or contribute to negative consequences. It also has a plan to involve stakeholders, entitled parties and their representatives in drawing up appropriate measures.

c. Policy rules

- If the company has contributed to the negative consequences, it will take measures to discontinue or prevent its contribution.
- The company tries to cooperate with the other entities involved in order to stop, limit or prevent the negative consequences, for example through industry initiatives and in cooperation with the government.
- Support or collaborate with business relations in developing effective plans to prevent or mitigate the negative impacts identified. Use qualitative and quantitative indicators to define and measure improvements.
- Use influence to persuade business relations to prevent or limit the negative consequences or risks.
- If the company does not have sufficient influence, look for opportunities to expand it (through senior management, commercial incentives, industry or government collaboration, policies or codes of conduct, contracts, or market power).

- Encourage companies that cause or contribute to negative consequences to consult with the (potentially) affected right holders or their representatives and to involve them in the development and implementation of corrective action plans.
- Support business relationships in preventing or mitigating negative impacts or risks, e.g. through training, upgrading facilities, strengthening their management systems. In doing so, continually strive for improvement.
- Terminate business relationships as a last resort and only after unsuccessful attempts to prevent or mitigate serious consequences; when the negative consequences cannot be repaired; when there is no reasonable prospect of change; or when very serious negative consequences or risks have been identified and the entity causing them does not take immediate action to prevent or mitigate them.
- When planning to terminate the relationship, consideration should also be given to: how crucial the supplier or business relationship is to the business, the legal consequences of continuing or terminating the relationship, the extent to which termination would affect the consequences, and reliable information on the potential negative social and economic consequences of the decision to terminate the relationship.
- If the company does continue the business relationship, it must account for what it has done to mitigate the risks and be aware of the dangers to its reputation and the financial or legal risks.
- Encourage the relevant authorities in the country of impact to act, e.g. through inspections, enforcement and application of existing laws and regulations.

Article 4 (Step 4: Monitor the practical application and results of the due diligence)

a. Legal obligations

1. *The company monitors the application and effectiveness of its due diligence measures.*
2. *The company integrates the conclusions of this monitoring into its business processes.*

b. Implementation rules

- The company monitors the results achieved by means of periodic own or external reviews or audits.
- The company communicates the results to the relevant levels within the company.
- The company periodically assesses business relationships to verify that risk mitigation measures are being implemented or that negative consequences are being prevented or mitigated.

c. Policy rules

- If there is a negative impact on human rights, the company tries to make contact with the right holders who are (potentially) affected and consults with them and their representatives.
- The company shall encourage periodic reviews by relevant and independent multi-stakeholder initiatives and sector initiatives with a view to identifying, preventing or mitigating negative impacts associated with its activities.
- The company shall identify any negative consequences or risks that may have been overlooked in previous due dili-gence processes and take them into account in the future.

- The company integrates the feedback and lessons learned into the company's due diligence processes to improve the process and results in the future.

Article 5 (Step 5: Communicate how negative consequences are addressed)

a. Legal obligations

1. *The company reports annually on its due diligence policy and process.*
2. *To this end, the company shall provide information on the measures taken to identify and redress any negative consequences.*
3. *The company shall also report on the findings and results of these measures.*

b. Implementation rule

- The company publishes the above information on the company's website (with a link from the homepage), on the relevant local websites and at the company's business locations, both in English and in the local language(s).

c. Policy rules

- Information may also be published in the company's annual report or sustainability report.
- The information should include: the company's policy, measures to integrate the policy into the management systems, the identified areas with the highest risks for the company, the identified, prioritised and assessed negative impacts or risks, the criteria for prioritisation, and the measures taken to prevent or mitigate these risks.
- The information shall also include deadlines and benchmarks for improvement and its outcomes, measures to monitor its practical application and results, and an explanation of how the firm is recovering or contributing to its recovery.
- Where there is a negative impact on human rights caused or contributed to by the company, the company should, taking into account cultural sensitivities, communicate in an accessible manner with the right holders who are or may be affected by its actions.

Article 6 (Step 6: Provide or assist with remedial measures)

a. Legal obligations

1. *If the company has caused or contributed to negative consequences, it shall offer or contribute to recovery.*
2. *The undertaking shall provide or contribute to legitimate remedial mechanisms.*
3. *Affected stakeholders and rightholders may lodge complaints and submit them to the undertaking through a legitimate recovery mechanism.*
4. *If the parties disagree as to whether the undertaking has caused or contributed to the negative follow-up, or as to the nature and scope of the remedy, they shall refer the matter to an out-of-court or judicial redress mechanism.*

b. Implementation rules

- The company must put the affected person or persons (again) in the situation in which they would have been or would have been if the negative consequences had not occurred.
- The company has dispute resolution mechanisms at operational level (DOL) for employees and third parties. The form and content of the DOL is determined in consultation with the

relevant stakeholders. For internal complaint procedures, these are in particular the employees and/or their representatives.

- In the event of human rights violations, the DOL must in particular meet the core criteria of legitimacy, accessibility, predictability, fairness, compatibility with OECD guidelines, transparency and engagement based on dialogue.
- The company should cooperate in remedial actions proportionate to the severity and extent of the negative consequences.
- In the event of a negative impact on human rights, consultations should be held with affected right-holders and their representatives on the remedial measures to be taken.

c. Policy rules

- Use international standards or guidelines for recovery. If these are not available, look for a remedy similar to what has been applied in similar situations.
- Try to determine whether those who have submitted complaints are satisfied with the process and its outcomes.
- The nature of the remedy depends on the nature and scope of the negative consequences.
- A remedy may consist of:
  - Apologies.
  - Restitution or rehabilitation (e.g. reinstatement of dismissed workers, recognition of the trade union for collective bargaining).
  - Financial or non-financial compensation (e.g. compensation funds for slaughter sacrifices or future information and education programmes).
  - Penalties (e.g. dismissal as punishment for the workers responsible).
  - Measures to prevent negative consequences in the future.
- A complaints procedure may include:
  - A step-by-step plan for recovery and resolution of complaints.
  - Deadlines for resolving disputes.
  - Procedures to respond to complaints if no agreement can be reached or if the consequences are very serious.
  - A description of the scope of the DOL mandate.
  - Possibilities to resolve complaints in an accessible and culture-sensitive manner.
  - The staffing and resources available to the DOL.
  - A monitoring mechanism for the functioning of the DOL.
- A company cooperates favourably in judicial and extrajudicial procedures. This also applies to NCP procedures and to initiatives that offer other forms of dispute resolution for the conduct of the company.

5.3 Private law and/or administrative enforcement?

5.3.1 Introduction

A proper assessment of the enforceable legal measures is not possible without involving the enforcement options. The statutory due diligence rules set out above can, in principle, be enforced in three ways: private law, administrative law and criminal law (see Chapter 3 for an overview). To make the comparison easier to understand, it will be limited to private law and administrative law enforcement.

The possibility or enabling of criminal law enforcement can always be considered additionally on specific grounds. See point 3.2.3 on this subject.

5.3.2 Exclusive private law enforcement: general

A legal provision can, in principle, always be enforced under private law. This will often be done either by individuals, interest groups or a combination of the two.[200] If a company fails to comply with a provision in the due diligence rule, individuals or interest groups may bring an action before the courts. They can, for example, seek an injunction or prohibition against a company from the civil courts (e.g. requiring it to draw up a policy document), seek a declaratory judgment (e.g. a declaration that the defendant company does not have a due diligence plan), or seek damages (e.g. that the company's failure to carry out due diligence has resulted in harm to individuals).

If the above rules (Option A and Option B) are only maintained under private law (e.g. this is the case in France), the following picture emerges. On the energy side the threshold for private-law actions is relatively low: the individual and the interest-group must have a sufficient interest in the claim and the interest-group must represent this interest pursuant to its articles of association (Section 3:305a subsection 2 of the Dutch Civil Code). Despite this relatively low threshold, individuals and interest groups will in practice only make sporadic use of recourse to the civil courts. The reason for this is that the costs of litigation and legal assistance for individuals and interest groups is an obstacle to taking this step more than incidentally.

This means that private law enforcement is not structural and systematic, but incidental and sporadic. If the statutory regulation is only enforced under private law, the expected level of enforcement will be low.[201]

In any case, this has two disadvantages. The first is that the interpretation of the statutory regulation, a review of its application and the related legal settlement can only be carried out by the civil court. Due to the expected small number of cases, however, the civil court will not be able to perform this task adequately. This means, for example, that it will remain unclear how far companies' material obligations (often best efforts obligations) will go. This will contribute to legal uncertainty for companies, stakeholders and other entitled parties.

Secondly, as a result of this lack of clarity, there will be little incentive for companies to commit to the legal rules. There is therefore a real risk that the legal regime will to a large extent become a dead letter.

The disadvantages can be overcome by encouraging a large number of private-law actions over a number of years, so that case law can provide clarity as to how the applicable standards are to be implemented. The question is, however, whether this is feasible and, if so, whether it is desirable.

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[200] This is only different if the legal rule does not seek to protect private interests, but this is only rarely the case.
[201] It is conceivable, however, that, in order to strengthen private law enforcement, the government will allow no cure no pay for interest groups or otherwise provide them with financial and/or procedural support, such as by means of a legal aid fund.

5.3.3 Exclusive private law enforcement: effects in Option A and Option B

Although these problems will occur both in Option A (narrow) and in Option B (broad), they are greater in Option A, because the standards set by the law are very limited. In this option, there is minimal clarity about the formal requirements and lack of clarity about the material requirements that apply to enterprises. Option A with exclusive private enforcement is therefore likely to further reduce the incentives for companies to commit to the rules.

Option B provides greater clarity on formal requirements, as these are laid down in more detail in law (or regulations based thereon). Implementing rules can also give more indications about the material obligations of companies (often best efforts obligations) but the possibilities for doing so are technically limited by law, given the multitude of situations that can arise and the many factors that are important in this respect. In Option B, too, with exclusive private law enforcement, there remains a considerable degree of legal uncertainty, particularly as regards legal certainty and the willingness of and need for companies to commit to the rules.

5.3.4 Administrative law enforcement: general

Administrative law enforcement is carried out by a public-law supervisor. If companies do not comply with the statutory provisions, the supervisor can (finally) intervene by means of an order subject to a penalty payment or an administrative fine.

Administrative enforcement can primarily focus on the formal requirements. These formal requirements are, to a large extent, also result obligations and can therefore be enforced relatively easily (such as having a policy document and having a due diligence plan). Of these, it is clear in advance what companies are expected to do.

However, monitoring and enforcing the formal behaviour of companies is not the purpose of making due diligence enforceable. After all, he formal requirements are requirements that can easily be met by empty ticking-box-exercises. The formal requirements are a means. The purpose of a statutory regulation is to bring about a material change in the behaviour of undertakings.

In order to achieve this goal, the material requirements are important, such as the quality of the due diligence plan, the way in which negative impact is detected and the way in which the company responds to this. These material requirements are often relatively open standards that include, in particular effort obligations. This means that the supervisor must develop policy and set concrete enforceable standards on the basis of this policy. This must be done carefully, often by means of consultation with stakeholders. It is also important that the supervisor develops and enforces standards in a dynamic manner (see Chapter 6 on this subject). It is inevitable that this process will take some time. However, it will take considerably less time than if it is enforced exclusively under private law.

5.3.5 Administrative law enforcement: effects in Option A and Option B

Although the above-mentioned bottlenecks in administrative enforcement will occur both in Option A (narrow) and in Option B (broad), they are greater in Option A, because the standards set by the law are very limited. In this option there is minimal clarity about the formal requirements and lack of clarity about the material requirements that apply to companies. This means that the supervisor will have to develop specific standards to a much greater extent than is the case in Option B. In the case of Option

A, there is minimal clarity about the formal requirements and lack of clarity about the material requirements that apply to companies. It is true that companies with a supervisor will be more likely to comply with the rules, but on the other hand, Option A will (narrowly) lead to a longer period of uncertainty for companies, stakeholders and other entitled parties.

In Option B there is more clarity about the formal obligations, as these are laid down in more detail in the law (or regulations based thereon). Execution schemes can also provide more indications about the interpretation of the material obligations of companies (often effort obligations), but the possibilities to do so are technically limited by law, given the multitude of situations that can arise and the multitude of factors that are important in this respect. In addition, the supervisor may of course develop specific rules, in particular in combination with dyna-mic supervision (Chapter 6). In Option B, therefore, there will be more clarity for companies, stakeholders and entitled parties from the outset.

In both options, providing clarity on the content of effort obligations will take more time, but in this area (in view of the variations in possible outcomes) this is, in a certain sense, inevitable. However, it can be expected that the development will be considerably faster than if only private law is enforced.

Moreover, this continuity (first maintaining formal rules, often result obligations, and then fleshing them out materially) is not illogical, because companies that do not yet carry out due diligence will first concern themselves with plans and procedures and then with their concrete implementation and operationalization. Formal obligations therefore precede material (substantive) obligations.

5.4 What is the optimal option for changing the material behaviour of companies?

5.4.1 Introduction: the expectations of the Dutch government

The government expects all Dutch companies doing business[202] internationally to operate in accordance with OECD guidelines.[203] To the extent that companies meet these expectations, making this step enforceable will not lead to any change in behaviour worth mentioning, because they are already deemed to have taken these steps. This will apply in particular to the forerunners and possibly also to some co-operating companies.

The question is therefore mainly to what extent mandatory due diligence will lead to material behavioural change in companies that do not yet meet the expectations of the Dutch government. This will concern the lagging companies as well as most of the co-operating companies.

Respondents to the study were asked several questions about the effects and effectiveness of a regulatory option of mandatory due diligence and the different sub-options (set out in the Problem Analysis and Regulation section).

A recent European Commission survey showed that a large majority (65.5%) of respondents to the business survey indicated that new mandatory due diligence regulations are likely to have societal con-

[202] This is a broad concept and, in principle, also includes smaller companies with, for example, foreign suppliers.
[203] https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/bevorderen-internationaal-maatschappelijk-verantwoord-ondernemen.

sequences. Only 11.76% disagreed. 52.9% of business respondents believed that mandatory due diligence would have an impact on the environment and more than two-thirds (67.6%) on human rights. Only 9.8% of business respondents believed that mandatory due diligence would have no impact on human rights.[204]

General respondents were even more convinced of the likely consequences of mandatory due diligence. The vast majority (86.39%) indicated that it would have social consequences, as opposed to only 4.08% who disagreed. Again, 81.63% said it would have an impact on the environment, and only 4.76% said it was unlikely. Similarly, 86.39% of the general respondents believed that mandatory due diligence would have an impact on human rights, and only 3.4% believed it was unlikely.

Whether mandatory due diligence will lead to a material change in behaviour will be assessed for the four modifications listed below.

5.4.2 Option A1: Limited regulation with only private law enforcement

In Option A1 (a statutory regulation with only private law enforcement) it is expected that this will only lead to a limited commitment for companies to comply with the statutory rules. To begin with, the number of rules is limited and are formulated in very general terms. In addition, enforcement is very limited because it has to be carried out by individuals and interest groups who will only occasionally and occasionally bring cases before civil courts. Moreover, this option may take a very long time to establish sufficient case law on the scope of formal obligations and the content of companies' material obligations.[205] This option therefore has the lowest expectations with regard to a material change of behaviour on the part of companies.

5.4.3 Option A2: Limited regulation with private law and administrative law enforcement

In Option A2 (a statutory regulation with a combination of private law and administrative law enforcement) it is expected that companies will show greater commitment to the statutory rules. To start with, the mere presence of an administrative law supervisor will contribute to this. This will lead to faster and more widespread enforcement of formal requirements. As far as substantive requirements are concerned, it will take some time before they are shaped by the regulator into more specific standards and can thus be enforced. Given the limited legal framework, this may take additional time. This Option A2 therefore leads to higher expectations with regard to a material change in behaviour at companies than Option A1.

5.4.4 Option B1: broad regulation with only private law enforcement

In Option B1 (a more detailed legal regime with only private law enforcement), it is expected that companies will show more commitment as a result of a clearer regulatory framework. However, it is questionable whether this effect will be (partly) neutralized by the fact that enforcement will be very limited, as it will have to be carried out by individuals and interest groups who will bring cases only sporadically and occasionally before civil courts. In this option, too, it may take a very long time for

[204] Smit, L., e.a., Study on due diligence requirements through the supply chain, DG Just 2020, p. 105. All stakeholders (including NGOs) had even higher percentages of positive expectations.

[205] Even if the legal regulation is limited to formal requirements, it is quite conceivable that the civil judge will also comment on material requirements, such as the content and scope of the policy plan and the way in which negative consequences are detected.

sufficient case law to be established on the substance of companies' substantive obligations. Therefore, Option B1 is more likely to lead to material behavioural changes in companies than Option A1, but less likely than Option A2.

5.4.5 Option B2: broad regulation with private law and administrative law enforcement

In Option B2 (a more detailed legal regime combining private law and administrative enforcement), companies are expected to show the highest level of commitment (a) as a result of a clearer regulatory framework and (b) as a result of the presence of an administrative supervision holder. The implementation and enforcement of formal requirements is expected to be quickest in this option. The implementation of material requirements (mostly effort obligations) will take longer in this option, as in Option A2, but is expected to take considerably less time than in Options A1 and B1. This Option B2 is therefore likely to lead to the quickest material behavioural change in companies of the possibilities discussed here.

5.5 Material change in behaviour at the individual steps in the due diligence cycle

5.5.1 Material change in behaviour in step 1 (Integrate due diligence in policy and management systems)

Drawing up a policy document and a due diligence plan does not in itself lead to a material change in a company's behaviour, because this obligation is of a formal nature. Nevertheless, this first step may indirectly lead to a material change in behaviour. This may, for example, be due to the fact that this formal obligation makes the company more aware of material risks in its own activities and those of its business partners and then takes action against them.

5.5.2 Material change in business conduct in steps 2-4 (Identify and assess adverse consequences; stop, prevent, and mitigate adverse consequences; monitor the practical application and results of due diligence)

Steps 2-4 form the heart of the due diligence process. They relate to the actual functioning of the business processes in order to identify, address and learn from negative consequences. If properly implemented and executed, this obligation will contribute most to a material change in the company's behaviour. It should also be borne in mind that these steps can be put into practice in many ways. Therefore, the focus does not necessarily always have to be on the formal steps, but can also focus on the effectiveness of the process used by the company. A company that does not follow all the steps, but can demonstrate that its process is effective, meets the scope of the requirements in steps 2-4.

Whether this actually happens depends in the first place on the due diligence capabilities (in terms of knowledge, management and resources) that the company has at its disposal. Whether this capacity is deployed and sufficiently utilized depends in the first place on decisions taken by the company in this regard. Insufficient knowledge, incapable management and insufficient resources will lead to a sub-optimal material behavioural change.

If these steps are made enforceable, the actual material change in behaviour also depends on the effectiveness of enforcement. This effectiveness is partly influenced by the fact that it is usually difficult to specify in concrete terms what can be expected of a company. This has to do with the wide variety of facts that can arise: the location of the activities, the nature of the activities (the sector), the nature of the negative impact (from child labour to environmental pollution), the question when there is a negative impact, the question when the company is sufficiently closely involved and how long a company must try to terminate a negative impact with a business partner before the relationship can be terminated.

It should also be borne in mind that value chains can be insufficiently transparent and that it is therefore difficult to determine what business partners do (further down) in that chain.[206] In addition, there may be legal barriers to transparency, for example due to confidentiality provisions in agreements, competition law[207] or other regulations.

This raises the question of whether there should be legal obligations to guarantee (a certain degree of) transparency in value chains, or whether other types of solutions (e.g. technological solutions) should be found. However, legal obligations do not seem easy to implement because they would also apply to relations between non-Dutch parties outside the Netherlands and the Dutch government cannot regulate them. Other types of facilities (e.g. technological facilities) seem more likely. Examples include blockchains, which some companies already use in their supply chains.[208]

All this means that, in these cases, enforcing the mere taking of a number of steps (identify, assess, stop, prevent and limit) is not sufficient to promote a material change in the company's behaviour.[209] It is important that substantive and qualitative supervision also takes place, and that the supervisor promotes the learning capacity of companies through information and guidelines. In this context, a form of dynamic supervision could be envisaged.

5.5.3 Material change in behaviour in step 5 (Communicate how negative consequences are addressed)

This step involves the company's obligation to report on the practice of its due diligence process and how it has addressed any negative consequences. Enforcing this obligation in itself, as in step 1, does not appear to lead to a material change in the company's behaviour because it is formal in nature.

However, this step may indirectly lead to a material change in behaviour. This may, for example, be due to the fact that, because the company has to report on the due diligence process, it dresses this process better and more effectively, thus preventing negative consequences earlier and, if they occur, tackling them better.

A majority (50.4%) of respondents to the European Commission's recent survey of companies indicated that new reporting requirements would have a social impact, and 40.9% that this would have an impact on the environment. A slightly larger majority (55.2%) of these respondents indicated that statutory due diligence reporting would have an impact on human rights and only 18.1% said it would not.[210]

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[206] Nevertheless, in the context of the due diligence carried out under the European Timber Regulation (Regulation EU 995/2010), it was possible for the supervisor to require that verifiable information on the (legal) origin of timber be available for the entire chain. See Rb Den Haag 9 January 2020, ECLI:NL:RBDHA:2020:473.
[207] In this context, problems may arise with full transparency about production sites and prices.
[208] This only increases transparency to a limited extent because the information is only accessible to the company itself. More public blockchains could be even more effective in this respect.
[209] Smit, L., e.a., *Study on due diligence requirements through the supply chain*, DG Just 2020, p. 107 et seq. All stakeholders (including NGOs) had even higher percentages of positive expectations.
[210] Smit, L., e.a., *Study on due diligence requirements through the supply chain*, DG Just 2020, p. 100.

An important element of monitoring will be the development of guidelines on content and method of reporting, which will make information more comparable between companies. This can indirectly lead to a qualitatively better due diligence process and thus also to a material change in the behaviour of companies, while preventing a reporting obligation from leading to a communication exercise in which relevant information is insufficiently highlighted. Here, too, a form of dynamic supervision is important (see Chapter 6).

5.5.4 Material behavioural change in step 6 (Take care of or contribute to remedial measures)

Step 6 forms the final part of the due diligence process. It aims to ensure that negative consequences are adequately addressed, either by the company itself or in cooperation with relevant business partners. If effectively and properly implemented and executed, this obligation will make a significant contribution to a material change in the company's behaviour.

It is not clear to what extent companies working according to OECD guidelines have also implemented this sixth step optimally in their business operations. Rather, it is likely that this step is still in its infancy in most companies. To this extent, coercive measures have the potential to bring about material behavioural change in companies.

It is also conceivable that, as a result of a legal obligation to take remedial action, companies may change their behaviour and focus at an earlier stage on identifying and addressing negative impacts they have caused or contributed to, so that these problems do not develop into disputes (steps 2-4). Assessing the quality of dealing with disputes about negative impacts and offering recovery cannot be separated from this preliminary process.

This means that enforcement through the usual route of command and control of rule compliance is not easy here, also in view of the varied and complex situations that may arise. In order to actually contribute to a material change in behaviour, the supervisory authority will need to have sufficient information at its disposal. Because these issues are often abroad, he will depend on the one hand on what companies report on this themselves (this is also related to step 5), and on the other hand on what individuals or NGOs report. The latter will usually be incidental rather than structural information.

Enforcement on the basis of the mere taking of a number of steps by the company (taking care of remedial measures or working on them) is therefore not sufficient in these cases to promote a material change in the company's behaviour. It is important that substantive and qualitative supervision also takes place and that the supervisor promotes the learning capacity of companies by means of information and guidelines. This also means, for example, preventing a company, which is involved in a negative outcome, from falling into a litigation mode but cooperating favourably in forms of out-of-court and judicial dispute resolution. For this reason too, a form of dynamic supervision is appropriate here (Chapter 6).

5.6 To what extent can legal certainty for businesses be ensured?

In the case of legal certainty, the (reasonable) degree of certainty that companies have as to what is required of them in order to comply with the requirements of the statutory regulation. Incidentally, it is not only businesses but also stakeholders and the law that have an interest in sufficient legal certainty. They too will have to find out on a trial basis (by means of private law enforcement, whether or not in combination with steering law enforcement) how the standards should be implemented in law and what they can expect from companies in law.

5.6.1 Option A1: Limited regulation with only private law enforcement

Legal certainty is very limited in Option A1 (a legal arrangement with only private law enforcement). To begin with, the number of rules is limited and are formulated in very general terms. It is then usually difficult for a company to assess when exactly legal requirements have been met or not yet met. Clarity in this respect can only be obtained through the sporadic and occasional actions brought by individuals and interest groups before civil courts.[211] It can therefore take a very long time before sufficient case law has been established regarding the scope of formal obligations and the content of companies' substantive obligations.[212] This is even more relevant now that private law standards based on unwritten law are also being established for the past and not just for the future. Option A1 therefore offers the lowest degree of legal certainty for companies.

5.6.2 Option A2: Limited regulation with private law and administrative law enforcement

In Option A2 (a statutory regulation with a combination of private law and administrative law enforcement), legal certainty is greater in the sense that the regulator can primarily contribute to the development of concrete standards that make clear what is expected of companies in complying with statutory standards. However, this may take longer with a limited legal framework than with a more detailed legal framework (such as in Option B2); to that extent, legal uncertainty may take longer with this option. Secondly, administrative law enforcement, which takes place systematically and structurally, leads to more legal certainty for companies than private law enforcement, which takes place incidentally and sporadically.

5.6.3 Option B1: broad regulation with only private enforcement

In Option B1 (a more detailed legal regime with private law enforcement only), legal certainty is enhanced by a more detailed regulatory framework allowing companies to better assess what is expected of them. On the other hand, however, this regulatory framework is only enforced under private law by individuals and interest groups who will only bring cases to civil courts on an occasional and occasional basis. This is why it can take a very long time to establish sufficient case law on the scope of formal obligations and the substance of companies' substantive obligations.[213] This is all the more relevant now that private law standards based on unwritten law are also being established for the past and not just for the future. Option B1 therefore offers more legal certainty than Option A1 but less legal certainty than Option A2.

5.6.4 Option B2: broad regulation with private law and administrative law enforcement

[211] It is true that the judge will probably be guided by the OECD's guidance, but this will not always lead to a predictable outcome in specific cases.
[212] Even if the legal regulation is limited to formal requirements, it is quite conceivable that the civil judge will also comment on material requirements, such as the content and scope of the policy plan and the way in which negative consequences are detected.
[213] It is true that the judge will probably be guided by the OECD's guidance, but this will not always lead to a predictable outcome in specific cases.

Option B2 (a more detailed legal regime combining private law and administrative enforcement) is likely to lead to the highest degree of legal certainty, (a) as a result of a clearer regulatory framework and (b) as a result of the presence of an administrative supervisor. Implementation and enforcement of formal requirements is expected to be quickest in this option and to the extent that it reduces legal certainty. The implementation of substantive requirements (mostly effort requirements) will take longer in this option, as in Option A2, but is expected to take considerably less time than in Options A1 and B1. This Option B2 is therefore likely to lead to the highest degree of legal certainty of the possibilities discussed here.

5.7 Other assessment factors

5.7.1 Feasibility of the scheme

The feasibility of a statutory scheme depends on whether companies can implement the statutory scheme in a practical manner. In principle, this depends, among other things, on the form and content of the statutory regulation. The practicability can be promoted by taking into account the experiences of all relevant stakeholders when shaping the rules. The starting point is (of course) a supervisor with knowledge of the field when it comes to carrying out due diligence.

This test would mean that a form of enforcement under administrative law would be preferable to exclusively private law enforcement, because in the latter case not all stakeholders can by definition be heard. In the case of a private-law decision, the enforceability of the scheme does not, in principle, play a role. This would mean that Options A2 and B2 are preferable to Options A1 and B1.

Does it make a difference to the enforceability whether the legal regulation is limited in scope or extensive? In itself this says little about the practicability of the rules, because in both cases the rules can be practicable to a greater or lesser extent.

5.7.2 Influence on regulatory burden

The government expects all large Dutch companies to operate in accordance with OECD guidelines.[214] To the extent that companies meet these expectations (the forerunners and a small proportion of the followers), making due diligence a legal requirement will add little to what these companies are already doing. This means that mandatory due diligence will not lead to a higher regulatory burden. However, this assumption is based on the assumption that the statutory rules are formulated in such a way that they are in line with the adequate practices of these companies.

A higher regulatory burden as a result of making due diligence enforceable will therefore mainly apply to companies that do not (yet) meet the government's expectations. These are, in particular, the laggards and a large proportion of the followers. This higher regulatory burden is in itself justified in view of the aim of the statutory regulation: to bring about a material change in the behaviour of companies. However, the means (the regulations) must be proportional to this goal.

[214] https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/bevorderen-internationaal-maatschappelijk-verantwoord-ondernemen.

If this aspect is considered in isolation, it can be argued that the more concise the legal regulation is, the lower the regulatory burden will be. In this respect, Options A1 and A2 are preferable. In these options, the number of regulations is concise and the open standards leave room for interpretation. Administrative law supervision contributes more to the regulatory burden than private law enforcement through the development of specific standards. This means that A1 has the lowest regulatory burden (concise regulation with private law enforcement only) and B2 the highest regulatory burden (extensive regulation with administrative law enforcement).

This reasoning is flawed, however, because a low regulatory burden probably does not bring the objective of the statutory regulation (material change in the behaviour of companies) any closer (6.4.2) and is therefore in fact non-functional.

Regulatory pressure should be seen in conjunction with the intended purpose of a statutory regulation. After all, an appropriate level of detail in regulations contributes to legal certainty and can also contribute to their enforceability. This appropriate level of detail will have to be a proportionality test: is the regulatory burden proportional to the objective to be achieved?

A general consideration here is the distinction between larger and smaller companies (this applies to each step in the due diligence cycle). Larger companies can, in principle, cope with a greater regulatory burden than smaller companies. This means that first of all it has to be decided whether enforceable IRBC measures should also apply to smaller companies. If so, it will have to be considered in which sectors in particular this is desirable and how the regulations for this category of companies can be adapted and made manageable. On this consideration see section 3.4.

Influence on the regulatory burden in enforcing Step 5 (reporting on due diligence)
In the Netherlands the European Directive on Non-Financial Reporting[215] has been implemented in Section 2:391 subsection 1 of the Dutch Civil Code. This requires large companies[216] to include non-financial information in the management report. This information also covers subjects that are important in connection with OECD due diligence (such as human rights and the environment) but does not include reporting on the OECD due diligence as such. Therefore, Article 2:391 of the Dutch Civil Code and the decision based thereon do not yet include a reporting requirement with regard to OECD due diligence.[217]

On the disadvantages of a reporting obligation and more generally of transparency obligations, as well as a possible extension of this obligation to smaller companies, see section 4.2.1. It is in any case important to ensure that, if an ad hoc reporting obligation for OECD due diligence were to be introduced, it would be in accordance with the European Directive and Article 2:391 of the Dutch Civil Code based thereon. In addition, it is wise to state explicitly in the explanatory notes to the new legislation that this is a more far-reaching obligation.

5.7.3 Business climate and international competitiveness

[215] Directive 2013/34/EU.
[216] Companies with more than 500 employees, a balance sheet total of more than Euro 20 million or a turnover of more than Euro 40 million.
[217] The same applies to the obligation in the Corporate Governance Code to provide an explanation of long-term value creation in the management report; this obligation also does not relate to the reporting on due diligence as such (see section 4.2.1).

As far as the climate for establishment is concerned, it is very unlikely that the introduction of a due diligence regime would in itself be a reason for a company to leave the Netherlands or not to establish itself in the Netherlands. If companies are already considering such a decision, they will often consider the whole system of legislation and regulations, including the tax burden. Mandatory due diligence will not make a material difference to the forerunners among companies above all for their operations. Neither the stakeholder consultation[218] nor previous research[219] have shown that the introduction of regulations in this area will lead companies to leave the Netherlands to relocate. This notwithstanding the fact that several countries in the European Union and the European Union itself have introduced or intend to introduce similar legislation.[220]

As far as the international competitive position is concerned, it cannot be ruled out that it may be affected by the introduction of regulations in the Netherlands. This may be the case if Dutch companies operate in the same market as foreign companies to which these rules do not apply. To what extent this is a competitive disadvantage depends on the way in which the Dutch rules will be shaped and the implementation costs involved.

It should also be noted that the government already expects Dutch companies to act in accordance with OECD guidelines. In this expectation, the government has apparently, and not incomprehensibly, assumed that compliance with the OECD guidelines will not lead to competitive disadvantage, and if this is already the case, this disadvantage will be compensated by the benefits that compliance with the guidelines is expected to bring, such as better risk management, a stronger market and credit position and a greater contribution to value creation.

5.7.4 What are possible side effects and unforeseen or unintended effects?

In the stakeholder consultation various possible side-effects, unforeseen or unintended effects of regulations were mentioned.

A first category related to the lack of material change in behaviour. A regulation could lead to window dressing, a defensive attitude, greenwashing and a focus on process instead of content. This is indeed a serious risk of introducing such legislation if it only consists of Option A and is only enforced under private law. If it is also enforced under administrative law, this risk is somewhat less. Option B will reduce this risk the most.

It was also noted that there is a risk of slowing down the development of the law. Although this is difficult to estimate, it will mainly depend on the way in which the regulation is shaped. In Option A, due to the open standards and their mainly formal character, the development of the law is in principle left open. Depending on the method of enforcement, the key to the development of the law lies with the

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[218] See annex 2.

[219] L. Enneking e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles* (report commissioned by the WODC at the request of the Legislation and Legal Affairs Department of the Ministry of Security & Justice and the Legal Affairs Department of the Ministry of Foreign Affairs.), Utrecht: UCall/Universiteit Utrecht 2015.

[220] More detail in Smit, L., e.a., *Study on due diligence requirements through the supply chain*, DG Just 2020, p. 142 et seq. on stakeholders' views on regulating due diligence at EU level with regard to harmonization, legal certainty and a level playing field.

civil courts (private law enforcement) or with the supervisory and administrative courts (or both). With Option A, however, there is a risk that legal development will not take place at all, because the regulation only leads to ticking-box exercises. If this is deemed sufficient, the statutory regulation could indeed act as a brake on the development of the law.

Could mandatory due diligence lead to distortion of the internal market? As such, this cannot be ruled out, but it also depends on the form and content of the legislation. It is clear that mandatory due diligence entails costs for companies that companies in other Member States do not have to incur. However, this is not unusual in itself. Even in today's internal market, there are rules that may differ from one Member State to another. This in itself does not mean that the internal market is being distorted.[221]

Moreover, the uneven playing field in Europe has already been somewhat constrained by specific legislation in France and the United Kingdom and is expected to be so in other countries in the foreseeable future (see Annex 1). In view of the fact that many European companies are familiar with conducting due diligence, the distinction between regulated due diligence in the Netherlands and unregulated due diligence abroad appears to be relative and certainly not black and white.

5.8 Conclusion

The extent to which an option leads to a favourable or less favourable effect is indicated in the column below for a number of test elements. The degree to which an option has a favourable effect is indicated by -- (unfavourable), - (moderately unfavourable) +/- (moderately favourable) and + (favourable).

	Material change in behaviour	**Legal certainty**	**Feasibility**	**Regulatory pressure**
Option A1 (limited) with only private law enforcement	--	--	-	+
Option A2 (limited) with administrative and private law enforcement	+/-	+/-	+/-	+/-
Option B1 (broad) with only private law enforcement	-	-	-	-
Option B2 (broad) with administrative and private law enforcement	+	+	+/-	--

[221] See ECJ 5 October 2000, Case C-376/98, ECR 2000, I-8419 (Germany v. European Parliament and European Council).

It follows from the analysis made in points 5.3 and 5.4 that the likelihood of a material change in the behaviour of companies is greatest in Option B2 (broad statutory regulation with private law and administrative law enforcement). The smallest chance of a material change in behaviour exists in Option A1 (limited statutory regulation and only private law enforcement). Option A2 ends in number two in this respect and Option B1 in number three.

In more general terms, it can be observed that a statutory regulation that does not suffice with a few general abstract standards, but contains more specific standards, has a greater chance of bringing about a material change in behaviour in companies. Furthermore, a form of administrative enforcement is an important precondition for bringing about a material change in the behaviour of undertakings. For the latter, it is particularly important that the supervisor makes use of forms of dynamic supervision (see Chapter 6).

With regard to the various steps in the due diligence cycle, it also appears (Section 5.5) that material change in behaviour is most likely to occur when regulating steps 2-4 and 6. However, the enforcement of precisely these steps (if regulated) is expected to be sub-optimal when applying classical command and control of rule compliance methods. It is therefore very important to develop forms of dynamic supervision in this context. See Chapter 6 on this subject.

The analysis in section 5.6 on legal certainty confirms the picture outlined above. Here, too, a better result can be expected with Option B2 than with the other options. Option A1 probably offers the least legal certainty, while Option A2 ends in number two and Option B1 in number three.

With regard to practicability (section 5.7.1) Options with administrative law enforcement (A2 and B2) score better than options that are only enforced under private law (A1 and B1).

Only in the case of regulatory pressure (section 5.7.2) does Option A1 (concise regulation and only private law enforcement) score best on its own. However, it makes little sense to consider regulatory pressure in isolation without considering the purpose of the statutory regulation. A regulation with a low regulatory burden that does not meet its objective is a cost item with no return. However, the regulatory burden will have to be considered in terms of whether it is proportional to the objective to be achieved. This applies in particular to the question whether a statutory regulation should apply to all enterprises or only to larger enterprises (section 3.4).

As far as the business climate is concerned, no particularities are to be expected as a result of making IRBC measures enforceable. As a result, it is unlikely that companies will decide to leave the Netherlands or not to establish themselves there (section 5.7.3).

With regard to the international competitive position of Dutch companies on the European market (section 5.7.3), a distinction can be made in the regulatory burden if IRBC measures are made enforceable in the Netherlands. In this respect national regulation in Europe is different and does not have to be a problem in itself. In addition, depending on how the relevant legislation is organized, the actual difference in regulatory burden can be limited.

In addition, the Dutch government has long expected Dutch companies to operate in accordance with OECD guidelines. So far it has not been shown that companies fulfilling this expectation are at a competitive disadvantage. If this were already the case, this would be offset by advantages that could offset the disadvantages. These include better risk management, a stronger market and credit position and a greater contribution to value creation.

6. DYNAMIC SUPERVISION

6.1 Introduction

In assessing the pros and cons of the legislative options presented in this study, it is very important that compliance with the legal rules can be ensured in the best possible way. It is then a matter of promoting that the legal rules, on the one hand, lead to as many desirable consequences as possible (material behavioural change of companies) and, on the other hand, as little undesirable consequences as possible (unnecessarily high administrative burdens, ticking-box exercises, minimal compliance and discouragement of positive (multi-stakeholder) initiatives.

The lack of effectiveness of regulations and the undesirable and unforeseen side effects have been a topic of discussion for some time and more widely.[222] For various reasons, this discussion particularly affects potential IRBC regulations, partly because this is a very complex and varied environment[223] in which companies themselves, partly because of the economic and social realities in many producing countries, cannot bring about all the desired change. Moreover, the current regulations only lead to a limited incentive for companies or multi-stakeholder initiatives to develop and implement best practices (which lead to a material change in behaviour).

The dynamic supervision to be elaborated below is conceivable for several of the options mentioned in chapter 4, with the exception of creating liability, declaring the IRBC covenants generally binding, extending the scope of the Scope for Sustainability Initiatives Act, adapting national procedural rules and/or the IPR and approving production locations. After all, these options will not involve (separate) public-law supervision (of actors) in the Netherlands.

For the other options, dynamic supervision of the subject specifically addressed in that option and the best practices developed or to be developed in that context is conceivable. However, in order to elaborate this form of supervision as concretely as possible, so that there is as clear a picture as possible of what is meant by it, and in view of the time available for the study, we have opted, following on from Chapter 5, to elaborate it for the statutory embedding of OECD due diligence.[224]

6.2 Special features of enforcing due diligence regulations

Firstly, although there is broad consensus that companies should carry out due diligence, there is not, or to a much lesser extent, what this due diligence should involve. This is not yet clear internationally either.[225] This applies, for example, to the question of when there is a negative impact and whether a company is (sufficiently) involved in such a negative impact.[226] However, open legal standards have

[222] M. de Bree & M. Dees, ‘Complexiteit vraagt om een andere manier van regels maken’, *TPC* 2019, issue 6, p. 14-18, with further references.
[223] J. Snowden & M.E. Boone, ‘A Leader’s Framework for Decision Making’, *Harvard Business Review* 2007, issue 11, p. 69-76.
[224] If one of these other options were chosen to be implemented, the development of dynamic surveillance in respect of that option could be further explored.
[225] Also compare L. Smit e.a., *Study on due diligence requirements through the supply chain* (research for the European Commission), DG Just 2020, p. 48-88.
[226] The concept of 'negative impact' refers to adverse effects for subjects mentioned in the OECD guidelines. Therefore, it does not necessarily refer to negative impacts laid down in legislation or regulations.

the disadvantage that, certainly in an area such as this, they are generally broadly formulated. Companies therefore need further clarification of their obligations.[227]

Secondly, there is a multitude of possible factual circumstances in which a negative impact can take place and these can vary according to the location of the negative impact, the sector in which it takes place and the size of the company. This means that the answer to the question of what is the desired behaviour of a company in concrete cases is not always easy to give.

Thirdly, the answer to the question of what the desired corporate behaviour is in motion and developing. What was sufficient five years ago can now be regarded as insufficient in view, for example, of the practice of pioneering companies.

Fourthly, in many cases a negative reaction of a company (withdrawal or withdrawal) can be counter-productive for a positive effect on the land. A company confronted with child labour or slave labour in the supply chain would do better to address the problem rather than to distance itself from it and, as far as possible, pass the problem on to other parties in the chain. A positive solution can be achieved by working with (local) governments, NGOs and other stakeholders to find an effective solution, such as raising wages and facilitating schooling for the children.

In other words: different forms of negative impacts require different approaches. Sometimes a company has to disinvest, often it has to take the problem into account, for example by creating conditions or by limiting or ending negative impacts with other stakeholders.

Fifthly, the market shows a divided picture of leading, moving and lagging companies. Especially in the first category (and occasionally in the second category) there are active and proactive initiatives (often in a multi-stakeholder context) that can be regarded as best practice for certain situations. Regulation and supervision should not stifle these initiatives, but rather support and encourage them. It is important to respond positively to business practices that are developing in the right direction.

Sixthly, in many cases it will involve the behaviour of companies (or their business partners) outside the Netherlands and also effects on the ground outside the Netherlands. The possibilities for a Dutch regulator are therefore limited when it comes to the classic forms of investigation and enforcement.

6.3 Special features of dynamic supervision

For the reasons mentioned above, monitoring compliance with due diligence obligations lends itself less well to a classical command and control of rule compliance approach. It is essential that supervision does not focus on seeing whether companies are making mistakes (road to the bottom) but, on the contrary, that it encourages companies to perform better and better (road to the top), thereby creating as much positive behavioural change as possible. This applies in particular to the extent that legislation includes best practice obligations (based on an open standard) in connection with OECD due diligence. As discussed in chapter 5, it is conceivable that there will be obligations to achieve results on certain

[227] Moreover, that does not necessarily mean that such open due diligence standards cannot be maintained because they are contrary to the principle of legal certainty. For the European timber regulation (Regulation EU 995/2010), see for example Rb Den Haag 9 January 2020, ECLI:NL:RBDHA:2020:473; Rb Noord-Nederland 24 May 2017, ECLI:NL:RBNHO:2017:4474. See also Commission communication of 18 October 2018, 2018/C 376/01, which provides guidance in cases where the legality of logging is unclear.

aspects of OECD due diligence. More classical public supervision could also be appropriate. It is therefore a combination of both forms of supervision.

A dynamic supervisory approach preferably also requires a single supervisor. The advantage of this is that supervision can be designed unambiguously and the supervisory burden on companies is limited. Moreover, the supervisor then has knowledge of different sectors and companies and what knowledge or best practices have been acquired in a certain sector or for a certain type of company can also be used in other sectors or for other types of companies, insofar as this is relevant.

Incidentally, it would also be conceivable to create an alliance of supervisors in this field that cooperates intensively in the field of OECD due diligence, in connection with which a statutory possibility should be created to exchange (supervisory) information within this alliance. Of course, it is very important that the supervisor also has sufficient budget to be able to carry out these tasks.[228] For example, the development of a benchmark to be discussed below is often labour-intensive.[229]

In addition, the supervisor will have to acquire knowledge, certainly where best practices from the market are used. This will take some time and the supervisor will also need to have sufficient capacity for this.[230] Moreover, it seems wise to enter into discussions with stakeholders about the set-up of the supervisor. Furthermore, good coordination between supervisors is important, partly in view of the fact that it must be avoided as far as possible that those under supervision have to provide the same information several times to different supervisors.

As far as supervised companies are concerned, the choice made when implementing the Non-Financial Reporting Directive[231] could be in line with the choice made, but a larger number of companies could also be subject to supervision, for example in certain sectors. Insofar as the Non-Financial Reporting Directive is followed, it concerns not only large companies but also companies that comply with the requirements of Article 2:396.[232] Incidentally, the AFM already supervises the reporting obligation under Article 2:396 of the Dutch Civil Code to a certain extent through its audit of auditors. In this context, the question is which companies should be subject to dynamic supervision in connection with (the other steps of) the OECD due diligence. If necessary, e.g. by enabling the possibility of extension with a governmental decree (AMvB), it can be determined that the rules also apply to smaller companies if they are active in certain risk sectors, such as, for example, clothing and textiles.

The way in which the supervisor can give shape to the dynamic form of supervision referred to above should, of course, be part of further study. This is a form of supervision that can be compared to what

[228] Some interviewees in the EU survey considered these costs to be potentially prohibitive. See Smit e.a., *Study on due diligence requirements through the supply chain* (study for the European Commission), DG Just 2020, p. 139.
[229] Incidentally, this is not always the case and depends, among other things, on the type of benchmark (general or more specific), the size of the market, the type of institutions and best practices and benchmarks already existing in the sector.
[230] It could be conceivable to introduce a transitional period for the development of best practice/due diligence plans and/or for the enforcement of regulations. See Smit e.a., DG Just 2020, p. 120 and 121.
[231] Directive 2014/95/EU.
[232] At least two of the following three conditions must be met:
a. the value of the assets according to the balance sheet and explanatory notes does not exceed € 6,000,000 on the basis of the acquisition and manufacturing price;
b. the net turnover for the financial year does not exceed € 12,000,000;
c. the average number of employees during the financial year is less than 50.

is known as 'experimentalist governance'[233], which involves both supervisors and supervised companies, as well as their stakeholders, in innovating regulation and supervision. Examples in the framework of OECD due diligence do not (yet) exist. However, this is partly done in other areas. This will be further elaborated below. Dynamic supervision can also contribute to reducing the gap between the formal and the real world in companies, where policy has been formally introduced but not actually implemented and is therefore ineffective.[234] The question of whether dynamic supervision is effective will, incidentally, also depend on the market. It is conceivable that factors such as competition for innovation, technology or labour and the interest of (daring) investors in that market may be relevant to the effectiveness of such supervision. It would seem obvious, now that little experience has been gained with this form of supervision, to verify by means of external research, for example, after five years, whether and to what extent this new form of supervision has been effective.

6.4 Instruments

As far as possible tools are concerned, benchmarking (6.4.1), the development of enforceable minimum standards (6.4.2), the development of best practices (6.4.3) and the roll-out of best practices in e.g. labelling and procurement (6.4.4) could in any case be considered.

6.4.1 Benchmarking

A first conceivable tool is the benchmarking of companies with regard to practices in certain sectors or with regard to specific due diligence aspects. The benchmark could be based on best practices within a company or, perhaps even better, within a multi-stakeholder initiative (such as the IRBC covenants) or in a particular sector.[235] This is particularly true if it has been shown (companies or multi-stakeholder initiatives need to monitor the effectiveness of their initiatives) that these best practices actually lead to material behavioural change, have to some extent crystallised in the market and are not disproportionately costly.[236] Furthermore, it is obvious that the supervisor mainly takes into account and encourages best practices that focus on the greatest risks of violations of the OECD guidelines within a sector or type of company. In the context of the manageability of the best practices and the prevention of disproportionate costs, it is also wise to (first) include them in the core of a company's activities or products because that is where the expected impact is greatest. In the case of oil companies, for example, it is obvious to focus these on their production activities and (in the first instance) less on their supply chains for the purchase of, for example, office supplies.

Such an approach also partly solves the problem that, in principle, a Dutch regulator cannot check on the ground in other countries and the autonomous setting of Dutch rules or obligations can conflict with regulations in the countries concerned. In the past, in response to EU regulations, the countries concerned have come up with their own regulations or (certification) initiatives to safeguard their own

[233] For example see C.F. Sabel, 'Beyond principal-agent governance: Experimentalist organisations, learning and accountability', in: E.R. Engelen and M. Sie Dhian Ho (red.) *De staat van de democratie. Democratie voorbij de staat*. Amsterdam: Amsterdam University Press, 2004, p. 173-193; E. Szyszczak, 'Experimental governance: The open method of coordination'. *European Law Journal* 2006, issue 4, p. 486–502.
[234] M. de Bree & A. Stopendaal, 'De- and Recoupling and Public Regulation', *Organization Studies* 2018, p. 1-22.
[235] Section 6.4.3 examines the question of how these can be developed.
[236] For the question of how and to what extent OECD due diligence is currently being carried out in the EU and examples of types of approaches that could provide best practice, see Smit e.a., DG Just 2020, p.48-88.

interests, as they saw fit.[237] Such a competition of regulations is, to put it mildly, not helpful. It therefore seems relevant to seek cooperation with the countries where the problems arise. However, it is more difficult for the legislator, in the context of setting legal standards, to shape this properly (subject perhaps to some (informal) consultation on what kind of legislative option would be most appropriate). In the context of best practices, however, a regulator can better consider which approach best relates to regulation and initiatives in the countries where the problems occur, and also maintain contact with local regulators through embassies in that context. In addition, best practices may also require the involvement of local supervisors/regulators, for example to see why existing regulations are not enforced there, which is generally difficult for a Dutch supervisor to achieve independently.

It is also conceivable that several such best practices exist and also that they differ per sector, type of company or size of company. The idea is that the companies that apply (many of) these best practices and implement them successfully, end up high in the benchmark, companies that are in the process of implementation but have not yet implemented them successfully or only apply a limited number of these best practices in the middle rankings and companies that do not do so at all in the bottom rankings. In this context, the benchmark does not only have to be related to the minimum standard (laid down by law and in the policy of the supervisory authority), but can also be related to that minimum exceeding best practice. The benchmark therefore does not look at best practices as such, but at whether and how often companies implement them. In addition, a benchmark could look at different actors. It is conceivable that a benchmark could relate to certain companies, certain sectors or a certain position of actors in the chain in several sectors (such as traders or processors of semi-manufactured products).

While it is true that the supervisor will not be able to enforce (administrative) sanctions above the statutory standard (after all, the power of enforcement relates to the statutory standard), this does not detract from the fact that, in discussions with those under supervision, supra-statutory best practices can be discussed and they can be questioned as to why they are not being used. In addition, the benchmark as such can provide a positive stimulus because companies that have developed best practices (or use best practices developed by multi-stakeholder initiatives) and implemented them end up high on the benchmark and are 'rewarded' in that sense. This applies not only if the benchmark is public, but even if only those under supervision (in a certain sector or of a certain type of companies) have insight into the benchmark.

An example in which such benchmarks are used in the context of (informal) supervision (outside the scope of OECD due diligence) is financial supervision. The Dutch Authority of Financial Markets (AFM) uses (not fully public) benchmarks for this purpose.[238] In a number of areas, the AFM has developed so-called 'dashboards' that indicate how a financial institution performs in the area of that dashboard.[239] The dashboards, which are sometimes more general and sometimes more specific, indicate to the public how the sector performs on average. Individual financial institutions also gain insight into their score in relation to the average. The average is determined by identifying a number of indicators

[237] See, for example, in relation to the European timber regulation (Regulation EU 995/2010 and Implementing Regulation EU 607/2012), where cooperation with a number of countries (Ghana and Indonesia) has now improved. See for example C. Overdevest & J. Zeitlin, 'Experimentalism in transnational forest governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana', *Regulation & Governance* (12) 2018, afl. 1, p. 64-87, and in particular par. 4 and 5.

[238] See for example *AFM, Annual Report 2016, Intense supervision in a changed playing field*, AFM 2017, p. 25 and 65. Because these largely relate to (sensitive) business information, it also seems unlikely that a request for (further) disclosure of the benchmark will succeed.

[239] For the various dashboard modules, see https://www.afm.nl/nl-nl/professionals/onderwerpen/kb-dashboard.

and using them to determine how financial institutions perform and then establishing an overall score for each institution, which is used to calculate the average for the sector as a whole. The indicators are based on knowledge of the AFM and information received from external parties. The AFM also always conducts a pilot with the indicators to see whether they work in practice. In a number of cases, the score on the indicators is determined by the regulator itself, but can also be based on self-assessments which, incidentally, are checked (randomly). These dashboards can stimulate financial institutions to get higher on the benchmark. The expectation of the AFM, which it also expresses in conversations with those under supervision, is that institutions will perform better if they are below the average, whereby enforcement can be challenging if an institution can only meet the average if it does more than is required by the statutory minimum standard. In such cases, there also appears to be a potential impact in practice of (the threat of) holding additional discussions with the institution concerned if no efforts are made to improve.

The Food and Consumer Goods Product Safety Authority (NVWA) also uses best practices from the market in the form of certification as part of its supervision. If a supervised person has a certificate of an initiative that meets all the requirements of the NVWA, the NVWA checks to a lesser extent. The NVWA is also discussing this with these certification initiatives. If a certification initiative scores well, less supervision is exercised over a supervised party who participates in this initiative.[240]

The incentive to go higher on a benchmark can be strengthened by making it public. As an interim solution, it is also conceivable that only the companies at the bottom end of the benchmark will be published by the supervisor. Incidentally, publication of the imposition of a sanction by a regulator is often seen as 'naming and shaming' and therefore as an additional form of sanctioning. To a certain extent, this may also be the case prior to publication of the benchmark, although its impact appears to be less than that of imposing a sanction. Nevertheless, it should be made clear in the statutory regulation for supervision that the regulator has the power to (partially) publish the benchmark and also under which conditions it can be exercised.[241] A slightly different but also conceivable disclosure is a note in a register for directors who notoriously refuse to make efforts in the field of OECD due diligence, as a result of which their company remains below the benchmark. Such an endorsement can be used in financial institutions and is relevant there because DNB has to approve the appointment of a director in a financial institution and such an endorsement is included in that assessment. In addition, such a note could be relevant for investors.

6.4.2 Developing enforceable minimum standards

A second instrument is the development by the supervisor of enforceable minimum standards to which firms must in any event adhere (in particular by laying down a bottom line in rules (there must then be a legal power to lay down such rules) or policy on the part of the supervisor)[242], as well as the gradual and continuous raising of this bottom line (by adapting the rules or policy just referred to).

[240] For example Scheltema 2016, p. 153 en 154.
[241] For example, for the publication of the imposition of a fine in the context of financial supervision, see Section 1:97 Wft. In the case of the serious breaches referred to in Section 1:97 of the Financial Supervision Act, the supervisory authority is even obliged to publish the fine. See for example Dieben, in: *GS Toezicht Financiële Markten,* art. 1:97 Wft, aant. 5.3.
[242] Strictly speaking, the policy of the supervisor is not binding on those under supervision. That does not alter the fact that this policy may, for example, include the practices against which a supervisor does or does not take action. In practice, therefore, it does have meaning in the context of the question to which supervisors must adhere.

The bottom line could be determined on the basis of a statutory, relatively open standard (related to OECD due diligence) and the policy of the supervisor based thereon. In this context, the supervisor can also be guided by existing best practices and determine which of these should in any case be used and implemented (in a certain sector or for a certain type of company). This can also increase support for supervision in the market.

The advantage of using best practices is that the supervisor does not quickly set unreasonably high or non-workable requirements. After all, there are companies that have already implemented such a best practice. If companies do not achieve this minimum, they risk enforcement, for example through increased supervision, consisting of frequent visits by the supervisor who reviews and discusses whether and how the relevant best practices are implemented. In general, a company will be given a period of time to achieve this. If companies refuse to cooperate or have not done anything or have not done enough after the deadline for implementation, they risk management and possibly even criminal sanctions (in case of repeated refusal and violations). It is logical that such enforcement cannot take place immediately because the supervisor must first build up sufficient knowledge about best practices (with impact). It is therefore obvious that supervision starts with conversations with those under supervision (which, if insufficient action is taken, will be intensified) and enforcement focuses in the first instance on companies that do nothing at all.

It is not inconceivable that companies, especially large(er) capital-intensive projects or (export credit) subsidies, will need to be told in advance by the supervisor whether they (at least) meet the minimum standard. In fact, they then apply for some sort of 'authorization' in terms of compliance with the OECD Directive, so that they cannot subsequently face enforcement for violations. Although this wish is understandable, in practice it seems difficult for the supervisor to issue such an 'authorization'. Indeed, the regulator is likely to lack the capacity to go through the relevant information on all major projects for which such an examination is requested in order to decide on such a 'permit'. This may be different in the case of (export credit) subsidies.

Best practices, as indicated earlier, are dynamic. Today's best practices will not always be sufficient in some time. This means that the minimum standard will also rise as best practices change over time. It also seems more obvious to link up with best practices now that legislation and regulations can quickly become obsolete and political processes are not designed to respond to this quickly and effectively. Now that the minimum standard is being maintained, this is a dynamic form of supervision. However, classical enforcement instruments can be used to enforce the minimum standard.

6.4.3 Developing best practices

A third instrument is the development of best practices in consultation with companies and stakeholders, making maximum use of existing initiatives, including the IRBC covenants.[243] Art. 5 paragraph 4 of the Child Labour Duty of Care Act takes this as a starting point to a certain extent now that it stipulates that the Minister can approve a joint plan of approach to address child labour developed in a multi-stakeholder initiative. According to this article, approval implies that the participants in the initiative are

[243] The advantage of using it in the context of monitoring is that an EU survey shows that respondents see little point in simply developing voluntary guidance in the area of OECD due diligence. See Smit e.a.., DG Just 2020, p. 98. Moreover, respondents also consider it relevant to look not only at whether steps have been taken, but also at how effective those steps are. See Smit e.a., DG Just 2020, p. 103. In order to determine whether a best practice exists, it is also relevant whether the steps taken are effective.

deemed to have exercised sufficient care. However, in the light of the use of best practices, this is not necessarily sufficient. After all, participation in an action plan for an initiative (such as the IRBC clothing covenant) does not automatically mean that a participant also implements all the best practices laid down therein (as witness the disputes between the secretariat and some participants in the clothing covenant).[244] Moreover, a plan of approach does not necessarily have to contain best practices. What matters is whether such an initiative has developed best practices that can be used in the context of monitoring. In addition to best practices developed in multi-stakeholder initiatives (including the use of certain databases (or other IT technology such as blockchains or artificial intelligence), certification or cooperation in procurement), examples include best practices developed by (an alliance of) companies, best practices that can be derived from NCP decisions, best practices that follow from research (commissioned by the supervisor) (as long as these are also implemented in, for example, foreign practice) and best practices developed by other supervisors or public institutions (such as those developed in the context of the EU Green Taxonomy). It is also conceivable that best practices can be seen in different parts of the OECD due diligence cycle. For example, a certain method of reporting used in the market could be regarded as best practice. As part of the follow-up of measures taken by a company (the fourth step in the cycle), a best practice could also apply to the way in which a company responds to reports.

An advantage of this form of monitoring could also be that private enforcement mechanisms can be used. In addition, public supervision can help actors further down the chain. For example, banks will be assisted in their due diligence if the supervisor supervises the due diligence of their clients. Also, the adoption of best practice can provide some comfort to compliant firms in meeting the OECD due diligence requirements.

The regulator need not remain passive with regard to the (development of) best practices, but may discuss them in consultation with the field to see where further best practices are needed, how it can be determined whether best practices lead to material behavioural change in companies (in which other stakeholders may also be involved), how common they are in the market and whether existing best practices need improvement.[245] After more experience has been gained with such best practices, the supervisor could lay down in his policy when he considers a certain measure to be best practice. Obtaining more knowledge from the market can also help the regulator to identify specific risks for a type of company or sector on the basis of this knowledge. Of course, the recording of best practices or the identification of risks by the supervisor as such cannot directly be regarded as 'supervision' in the administrative law sense, but it is important for this. After all, these best practices or those risks can form the basis for benchmarks, rules or policy drawn up by the supervisor (insofar as the supervisor is allowed to draw them up). When establishing best practices, in addition to the question of whether they bring about a material change in behaviour, it is of course also important whether they are proportionate.

However, one point of attention is that being in discussion with stakeholders (including supervised companies) about best practices can interfere with the enforcement task if sanctions are later imposed on the same companies. It is possible that a solution to this problem can be found by using 'Chinese

[244] These can be found at https://www.imvoconvenanten.nl/en/garments-textile/agreement/complaints.
[245] This approach also fits in with the idea that administrative law should be more in keeping with the citizen's perspective. See, for example, L.J.A. Damen, 'Op naar 2GST in het bestuursrecht', *NTB* 2020/2; M. Scheltema, 'De responsieve rechtsstaat: het burgerperspectief', *NTB* 2019/24.

walls' between the enforcement department and the supervisors who are in discussion with the market.[246] In addition to the internal working method within the supervisor, coordination with other supervisors in relation to best practices is relevant. The Dutch Authority for Consumer and Market (ACM), for instance, should be consulted as to whether these are permissible under competition law. Furthermore, the supervisor should be transparent about the way in which best practices are established, for example by formulating policy in this area. In establishing best practices, it is also relevant that these Dutch companies should not be unfairly favoured. If it concerns best practices that foreign (and in particular European) companies active on the Dutch market cannot comply with, or can only comply with at disproportionate cost, they will generally not qualify as best practices unless a drinking justification of public interest can be found for them (also in view of Article 36 TFEU).

In addition, the advantage of using best practices over requirements developed by the legislator or supervisory authority which companies may feel are difficult to implement[247] is that there is less incentive for companies to withdraw from risky areas or sectors because otherwise there is a risk of sanctions by the supervisor. As has already been mentioned, the withdrawal of companies is often a last resort and is not preferable. The starting point is that a company tries to improve the situation, for example by implementing best practices instead of withdrawing.

A risk of this approach could be seen as the creation of a stimulance in the market in order not to set the bar too high in relation to best practices in order to avoid burdensome and costly perceived supervision. In addition, there is a risk that 'best practices' will be developed that appear interesting to the outside world but do not actually lead to a material change in behaviour. However, it is questionable whether these negative stimuli will actually arise. After all, it is plausible that at least a number of (frontrunner) companies (and multi-stakeholder initiatives) will not leave the path already taken and will moreover be stimulated by the 'reward' in the form of recognition of their best practices by the supervisor, partly due to the high position in the benchmark. In addition, a number of companies (and multi-stakeholder initiatives) will have an interest from a reputation perspective in developing and implementing sufficiently effective best practices and will increasingly steer investors towards this. The government can also encourage this, for example through its role in the IRBC covenants, through (export credit) subsidies and guarantees, as well as in tenders. The above does not, of course, detract from the fact that there will also be companies in the market that do not (want to) make an effort to develop or implement such best practices. For such companies the more traditional compliance rules and enforcement will continue to be necessary.

6.4.4 Rolling out best practices in labelling and tendering

For example, if more clarity has been developed on best practices (which will take time), this could be rolled out/implemented in labelling and tendering. In the context of the legislative options discussed, this could include information obligations on products for consumers and mandatory requirements for the application of (some) of them in public procurement.

Both could be related to the benchmark discussed above (6.4.1). For example, products could indicate where a company stands on the benchmark.

[246] The question is whether this is necessary. With regard to the dashboards developed by the AFM, there are no 'Chinese walls' between those talking to the market and those imposing sanctions.
[247] This is more true in the field of IMO because the problems and approaches differ per country, sector or type of company and, moreover, the problems generally occur outside the Netherlands.

Calls for tenders could also require that at least the best practices required in the middle part of the benchmark are applied and points could be awarded for the predecessor companies under the award criteria. This approach ensures that, in addition to monitoring, further external incentives are created for companies to develop and implement best practices. Furthermore, this approach also leads to consumers gaining a better understanding (and being verified by a regulator) of the way in which companies conduct OECD due diligence and governments impose (more uniform and objectively verifiable) OECD due diligence requirements in their tenders. This approach involves as many relevant actors alongside businesses as possible.

6.5 Conclusion

To this end, it has been set out that an important objective of OECD due diligence should be to promote that compliance with the relevant legal rules leads, on the one hand, to desirable consequences (material change in the behaviour of companies) and, on the other hand, to the least possible undesirable consequences (unnecessarily high administrative burdens, ticking-box exercises, minimal compliance and discouragement of positive (multi-stakeholder) initiatives). Furthermore, due diligence compliance is less suitable for a classic command and control of rule compliance approach because of the special characteristics of the areas covered by due diligence. It is essential that supervision does not focus on seeing whether companies are making mistakes (road to the bottom) but, on the contrary, that it encourages companies to perform better and better (road to the top), thereby creating as much positive behavioural change as possible. This applies in particular to the extent that legislation includes effort obligations (based on an open standard) in connection with OECD due diligence. As discussed in Chapter 6, it is conceivable that there could be obligations to achieve results with regard to certain aspects of OECD due diligence. More classical public oversight could also be appropriate. It is therefore a combination of both forms of supervision.

The most obvious solution for this supervision of compliance with OECD due diligence would be to create a single supervisor (or a cooperative of supervisors that works closely together and also has a statutory possibility to exchange information). Of course, there should also be an adequate budget for supervision. A relatively new form of supervision would be best suited to this, which, incidentally, is already partly used in other areas of supervision: dynamic supervision.

Dynamic supervision is partly based on existing and somewhat crystallized best practices in the market. It is dynamic because these best practices are not static but change over time. This also seems to stimulate the desired process of continuous improvement. Different instruments can be used in the context of dynamic supervision. For example, benchmarking on the development and implementation of best practices, the development of best practices in cooperation with the market and other stakeholders, basing minimum standards on this and using the benchmarks in tenders, subsidies and by means of labelling on consumer markets.